



MORGANTOWN BOARD OF ZONING APPEALS

March 20, 2013
6:30 PM
City Council Chambers

Board Members:

Bernie Bossio, Chair
Leanne Cardoso, Vice-Chair
George Papandreas
Tom Shamberger
Jim Shaffer

STAFF REPORT

CASE NO: CU13-05 / Mutt's Place, Inc. / 263 Beechurst Avenue

REQUEST and LOCATION:

Request by George Vrooman, on behalf of Mutt's Place, Inc., for conditional use approval of a "Private Club" use located at 263 Beechurst Avenue.

TAX MAP NUMBER(s) and ZONING DESCRIPTION:

Tax Map 19, Parcel 22.1; B-2, Service Business District

SURROUNDING ZONING:

B-2, Service Business District and PUD, Planned Unit Development (Beechview Place)

BACKGROUND and ANALYSIS:

According to the West Virginia Alcohol Beverage Control Administration (WVABCA) website, a WVABCA private club license for "Mutt's Place" at 2129 University Avenue was first issued in February 1982. According to the West Virginia Secretary of State (WVSOS), the current ownership of the establishment is Mutt's Place, Inc., for which Mr. George Vrooman is listed as secretary and owner.

The property on which "Mutt's Place" is currently located was included in the recent real estate acquisition by West Virginia University, which is bound by University Avenue, Third Street, Grant Avenue, and Houston Drive. This newly assembled site will be redeveloped by WVU's public-private partnership's mixed-use "University Place".

The petitioner seeks to relocate the Mutt's Place establishment by converting the use of the commercial storefront at 263 Beechurst Avenue from an "Art Gallery" use to a "Private Club" so that the establishment can obtain a new private club liquor license from WVABC. "Private Club" uses require conditional use approval by the Board of Zoning Appeals. Addendum A of this report illustrates the location of the subject site.

According to the petitioner, the existing 2129 University Avenue location of Mutt's Place is 880 square feet. The proposed 263 Beechurst Avenue location would be 1,134 square feet, which would be an increase in area of 254 square feet for the establishment.

Located on the second and third stories above the commercial storefront at 263 Beechurst Avenue are four one-bedroom mixed-use apartments.

The minimum parking requirement for the subject building, including the four one-bedroom mixed-use dwellings and the proposed private club, would be 16 to 18 parking stalls.

Development Services

Christopher Fletcher, AICP
Director

Planning Division

389 Spruce Street
Morgantown, WV 26505
304.284.7431



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The existing building appears to cover nearly the entire, if not all, the subject property and no on-site parking spaces are available.

Although the petitioner states in his application exhibits that most of his customers at the 2129 University Avenue location were walk-ins from residents of the Sunnyside Neighborhood, the proposed 263 Beechurst Avenue location is situated on the opposite side of Beechurst Avenue from the heart of the neighborhood. Additionally, there does not appear to be any formal public parking spaces on the west side of Beechurst Avenue for several blocks in either direction. Therefore, access for the majority of the establishment's long and well-established patron base will be crossing Beechurst Avenue, which serves as a primary and heavily traveled north-south corridor.

The current dumpster location appears to be situated along the side and rear of the building, which may be encroaching into the right-of-way and/or onto the adjoining property to the rear of 263 Beechurst Avenue (see illustration below).



Even if the dumpster is not encroaching as the illustration below indicates, a sufficient location or adequate area does not appear to exist where a formal dumpster enclosure can be developed to properly screen and manage what will become a heavily utilized facility. Specifically, the proposed change in land use will significantly increase the amount of refuse generated by the establishment (i.e., bottles, cardboard, food related waste, etc.).

A letter of opposition from Mr. Don Corwin is included with this Staff Report.

Development Services
Christopher Fletcher, AICP
Director

Planning Division
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STAFF RECOMMENDATION:

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.

Staff recommends that the Board deny Case No. CU13-05 based on Staff's recommended revisions to the petitioner's findings of fact as submitted in Addendum B of this report (deleted matter struck through; new matter underlined).

Should the Board disagree with Staff's recommendation and approve Case No. CU13-05, then the Board should include at least the following conditions:

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 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.

Attachments: Application and submitted exhibits.

Development Services

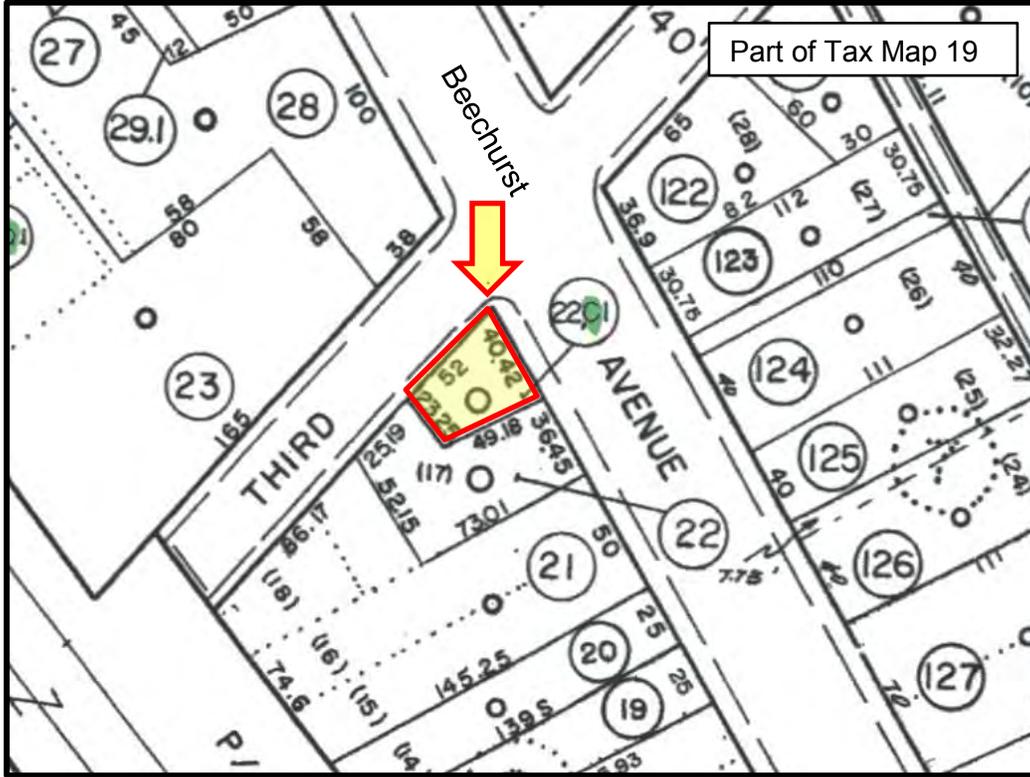
Christopher Fletcher, AICP
Director

Planning Division

389 Spruce Street
Morgantown, WV 26505
304.284.7431

STAFF REPORT ADDENDUM A

CU13-05 / G. Vrooman – Mutts Place / 263 Beechurst Avenue





STAFF REPORT ADDENDUM B

CU13-05 / Mutt's Place, Inc. / 263 Beechurst Avenue

Staff recommended revisions to petitioner's Findings of Fact (deleted matter struck through; new matter underlined)

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

~~The main street is more than 15 feet from building so in the event of a small line at capacity, guests would be off of public side walk and controlled by a trained staff. The proposed 263 Beechurst Avenue location does not provide on-site parking. There does not appear to be formal public parking on the west side of Beechurst Avenue for several blocks in either direction. Based on the petitioner's application, it appears that the majority of the establishment's patron base is located within the Sunnyside Neighborhood, which requires the majority of patrons to cross the heavily traveled and primary north-south corridor of Beechurst Avenue. The lack of on-site parking and apparent dependence of Beechurst Avenue pedestrian crossings by patrons will create roadway congestion within the immediate area and increase vehicular and pedestrian conflicts.~~

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

~~If there was a fire, electric disruption, etc. there is ample space for a trained evacuation for guests to go outside and back of property. Although the establishment will be required to meet current building and fire code standards on the inside of the building, there is a serious concern of potential danger created by the increase in frequency and intensity of pedestrians crossing Beechurst Avenue to approach the establishment.~~

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

~~Current lighting is dark in front and side and would be improved by upgrading. Air would not be disturbed due to no outside music area. The proposed "Private Club" use does not appear to require or result in modifications or additions to the building that would alter existing sunlight distribution or air flow patterns that exist within the immediate area.~~

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

~~No overcrowding, but an increase in foot traffic but controllable. The proposed "Private Club" use will significantly increase the scale, scope, and frequency of patrons visiting the subject site, which will exacerbate efforts to control and manage private parking spaces within the immediate area by neighboring property owners. Additionally, the existing solid waste containment and management facility on the site does not appear to support the significant increase in waste that will be generated by a "Private Club" use.~~

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

Population would stay as 4 people living in 4 apartments.

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:

~~No it will not. The proposed location does not include on-site parking, which will create congestion along public roadways. Additionally, the lack of sufficient on-site solid waste containment and management facilities may unnecessary contribute to increased litter and debris within the public right-of-way.~~

Finding of Fact No. 7 – Value of buildings will **NOT** be conserved, in that:

~~Value will be increased and improved. Although mixed-uses with commercial storefronts along Beechurst Avenue is the desired development pattern set forth in the City's Planning and Zoning Code, it appears that a "Private Club" use at the proposed location may have a more deleterious impact on existing and planned commercial uses within the immediate area fronting Beechurst Avenue. Specifically, it appears that the existing and planned commercial uses within the immediate area enjoy on-site parking. However, there does not appear to be enough private parking within the immediate area that would serve well as shared parking facilities. The lack of public parking and on-site parking and the undersupply of private parking may very well result in unnecessary pressures on neighboring property owners to control, manage, and maintain their respective properties. Excessive pressures on parking may adversely impact the vitality and sustainability of existing and planned businesses thereby adversely impacting the market value of commercial lease rates and market value of neighboring buildings. Additionally, the lack of solid waste management facilities to serve the proposed "Private Club" will similarly result in excessive pressures on neighboring waste containment facilities, contribute to increased litter and debris on neighboring properties thereby adversely impacting the quality, character, and consequential market value of commercial lease rates and market value of neighboring buildings.~~

Finding of Fact No. 8 – The most appropriate use of land is **NOT** encouraged, in that:

~~Property will continue to be apartment rental and first floor commercial business rental. Although mixed-uses with commercial storefronts along Beechurst Avenue is the desired development pattern set forth in the City's Planning and Zoning Code, it appears that a "Private Club" use at the proposed location creates parking and traffic congestion, vehicle and pedestrian conflicts, and solid waste containment and management challenges that may unreasonably and unjustifiably disturb the quality, character, viability, attractiveness, and sustainability of existing and planned uses and the public realm within the immediate area that would otherwise not be a generated by a commercial use in the subject storefront that would rely less on the scale, scope, frequency, and peak commercial periods anticipated by the proposed "Private Club" use.~~

mail to:

Betty Ireland
Secretary of State
State Capitol
1900 Kanawha Blvd. East
Charleston, WV 25305
Hrs. 8:30 am - 5:00 pm



FILED

JUN 15 2006 gm

IN THE OFFICE OF
SECRETARY OF STATE
WEST VIRGINIA

Vicki Haught, Manager
Process/UCC Division
Tel: (304)558-6000
Toll Free: (866)767-8683
Fax: (304) 558-8381
email: process@wvsos.com
web: www.wvsos.com

Fee: \$15 per application

FILE ONE ORIGINAL (Send two originals if you want a filed copy returned to you)

**APPLICATION TO APPOINT OR CHANGE
AGENT FOR PROCESS, OFFICERS, and/or OFFICE ADDRESSES**

1. The company filing this change is registered as a:

- Corporation
- Limited Liability Company
- Limited Liability Partnership
- Limited Partnership
- Voluntary Association
- Business Trust

2. The change is filed for:
(Note: Enter information as previously filed. No change can be accepted without this information.)

Company name MUTT'S PLACE INC

Access current company record at www.wvsos.com

Principal Office Address 2129 UNIVERSITY AVE
MORGANTOWN WV, 26505
As Listed _____

Home State: WV WV Formation Date 8-25-2000

3. Change of Address (use appropriate lines for the type of address to be changed):

Address Type _____ New Address _____

a. Principal Office 2129 UNIVERSITY AVE
MORGANTOWN WV, 26505

b. Local Office (WV) _____

c. Designated Office (LLC) (must be physical address) _____

4. Change of Agent for Service of Process:

New Agent Name and Address

The agent named here has given consent to appointment as agent to accept service of process on behalf of this company.

New Agent Signature

5. Complete the Change of Officers or Other Persons in Authority:

Officer Type
(check one for each new officer.)

New Officer Name

New Officer Address

- a. President (Corp. VA)
- Manager (LLC)
- General Partner (LP, LLP)
- Trustee (Bus. Trust)
- Other _____

Remove _____
(Previous officer name, if any.)

- b. Vice-President (Corp. VA)
- Manager (LLC)
- General Partner (LP, LLP)
- Trustee (Bus. Trust)
- Other _____

Remove _____
(Previous officer name, if any.)

- c. Secretary (Corp. VA)
- Member (LLC)
- Limited Partner (LP)
- General Partner (LLP)
- Trustee (Bus. Trust)
- Other _____

Remove DOUG WOODWARD
(Previous officer name, if any.)

GEORGE VROOMAN 2129 UNIVERSITY AVE
MORGANTOWN WV 26505

- d. Treasurer (Corp. VA)
- Member (LLC)
- Limited Partner (LP)
- General Partner (LLP)
- Trustee (Bus. Trust)
- Other _____

Remove _____
(Previous officer name, if any.)

- e. Director (Corp. VA)
- Member (LLC)
- Limited Partner (LP)
- General Partner (LLP)
- Trustee (Bus. Trust)
- Other _____

Remove _____
(Previous officer name, if any.)

GEORGE VROOMAN
Name (please print)

OWNER
Title

George Vrooman
Signature

PURCHASE AGREEMENT

THIS PURCHASE AGREEMENT made this 17th day of February, 2006, by and between **DOUG WOODWARD**, d/b/a Mutt's Place Bar, hereinafter referred to as **SELLER**, and **George Vrooman**, or his assigns, hereinafter referred to as **PURCHASER**. Doug Woodward relinquishes all liabilities to debtors, written obligations, and written commitments as owner of Mutt's Place Bar. Seller does transfer any and all claims and interest seller holds in any and all corporation entities. Purchaser shall continue to pay all loans held by Seller in reference to Mutt's Place Bar. Both parties acknowledge that all negotiations relative to this agreement have been carried out by them directly.

The undersigned Seller hereby accepts the offer and conditions of this agreement, this 17th day of February, 2006.

SELLER:

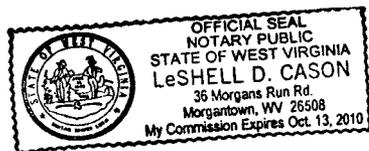
Doug Woodward 2/17/06 **DOUG WOODWARD**

PURCHASER:

George Vrooman 2/17/06 **GEORGE VROOMAN**

WITNESS:

Leshell D. Cason 2-17-06





City of Morgantown, West Virginia

APPLICATION FOR TYPE IV SITE PLAN - CONDITIONAL USE

OFFICE USE	
CASE NO.	CU13-05
RECEIVED:	2/8/13
COMPLETE:	

(PLEASE TYPE OR PRINT IN BLACK INK)

I. APPLICANT

Name:	GEORGE VROOMAN (mutts Place)	Phone:	304.685.9550
Mailing Address:	PO Box 865	Mobile:	
	Street: MORGANTOWN WV 26507-0865	Email:	gvrooman13@yahoo.com
	City State Zip		

II. AGENT / CONTACT INFORMATION

Name:	SAME AS ABOVE	Phone:	
Mailing Address:	Street	Mobile:	
	City State Zip	Email:	

Mailings - Send all correspondence to (check one): Applicant OR Agent/Contact

III. PROPERTY

Owner:		Phone:	
Mailing Address:	263 Beechwest Ave	Mobile:	
	Street: MORGANTOWN WV 26505	Email:	
	City State Zip		

IV. SITE

Street Address (if assigned):		Tax Map #:	19	Parcel #:	22.1
Zoning:	B2				
Lot Dimensions:	Width:	Ft.	Depth:	Ft.	Square Footage: ft. ²
Shape of Lot:	<input checked="" type="checkbox"/> Corner <input type="checkbox"/> Interior <input type="checkbox"/> Through <input type="checkbox"/> Flag <input type="checkbox"/> Irregular <input type="checkbox"/> Non-conforming				
Existing Use of Structure or Land:	4 Apartments 1 COMMERCIAL USE - MAIN FLOOR - ART STORE				
Proposed Use of Structure of Land:	4 Apartments 1 - COMMERCIAL USE - MAIN FLOOR - PRIVATE CLUB				

21

Finance Office Morgantown, WV 26505 304.284-7423



APPLICATION FOR TYPE IV SITE PLAN – CONDITIONAL USE

OFFICE USE	
CASE NO.	CU13-05
RECEIVED:	
COMPLETE:	

V. STRUCTURE

Proposed Setbacks: Front: _____ ft. Rear: _____ ft. Side A: _____ ft. Side B: _____ ft.

Proposed Height of Structure: _____ No. of Proposed Off-Street Parking Spaces: _____

No. of Dwelling Units (if applicable): 4 No. of Bedrooms: 4 No. of Employees: 4

Square Footage of all Proposed Structures (please explain): MAIN FLOOR = 42' x 27' = 1134 SF
The Basement AND 2 FLOORS OF APARTMENTS ARE THE SAME SIZE
With respect to Adding divider walls AND DOORS.

VI. SITE PLAN

A Site Plan (8 copies), drawn to scale, that includes the following elements must accompany the application if not provided above in Sections IV and V:

- (a) The actual dimensions, size, square footage, and shape of the lot to be built upon as shown on an actual survey by a registered design professional licensed by the State of West Virginia.
- (b) The exact sizes and locations on the lot of existing structures, if any;
- (c) The location, square footage, and dimensions of the proposed structure or alteration;
- (d) The location of the lot with respect to adjacent rights-of-way;
- (e) The existing and proposed uses of the structure and land;
- (f) The number of employees, families, housekeeping units, bedrooms, or rental units the structure is designed to accommodate;
- (g) The location and dimensions of off-street parking and means of ingress and egress for such space;
- (h) Height of structure;
- (i) Setbacks;
- (j) Buffer yard and screening, if applicable;
- (k) Location of garbage collection area and screening;
- (l) Location of existing and/or proposed signs, if applicable;
- (m) Roadway typical detail for internal roadways, if applicable;
- (n) Location and size of stormwater management facilities; and,
- (o) Utility lines and easements, if applicable.



**APPLICATION FOR
TYPE IV SITE PLAN – CONDITIONAL USE**

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VII. SUPPLEMENTAL PLANS AND EXHIBITS

Applicants **MUST** also submit the following plans and exhibits, unless waived by the Planning Director:

- (a) Drainage plan and drainage calculations that bear the name, address, signature and seal of a registered professional engineer licensed by the State of West Virginia, with floodplain zones clearly denoted, a typical of all swales, and a design of the drop inlets.
- (b) If applicable, design of stormwater management facilities and drainage calculations that bear the name, address, and seal of a registered professional engineer licensed by the State of West Virginia that meet the requirements of the City Zoning Ordinance, the City Stormwater Management Ordinance, and all other applicable local, state and federal regulations.
- (c) Parking and Landscaping Plan
- (d) Sign Plan
- (e) Approved WV Division of Highways Access Permit, if applicable
- (f) Sediment and erosion control plan as approved by the West Virginia Department of Environment Protection and the City of Morgantown
- (g) Approved State of West Virginia NPDES General Permit for Storm Water Associated with Industrial (Construction) Activity, if applicable
- (h) A traffic impact study, if required by the City Engineer
- (i) The Planning Director may require the applicant to submit additional information concerning the lot or neighboring lots to determine conformance with, and provide for the enforcement of, the City Zoning Ordinance.
- (j) The Planning Director may require the applicant to submit, in the case of accessory structures or minor additions, dimensions shown on plans relating to the size of the lot and the location of the structure(s) thereon be based on an actual survey prepared a registered design professional licensed by the State of West Virginia.

Applicants submitting a conditional use application in accordance with Article 313.05 "Building Height and Use" within the B-4 General Business District **MUST** also submit the following analyses:

- (a) An air flow analysis conducted by a licensed architect or profession engineer, describing the estimated impact of the proposed building on existing patterns of air flow in the general vicinity; and how those impacts may affect existing properties with a 300 foot radius of the site.
- (b) An analysis of the impacts of the proposed building on sunlight distribution in the general vicinity, with special emphasis on predicting light blockage and shadow casting onto all properties with a 300 foot radius of the site. Such analysis shall be conducted by a licensed architect or professional engineer.
- (c) An analysis of the potential of "stepping back" upper floors as a technique to avoid negative impacts with respect to light and airflow, and to minimize the canyon effect of non-recess tall buildings. Such analysis shall be conducted by a licensed architect or professional engineer.
- (d) An infrastructure and traffic analysis predicting the impacts of the building on water, sewer, drainage, electrical and gas infrastructure, on transportation levels of service (including transit) for impacted streets, and on fire suppression capabilities of the city. Such analysis shall be conducted by a licensed architect or professional engineer.



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**APPLICATION FOR
TYPE IV SITE PLAN – CONDITIONAL USE**

VIII. FINDINGS OF FACT

The Board of Zoning Appeals may grant the request only if each of the Conditional Use Findings of Fact Criteria is determined to be in the positive. Applicants must give their own responses to the criteria statements provided below.

This Conditional Use is within the fitting character of the surrounding area and is consistent with the spirit, purpose, and intent of the Zoning Ordinance, because,

1. Congestion in the streets is not increased, in that:

THE MAIN STREET IS MORE THAN 15 FEET FROM BUILDING SO IN THE EVENT OF A SMALL LINE AT CAPACITY, GUESTS WOULD BE OFF OF A PUBLIC SIDE WALK AND CONTROLLED BY A TRAINED STAFF.

2. Safety from fire, panic, and other danger is not jeopardized, in that:

IF THERE WAS A FIRE, ELECTRIC DISRUPTION, ETC. THERE IS AMPLE SPACE FOR A TRAINED EVACUATION FOR GUESTS TO GO OUT SIDE AND BACK OF PROPERTY

3. Provision of adequate light and air is not disturbed, in that:

CURRENT LIGHTING IS DARK IN FRONT AND SIDE AND WOULD BE IMPROVED BY UPGRADING. AIR WOULD NOT BE DISTURBED DUE TO NO OUTSIDE MUSIC AREA.

4. Overcrowding of land does not result, in that:

NO OVERCROWDING, BUT AN INCREASE IN FOOT TRAFFIC BUT CONTROLLABLE.

5. Undue congestion of population is not created, in that:

POPULATION WOULD STAY AS 4 PEOPLE LIVING IN 4 APARTMENTS.



APPLICATION FOR TYPE IV SITE PLAN – CONDITIONAL USE

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CASE NO.	CUIB-05
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VIII. FINDINGS OF FACT (cont.)

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

NO IT WILL NOT.

7. Value of buildings will be conserved, in that:

VALUE WILL BE INCREASED AND IMPROVED

8. The most appropriate use of land is encouraged, in that:

PROPERTY WILL CONTINUE TO BE APARTMENT RENTAL AND FIRST FLOOR COMMERCIAL BUSINESS RENTAL.

IX. ATTEST

I hereby certify that I am the owner of record of the named property, or that this application is authorized by the owner of record and that I have been authorized by the owner to make this application as his/her authorized agent and I agree to conform to all applicable laws of this jurisdiction. I certify that the information submitted herein and attached hereto is true and accurate and understand that if found otherwise may result in the denial of this request or subsequent revocation of any and all related approvals. The undersigned has the power to authorize and does hereby authorize City of Morgantown representatives on official business to enter the subject property as necessary to process the application and enforce related approvals and conditions.

GEORGE VROOMAN

George Vrooman

Feb. 27, 2013

Type/Print Name of Applicant/Agent

Signature of Applicant/Agent

Date

- Conditional Use Petition Fee of \$75 must accompany application

CW13-05

- THE SQUARE FOOTAGE OF 263 BEECHURST.
- Ⓐ MAIN FLOOR MEASURES $42' \times 27' = 1134 \text{ sq. ft.}$
- Ⓑ THE BASEMENT, THE SECOND FLOOR, AND THE THIRD FLOOR WOULD BE IN THE AREA OF 4540 sq. ft. TOTAL FOR THE ENTIRE BUILDING.

THE SECOND AND THIRD FLOORS CONTAIN 4 APARTMENTS. EACH APARTMENT HAS ONE BEDROOM. A TOTAL OF 4 PEOPLE WOULD BE LIVING IN THIS RESIDENCE.

THE FIRE CODE FOR MULTISPACE ON UNIVERSITY AVE WAS 88 ppl INCLUDING EMPLOYEES. THE SQ. FOOTAGE OF PREVIOUS ADDRESS WAS: 880 sq. ft. WHICH IS 250 sq. ft. LESS THAN 263 BEECHURST.

THE TOTAL NUMBER OF EMPLOYEES PRESENT DURING BUSIEST SHIFT WOULD BE FIVE (5). WHICH WOULD MAKE CAPACITY 83.

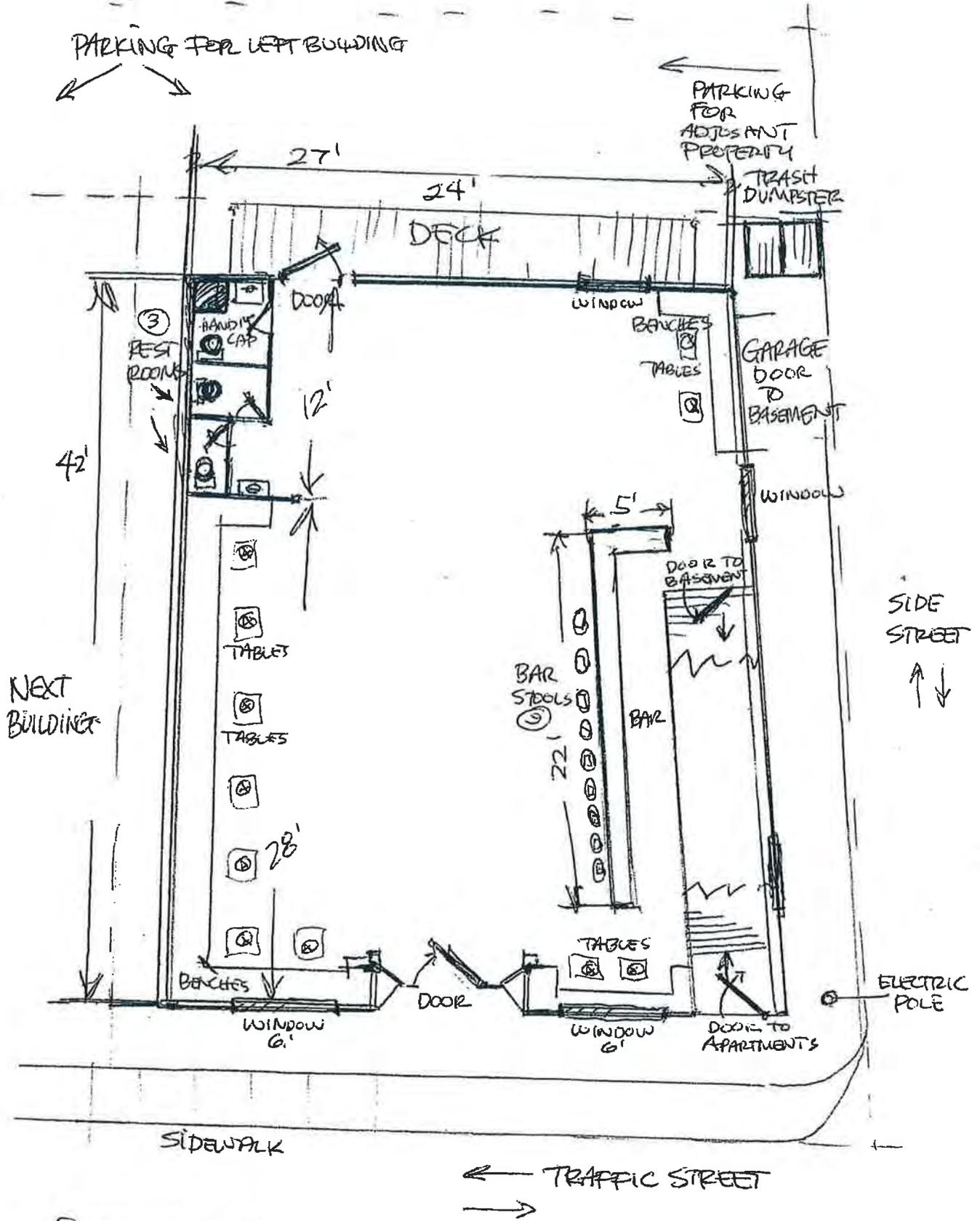
THE DUMPSTER FOR TRASH IS LOCATED AT THE RIGHT CORNER OF THE BUILDING. THE SIDE STREET PROVIDES AMPLE SPACE FOR TRUCK TO LOAD AND UNLOAD TRASH.

263 BEECHURST AVE

CU13-05

THE PARKING:

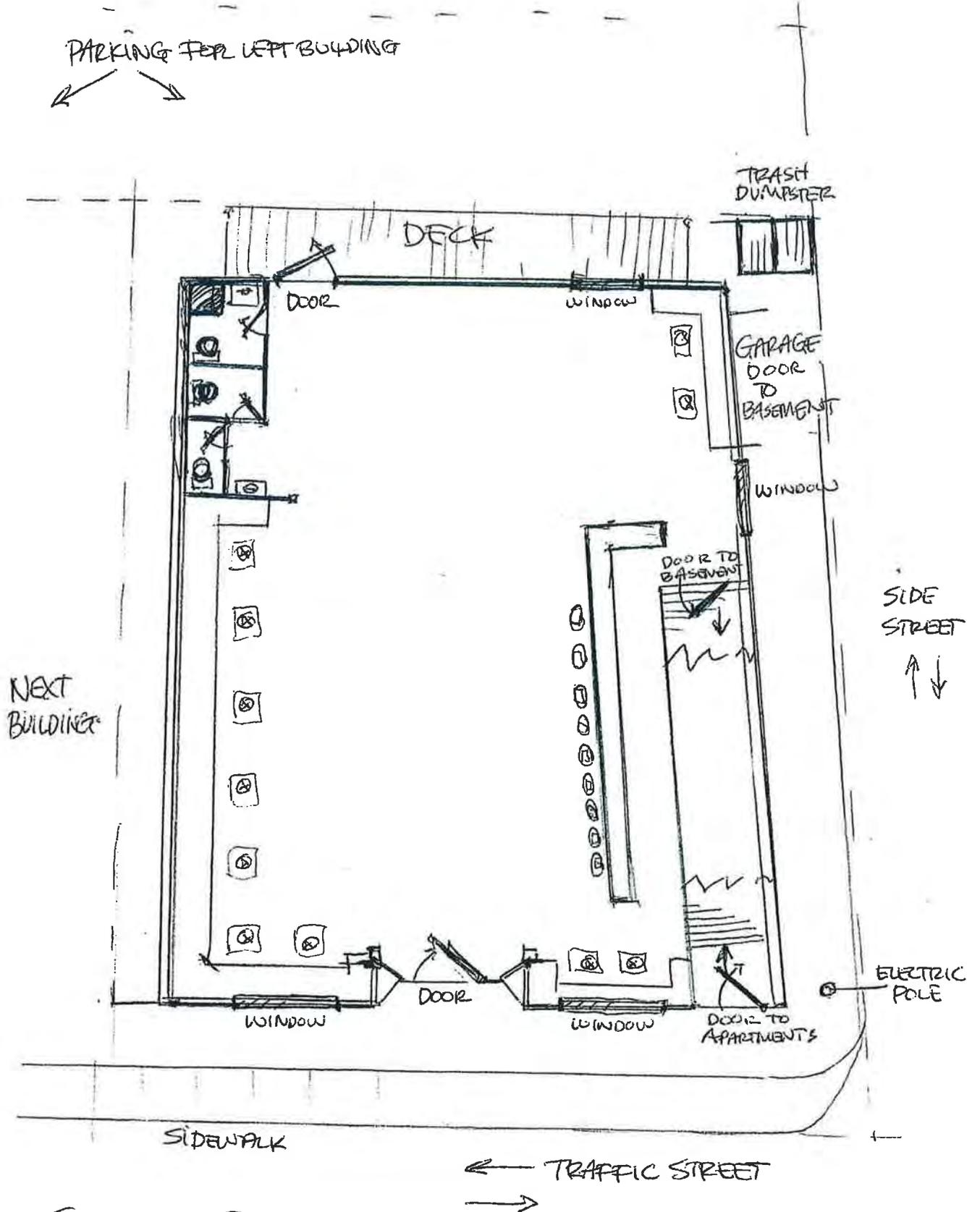
THERE IS FREE PARKING ACROSS STREET GOING UP 3RD STREET. TWO BLOCKS UP ON UNIVERSITY IS THE PAID PARKING LOT THAT ALSO ALLOWS FREE PARKING FROM 7pm FRIDAY TO 7AM MONDAY. MURKIN PLACE USED THIS LOT AS WELL AS TWO SPOTS LOCATED BEHIND BUILDING. THERE ARE TWO SPOTS LOCATED ON SIDE STREET OF BUILDING FACING RIGHT SIDE. THERE ARE TEN SPOTS BEHIND BUILDING UNDER P.R.T SYSTEM WITH NO SIGNAGE OF TOWING. MOST OF OUR CUSTOMERS WERE WALK-INS FROM RESIDENTS OF THE SUNNYSIDE AREA.



[EFT = 1 INCH]

263 BEECHURST AVE

CW13-05



[8FT = 1 INCH.]

263 BEECHURST AVE

CU13-05

Subject: Conditional Use Application
From: Christopher Fletcher (cfletcher@cityofmorgantown.org)
To: gvrooman13@yahoo.com;
Date: Tuesday, October 23, 2012 11:08 AM

Mr. Vrooman:

To follow up on our telephone conversation this morning, I have attached a conditional use application. Conditional Use petitions are reviewed and approved by the BZA. Based on our discussion, I understand that you are actively pursuing another location for Mutt's Place currently located at 2129 University Avenue. As discussed, the specific location of the contemplated new site will dictate the type of approvals that may be required. The next available BZA hearing is Wednesday, December 19, 2012. The deadline to submit a complete conditional use application, required exhibits, and fee for the December 19th hearing is November 9, 2012.

The conditional use application will need to be accompanied by a scaled drawing of the new site's interior layout including table/seating arrangement; number of occupants (Fire Department will be able to assist in determining occupant load); menu (if applicable); site plan showing number of available/proposed parking spaces; square footage of patron area and number of employees present during busiest shift. I may need additional information once I have reviewed your application.

The "Findings of Fact" can be the most challenging element of the conditional use application. When preparing your responses, please write in third person as if the BZA is responding to the findings.

Please review the attachment carefully and contact me with any additional questions or further clarification. We look forward to serving your planning and development approval needs.

Respectfully,

Christopher M. Fletcher, AICP
Director of Development Services
389 Spruce Street
Morgantown, WV 26505
(o) 304-284-7413
(f) 304-284-7534
(c) 304-906-7843
cfletcher@cityofmorgantown.org

Chris, I apologize for the handwritten pages no excuse. Laptop problems. Please call with any questions

GEORGE VROOMAN - 304.685.9550

Zimbra

cfletcher@cityofmorgantown.org

CU13-05/263 Beechurst Avenue "Mutts Place"

From : decorwin@aol.com

Fri, Mar 08, 2013 01:35 PM

Subject : CU13-05/263 Beechurst Avenue "Mutts Place" 1 attachment**To :** cfletcher@cityofmorgantown.org

Chris,

Please see my write up in response to the Conditional Use application. To date, I have contacted two adjacent property owners, Mr Vincent Bartling (owns 257 building right next door) and Mr John Rice (owns 256 Beechurst Ave immediately across the street). They have reviewed this document and are in support of this position.

There are some inaccurate statements in the application that was submitted to you by the applicant . I have addressed these in my write up. A site visit may be appropriate if you have time. Let me know if you need further information.

Have a good weekend.

Don
Don E. Corwin
General Manager
WinCor Properties LLC
wincorproperties.com
304-292-0400

 **265_Mutts_Place.docx**
17 KB

March 8, 2013

Mr Chris Fletcher
City of Morgantown
Planning Manager

Re: CU13-05 "Mutts Place"- 265 Beechurst Avenue - Application for Conditional Use

Mr. Fletcher,

Adjacent property owners believe that the Board of Zoning Appeals must deny the request for Conditional Use "Private Club" made by the applicant at 263 Beechurst Avenue. The granting of this request will create serious traffic/parking/congestion issues and the location of a "bar" in this location is wholly inconsistent with the character and ongoing development of this neighborhood.

Discussion: The applicant wishes to relocate "Mutts Place" from its previous location on University Avenue to a location in an existing building on Beechurst Avenue. Mutts was a longstanding club (bar) with origins back to the days when Sunnyside had a vibrant bar and restaurant scene. The purchase of this property by WVU and subsequent development plans has necessitated that Mutts close down at that location.

The proposed new location is at the corner of 3rd Street and Beechurst Avenue in a B2 zone. Many of the older homes and buildings in this area have been razed to make room for new development. Others have been rehabilitated or are in the process of being upgraded. This area has undergone a dramatic transformation in recent years with major construction and revitalization. These include Beechview Project, Wiser Development (Ashebrook and apartments) among others. WinCor Properties is also heavily vested in this area with the relocation of their office location to 251 Beechurst. Higher density and better quality housing continue to improve the neighborhood. Allowing Mutts Place to relocate a bar to this location is not consistent with the growth and character of this area.

The issue of parking is the most important as this location has zero parking lots/spaces associated with the property. The building is bordered by Beechurst Avenue, Third Street, and an apartment building with parking lot on the rear and south. The nearest on-street parking is on 3rd street, across Beechurst Avenue, a main transportation artery which has a high volume of traffic. The 3rd street spots are small in number, less than 5 up to McLane, and used by Residents of the area. They are rarely open for visitor use. More importantly, all surrounding businesses are required to provide parking for their patrons. It would be inevitable for patrons of Mutts to attempt to use spaces designated for other businesses. This will certainly impact those businesses and increase the volume of towing and associated problems.

To our knowledge, Applicant has made no request to the BZA for an Off Site Parking Variance. On this basis alone, the application should lack significant merit.

This B2 zone is not the most suitable for locating a bar which serves alcoholic beverages. This type of establishment is much more suited in B4 zone, such as the High Street area, adjacent to similar establishments. This would also permit greater oversight and management of the inevitable problems and crimes associated with such businesses as Police and other public safety officials more closely patrol, inspect, and monitor these areas.

The Board should also consider the suitability of the building when considering this request. Historically, the building has served the neighborhood as a small grocery store, appliance store in addition to the apartment units upstairs. In recent years, the building has not been maintained to the standard of other buildings in the area. One must consider how allowing such a "private club" would enhance and improve the character of this building and be consistent with the major capital improvements of adjacent buildings.

Application for Type IV Site Plan- Findings of Fact

1. Congestion: Congestion in the area would be significantly increased as this building/location provides no parking. Additional burden would be placed on very limited off street parking spaces in the surrounding area. Surrounding parking lots will be forced to more aggressively monitor and tow from their parking lots.
2. Safety: This building has no means of egress to the rear. In the event of fire or other emergency that blocks the front egress point, patrons would be forced to exit the rear and jump approximately 10 ft to the ground below. This issue would be better addressed by Code Enforcement and the Fire Marshall.
 - 2a. Pedestrians attempting to access this location from any on-street parking location will be forced to cross Beechurst Avenue at an unmarked intersection. This intersection does not have high quality lighting and traffic passes through at high rates of speed. Patrons safety would be at risk, especially at night and where said patrons would be impaired.
3. Provision of adequate light and air: Limited lighting exists on the streets and sidewalks. As this will be a no-smoking establishment by County Ordinance, smoking patrons will be forced to go outside and smoke on public or private property. Adjacent buildings will be subjected to secondary cigarette smoke.
4. Overcrowding of Land: The location has no associated parking lots. Patrons will be forced to limited on-street parking spaces which will limit their use by Residents of the area. When on-street spaces are not available, patrons will park in adjacent lots reserved for customers of other establishments. Aggressive towing will be necessary and the problems associated with these actions will be significant. .
5. Undue congestion of population: Congestion of patrons and vehicles will be significant in a building/area not designed for this use. The space is relatively small and is adjacent to Residential

apartment buildings. Inebriated patrons and their inevitable actions can impact the quality of life of adjacent Residents. Crowding of sidewalk is a serious concern as there is less than 15 ft to Beechurst Avenue and the condition of the sidewalk is very poor.

6. Inadequate provision of transportation, water, sewage, schools, parks: Granting this request would be in effect, the granting of a parking variance. This is in direct contrast to all surrounding establishments in the B2 zone. Every other surrounding business is currently providing parking to their patrons. This establishment would not provide parking. Other applicants would then look to this precedent to establish similar businesses under the same requirements.
7. Value of Buildings: Allowing a bar to operate in the neighborhood will certainly not enhance property values and some decrease may actually occur.
8. The most appropriate use of land: The building and property was never intended to be used for this purpose and the site is not designed to handle parking for such a high impact business. With the surrounding development, there are certainly substantially better uses for this space that will have a positive, not negative, impact on the community.

Notes from Application – Site Plan

The following are some inaccurate statements contained in the notes attached to the application:

Applicant states there is *“free parking across the street”*. There are approximately 6 on-street parking spaces between Beechurst and McLane Avenues. These are primarily used by Residents and are rarely, if ever accessible for customers of area businesses.

Applicant states there is a *“paid parking lot two blocks up on University Avenue”*. This is not correct. There is no paid parking lot on University Avenue to our knowledge. The nearest paid/metered parking spaces are on Grant Avenue in front of Summit Hall, approximately 1500 ft from the location.

Applicant states that there are *“two spots behind the building”*. This is not correct. There are no spaces behind or adjacent to the building. The spaces behind the building are assigned to the Tenants living at 257 Beechurst which is not connected or owned by the same party. There is no available space next to the building for parking.

Applicant states there are *“ten spots under the PRT”*. This area is an unpaved, dirt lot that is often used for parking, however it is a part of the *“Rails to Trails”* property leased to the RTT Authority from the Baltimore and Ohio Railroad and is not a parking area regulated or maintained by the Morgantown Parking Authority.

Applicant states *“most of our customers are walk-ins”*, but fails to quantify how many would walk and how many would drive. A canvas of adjacent businesses including the Lavender Café and Papa Johns

indicate less than 5% of their business is walk up. This is not a neighborhood that supports significant volume of "walk up" business.



MORGANTOWN BOARD OF ZONING APPEALS

April 17, 2013
6:30 PM
City Council Chambers

Board Members:

Bernie Bossio, Chair
Leanne Cardoso, Vice-Chair
George Papandreas
Tom Shamberger
Jim Shaffer

STAFF REPORT SUPPLEMENT

STAFF REPORT DATE: March 20, 2013

STAFF REPORT SUPPLEMENT DATE: April 17, 2013

CASE NO: CU13-05 / Mutt's Place, Inc. / 263 Beechurst Avenue

REQUEST and LOCATION:

Request by George Vrooman, on behalf of Mutt's Place, Inc., for conditional use approval of a "Private Club" use located at 263 Beechurst Avenue.

TAX MAP NUMBER(s) and ZONING DESCRIPTION:

Tax Map 19, Parcel 22.1; B-2, Service Business District draft

SURROUNDING ZONING:

B-2, Service Business District and PUD, Planned Unit Development (Beechview Place)

ATTACHED EXHIBITS:

- Exhibit A BZA and Monongalia County Circuit Court proceedings concerning to V80-07 and BA-03 relating to Mottie Pavone and Mutt's Place at 2129 University Avenue.
- Exhibit B BZA proceedings concerning V02-03 / Don Corwin / 263 Beechurst Avenue.
- Exhibit C Notes from BZA site visit on Thursday, April 4, 2013, 6:00 PM at 263 Beechurst Avenue attended by George Vrooman, Seth Wilson, Bill Morlino, Bernie Bossio, Leanne Cardoso, George Papandreas, Tom Shamberger, and Chris Fletcher.
- Exhibit D Supplemental Background, Analysis, and Staff Recommendations

Development Services

Christopher Fletcher, AICP
Director

Planning Division

389 Spruce Street
Morgantown, WV 26505
304.284.7431

The City of Morgantown

BOARD OF ZONING APPEALS
389 SPRUCE STREET
MORGANTOWN, W. VA. 26505

EXHIBIT A

June 30, 1980

Mr. William Pavone
455 Park Street
Morgantown, West Virginia 26505

Dear Mr. Pavone:

On June 18, 1980 the Board of Zoning Appeals overruled the Zoning Administrator's decision denying you an occupancy permit to operate a restaurant at 2129 University Avenue which is zoned B-1. In so doing the Board of Zoning Appeals determined from your testimony at the meeting that the characteristic of operation and the type of food preparation equipment to be placed in the structure delineated that your proposed use is to be classified as a restaurant. This decision was based upon this business operation meeting the following criteria:

- 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

Sincerely,

William A. Kawecki, Chairman
Board of Zoning Appeals

pla

VFO-7
10P80-3

MARKUSIC AND SMITH
ATTORNEYS AT LAW
P. O. BOX 660
467 CHESTNUT STREET
MORGANTOWN, WEST VIRGINIA 26505

GEORGE A. MARKUSIC & Michael Smith, Partners
BROOKS E. SMITH, Associate

PHONE: 304-296-0061

July 16, 1980

The Board of Zoning Appeals of the
City of Morgantown, West Virginia
William Kawecki, Chairman
Richard Csmaer, member
Robert Bfhling, member
Art Hahn, member
Avery Gaskins, member

Mr. Chairman and Board Members:

This letter is to inform you that pending the appeal of your June 18, 1980 order, I have advised my client, Bill Pavone, to comply with the restrictions that you have placed upon his business situated in the Sunnyside area.

It is still our contention that Mr. Pavone should have the right to operate his restaurant in a manner that would allow him to serve beer without food to those who did not choose to order food. This is not meant to be a defiant or bad faith contention on Mr. Pavone's part. We appreciate greatly the fairness and objectivity in which the Board members displayed on June 18, 1980. However, we still feel that the restrictions placed on Mr. Pavone's business were legislative in nature and beyond the delegated authority of the Board of Zoning Appeals.

As for the appeal filed on the parking variance, Judge DePond has ordered written findings of fact either after a reconsideration of the evidence presented May 21, 1980, or a new hearing. I would suggest that the better course of action may be a new hearing due to the lapse of time and the absence of two board members at the original hearing. At a new hearing we could also be more helpful to the Board by having a real estate appraiser and traffic expert present to testify. If the Board decides to simply make new findings of fact I would only ask that the Board look objectively at the evidence and grant the variance.

If I can be of any assistance, please do not hesitate to call.

Very truly yours,
Michael Smith
Michael Smith

MS/djh

May 14, 1980

CASE #3 - 2129 University Avenue

V80-7 BASO-3

The petitioner is before the Board seeking an administrative review of the Zoning Administrator's decision to refuse an occupancy permit for a restaurant which serves beer located in a B-1 zoning district. In addition, the petitioner is requesting relief from the parking requirements of a B-1 zoning district.

The Zoning Administrator denied an occupancy permit for a restaurant and tavern in a B-1 zoning district because only a restaurant and a delicatessen which prepares food for consumption on site are allowed in a B-1 zoning district. Once beer is sold on the premises the Zoning Administrator cannot make a determination whether the proposed establishment is a restaurant with incidental beer sales or a beer parlor or tavern with incidental food sales. The Board should examine the characteristics of operations of this business to determine whether it is a restaurant or tavern. The Board may impose restrictions on the restaurant to assure that the characteristics of operation do not change. The Board may limit the amount of beer sales in relation to food sales, prohibit the serving of beer without food, prohibit the serving of beer at no other place but a table, or prohibit a seating arrangement at the serving bar, or other similar restrictions.

The petitioner contends that the serving of beer is only incidental to his food service. He contends that beer is only one of a number of beverages served to aid in the digestion of the food served at the business.

Section 23, paragraph E, sub-paragraph 1 of the Zoning Ordinance delegates the authority to the Board of Zoning Appeals to hear administrative reviews regarding enforcement of the zoning ordinance. The Board must determine on what grounds the Zoning Administrator, acting on behalf of the City Manager, made the decision. After hearing testimony from the aggrieved party and other affected parties, the Board must reaffirm or overrule the Zoning Administrator's decision based on the literal interpretation of the zoning ordinance. If the Board overrules the Zoning Administrator's decision, they, in effect, are acting as the Zoning Administrator.

Section 23, paragraph E, sub-paragraph 3 of the Zoning Ordinance delegates the authority to the Board of Zoning Appeals to hear this request for a parking variance.

The petitioner has converted the first floor of a multi-family residential structure to a restaurant. The upper floor of the structure remains as a multi-family residential use. The size of the building has not been changed but the characteristics of land use have changed by the conversion.

The building is required to have fourteen (14) off-street parking spaces, whereas, the petitioner proposes to accommodate six (6) off-street parking spaces located in the back of the building. This is the maximum number of off-street parking spaces which can be supplied on this undeveloped portion of the site. The alleyway serving this parking area is very narrow and probably this will cause the beer parking area to not be frequently patronized. However, most businesses in this area depend on walk-by pedestrian traffic for patronage.

The exceptional or extraordinary circumstances or conditions in this case are that many of the businesses in this area do not meet minimum off-street parking

May 14, 1980

requirements. Most of the businesses in this area depend on pedestrian traffic for a major portion of their patronage.

Many businesses in this area supply no off-street parking spaces or less than the required number of off-street parking spaces. The businesses located on the 2000 block of University Avenue and the Stadium Inn supply no off-street parking spaces. The Fred Wyant Insurance Company supplies one (1) off-street parking space. The Vagabond supplies three (3) off-street parking spaces. Ceramic Tile supplies six (6) off-street parking spaces. Sunnyside Superette supplies seven (7) off-street parking spaces. The office complex located at 2139 University Avenue supplies nine (9) off-street parking spaces.

The alleyway located behind the questioned site is narrow. It is questionable that if more off-street parking spaces could be placed in the back of the building that utilization of these off-street parking spaces would be heavy. The remaining portion of the questioned site is covered by building.

The author of this paper believes that the granting of this parking variance will 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 will 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.

CASE #4 - 828 Louise Avenue

V80-9

The petitioner is before the Board pleading for the issuance of three (3) variances to allow relief from the minimum ground area, the minimum lot width, and the minimum ground floor area of an R-2 zoning district.

Section 23, paragraph E, sub-paragraph 3 of the Zoning Ordinance delegates the authority to the Board of Zoning Appeals to hear these three (3) requested variances. The Board must determine whether these three (3) separate variances meet the four findings of fact and upon this basis grant or deny the requested variances.

This is a single family residential structure which was recently sold. The structure is placed about fifty-four (54) feet from the front property line. The placement of this structure so far from the front property line is unusual for this area. The new owner wants to convert this single family residential structure into a duplex residential structure and consequently is requesting these three (3) variances from an R-2 zoning district.

The requested variance for ground area to allow relief from the required minimum of 6,000 square feet to allow a duplex on 4,000 square feet of ground area seems to meet the four findings of fact. Likewise, the requested variance from the minimum lot width of fifty (50) feet to allow a duplex on a forty (40) foot wide lot seems to meet the four findings of fact. Duplexes located at 800, 804 and 824 Louise Avenue are similar situations and do not seem to have substantial negative impact on the surrounding area.

The variance applied for to seek relief from the required minimum of 960 square feet of ground floor area to allow a duplex to be established with a ground



The City of Morgantown

389 SPRUCE STREET
MORGANTOWN, WEST VIRGINIA 26505
(304) 291-7431

PLANNING DEPARTMENT

MEMORANDUM

June 12, 1980

To: Members, Board of Zoning Appeals
From: Robert Gossler, Planning Director
Subj: Comments on cases to be heard by the Board of Zoning Appeals on June 18, 1980

Case #1 - Mottie Pavone, 2129 University Avenue

BA80-3

The petitioner is before the Board seeking an administrative review of the Zoning Administrator's decision refusing an occupancy permit for a restaurant which serves beer located in a B-1 zoning district. The Board members voted unanimously at their May 21, 1980 meeting to postpone action on this administrative review until the June 18, 1980 meeting.

Section 23, paragraph E, sub-paragraph 1 of the Zoning Ordinance delegates the authority to the Board of Zoning Appeals to hear administrative reviews regarding enforcement of the zoning ordinance. The Board must determine on what grounds the Zoning Administrator, acting on behalf of the City Manager, made the decision. After hearing testimony from the aggrieved party and other affected parties, the Board must reaffirm or overrule the Zoning Administrator's decision based on the literal interpretation of the zoning ordinance. If the Board overrules the Zoning Administrator's decision, they, in effect, are acting as the Zoning Administrator.

The Zoning Administrator denied an occupancy permit for a restaurant and tavern in a B-1 zoning district because only a restaurant and a delicatessen which prepares food for consumption on site are allowed in a B-1 zoning district. Once beer is sold on the premises the Zoning Administrator cannot make a determination whether the proposed establishment is a restaurant with incidental beer sales or a beer parlor or tavern with incidental food sales. The Board should examine the characteristics of operations of this business to determine whether it is a restaurant or tavern. The Board may impose restrictions on the restaurant to assure that the characteristics do not change. The Board may limit the amount of beer sales in relation to food sales, prohibit the serving of beer without food, prohibit the serving of beer at no other place but a table, prohibit the advertising of beer sales which can be observed from outside the building, prohibit a seating arrangement at the serving bar, or other similar restrictions.

The petitioner contends that the serving of beer is only incidental to his food service. He contends that beer is only one of a number of beverages served to aid in the digestion of the food served at the business.

The City of Morgantown

V80-7

BOARD OF ZONING APPEALS
389 SPRUCE STREET
MORGANTOWN, W. VA. 26505

December 18, 1980

Mr. Mottie Bill Pavone
2129 University Avenue
Morgantown, West Virginia 26505

Dear Mr. Pavone:

At its meeting on December 17, 1980, the Board of Zoning Appeals took the following action:

In accordance with the recent findings by Judge DePond, your requested variance from the minimum parking requirements in a B-1 zoning district does meet the four Findings of Fact. You are, therefore, granted the requested parking variance.

Sincerely,



Peggy L. Akers, Secretary
Board of Zoning Appeals

c: Judge Frank DePond

The City of Morgantown

V80-7

BOARD OF ZONING APPEALS
389 SPRUCE STREET
MORGANTOWN, W. VA. 26505

Dear Applicant:

Your application for a variance from the criteria of the Zoning Ordinance listed below was DENIED by the Board of Zoning Appeals. The Board of Zoning Appeals determined that the items checked below resulted in the denial of the requested variance.

- 1) That there are no exceptional or extraordinary circumstances or conditions applicable to the property or to the intended use that do not apply generally to other property or class of use in the same vicinity and district.
- 2) That such variance(s) is/are not necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and district but which is denied to the property in question.
- 3) That the granting of such variance(s) will 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.
- 4) That the granting of such variance(s) will 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 street.
- 5) The Zoning Ordinance does not delegate the authority to the Board of Zoning Appeals to consider this requested variance(s).

Anyone opposing the Board's decision may file an appeal with the Circuit Court within thirty (30) days from the date of the Board's decision.

Address of Site 2129 University Avenue -- Mottie Pavone

Zoning District of Site B-1

Variance Requested Relief from off-street parking requirement of 14 spaces to 6 spaces

John A. Kawecki
Chairman, Board of Zoning Appeals

May 21, 1980
Date of Denial

The City of Morgantown

BOARD OF ZONING APPEALS

389 SPRUCE STREET

MORGANTOWN, W. VA. 26505

Dear Applicant:

Your application for a variance from the criteria of the Zoning Ordinance listed below was DENIED by the Board of Zoning Appeals. The Board of Zoning Appeals determined that the items checked below resulted in the denial of the requested variance. Failure, in the opinion of the Board members, to meet any one or more of the following items necessitated that the Board of Zoning Appeals can take no action other than denial of the requested variance.

- X 1) That there are no exceptional or extraordinary circumstances or conditions applicable to the property or to the intended use that do not apply generally to other property or class of use in the same vicinity and District, in that this is typical property in that B-1 area and no other parking variances have been granted to our knowledge.
- X 2) That such variance(s) is/are not necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and District but which is denied to the property in question, in that the square footage of the proposed restaurant could be reduced sufficiently to allow the existing parking spaces to satisfy the requirements of the existing Zoning Ordinance.
- X 3) That the granting of such variance(s) will 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, in that there was testimony that there already is a problem with parking in the area and granting of this variance would only aggravate this problem.

V80-7

V80-7
BA80-3

MARKUSIC AND SMITH
ATTORNEYS AT LAW
P. O. BOX 660
467 CHESTNUT STREET
MORGANTOWN, WEST VIRGINIA 26505

GEORGE A. MARKUSIC & Michael Smith, Partners
BROOKS E. SMITH, Associate

PHONE: 304-296-0061

July 16, 1980

The Board of Zoning Appeals of the
City of Morgantown, West Virginia
William Kawecki, Chairman
Richard Csmaer, member
Robert Bfhling, member
Art Hahn, member
Avery Gaskins, member

Mr. Chairman and Board Members:

This letter is to inform you that pending the appeal of your June 18, 1980 order, I have advised my client, Bill Pavone, to comply with the restrictions that you have placed upon his business situated in the Sunnyside area.

It is still our contention that Mr. Pavone should have the right to operate his restaurant in a manner that would allow him to serve beer without food to those who did not choose to order food. This is not meant to be a defiant or bad faith contention on Mr. Pavone's part. We appreciate greatly the fairness and objectivity in which the Board members displayed on June 18, 1980. However, we still feel that the restrictions placed on Mr. Pavone's business were legislative in nature and beyond the delegated authority of the Board of Zoning Appeals.

As for the appeal filed on the parking variance, Judge DePond has ordered written findings of fact either after a reconsideration of the evidence presented May 21, 1980, or a new hearing. I would suggest that the better course of action may be a new hearing due to the lapse of time and the absence of two board members at the original hearing. At a new hearing we could also be more helpful to the Board by having a real estate appraiser and traffic expert present to testify. If the Board decides to simply make new findings of fact I would only ask that the Board look objectively at the evidence and grant the variance.

If I can be of any assistance, please do not hesitate to call.

Very truly yours,

Michael Smith
Michael Smith

MS/djh

May 14, 1980

CASE #3 - 2129 University Avenue

V80-7 BASO-3

The petitioner is before the Board seeking an administrative review of the Zoning Administrator's decision to refuse an occupancy permit for a restaurant which serves beer located in a B-1 zoning district. In addition, the petitioner is requesting relief from the parking requirements of a B-1 zoning district.

The Zoning Administrator denied an occupancy permit for a restaurant and tavern in a B-1 zoning district because only a restaurant and a delicatessen which prepares food for consumption on site are allowed in a B-1 zoning district. Once beer is sold on the premises the Zoning Administrator cannot make a determination whether the proposed establishment is a restaurant with incidental beer sales or a beer parlor or tavern with incidental food sales. The Board should examine the characteristics of operations of this business to determine whether it is a restaurant or tavern. The Board may impose restrictions on the restaurant to assure that the characteristics of operation do not change. The Board may limit the amount of beer sales in relation to food sales, prohibit the serving of beer without food, prohibit the serving of beer at no other place but a table, or prohibit a seating arrangement at the serving bar, or other similar restrictions.

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The petitioner has converted the first floor of a multi-family residential structure to a restaurant. The upper floor of the structure remains as a multi-family residential use. The size of the building has not been changed but the characteristics of land use have changed by the conversion.

The building is required to have fourteen (14) off-street parking spaces, whereas, the petitioner proposes to accommodate six (6) off-street parking spaces located in the back of the building. This is the maximum number of off-street parking spaces which can be supplied on this undeveloped portion of the site. The alleyway serving this parking area is very narrow and probably this will cause the rear parking area to not be frequently patronized. However, most businesses in this area depend on walk-by pedestrian traffic for patronage.

The exceptional or extraordinary circumstances or conditions in this case are that many of the businesses in this area do not meet minimum off-street parking

May 14, 1980

requirements. Most of the businesses in this area depend on pedestrian traffic for a major portion of their patronage.

Many businesses in this area supply no off-street parking spaces or less than the required number of off-street parking spaces. The businesses located on the 2000 block of University Avenue and the Stadium Inn supply no off-street parking spaces. The Fred Wyant Insurance Company supplies one (1) off-street parking space. The Vagabond supplies three (3) off-street parking spaces. Ceramic Tile supplies six (6) off-street parking spaces. Sunnyside Superette supplies seven (7) off-street parking spaces. The office complex located at 2139 University Avenue supplies nine (9) off-street parking spaces.

The alleyway located behind the questioned site is narrow. It is questionable that if more off-street parking spaces could be placed in the back of the building that utilization of these off-street parking spaces would be heavy. The remaining portion of the questioned site is covered by building.

The author of this paper believes that the granting of this parking variance will 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 will 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.

CASE #4 - 828 Louise Avenue

V80-8

The petitioner is before the Board pleading for the issuance of three (3) variances to allow relief from the minimum ground area, the minimum lot width, and the minimum ground floor area of an R-2 zoning district.

Section 23, paragraph E, sub-paragraph 3 of the Zoning Ordinance delegates the authority to the Board of Zoning Appeals to hear these three (3) requested variances. The Board must determine whether these three (3) separate variances meet the four findings of fact and upon this basis grant or deny the requested variances.

This is a single family residential structure which was recently sold. The structure is placed about fifty-four (54) feet from the front property line. The placement of this structure so far from the front property line is unusual for this area. The new owner wants to convert this single family residential structure into a duplex residential structure and consequently is requesting these three (3) variances from an R-2 zoning district.

The requested variance for ground area to allow relief from the required minimum of 6,000 square feet to allow a duplex on 4,000 square feet of ground area seems to meet the four findings of fact. Likewise, the requested variance from the minimum lot width of fifty (50) feet to allow a duplex on a forty (40) foot wide lot seems to meet the four findings of fact. Duplexes located at 800, 804 and 824 Louise Avenue are similar situations and do not seem to have substantial negative impact on the surrounding area.

The variance applied for to seek relief from the required minimum of 960 square feet of ground floor area to allow a duplex to be established with a ground

MINUTES

BOARD OF ZONING APPEALS

May 21, 1980

MEMBERS PRESENT: William Kawecki, Chairman
 Richard Csamer, Board Member
 Robert Behling, Board Member

MEMBERS ABSENT: Art Hahn, Board Member
 Avery Gaskins, Board Member

OTHERS ATTENDING: Robert Gossler, City Planner
 Patty Vandergrift, Dominion-Post

MINUTES of the Board of Zoning Appeals held in Council Chambers on May 21, 1980.

The meeting was called to order by the Chairman Mr. Kawecki at 7:30 PM. It was determined that a quorum was present. Approval of the Minutes of the April 16, 1980 meeting was postponed until the next meeting. Mr. Kawecki declared the Public Hearing open at 7:35 PM.

Case #1 - Allan R. Liddle, 665 Easton Avenue

Mr. Liddle appeared before the Board requesting a front yard variance to erect a "shed" 12'x20'. He wants to put this on the existing driveway which, he stated, is the only level spot on this lot. The required front setback for an accessory structure in an R-2 zoning district is 75 feet. Mr. Liddle proposes to erect the accessory structure twenty (20) feet from the front property line.

V80-5

There were no objections.

Case #2 - John Trotter, 54 Maple Avenue

Dr. Trotter appeared before the Board requesting a rear yard variance to construct an addition to enlarge his kitchen. The required rear yard setback is 20 feet and Dr. Trotter proposes to construct his addition to within twelve feet of the rear property line.

V80-6

Dr. Trotter stated that his is a modular type home and the kitchen is "very cramped". There is currently a fenced in patio at the rear of the house and the addition to enlarge the kitchen will include part of this patio.

There were no objections.

Case #3 - Mottie Pavone, 2129 University Avenue

Mr. Pavone appeared before the Board seeking a variance from the fourteen (14)

V80-7 BA80-3

required off-street parking spaces. He proposes to operate a restaurant and rent three apartments in the same building with six (6) off-street parking spaces. He is also appealing an administrative decision prohibiting the serving of beer in the proposed restaurant.

Mr. Pavone stated that his family has had a business on Beechurst Avenue for 47 years; however, they did not own the building in which they were located. Because of decreasing business in that area it was decided to move to the site in question (2129 University Avenue). Mr. Pavone further stated that when he began remodeling the building to accommodate a restaurant, he found the area was zoned R-2. He went to the Planning Commission requesting a zoning change to B-1, which was granted by City Council. With the zoning change, he thought he could open as a restaurant-tavern serving beer. He stated that he wants to serve beer in conjunction with food. There would be no sit-down bar and only draft beer in glass containers will be served for consumption on the premises.

At this point Mr. Gossler was recognized by the Chair and stated the following: As Zoning Administrator he needs guidance from the Board to help make the determination of when a restaurant becomes a tavern. He stated that the current Zoning Ordinance is mute on the question of serving beer in a B-1 zoning district. He noted that the Board will be setting a precedent in this case; that the Board might want to impose certain restrictions on the business, for example, no sit-down bar, food sales in relation to beer sales, required kitchen equipment, etc.

Mr. Pavone stated that he hoped to have about 80% of his business in food sales and 20% in beer sales.

Mr. Kawecki wanted to know if the bar would be a service bar only and if the cash register would be located there. Mr. Pavone stated it would be a service bar only with the cash register located there.

Several people spoke in opposition stating that parking is a severe problem in the area, littering is a problem and another beer parlor is not needed in the area. Mr. Jack Bonasso, 2139 University Avenue, stated that he would be amenable to negotiating with Mr. Pavone to provide additional parking spaces.

Mr. Pavone stated he is trying to take the following safeguards to help alleviate some of the concerns of the neighbors:

- (1) No paper containers
- (2) No single sales of beer by can; must buy a six-pack or more

He doesn't feel his business will significantly increase the parking problem as he hopes to cater to pedestrian traffic business.

Case #4 - Wendell McPherson, 828 Louise Avenue V86-8

Mr. McPherson appeared before the Board seeking variances from the minimum ground area requirement, minimum lot width and minimum ground floor area for the establishment of a duplex in an R-2 zoning district. He desires to remodel a portion of the basement of a single family residential structure and convert the building into a duplex.

Mr. McPherson stated that it would be more feasible as rental property if this structure could be converted to a duplex. He stated that the building is situated in such a manner that he doesn't feel the conversion will impose on the neighborhood. He stated that he will have adequate off-street parking.

Mr. Kawecki asked about the size of the other lots in the neighborhood. Mr. McPherson replied that most of them are 40 feet wide, although some are 60 feet; however, he further stated that lots abutting the property in question are only 40 feet wide and both have duplex dwellings on them.

One person had questions about the appearance of the house after remodeling and the number of off-street parking spaces. Mr. McPherson stated the outward appearance of the house after remodeling would not change and there would be adequate parking because the whole rear portion of the lot is concrete surfaced.

There were no objections.

The Public Hearing was closed and the Board began its deliberations.

Case #1 - Allan Liddle, 665 Easton Avenue

V80-5

After discussion, the following findings of fact were made:

- 1) That there are exceptional or extraordinary circumstances or conditions applicable to the property or to the intended use that do not apply generally to other property or class of use in the same vicinity and District.
- 2) That such variance is necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and District but which is denied to the property in question.
- 3) That the granting of such variance will 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.
- 4) That the granting of such variance will 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.
- 5) That the Zoning Ordinance does delegate the authority to the Board of Zoning Appeals to consider this requested variance.

It was moved (R. Csamer) and seconded (R. Behling) that the front yard variance be granted. Approval was unanimous.

Case #2 - John Trotter, 54 Maple Avenue

V80-4

After discussion, the following findings of fact were made:

- 1) That there are exceptional or extraordinary circumstances or conditions

applicable to the property or to the intended use that do not apply generally to other property or class of use in the same vicinity and District.

- 2) That such variance is necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and District but which is denied to the property in question.
- 3) That the granting of such variance will 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.
- 4) That the granting of such variance will 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.
- 5) That the Zoning Ordinance does delegate the authority to the Board of Zoning Appeals to consider this requested variance.

It was moved (R. Behling) and seconded (R. Csamer) that the rear yard variance be granted. Approval was unanimous.

Case #3 - Mottie Pavone, 2129 University Avenue

V80-7 BASO-3

Mr. Kawecki stated that the Board would be acting on an administrative appeal and a parking variance. Mr. Behling wanted to know if one was dependent on the other. The answer was no.

Mr. Gossler reiterated the necessity for guidelines to help in making the determination of when a restaurant becomes a tavern. Some further suggested restrictions were given.

It was moved (R. Behling) and seconded (W. Kawecki) to disagree with the Zoning Administrator's decision not to grant an occupancy permit for this business. The vote was 2-1 with Mr. Behling and Mr. Kawecki voting to approve the motion and Mr. Csamer dissenting. Because it takes three votes to approve or defeat a motion, no decision was made on this motion.

It was then moved (R. Behling) and seconded (R. Csamer) to table this request for administrative appeal until the June meeting. Approval was unanimous.

The secretary was instructed to notify those on the list which has been provided by Mr. Pavone that this will be heard again at the June meeting.

Mr. Csamer moved to grant the parking variance requested. Mr. Behling seconded this motion. During discussion, a negative finding was made on the following four findings of fact:

- 1) That there are exceptional or extraordinary circumstances or conditions applicable to the property or to the intended use that do not apply generally to other property or class of use in the same vicinity and District.

- 2) That such variance is necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and District but which is denied to the property in question.
- 3) That the granting of such variance will 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.
- 4) That the granting of such variance will 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 fifth finding of fact was positive. The motion was defeated 3-0 and thus the requested parking variance was denied.

Case #4 - Wendell McPherson, 828 Louise Avenue

V80-8

After discussion, it was moved (R. Behling) and seconded (R. Csamer) to grant the ground area variance.

It was moved (R. Behling) and seconded (R. Csamer) to grant the minimum lot width variance.

It was moved (R. Behling) and seconded (R. Csamer) to grant the minimum ground floor area variance.

The following findings of fact were made concerning all three variances:

- 1) That there are exceptional or extraordinary circumstances or conditions applicable to the property or to the intended use that do not apply generally to other property or class of use in the same vicinity and District.
- 2) That such variance is necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and District but which is denied to the property in question.
- 3) That the granting of such variance will 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.
- 4) That the granting of such variance will not alter the land use characteristics of the vicinity and District, diminish the marketable value of adjacent land and improvements or increase congestion in the public streets.
- 5) That the Zoning Ordinance does delegate the authority to the Board of Zoning Appeals to consider this requested variance.

All motions to approve the requested variances were approved unanimously.

There being no further business to come before the Board, it was moved (R. Behling) and seconded (R. Csamer) that the meeting be adjourned. Approval was unanimous.

Respectfully submitted,

A handwritten signature in cursive script that reads "Peggy L. Akers". The signature is written in dark ink and is positioned above the typed name.

Peggy L. Akers, Secretary

MEMORANDUM TO CLERK
for INSTITUTING CIVIL ACTION

27/303
#567
81.00

To the Clerk of the Circuit Court of Monongalia
County, West Virginia

CIVIL ACTION NO. 80-P-103
(To be filled in by Clerk)

MOTTIE WILLIAM PAVONE

VS.

Plaintiffs Days to answer	Type of Service Personal Publication or Auditor
<u>20</u>	<u>personal</u>

THE BOARD OF ZONING APPEALS OF THE CITY
OF MORGANTOWN, WEST VIRGINIA

William Kawecki, Chairman agent & individually
Street

City and County

THE CITY OF MORGANTOWN, W.VA.
A MUNICIPAL CORPORATION,

George DeFrench Agent
Street

City and County

Street

City and County

Street

City and County

Street

City and County

Defendants

Please issue summons in the above styled action as indicated.

Original and.....copies of complaint furnished herewith.

Counsel for Plaintiff

Michael Smith
Attorney at Law

P.O. Box 660, 467 Chestnut Street

Address

Morgantown, WV 26505

Counsel for Plaintiff

Address

Date:.....

Rec'd. June 23, 1980

MEMORANDUM TO CLERK for INSTITUTING CIVIL ACTION

To the Clerk of the Circuit Court of Monongalia
County, West Virginia

MOTTIE WILLIAM PAVONE

CIVIL ACTION NO.....
(To be filled in by Clerk)

VS.

Plaintiffs
Days to answer

Type of Service
Personal Publication
or Auditor

RICHARD CSAMER

1000 Brown Street

Morgantown WV 26505

Street

City and County

20

personal

ROBERT BEHLING

416 Devon Road

Morgantown WV 26505

Street

City and County

20

personal

ART HAHN

909 Fairfax Drive

Street
Morgantown WV 26505

City and County

20

personal

AVERY GASKINS

644 West Virginia Avenue

Morgantown WV 26505

Street

City and County

20

personal

Defendants

Please issue summons in the above styled action as indicated.

Original and.....copies of complaint furnished herewith.

Counsel for Plaintiff

Address

Counsel for Plaintiff

Address

MEMORANDUM TO CLERK for INSTITUTING CIVIL ACTION

To the Clerk of the Circuit Court of Monongalia
County, West Virginia

CIVIL ACTION NO.....
(To be filled in by Clerk)

VS.

Plaintiffs
Days to answer

Type of Service
Personal Publication
or Auditor

SHERRY ROTH

MAY LEE MILLER

JOE FREDLOCK

Street

HELEN VANDERPORT

City and County

FRED WYANT

JOHN SANDERS

Street

City and County

Street

City and County

Street

City and County

Defendants

Please issue summons in the above styled action as indicated.

Original and.....copies of complaint furnished herewith.

Counsel for Plaintiff

Counsel for Plaintiff

Address

Address

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
MOTTIE WILLIAM PAVONE,

Petitioner,

v.

THE BOARD OF ZONING APPEALS OF THE
CITY OF MORGANTOWN, WEST VIRGINIA;
THE CITY OF MORGANTOWN, WEST VIRGINIA,
a municipal corporation; and,
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAHN, and
AVERY GASKINS,

Respondents.

LAW ACTION NO. 80-P-103
ON PETITION FOR A WRIT OF
CERTIORARI

ORDER TO SHOW CAUSE

This day came the petitioner by his attorney, Michael Smith, and presented his verified petition praying that a Writ of Certiorari be issued to review the action of the Board of Zoning Appeals of the City of Morgantown, West Virginia, in refusing to grant and continue in effect a parking variance to the Zoning Ordinance of the City of Morgantown, W.Va., to the above petitioner by a decision and/or order made and entered on the 21st day of May, 1980.

And the Court having seen and inspected said petition does hereby order that said petition be filed.

The Court having considered said petition, hereby directs that the respondents, the Board of Zoning Appeals of the City of Morgantown, W.Va., and the City of Morgantown, W.Va., a municipal corporation, and William Kaweck, Richard Csamer, Robert Behling, Art Hahn, and Avery Gaskins, show cause within twenty (20) days from the date of entry of this order, why a Writ of Certiorari should not issue, more specifically, on the 10th day of July, 1980, at 1 P.M. o'clock.

mailed - 6-23-80

The Clerk of this Court is directed to certify copies of this order and deliver the same to the Sheriff of Monongalia County for service upon each of the respondents, without delay.

ENTER: June 23, 1980
Frank J. [Signature]

Prepared & Presented by:

Michael Smith
MICHAEL SMITH
Attorney for Petitioner
P.O. Box 660, 467 Chestnut Street
Morgantown, West Virginia 26505

ENTERED June 23, 1980
Civil ORDER BOOK 31 PAGE 638
Jean Friend, CLERK

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
MOTTIE WILLIAM PAVONE,
Petitioner,

v.

LAW ACTION NO. 20 P-103
ON PETITION FOR A WRIT OF
CERTIORARI

THE BOARD OF ZONING APPEALS OF THE
CITY OF MORGANTOWN, WEST VIRGINIA;
THE CITY OF MORGANTOWN, WEST VIRGINIA,
a municipal corporation; and,
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAHN, and
AVERY GASKINS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

1. That on or about the ___ day of _____, 19___, petitioner applied for a building permit to convert one floor of the building owned by him into a restaurant situate at 2129 University Avenue, in the Fourth Ward of the City of Morgantown, Morgan District, Monongalia County, West Virginia. The building permit was granted and petitioner expended large sums of money and personal work and labor was performed by petitioner and petitioner's family in order to complete the renovation of their building into a restaurant.

2. That when the restaurant was ready to be opened to the public, petitioner applied for a certificate of occupancy and was denied that certificate of occupancy on the ground that the Zoning Ordinance of the City of Morgantown, West Virginia, required fourteen (14) parking spaces for petitioner's total building area and petitioner only could accommodate six (6) parking spaces. Petitioner then filed a request to the Board of Zoning Appeals for a parking variance and at a public hearing held on May 21, 1980, the petitioners and others introduced competent evidence sufficient for the granting of a variance pursuant to the provisions of Subsection H, Section 23, of the Zoning Ordinance of the City of Morgantown,

a copy of said Subsection H is attached hereto and marked as Exhibit "A" and made a part of this petition. Included in the competent evidence was petitioner, Mottie William Pavone's testimony as to the fact that although parking is limited in Sunnyside the congestion in the street will not be increased by the opening of a restaurant since he will be catering almost exclusively to pedestrian traffic. Petitioner further offered evidence as to the renovation of his building so that the marketable adjacent properties would be increased. Petitioner further offered testimony to the fact that almost all the businesses in the Sunnyside area lacked the required number of parking spaces set forth in the zoning ordinance, and that it would be depriving petitioner of a substantial property right possessed by other property owners in the same vicinity and district.

3. The Board of Zoning Appeals further had before it to consider a memo authored by Robert Gosler, the City Planner of the City of Morgantown, who is an expert of 12 years in the area of city zoning variances, etc., setting forth various facts pertinent to the Sunnyside area that satisfied the provisions of Subsection H of Section 23 of the zoning ordinance of the City of Morgantown. A copy of this memo is attached hereto and marked as Exhibit "B" and made a part of this petition.

4. The Board of Zoning Appeals nevertheless denied the petitioner's request for a variance by decision and/or order dated May 21, 1980. Said decision and/or order of the Board of Zoning Appeals was contrary to the law and evidence in this matter. The decision was further made without adequate written findings of fact as required by law.

THEREFORE, the petitioner alleges that he is aggrieved by said illegal decision and/or order of the Board of Zoning Appeals in refusing to grant him a variance which illegality consists of the following matters and grounds:

(a). The Board of Zoning Appeals of the City of Morgantown failed to make the necessary written findings of fact which are required by Subsection H of Section 23 of the Zoning Ordinance of the City of Morgantown, and which written findings of fact are necessary pursuant to William H. Miernyk et al. v. Board of Zoning Appeals of the City of Morgantown et al., 155 W.Va. 143, 181 S.E. 2d 681 (1971) and V.H. Harding et al. v. Board of Zoning Appeals of the City of Morgantown et al., Supreme Court of Appeals of West Virginia decided November 4, 1975, 219 S.E. 2d 324, which case provided that the Board of Zoning Appeals of the City of Morgantown has a mandatory duty to make written findings before a variance is approved or denied. Miernyk, supra ., 155 W.Va. at 148, 181 S.E. 2nd at 684, explains that the rationale for requiring such findings is as follows:

Without such findings it would not be possible for the Circuit Court upon Certiorari or this Court upon Writ of Error to determine whether the conditional use (or variance) sought by the applicant before the Board violated any of the conditions required before the granting (or denial) of such conditional use (or variance). In other words, these review procedures would be worthless if it could be said that written findings are not necessary, for there would be nothing to review.

The Board of Zoning Appeals in denying petitioner's request for a parking variance did not meet the above described requirements as to making written findings of fact, but merely sent to petitioner a form letter which contained merely the ordinance language of Subsection H of Section 23 of the Zoning Ordinance and placed an "X" next to those items the Board of Zoning Appeals determined were not satisfied. A copy of said letter is attached hereto and marked as Exhibit "C" and made a part of this petition. There was no written findings as to how the board determined the requirements of Subsection H of Section 23 were not satisfied.

(b). The petitioner's constitutional rights were violated in the denial of his variance request. The Zoning Ordinance of the City of Morgantown, West Virginia, was adopted by City Council on November 3, 1959. For over twenty (20) years the parking requirements were not enforced in the Sunnyside area. Many of the businesses in the Sunnyside area do not have the required number of parking spaces or have no parking at all. To enforce the parking requirement of the zoning ordinance against only the petitioner is a violation of his constitutional rights to be equally protected by the law. If the Board of Zoning Appeals of the City of Morgantown or City Planner had decided after twenty (20) years to enforce the parking requirements in the Sunnyside area, the petitioner should have been informed as to these requirements when he first applied for his restaurant building permit.

(c). The Board of Zoning Appeals allowed their judgment to be influenced by the general complaints of the Sunnyside area by protestants who appeared at the public hearing on May 21, 1980. Most of the testimony of the protestants was simply complaining about how other businesses were managed; how the students behaved; or how the people in the area violated the parking laws of the City of Morgantown. These protests had nothing to do with the issue before the Board. The Board of Zoning Appeals should not have allowed their judgment to be influenced by these protests.

(d). That the provisions of Subsection H of Section 23 of the Zoning Ordinance of the City of Morgantown is illegal, unconstitutionally void for vagueness, and incapable of being interpreted, complied with and enforced since the Board of Board of Zoning Appeals does not know whether to construe the provisions of Subsection H of Section 23 strictly so as to deny most variances or liberally to allow persons their property rights.

(e). The petitioner introduced substantial competent evidence under Section 23, Subsection H of the Zoning Ordinance which the Board failed or refused to consider in their decision, thus constituting their action arbitrary and capricious.

(f). The protestants failed to introduce any competent

evidence before the Board which would be justified in the Board refusing to grant a variance to the petitioner, thus constituting the action of the Board arbitrary, capricious and discriminatory.

(g). The action of the Board of Zoning Appeals in rendering said decision was arbitrary, capricious, discriminatory and confiscatory, due to the fact that the Board of Zoning Appeals ignored and refused to consider all of the competent evidence introduced by the petitioner under the provisions of Subsection H of Section 23 of the City Ordinance of Morgantown.

(h). The Board of Zoning Appeals abused it's discretion in refusing to grant the variance to the petitioner on the ground that the testimony and evidence of the petitioner and Mr. Gosler is so overwhelming that the Board had no discretion with regard to disallowing this variance.

(i). The Board of Zoning Appeals was misinformed and/or misadvised in that the Board apparently was under the impression that it was mandatory upon them to strongly construe the provisions of Subsection H of Section 23 of the City Ordinance and the Board applied the provisions illegally by denying the petitioner's variance.

(j). The Board of Zoning Appeals of the City of Morgantown has arbitrarily, capriciously and discriminatorily set two standards by allowing businesses to open in the Sunnyside area. One standard has been to allow most businesses which have been established since November 3, 1959 to open without the required number of parking spaces. The other standard has been to refuse petitioner to open his business due to a lack of required parking spaces. This double standard practiced by the City of Morgantown and/or Board of Zoning Appeals is discriminatory and violates petitioner's constitutional rights.

(k). The provision of Subsection H of Section 23 of the Zoning Ordinance is confiscatory in that it denies applicants due process of law in that applicants cannot make a legal use of their property and are denied a legal use of their property without due process because no applicant could come within the terms of said section if and when an application is protested and the applicant is made to comply with each and every provision of said section, if and when the Board in it's discretion desires to place a literal interpretation and ruling as to the requirements of said section.

(l). Any and all other grounds which the recording of evidence taken may disclose on its face.

PRAYER

WHEREFORE, the petitioner prays that this Court issue an order directing to the respondents to show cause why a Writ of Certiorari should not issue in this proceeding; that a hearing be held upon said order to show cause and from the evidence adduced at said hearing that the Court issue a Writ of Certiorari directed to the respondents, the Board of Zoning Appeals of the City of Morgantown, West Virginia, and the City of Morgantown, West Virginia, a municipal corporation, requiring said respondents to certify and deliver to the Court a full and complete record of all proceedings had and taken, so that said matter may be reviewed by the Court; that after the Court has reviewed the same that it declare the action of the Board of Zoning Appeals, in refusing to grant the above variance to the petitioner, illegal; and that the parking variance be granted or grant such other relief as it may deem necessary under the Zoning Ordinance of the City

of Morgantown and Chapter 8, Article 24 of the Official Code of West Virginia, 1931, as amended.

Mottie William Pavone

Mottie William Pavone

Michael Smith

MICHAEL SMITH
ATTORNEY FOR PETITIONER
P.O. Box 660, 467 Chestnut Street
Morgantown, West Virginia 26505

STATE OF WEST VIRGINIA,
COUNTY OF MONONGALIA, to-wit:

MOTTIE WILLIAM PAVONE, the petitioner named in the foregoing
Petition, being duly sworn, says that the facts and allegations therein
contained are true, except so far as they are therein stated to be on
information, and that so far as they are therein stated to be on
information, he believes them to be true.

Mottie William Pavone
MOTTIE WILLIAM PAVONE

Taken, sworn to and subscribed before me this 20th day of
June, 1980.

My Commission expires: January 4, 1982.

Darlene J. Hentley
Notary Public in and for Monongalia
County, West Virginia

Commissioned: Darlene J. Rose

FILED June 23, 1980
John F. Wood
CIRCUIT CLERK

PETITIONER'S EXHIBIT A

SUBSECTION H, SECTION 23. Board of Zoning Appeals, Zoning Ordinance of the City of Morgantown, West Virginia, adopted by City Council - November 3, 1959:

" H. No variance in the application of the provisions of this ordinance shall be made by the Board relating to buildings, land or premises now existing or to be constructed, unless after a public hearing, the Board shall find:

- (1) That there are exceptional or extraordinary circumstances or conditions applicable to the property or to the intended use that do not apply generally to the other property or class of use in the same vicinity and District.
- (2) That such variance is necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and District but which is denied to the property in question.
- (3) That the granting of such variance will 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.
- (4) That the granting of such variance will 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. "

May 14, 1980

requirements. Most of the businesses in this area depend on pedestrian traffic for a major portion of their patronage.

Many businesses in this area supply no off-street parking spaces or less than the required number of off-street parking spaces. The businesses located on the 2000 block of University Avenue and the Stadium Inn supply no off-street parking spaces. The Fred Wyant Insurance Company supplies one (1) off-street parking space. The Vagabond supplies three (3) off-street parking spaces. Ceramic Tile supplies six (6) off-street parking spaces. Sunnyside Superette supplies seven (7) off-street parking spaces. The office complex located at 2139 University Avenue supplies nine (9) off-street parking spaces.

The alleyway located behind the questioned site is narrow. It is questionable that if more off-street parking spaces could be placed in the back of the building that utilization of these off-street parking spaces would be heavy. The remaining portion of the questioned site is covered by building.

The author of this paper believes that the granting of this parking variance will 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 will 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 street.

The City of Morgantown

PETITIONER'S
EXHIBIT "C"

BOARD OF ZONING APPEALS

309 SPRUCE STREET

MORGANTOWN, W. VA. 26505

Dear Applicant:

Your application for a variance from the criteria of the Zoning Ordinance listed below was DENIED by the Board of Zoning Appeals. The Board of Zoning Appeals determined that the items checked below resulted in the denial of the requested variance.

- 1) That there are no exceptional or extraordinary circumstances or conditions applicable to the property or to the intended use that do not apply generally to other property or class of use in the same vicinity and district.
- 2) That such variance(s) is/are not necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and district but which is denied to the property in question.
- 3) That the granting of such variance(s) will 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.
- 4) That the granting of such variance(s) will 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 street.
- 5) The Zoning Ordinance does not delegate the authority to the Board of Zoning Appeals to consider this requested variance(s).

Anyone opposing the Board's decision may file an appeal with the Circuit Court within thirty (30) days from the date of the Board's decision.

Address of Site 2129 University Avenue -- Mottie Pavone

Zoning District of Site B-1

Variance Requested Relief from off-street parking requirement of 14 spaces to 6 spaces

John A. Kaweckie
Chairman, Board of Zoning Appeals

May 21, 1980
Date of Denial

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
MOTTIE WILLIAM PAVONE,

Petitioner,

v.

LAW ACTION NO. 80-P-103
ON PETITION FOR A WRIT OF
CERTIORARI

THE BOARD OF ZONING APPEALS OF THE
CITY OF MORGANTOWN, WEST VIRGINIA:
THE CITY OF MORGANTOWN, WEST VIRGINIA,
a municipal corporation; and,
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAHN, and
AVERY GASKINS,

Respondents.

TO: WILLIAM KAWECKI, Chairman of the
Board of Zoning Appeals of the
City of Morgantown, W.Va.

The City of Morgantown, W.Va.,
a municipal corporation,

RICHARD CSAMER

ROBERT BEHLING

ART HAHN

AVERY GASKINS

Sherry Roth
228 Grant Avenue
Morgantown, WV

May Lee Miller
2134 University Avenue
Morgantown, WV

Joe Fredlock
% Billie Penrod
Glenlock Hall
2108 University Avenue
Morgantown, WV

Helen Vanderport
2126 University Avenue
Morgantown, WV

Fred Wyant
2109 University Avenue
Morgantown, WV

John Sanders
2125 University Avenue
Morgantown, WV

NOTICE

Each of you are hereby notified that the petitioner, on the 23rd day of June, 1980, filed a petition for a Writ of Certiorari in the above court praying for a review of the decision and/or order of the Board of Zoning Appeals of the City of Morgantown, West Virginia, in refusing to grant and continue in effect a parking variance to the

above petitioner for his existing building situate at 2129 University Avenue, Morgantown, West Virginia. The decision and/or order of denial was denied by the Board of Zoning Appeals on May 21, 1980. A hearing date is set down for July 10, 1980 at 1:00 p.m. in Courtroom No. II.

Michael Smith

MICHAEL SMITH
Counsel for Petitioner
P.O. Box 660, 467 Chestnut Street
Morgantown, West Virginia 26505

FILED June 23, 1980
John Friend
CIRCUIT CLERK

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

MOTTIE WILLIAM PAVONE,
Petitioner,

v.

LAW ACTION NO. 80-P-103
ON PETITION FOR A WRIT OF
CERTIORARI

THE BOARD OF ZONING APPEALS
OF THE CITY OF MORGANTOWN,
WEST VIRGINIA: THE CITY OF
MORGANTOWN, WEST VIRGINIA,
A Municipal Corporation;
and WILLIAM KAWECKI, RICHARD
CSAMER, ROBERT BEHLING, ART
HAHN, and AVERY GASKINS,
Respondents.

O R D E R

This day came the Respondent, the City of Morgantown, represented by its Attorney at Fact, and asked leave to file its Demur or Motion to Quash Petition for Writ of Certiorari. The court having seen and inspected said Demur or Motion to Quash and finding the same to be proper, hereby orders it be filed and further orders a hearing to be held on the 10th day of July, 1980, at 1:00 p.m. in Courtroom No. #2 in the Courthouse of Monongalia County, West Virginia.

ENTER: July 9, 1980

MICHAEL K. CALLEN
ATTORNEY AT LAW
MORGANTOWN, WV 26505

ENTERED July 9, 1980
Civil DEPT BOOK 31 PAGE 747
Jean Friend CLERK

Frank J. [Signature]
JUDGE

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

MOTTIE WILLIAM PAVONE,

Petitioner,

v.

LAW ACTION NO. 80-P-103
ON PETITION FOR A WRIT OF
CERTIORARI

THE BOARD OF ZONING APPEALS
OF THE CITY OF MORGANTOWN,
WEST VIRGINIA: THE CITY OF
MORGANTOWN, WEST VIRGINIA,
A Municipal Corporation;
and WILLIAM KAWECKI, RICHARD
CSAMER, ROBERT BEHLING, ART
HAHN, and AVERY GASKINS,

Respondents.

DEMUR OR MOTION TO QUASH
PETITION FOR WRIT OF CERTIORARI

I.

The Board of Zoning Appeals of the City of Morgantown made the necessary finding of facts in their letter marked Petitioners Exhibit C and, although those findings of facts are in conclusionary form, they are controlling. Should the court find that the Board of Zoning Appeals made no findings of facts, the Court would have no basis to determine whether the Board erred under a review by a Writ of Certiorari.

II.

The Zoning Ordinance of the City of Morgantown is constitutional on its face and does not become unconstitutional simply because it gives the board members a certain amount of

flexibility in granting variances. Each individual request for variance involves its own unique set of facts and involves an individual parcel real estate and as a result, the petitioners can not rely on decisions in other cases as a basis for claiming unequal treatment under the law. For example, business establishments which were in operation prior to the adoption of the ordinance are allowed to continue under the ordinance in their present form under what is commonly referred to as a "Grandfather Clause" in order to protect the rights of the owners of those businesses. This would be an entirely different situation from the present set of circumstances.

III.

The petition alleges insufficient facts to show the petitioner is entitled to a variance in that it lists no facts that establish exceptional or extraordinary circumstances applicable to the property that do not generally apply to other property or class of use in the same vicinity and district nor does it list any facts which indicate that the variance will not be materially detrimental to the public welfare or injurious to property in the vicinity.

PRAYER

WHEREFORE, the respondent prays that the court quash or dismiss the petitioners petition for Writ of Certiorari.

Michael K. Callen

Michael K. Callen
Attorney for the Respondent
148 Willey Street
Morgantown, WV 26505

July 9, 1980
Jean Friend

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
MOTTIE WILLIAM PAVONE,

Petitioner,

v.

LAW ACTION NO. 80-P-103
ON PETITION FOR A WRIT
OF CERTIORARI

THE BOARD OF ZONING APPEALS OF
THE CITY OF MORGANTOWN, WEST
VIRGINIA; THE CITY OF MORGANTOWN,
WEST VIRGINIA, a municipal corp-
oration; and,
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAHN, and
AVERY GASKINS,

Respondents.

ORDER

This 10th day of July, 1980, came the Petitioner, Mottie William Pavone, by Counsel, Michael Smith and the Respondent, the City of Morgantown, by Counsel, Michael Callen in the above-styled case. Whereupon the Court, after reviewing the pleadings and arguments of the parties, ruled that the Board of Zoning Appeals of the City of Morgantown had not made findings of fact necessary for the Court to review the matter, and therefore, the Court ORDERED and does hereby ORDER that the above-styled case be remanded back to the Board of Zoning Appeals of the City of Morgantown and said Board make and set down the written findings of fact on which it based its decision in the case or hold a de novo hearing in the matter and make its ruling and findings of fact from the evidence then presented, all of which shall be done within sixty (60) days from the entry of this ORDER.

Enter: July 11, 1980

Frank J. Depond

Judge Frank J. Depond

Michael Callen

Michael Callen
Counsel for Respondent
148 Willey Street
Morgantown, WV 26505

Michael Smith

Michael Smith
Counsel for Petitioner
467 Chestnut Street
Morgantown, WV 26505

ENTERED *July 11, 1980*
Civil ORDER BOOK *30* PAGE *14*
Leon Friend, CLERK

STATE OF WEST VIRGINIA, SS:

In the Circuit Court of Monongalia County, West Virginia, on the 23rd day of June, 1980, the following order was made and entered:

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
MOTTIE WILLIAM PAVONE,

Petitioner,

v.

LAW ACTION NO. 80-P-103
ON PETITION FOR A WRIT OF
CERTIORARI

THE BOARD OF ZONING APPEALS OF THE
CITY OF MORGANTOWN, WEST VIRGINIA;
THE CITY OF MORGANTOWN, WEST VIRGINIA,
a municipal corporation; and,
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAHN, and
AVERY GASKINS,

Respondents.

ORDER TO SHOW CAUSE

This day came the petitioner by his attorney, Michael Smith, and presented his verified petition praying that a Writ of Certiorari be issued to review the action of the Board of Zoning Appeals of the City of Morgantown, West Virginia, in refusing to grant and continue in effect a parking variance to the Zoning Ordinance of the City of Morgantown, W.Va., to the above petitioner by a decision and/or order made and entered on the 21st day of May, 1980.

And the Court having seen and inspected said petition does hereby order that said petition be filed.

The Court having considered said petition, hereby directs that the respondents, the Board of Zoning Appeals of the City of Morgantown, W.Va., and the City of Morgantown, W.Va., a municipal corporation, and William Kaweck, Richard Csamer, Robert Behling, Art Hahn, and Avery Gaskins, show cause within twenty (20) days from the date of entry of this order, why a Writ of Certiorari should not issue, more specifically, on the 10th day of July, 1980, at 1 PM. o'clock.

The Clerk of this Court is directed to certify copies of this order and deliver the same to the Sheriff of Monongalia County for service upon each of the respondents, without delay.

ENTER: June 23, 1980
Frank J. R. [Signature]

Prepared & Presented by:

Michael Smith

MICHAEL SMITH

Attorney for Petitioner

P.O. Box 660, 467 Chestnut Street

Morgantown, West Virginia 26505

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
MOTTIE WILLIAM PAVONE,
Petitioner,

v.

LAW ACTION NO. 80-P-103
ON PETITION FOR A WRIT OF
CERTIORARI

THE BOARD OF ZONING APPEALS OF THE
CITY OF MORGANTOWN, WEST VIRGINIA:
THE CITY OF MORGANTOWN, WEST VIRGINIA,
a municipal corporation; and,
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAHN, and
AVERY GASKINS,

Respondents.

TO: WILLIAM KAWECKI, Chairman of the
Board of Zoning Appeals of the
City of Morgantown, W.Va.

The City of Morgantown, W.Va.,
a municipal corporation,

RICHARD CSAMER

ROBERT BEHLING

ART HAHN

AVERY GASKINS

Sherry Roth
228 Grant Avenue
Morgantown, WV

May Lee Miller
2134 University Avenue
Morgantown, WV

Joe Fredlock
% Billie Penrod
Glenlock Hall
2108 University Avenue
Morgantown, WV

Helen Vanderport
2126 University Avenue
Morgantown, WV

Fred Wyant
2109 University Avenue
Morgantown, WV

John Sanders
2125 University Avenue
Morgantown, WV

N O T I C E

Each of you are hereby notified that the petitioner, on the
23rd day of June, 1980, filed a petition for a Writ of Certiorari in the
above court praying for a review of the decision and/or order of the
Board of Zoning Appeals of the City of Morgantown, West Virginia, in
refusing to grant and continue in effect a parking variance to the

above petitioner for his existing building situate at 2129 University Avenue, Morgantown, West Virginia. The decision and/or order of denial was denied by the Board of Zoning Appeals on May 21, 1980. A hearing date is set for July 10, 1980 at 1:00 p.m. in Courtroom No. II.

Michael Smith

MICHAEL SMITH
Counsel for Petitioner
P.O. Box 660, 467 Chestnut Street
Morgantown, West Virginia 26505

ATTEST COPY
ATTEST *Jean Freund* CLERK
MONONGALIA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
MOTTIE WILLIAM PAVONE,
Petitioner,

v.

LAW ACTION NO. 80-P-103
ON PETITION FOR A WRIT OF
CERTIORARI

THE BOARD OF ZONING APPEALS OF THE
CITY OF MORGANTOWN, WEST VIRGINIA;
THE CITY OF MORGANTOWN, WEST VIRGINIA,
a municipal corporation; and,
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAHN, and
AVERY GASKINS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

1. That on or about the ___ day of _____, 19___, petitioner applied for a building permit to convert one floor of the building owned by him into a restaurant situate at 2129 University Avenue, in the Fourth Ward of the City of Morgantown, Morgan District, Monongalia County, West Virginia. The building permit was granted and petitioner expended large sums of money and personal work and labor was performed by petitioner and petitioner's family in order to complete the renovation of their building into a restaurant.

2. That when the restaurant was ready to be opened to the public, petitioner applied for a certificate of occupancy and was denied that certificate of occupancy on the ground that the Zoning Ordinance of the City of Morgantown, West Virginia, required fourteen (14) parking spaces for petitioner's total building area and petitioner only could accommodate six (6) parking spaces. Petitioner then filed a request to the Board of Zoning Appeals for a parking variance and at a public hearing held on May 21, 1980, the petitioners and others introduced competent evidence sufficient for the granting of a variance pursuant to the provisions of Subsection H, Section 23, of the Zoning Ordinance of the City of Morgantown,

a copy of said Subsection H is attached hereto and marked as Exhibit "A" and made a part of this petition. Included in the competent evidence was petitioner, Mottie William Pavone's testimony as to the fact that although parking is limited in Sunnyside the congestion in the street will not be increased by the opening of a restaurant since he will be catering almost exclusively to pedestrian traffic. Petitioner further offered evidence as to the renovation of his building so that the marketable adjacent properties would be increased. Petitioner further offered testimony to the fact that almost all the businesses in the Sunnyside area lacked the required number of parking spaces set forth in the zoning ordinance, and that it would be depriving petitioner of a substantial property right possessed by other property owners in the same vicinity and district.

3. The Board of Zoning Appeals further had before it to consider a memo authored by Robert Gosler, the City Planner of the City of Morgantown, who is an expert of 12 years in the area of city zoning variances, etc., setting forth various facts pertinent to the Sunnyside area that satisfied the provisions of Subsection H of Section 23 of the zoning ordinance of the City of Morgantown. A copy of this memo is attached hereto and marked as Exhibit "B" and made a part of this petition.

4. The Board of Zoning Appeals nevertheless denied the petitioner's request for a variance by decision and/or order dated May 21, 1980. Said decision and/or order of the Board of Zoning Appeals was contrary to the law and evidence in this matter. The decision was further made without adequate written findings of fact as required by law.

THEREFORE, the petitioner alleges that he is aggrieved by said illegal decision and/or order of the Board of Zoning Appeals in refusing to grant him a variance which illegality consists of the following matters and grounds:

(a). The Board of Zoning Appeals of the City of Morgantown failed to make the necessary written findings of fact which are required by Subsection H of Section 23 of the Zoning Ordinance of the City of Morgantown, and which written findings of fact are necessary pursuant to William H. Miernyk et al. v. Board of Zoning Appeals of the City of Morgantown et al., 155 W.Va. 143, 181 S.E. 2d 681 (1971) and V.H. Harding et al. v. Board of Zoning Appeals of the City of Morgantown et al., Supreme Court of Appeals of West Virginia decided November 4, 1975, 219 S.E. 2d 324, which case provided that the Board of Zoning Appeals of the City of Morgantown has a mandatory duty to make written findings before a variance is approved or denied. Miernyk, supra ., 155 W.Va. at 148, 181 S.E. 2nd at 684, explains that the rationale for requiring such findings is as follows:

Without such findings it would not be possible for the Circuit Court upon Certiorari or this Court upon Writ of Error to determine whether the conditional use (or variance) sought by the applicant before the Board violated any of the conditions required before the granting (or denial) of such conditional use (or variance). In other words, these review procedures would be worthless if it could be said that written findings are not necessary, for there would be nothing to review.

The Board of Zoning Appeals in denying petitioner's request for a parking variance did not meet the above described requirements as to making written findings of fact, but merely sent to petitioner a form letter which contained merely the ordinance language of Subsection H of Section 23 of the Zoning Ordinance and placed an "X" next to those items the Board of Zoning Appeals determined were not satisfied. A copy of said letter is attached hereto and marked as Exhibit "C" and made a part of this petition. There was no written findings as to how the board determined the requirements of Subsection H of Section 23 were not satisfied.

(b). The petitioner's constitutional rights were violated in the denial of his variance request. The Zoning Ordinance of the City of Morgantown, West Virginia, was adopted by City Council on November 3, 1959. For over twenty (20) years the parking requirements were not enforced in the Sunnyside area. Many of the businesses in the Sunnyside area do not have the required number of parking spaces or have no parking at all. To enforce the parking requirement of the zoning ordinance against only the petitioner is a violation of his constitutional rights to be equally protected by the law. If the Board of Zoning Appeals of the City of Morgantown or City Planner had decided after twenty (20) years to enforce the parking requirements in the Sunnyside area, the petitioner should have been informed as to these requirements when he first applied for his restaurant building permit.

(c). The Board of Zoning Appeals allowed their judgment to be influenced by the general complaints of the Sunnyside area by protestants who appeared at the public hearing on May 21, 1980. Most of the testimony of the protestants was simply complaining about how other businesses were managed; how the students behaved; or how the people in the area violated the parking laws of the City of Morgantown. These protests had nothing to do with the issue before the Board. The Board of Zoning Appeals should not have allowed their judgment to be influenced by these protests.

(d). That the provisions of Subsection H of Section 23 of the Zoning Ordinance of the City of Morgantown is illegal, unconstitutionally void for vagueness, and incapable of being interpreted, complied with and enforced since the Board of Board of Zoning Appeals does not know whether to construe the provisions of Subsection H of Section 23 strictly so as to deny most variances or liberally to allow persons their property rights.

(e). The petitioner introduced substantial competent evidence under Section 23, Subsection H of the Zoning Ordinance which the Board failed or refused to consider in their decision, thus constituting their action arbitrary and capricious.

(f). The protestants failed to introduce any competent

evidence before the Board which would be justified in the Board refusing to grant a variance to the petitioner, thus constituting the action of the Board arbitrary, capricious and discriminatory.

(g). The action of the Board of Zoning Appeals in rendering said decision was arbitrary, capricious, discriminatory and confiscatory, due to the fact that the Board of Zoning Appeals ignored and refused to consider all of the competent evidence introduced by the petitioner under the provisions of Subsection H of Section 23 of the City Ordinance of Morgantown.

(h). The Board of Zoning Appeals abused it's discretion in refusing to grant the variance to the petitioner on the ground that the testimony and evidence of the petitioner and Mr. Gosler is so overwhelming that the Board had no discretion with regard to disallowing this variance.

(i). The Board of Zoning Appeals was misinformed and/or misadvised in that the Board apparently was under the impression that it was mandatory upon them to strongly construe the provisions of Subsection H of Section 23 of the City Ordinance and the Board applied the provisions illegally by denying the petitioner's variance.

(j). The Board of Zoning Appeals of the City of Morgantown has arbitrarily, capriciously and discriminatorily set two standards by allowing businesses to open in the Sunnyside area. One standard has been to allow most businesses which have been established since November 3, 1959 to open without the required number of parking spaces. The other standard has been to refuse petitioner to open his business due to a lack of required parking spaces. This double standard practiced by the City of Morgantown and/or Board of Zoning Appeals is discriminatory and violates petitioner's constitutional rights.

(k). The provision of Subsection H of Section 23 of the Zoning Ordinance is confiscatory in that it denies applicants due process of law in that applicants cannot make a legal use of their property and are denied a legal use of their property without due process because no applicant could come within the terms of said section if and when an application is protested and the applicant is made to comply with each and every provision of said section, if and when the Board in it's discretion desires to place a literal interpretation and ruling as to the requirements of said section.

(l). Any and all other grounds which the recording of evidence taken may disclose on its face.

PRAYER

WHEREFORE, the petitioner prays that this Court issue an order directing to the respondents to show cause why a Writ of Certiorari should not issue in this proceeding; that a hearing be held upon said order to show cause and from the evidence adduced at said hearing that the Court issue a Writ of Certiorari directed to the respondents, the Board of Zoning Appeals of the City of Morgantown, West Virginia, and the City of Morgantown, West Virginia, a municipal corporation, requiring said respondents to certify and deliver to the Court a full and complete record of all proceedings had and taken, so that said matter may be reviewed by the Court; that after the Court has reviewed the same that it declare the action of the Board of Zoning Appeals, in refusing to grant the above variance to the petitioner, illegal; and that the parking variance be granted or grant such other relief as it may deem necessary under the Zoning Ordinance of the City

of Morgantown and Chapter 8, Article 24 of the Official Code of West Virginia, 1931, as amended.

Mottie William Pavone

Mottie William Pavone

Michael Smith

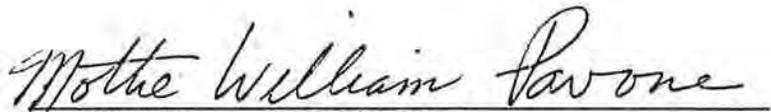
MICHAEL SMITH
ATTORNEY FOR PETITIONER
P.O. Box 660, 467 Chestnut Street
Morgantown, West Virginia 26505

A TRUE COPY

ATTEST Jean L. Grund
MANON ALIA COUNTY CLERK

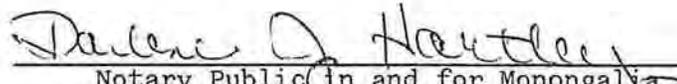
STATE OF WEST VIRGINIA,
COUNTY OF MONONGALIA, to-wit:

MOTTIE WILLIAM PAVONE, the petitioner named in the foregoing
Petition, being duly sworn, says that the facts and allegations therein
contained are true, except so far as they are therein stated to be on
information, and that so far as they are therein stated to be on
information, he believes them to be true.


MOTTIE WILLIAM PAVONE

Taken, sworn to and subscribed before me this 20th day of
June, 1980.

My Commission expires: January 4, 1982.


Notary Public in and for Monongalia
County, West Virginia

Commissioned: Darlene J. Rose

PETITIONER'S EXHIBIT A

SUBSECTION H, SECTION 23. Board of Zoning Appeals, Zoning Ordinance of the City of Morgantown, West Virginia, adopted by City Council - November 3, 1959:

" H. No variance in the application of the provisions of this ordinance shall be made by the Board relating to buildings, land or premises now existing or to be constructed, unless after a public hearing, the Board shall find:

- (1) That there are exceptional or extraordinary circumstances or conditions applicable to the property or to the intended use that do not apply generally to the other property or class of use in the same vicinity and District.
- (2) That such variance is necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and District but which is denied to the property in question.
- (3) That the granting of such variance will 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.
- (4) That the granting of such variance will 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. "

CASE #3 - 2129 University Avenue

The petitioner is before the Board seeking an administrative review of the Zoning Administrator's decision to refuse an occupancy permit for a restaurant which serves beer located in a B-1 zoning district. In addition, the petitioner is requesting relief from the parking requirements of a B-1 zoning district.

The Zoning Administrator denied an occupancy permit for a restaurant and tavern in a B-1 zoning district because only a restaurant and a delicatessen which prepares food for consumption on site are allowed in a B-1 zoning district. Once beer is sold on the premises the Zoning Administrator cannot make a determination whether the proposed establishment is a restaurant with incidental beer sales or a beer parlor or tavern with incidental food sales. The Board should examine the characteristics of operations of this business to determine whether it is a restaurant or tavern. The Board may impose restrictions on the restaurant to assure that the characteristics of operation do not change. The Board may limit the amount of beer sales in relation to food sales, prohibit the serving of beer without food, prohibit the serving of beer at no other place but a table, or prohibit a seating arrangement at the serving bar, or other similar restrictions.

The petitioner contends that the serving of beer is only incidental to his food service. He contends that beer is only one of a number of beverages served to aid in the digestion of the food served at the business.

Section 23, paragraph E, sub-paragraph 1 of the Zoning Ordinance delegates the authority to the Board of Zoning Appeals to hear administrative reviews regarding enforcement of the zoning ordinance. The Board must determine on what grounds the Zoning Administrator, acting on behalf of the City Manager, made the decision. After hearing testimony from the aggrieved party and other affected parties, the Board must reaffirm or overrule the Zoning Administrator's decision based on the literal interpretation of the zoning ordinance. If the Board overrules the Zoning Administrator's decision, they, in effect, are acting as the Zoning Administrator.

Section 23, paragraph E, sub-paragraph 3 of the Zoning Ordinance delegates the authority to the Board of Zoning Appeals to hear this request for a parking variance.

The petitioner has converted the first floor of a multi-family residential structure to a restaurant. The upper floor of the structure remains as a multi-family residential use. The size of the building has not been changed but the characteristics of land use have changed by the conversion.

The building is required to have fourteen (14) off-street parking spaces, whereas, the petitioner proposes to accommodate six (6) off-street parking spaces located in the back of the building. This is the maximum number of off-street parking spaces which can be supplied on this undeveloped portion of the site. The alleyway serving this parking area is very narrow and probably this will cause the near parking area to not be frequently patronized. However, most businesses in this area depend on walk-by pedestrian traffic for patronage.

The exceptional or extraordinary circumstances or conditions in this case are that many of the businesses in this area do not meet minimum off-street parking

May 14, 1980

requirements. Most of the businesses in this area depend on pedestrian traffic for a major portion of their patronage.

Many businesses in this area supply no off-street parking spaces or less than the required number of off-street parking spaces. The businesses located on the 2000 block of University Avenue and the Stadium Inn supply no off-street parking spaces. The Fred Wyant Insurance Company supplies one (1) off-street parking space. The Vagabond supplies three (3) off-street parking spaces. Ceramic Tile supplies six (6) off-street parking spaces. Sunnyside Superette supplies seven (7) off-street parking spaces. The office complex located at 2139 University Avenue supplies nine (9) off-street parking spaces.

The alleyway located behind the questioned site is narrow. It is questionable that if more off-street parking spaces could be placed in the back of the building that utilization of these off-street parking spaces would be heavy. The remaining portion of the questioned site is covered by building.

The author of this paper believes that the granting of this parking variance will 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 will 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 street.

The City of Morgantown

P A ONER'S
EXHIBIT "C"

BOARD OF ZONING APPEALS
309 SPRUCE STREET
MORGANTOWN, W. VA. 26505

Dear Applicant:

Your application for a variance from the criteria of the Zoning Ordinance listed below was DENIED by the Board of Zoning Appeals. The Board of Zoning Appeals determined that the items checked below resulted in the denial of the requested variance.

- 1) That there are no exceptional or extraordinary circumstances or conditions applicable to the property or to the intended use that do not apply generally to other property or class of use in the same vicinity and district.
- 2) That such variance(s) is/are not necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and district but which is denied to the property in question.
- 3) That the granting of such variance(s) will 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.
- 4) That the granting of such variance(s) will 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 street.
- 5) The Zoning Ordinance does not delegate the authority to the Board of Zoning Appeals to consider this requested variance(s).

Anyone opposing the Board's decision may file an appeal with the Circuit Court within thirty (30) days from the date of the Board's decision.

Address of Site 2129 University Avenue -- Mottie Pavone

Zoning District of Site B-1

Variance Requested Relief from off-street parking requirement of 14 spaces to 6 spaces

John A. Kaweckie
Chairman, Board of Zoning Appeals

May 21, 1980
Date of Denial

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
MOTTIE WILLIAM PAVONE,
Petitioner,

v.

LAW ACTION NO. 80-P 103
ON PETITION FOR A WRIT OF
CERTIORARI

THE BOARD OF ZONING APPEALS OF THE
CITY OF MORGANTOWN, WEST VIRGINIA:
THE CITY OF MORGANTOWN, WEST VIRGINIA,
a municipal corporation; and,
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAHN, and
AVERY GASKINS,

Respondents.

TO: WILLIAM KAWECKI, Chairman of the
Board of Zoning Appeals of the
City of Morgantown, W.Va.

The City of Morgantown, W.Va.,
a municipal corporation,

RICHARD CSAMER

ROBERT BEHLING

ART HAHN

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228 Grant Avenue
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2108 University Avenue
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Helen Vanderport
2126 University Avenue
Morgantown, WV

Fred Wyant
2109 University Avenue
Morgantown, WV

John Sanders
2125 University Avenue
Morgantown, WV

NOTICE

Each of you are hereby notified that the petitioner, on the 23rd day of June, 1980, filed a petition for a Writ of Certiorari in the above court praying for a review of the decision and/or order of the Board of Zoning Appeals of the City of Morgantown, West Virginia, in refusing to grant and continue in effect a parking variance to the

4
For Return

above petitioner for his existing building situate at 2129 University Avenue, Morgantown, West Virginia. The decision and/or order of denial was denied by the Board of Zoning Appeals on May 21, 1980. A hearing date is set down for July 10, 1980 at 1:00 p.m. in Courtroom No. II.

Michael Smith

MICHAEL SMITH
Counsel for Petitioner
P.O. Box 660, 467 Chestnut Street
Morgantown, West Virginia 26505

Dean Friend

FILED June 23, 1980
John Friend
CIRCUIT CLERK

STATE OF WEST VIRGINIA, SS:

In the Circuit Court of Monongalia County, West Virginia, on the 18th day of August, 1980, the following order was made and entered:

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

MOTTIE WILLIAM PAVONE,
PETITIONER,

V.

THE BOARD OF ZONING APPEALS OF
THE CITY OF MORGANTOWN, WEST
VIRGINIA; THE CITY OF MORGANTOWN,
WEST VIRGINIA, a municipal corporation, and
WILLIAM KAWECKI, RICHARD CSAMER,
ROBERT BEHLING, ART HAHN, and
AVERY GASKINS,
RESPONDENTS.

LAW ACTION NO. 80-P-103
ON PETITION FOR A WRIT
OF CERTIORARI

ORDER AWARDING WRIT OF CERTIORARI

On the 4th day of August, 1980, came the petitioner by his attorney, Michael Smith, and came the City of Morgantown, West Virginia, and the Board of Zoning Appeals of the City of Morgantown, West Virginia, by their attorney, Mike Magro, Jr., pursuant to an order to show cause entered in the above action on July 18, 1980, and the Court having considered the petition and exhibit filed therewith and the argument of counsel, is of the opinion to and does hereby award the petitioner a Writ of Certiorari directed to the respondents, Board of Zoning Appeals of the City of Morgantown, West Virginia, and the City of Morgantown, West Virginia, a municipal corporation, commanding each of them to certify to the Clerk of this Court the record and proceedings had before the Board of Zoning Appeals of the City of Morgantown, West Virginia, on June 18, 1980, in connection with the petitioner's appeal from the Zoning Administrator's denial to issue an Occupancy Permit to petitioner, together with a transcript of all evidence taken and copies of all exhibits filed and a certified copy of the minutes prepared and preserved upon the permanent records of said respondents as the same relates to said appeal, on or before September 8, 1980, or within a reasonable time thereafter if additional time is needed to prepare said records and transcript so that this Court may review the entire record before argument is heard by counsel on the 19th day of September, 1980, at 1:30 o'clock p.m.

For Return

It is further ORDERED that those three (3) restrictions placed upon the petitioner's business by the Board of Zoning Appeals on June 18, 1980, with regard to the sale of beer, not be enforced by the City of Morgantown pending the review by this Court of the entire proceedings in this matter.

It is further ORDERED that the Clerk of this Court issue certified copies of this order to be served upon George DeFrench, City Manager, on behalf of the City of Morgantown, and William Kawecki, Board Chairman, on behalf of the Board of Zoning Appeals, which when served upon each of said respondents to this proceeding shall operate as and be in lieu of a formal Writ of Certiorari and deliver the same to the Sheriff of Monongalia County, West Virginia, for service upon each of the respondents as provided by law.

ENTER: August 18, 1980
Frank J. DePaul
Judge

Seen and Approved by:

Michael Smith
Michael Smith
Attorney for Petitioner

Mike Magro, Jr.
Mike Magro, Jr.,
Attorney for Respondents

ATTEST
ATTEST
MONONGALIA COUNTY CIRCUIT COURT
Dean Friend

write receipt

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
MOTTIE WILLIAM PAVONE,
Petitioner,

v.

LAW ACTION NO. 80-P-103
ON PETITION FOR A WRIT OF
CERTIORARI

THE BOARD OF ZONING APPEALS OF THE
CITY OF MORGANTOWN, WEST VIRGINIA:
THE CITY OF MORGANTOWN, WEST VIRGINIA,
a municipal corporation; and;
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAHN, and
AVERY GASKINS,

Respondents.

TO: WILLIAM KAWECKI, Chairman of the
Board of Zoning Appeals of the
City of Morgantown, W.Va.

The City of Morgantown, W.Va.,
a municipal corporation,

RICHARD CSAMER

ROBERT BEHLING

ART HAHN

AVERY GASKINS

✓ Sherry Roth
228 Grant Avenue
Morgantown, WV

✓ May Lee Miller
2134 University Avenue
Morgantown, WV

✓ Joe Fredlock
% Billie Penrod
Glenlock Hall
2108 University Avenue
Morgantown, WV

✓ Helen Vanderport
2126 University Avenue
Morgantown, WV

✓ Fred Wyant
2109 University Avenue
Morgantown, WV

✓ John Sanders
2125 University Avenue
Morgantown, WV

NOTICE

Each of you are hereby notified that the petitioner, on the
23rd day of June, 1980, filed a petition for a Writ of Certiorari in the
above court praying for a review of the decision and/or order of the
Board of Zoning Appeals of the City of Morgantown, West Virginia, in
refusing to grant and continue in effect a parking variance to the

"For Return"

above petitioner for his existing building situate at 2129 University Avenue, Morgantown, West Virginia. The decision and/or order of denial was denied by the Board of Zoning Appeals on May 21, 1980. A hearing date is set for July 10, 1980 at 1:00 p.m. in Courtroom No. II.

Michael Smith

MICHAEL SMITH
Counsel for Petitioner
P.O. Box 660, 467 Chestnut Street
Morgantown, West Virginia 26505

ATTEST *Jean Freund* CLERK
MONONGALIA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
MOTTIE WILLIAM PAVONE,

Petitioner,

v.

LAW ACTION NO. 80-P-103

THE BOARD OF ZONING APPEALS OF
THE CITY OF MORGANTOWN, WEST
VIRGINIA; THE CITY OF MORGANTOWN,
WEST VIRGINIA, a municipal corporation,
and WILLIAM KAWECKI, RICHARD CSAMER,
ROBERT BEHLING, ART HAUN, and
AVERY GASKINS,

Respondents.

ORDER AWARDING WRIT OF CERTIORARI

On the 19th day of September, 1980, came the petitioner by his attorney, Michael Smith, and came the City of Morgantown, West Virginia, and the Board of Zoning Appeals of the City of Morgantown, West Virginia, by their attorneys, Mike Magro, Jr. and Michael Callen, pursuant to an Order to Show Cause entered in the above action on 23rd day of June, 1980, and the Court having considered the petition and exhibits filed therewith and the argument of counsel, is of the opinion and does hereby award the petitioner a Writ of Certiorari directed to the respondents, Board of Zoning Appeals of the City of Morgantown, West Virginia, and the City of Morgantown, West Virginia, a municipal corporation, commanding each of them to certify to the Clerk of the Court the record and proceedings had before the Board of Zoning Appeals of the City of Morgantown, West Virginia, on May 21, 1980, in connection with the petitioner's request for a parking variance, together with a transcript of all evidence taken and copies of all exhibits filed and a certified copy of the minutes prepared and preserved upon the permanent records of said respondents as the same relates to said appeal, on or before the 20th day of October, 1980, or within a reasonable time thereafter if additional time is needed to prepare said records and transcript so that the Court may review the entire record.

msd 10/7/80 ck

It is further ORDERED that the Clerk of this Court issue certified copies of this Order to be served upon George DeFrench, City Manager, on behalf of the City of Morgantown, and William Kaweck, Board Chairman, on behalf of the Board of Zoning Appeals, which when served upon each of said respondents to this proceeding shall operate as and be in lieu of a formal Writ of Certiorari and deliver the same to the Sheriff of Monongalia County, West Virginia, for service upon each of the respondents as provided by law.

ENTER: October 6, 1980
[Signature]
Judge

Seen and Approved by:
[Signature]
Michael Smith
Attorney for Petitioner
[Signature]
Michael Callen
Attorney for Respondent

ENTERED October 6, 1980
CIVIL 33 PAGE 68
[Signature] CLERK

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
MOTTIE WILLIAM PAVONE,

Petitioner,

VS.

LAW ACTION NOS. 80-P-103

80-P-116

THE BOARD OF ZONING APPEALS
OF THE CITY OF MORGANTOWN,
WEST VIRGINIA; THE CITY OF
MORGANTOWN, WEST VIRGINIA,
a municipal corporation; and,
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAHN and
AVERY GASKINS,

Respondents.

MEMORANDUM/OPINION

STATEMENT OF CASE AND FACTS: The Petitioner, Mottie William Pavone, hereinafter referred to as "Pavone", instituted two actions, each seeking a Writ of Certiorari against the City of Morgantown, hereinafter referred to as "City" and the Board of Zoning Appeals of the City of Morgantown, hereinafter referred to as "Board" and its five members individually, hereinafter referred to as "Board Members".

In 80-P-103 Pavone challenges the Board's refusal to grant a variance as to the parking spaces requirement applicable to his business under the City's zoning ordinance and in 80-P-116 Pavone challenges the restrictions placed upon his business property by the Board.

After the filing of said petition and a response to the

show cause Order, the Board was required to show to the Court its records relative to the matters involved herein. Thereafter, each side was permitted to argue the matters in issue and permitted to file legal memorandums in support of their position.

From the pleadings and testimony taken at these meetings before the Board on May 21, 1980, June 18, 1980 and July 16, 1980, the following facts are adduced:

Pavone is the owner of property located at 2129 University Avenue, in a section of town more commonly referred to as Sunnyside. The building located on the property had been used by Pavone exclusively as an apartment rental property until April, 1979, Pavone's building was fire-damaged when the building next to his building was destroyed by fire. The building inspector informed Pavone that due to the damage that he would have to rewire the apartment building. Therefore, Pavone on June 22, 1979, applied and was granted a building permit to rewire the building and repair other fire damage. (Petitioner's Exhibit No. 1)

While rewiring the building, Pavone decided to convert one floor of the building to a restaurant due to the fact that his family business of forty-seven (47) years located on Beechurst Avenue had decreased considerably due to the closing of one glass factory and reduction of workers in the other glass factory in the Seneca area. After the rewiring was completed, he applied and was granted a building permit on November 9, 1979, to enclose the front porch of the building, construct a new stairwell, construct and install an exterior door and other additions.

(Petitioner's Exhibit No. 2).

The City Planner, Robert Gossler, and other City officials were aware that Pavone planned to open a restaurant. The City Planner advised Pavone that he could not open a restaurant on his property, since the property was zoned R-2. If Pavone wanted to operate a restaurant business in the Sunnyside area, his property had to be rezoned to B-1.

Pavone went to the Planning Commission on November 29, 1979, and requested the Planning Commission to recommend to the City Council that his property be rezoned to a B-1 area. The City Council did thereafter rezone Pavone's property to a B-1 area. Thereafter, Pavone continued to convert one floor of his building to a restaurant.

On April 9, 1980, Pavone applied for and was denied a building permit to do paneling, drywall work and plumbing work. (Petitioner's Exhibit No. 3). Pavone was further denied a Certificate of Occupancy for his restaurant on the following two grounds:

(1) Pavone needed fourteen (14) parking spaces for his restaurant and three apartments, but could only provide for six parking spaces. (a survey later revealed that Pavone could actually provide for seven spaces).

(2) The Zoning Administrator ruled that only a restaurant and delicatessen are allowed in a B-1 zoning district and that he was not going to

determine whether or not Mutt's Place could be considered a restaurant.

In order to open his business, Pavone applied to the Board for a parking variance and further filed an administrative appeal to have the Board determine whether Pavone could be classified a restaurant or other business which is allowed in a B-1 zoning area.

A public hearing was held before the Board on May 21, 1980, after which the Board denied Pavone's request for a parking variance. Pavone filed a petition for a Writ of Certiorari and assigned several grounds to reverse the action taken by the Board on May 21, 1980.

The administrative appeal filed by Pavone was decided in his favor after a public hearing was held on June 18, 1980. The Board found that Pavone had made a substantial financial commitment to the preparation of food and should be granted a Certificate of Occupancy for a restaurant. However, the Board placed restrictions on Pavone's Certificate of Occupancy. They are as follows:

- (1) Beer may be served only to persons who have ordered food.
- (2) No seating arrangement may be provided at the service bar area.
- (3) That beer be dispensed from the service bar only to persons in booths and tables separate from service bar.

ISSUES

1. Were the findings made by the Board pursuant to the provisions of 23H (1)(2)(3) and (4) of the Morgantown Zoning Ordinance supported by the evidence?
2. Did the Board have authority to place restrictions on Pavone's property?

LAW AND ARGUMENT

(1) DENIAL OF THE PARKING VARIANCE

Section 23H of the Zoning Ordinance provides as follows:

"No variance in the application of the provisions of this ordinance shall be made by the Board relating to buildings, land or premises now existing or to be constructed, unless after a public hearing, the Board shall find:

- (1) That there are exceptional or extraordinary circumstances applicable to the property or to the intended use that do not apply generally to the other property or class of use in the same vicinity and District.
- (2) That such variance is necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and District but which is denied to the property in question.
- (3) That the granting of such variance will 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.
- (4) That the granting of such variance will not alter the land use characteristics of the vicinity and District, diminish the marketable value of adjacent land and improvements or increase the contestation in the public streets."

The Board, on July 16, 1980 made the following findings of fact:

- "1) That there are no exceptional or extraordinary circumstances or conditions

applicable to the property or to the intended use that do not apply generally to other property or class of use in the same vicinity and District, in that this is typical property in that B-1 area and no other parking variances have been granted to our knowledge.

- 2) That such variance is not necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and District but which is denied to the property in question, in that the square footage of the proposed restaurant could be reduced sufficiently to allow existing parking spaces to satisfy the requirements of the existing Zoning Ordinance.
- 3) That the granting of such variance will 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, in that there was testimony that there already is a problem with parking in the area and granting of this variance would only aggravate this problem.
- 4) That the granting of such variance will 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 street, in that this variance would increase the congestion in the public streets through providing insufficient space for parking."

In denying the variance the Board found that Pavone could not satisfy any of the provisions of 23H (1) (2) (3) and (4) of said Zoning Ordinance. To determine whether the Board's findings are supportive of its decision, it becomes necessary to examine the evidence available for its findings.

The facts available to the Board under 23H (1) are: The city planner stated and found that many businesses in the area did not meet the minimum off street parking requirements. In fact, he could mention only five businesses in the Sunnyside

area which had any parking at all and that all businesses in the 1200 block of University Avenue and Stadium Inn provided no off-street parking spaces. Said planner also indicated that there is a narrow alley behind Pavone's property and even if additional parking spaces are acquired by Pavone in that area, it is questionable if anyone would use the additional spaces. Pavone indicated that his business would rely entirely upon pedestrian customers. This assertion was supported by the city planner.

The Board was correct in finding Pavone's property is typical of properties in this B-1 area. However, there was no evidence to support the Board's finding that no other businesses were granted variances. This is speculation on their part. There was also no evidence that any parking variance was denied or required even though several businesses have opened in recent years.

Facts available to the Board under 23H (2) are: Pavone has 1,375 square feet available for restaurant use and three (3) apartments in the same building. The city ordinance required one parking space for every 125 square feet used for the restaurant. This means that eleven (11) spaces are required for the restaurant. Also required is one parking space for each apartment, making a total of fourteen (14). Pavone provides seven (7) spaces. Additional spaces would necessitate leasing or property purchase.

The Board found that the square footage of the proposed restaurant could be reduced to meet the requirements of the Zoning Ordinance.

Since the square footage of the kitchen and storage area are included in the square footage determination of the spaces necessary, the reduction of the square footage would leave Pavone with an unusually small restaurant area. In addition, a substantial area could not be used for any purpose. This would amount to a loss of substantial property right and no evidence other businesses were required to do the same.

Facts available to the Board under 23H (3) are: Several residents and other persons having businesses in the area stated that parking, littering and noise were problems in the Sunnyside area and they objected mainly to another beer garden. Pavone showed that he would rely mostly on pedestrian trade and the city planner supported this contention. There was no showing that Pavone's restaurant would aggravate the existing parking situation.

Facts available to the Board under 23H (4) are; Pavone spent \$21,000.00 for materials plus one year of labor to remodel his property. The city planner, an expert in zoning and variances for the past twelve years, found that most businesses in the area in question rely upon pedestrian traffic for a major portion of their business, and that the restaurant would not increase the congestion in the public street. Since there were considerable improvements to Pavone's property, the Board could not find that these improvements would in any way diminish the market value of adjacent properties and improvements in the area.

Zoning ordinances not only must be non-discriminatory and reasonable, but must be applied in a non-discriminatory and

reasonable manner and are to be strictly construed in favor of the land owner. Yokley Zoning Law & Practice pages 466-467.

The fact that the city is not enforcing the parking requirements would not of itself be sufficient to warrant the granting of a variance. The petitioner relies upon a number of factors, such as, (1) area is primarily for walk-in-travvid due to the facts that there is a high concentration of students thereon; the terrain is hilly; businesses are up against each other; few businesses which have established in the area have been permitted to operate in this area without complying with the parking requirements of the Zoning Ordinance.

Is the Board's position in denying the parking variance under all the facts reasonable and non-discriminatory?

An issue may be said to be fairly debatable when evidence offered in support of opposing view would lead objective and reasonable persons to reach different conclusions; evidence to be sufficient for the purpose must not only meet a quantitative but also a qualitative test. It must be evidence which is not only substantial but relevant and material as well. Board of Supervisors of Fairfax County v. Williams, 216 SE 2d 33 at page 49, 216 Va. 49, (1975).

The facts shown by Pavone are substantial and material. The Board in denying the variance would be acting unreasonable and discriminatroy in requiring full compliance with the parking requirements.

In the final analysis after reviewing the facts one needs only to read the definition given to the word "variance" when the Zoning Ordinance was adopted. The definition can be found on Page 59 of the Zoning Ordinance and reads as follows"

"variance - a modification of the specific requirements of this ordinance granted by the board in accordance with the terms of this ordinance for the purpose of assuring that no property because of special circumstances applicable to it shall be deprived of privileges commonly enjoyed by other properties in the same vicinity and district." No property fits this definition any better than Pavone's property.

Therefore, the matter of a parking variance shall be returned to the Board to proceed in accordance herewith.

(2) Restrictions Placed Upon Pavone's Business by the Board

The Board ruled on June 18, 1980, that Pavone's business was a restaurant, since he had made a substantial commitment to the preparation of food. The Board, however, went further by placing restrictions on Pavone's business. These restrictions are (1) to serve beer only to people who ordered food; (2) serve beer only to persons in booths or at tables separate from the service bar; and (3) no seating arrangement be provided at the service bar area.

The Zoning Ordinance provides that a restaurant is permissible in a B-1 area. The Zoning Ordinance does not provide any restrictions for the operation of a restaurant as would be applicable to all restaurants.

Pavone contends that the Board of Zoning Appeals acted beyond its powers when it tried to restrict, guide and manage and

direct him how to operate his business. A Board of Zoning Appeals is merely an administrative agency acting in a quasi-judicial capacity and has no power to amend the Zoning Ordinance under which it functions. Wolfe v. Forbes, 217 SE 2d 899, at 906 (W.Va. 1975).

Boards of Zoning Appeals are creatures of statutes possessing only those powers expressly conferred upon them. Board of Zoning Appeals of Fairfax County, v. Cedar Knall, 232 SE 767, at 769, 217 Va. 740 (1977).

Chapter 23, Subsection E of the Zoning Ordinance sets forth the powers, authorities and duties of the Board of Zoning Appeals. It sets forth that the Board shall (1) hear and determine appeals from and review any order made by the City Manager. (2) hear and decide all permits for conditional uses, developments and plans and other uses; (3) authorize upon appeal in specific cases variances from the ordinance as will not be contrary to the public interest where owing to special conditions fully demonstrated on the basis of facts presented a literal enforcement of the provisions of this ordinance will result in unnecessary hardship.

Even more importantly, Section 23, Subsection F makes clear that the Board in modifying any order or decision appealed from shall have all the powers of the City Manager from which the appeal is taken. Since the City Manager has no power to place restrictions, the Board has none.

The Board, in this instance, exceeded its authority by attempting to legislate conditions applicable to a business use. Legislating is a function of Council and not the Board or the City Manager.

Also to permit the Board to place restrictions on Pavone's business would not effect like businesses. This would be discriminatory against Pavone's business.

Therefore, the restrictions placed upon the Certificate of Occupancy by order dated June 18, 1980 are invalid and of no effect.

This Court realizes the Board's position in deciding delicate zoning situations including the present one. Certainly the Board's position is commendable in attempting to secure the required parking spaces and to maintain this position when other properties are taken into the B-1 zoning designation.

Council rezoned Pavone's property to B-1. In doing so Council was well aware of the area problems, especially the availability of parking spaces. In fact, the Sunnyside area has been permitted to grow in the same manner as the downtown area where businesses provide very little parking and most of the parking is provided by the city.

CONCLUSION

From the foregoing finding the Court concludes that the denial of a parking variance for Pavone's property would be unreasonable and discriminatory; that the Board's order of May 21, 1980 denying a parking variance be set aside and that a parking variance for parking be granted for the Pavone' property.

The Court further concludes that the restrictions placed upon Pavone's business by order dated June 18, 1980, are invalid and of no effect.

That an Order be prepared in accordance herewith.

Dated this 14th day of November, 1980.

Frank J. O'Neil

JUDGE

FILED

Nov. 14, 1980

Jean Freund

CIRCUIT CLERK

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

MOTTIE WILLIAM PAVONE,
Petitioner,

v.

LAW ACTION NOS. 80-P-103
80-P-116

THE BOARD OF ZONING APPEALS
OF THE CITY OF MORGANTOWN,
WEST VIRGINIA; THE CITY OF
MORGANTOWN, WEST VIRGINIA,
a municipal corporation, and
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAHN and
AVERY GASKINS,
Respondents.

O R D E R

This 19th day of September, 1980, came the petitioner, Mottie William Pavone, by his attorney, Michael Smith, and also came the Respondents, The Board of Zoning Appeals of the City of Morgantown, West Virginia, and George DeFrench, City Manager of the City of Morgantown, West Virginia, a municipal corporation, by their attorneys, Mike Magro, Jr., and Michael Callen, to be heard upon two Writs of Certiorari heretofore issued by this Court to review the actions of the Board of Zoning Appeals of the City of Morgantown in reference to petitioner's challenge of the Board's refusal to grant petitioner a variance as to the number of parking spaces required for his property on University Avenue under the zoning ordinance of the City of Morgantown, and petitioner's further challenge to the restrictions placed upon his business property by the Board of Zoning Appeals.

The Court after reviewing the evidence and hearing argument of counsel and reviewing the original evidence which was before the Board of Zoning Appeals at its meetings of May 21, 1980, and June 18, 1980, and allowing counsel the opportunity to submit memoranda, and further after review of the law applicable to this matter, the Court does hereby ORDER that the Board of Zoning Appeals' Order of May 21, 1980, denying the petitioner a parking variance be set aside

and that a parking variance be granted for the petitioner's property.

The Court further ORDERS that the restrictions placed upon petitioner's business by Order dated June 18, 1980, are invalid and of no effect.

The Court realizes the Board's position in deciding delicate zoning situations of this type. The Board's position is commendable in attempting to secure the required parking spaces and to maintain this position when other properties are taken into the B-1 zoning designation. However, with regard to the parking variance requested by petitioner there were facts available before the Board to support granting petitioner's parking variance. The Sunnyside area has been permitted to grow in a manner similar to the downtown area where businesses provide very little parking and most parking is provided by the City. The evidence showed that most of the businesses in the Sunnyside area did not have the required parking spaces, and that most of the businesses in the Sunnyside area rely upon pedestrian customers as would the petitioner, and that there is a narrow alley behind petitioner's property and that even if he could supply the additional parking spaces, it is unlikely that customers would use them. The evidence further showed that petitioner spent over Twenty-One Thousand (\$21,000.00) Dollars for materials plus one (1) year's labor to remodel his property, and that these improvements in no way could diminish the market value of the property adjacent to petitioner's in the Sunnyside area. That in view of these facts and the others appearing on the record, it is apparent that due to the special circumstances of this case, it would be unreasonable and discriminatory to deny petitioner his parking variance.

Therefore, it is ORDERED that the Board of Zoning Appeals' Order dated May 21, 1980, denying the petitioner a parking variance as to his property on University Avenue be set aside and that the matter of the parking variance be returned to the Board of Zoning Appeals and that said parking variance be granted to the petitioner.

The restrictions placed upon petitioner's business by Order dated June 18, 1980, must also be held invalid. The Zoning Ordinance does not provide for any restrictions for the operation of a restaurant. The Board of Zoning Appeals has no power to amend the zoning ordinance and place restrictions on one particular restaurant. The Board was exceeding its authority by attempting to legislate conditions applicable to petitioner's business. A board in modifying any order or decision appealed from shall have only the powers of the City Manager from which the appeal is taken. Since the City Manager has no power to place restrictions on a particular business, the Board of Zoning Appeals has none. Also, to permit the Board to place restrictions on petitioner's business that would not effect similar businesses, would be to discriminate against petitioner's business.

Therefore, it is ORDERED that the restrictions placed upon the petitioner's Certificate of Occupancy by Order dated June 18, 1980, are invalid and of no effect.

ENTER: November 26, 1980
Frank J. DePond
Judge

MS
[Handwritten signature]

November 26, 1980
Civil Division 330 - 497
San Diego, CA

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
MOTTIE WILLIAM PAVONE,
Petitioner,

v.
THE BOARD OF ZONING APPEALS OF THE
CITY OF MORGANTOWN, WEST VIRGINIA;
THE CITY OF MORGANTOWN, WEST VIRGINIA,
a municipal corporation, and
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAHN, and
AVERY GASKINS,
Respondents.

LAW ACTION NO. 80-P-116
ON PETITION FOR A WRIT OF
CERTIORARI

ORDER TO SHOW CAUSE

This day came the petitioner by his attorney, Michael Smith, and presented his verified petition praying that a Writ of Certiorari be issued to review the action of the Board of Zoning Appeals of the City of Morgantown, West Virginia, in placing restrictions on petitioner's restaurant business located at 2129 University Avenue, Morgantown, West Virginia. The said order and/or decision was made and entered on the 18th day of June, 1980.

And the Court having seen and inspected said petition does hereby Order that said petition be filed.

The Court having considered said petition, hereby directs that the respondents, the Board of Zoning Appeals of the City of Morgantown, W.Va., and the City of Morgantown, W.Va., a municipal corporation, and William Kaweck, Richard Csamer, Robert Behling, Art Hahn, and Avery Gaskins, show cause within twenty (20) days from the date of entry of this order, why a Writ of Certiorari should not issue, more specifically, on the 4th day of August, 1980, at 2:00 o'clock.

Entered 7/18/80 ce

The Clerk of this Court is directed to certify copies of this order and deliver the same to the Sheriff of Monongalia County for service upon each of the respondents, without delay.

ENTER: _____

July 18, 1980

Frank J. [unclear]

Judge

Prepared & Presented by:

Michael Smith

MICHAEL SMITH
Markusic and Smith
Attorneys at Law
P.O. Box 660, 467 Chestnut St
Morgantown, West Virginia 26505

COUNSEL FOR PETITIONER

July 19, 1980
Civil *32* *99*
Don Friend, CLERK

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

MOTTIE WILLIAM PAVONE,

Petitioner,

v.

LAW ACTION NO. 80-P-116
ON PETITION FOR A WRIT OF
CERTIORARI

THE BOARD OF ZONING APPEALS OF
THE CITY OF MORGANTOWN, WEST VIRGINIA;
THE CITY OF MORGANTOWN, WEST VIRGINIA,
a municipal corporation; and,
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAUN, and
AVERY GASKINS,
Respondents.

TO: WILLIAM KAWECKI, Chairman of the
Board of Zoning Appeals of the
City of Morgantown, W.Va.

Mary Lee Miller
2134 University Avenue
Morgantown, WV

The City of Morgantown, W.Va.,
a municipal corporation,

Helen Vanderport
2126 University Avenue
Morgantown, WV

RICHARD CSAMER

John Sanders

ROBERT BEHLING

Bruceton Mills, WV

ART HAUN

AVERY GASKINS

NOTICE

Each of you are hereby notified that the petitioner, on the 18th day of July, 1980, filed a petition for a Writ of Certiorari in the above Court praying for a review of the decision and/or order of the Board of Zoning Appeals of the City of Morgantown, West Virginia, in placing certain restrictions upon petitioner's restaurant business situate at 2129 University Avenue, Morgantown, West Virginia. The decision and/or order of restrictions was approved by the Board of Zoning appeals on June 18, 1980.

Michael Smith

MICHAEL SMITH
Markusic and Smith
P.O. Box 660, 467 Chestnut Street
Morgantown, West Virginia 26505

COUNSEL FOR PETITIONER

FILED July 28, 1980
James S. Friend

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

MOTTIE WILLIAM PAVONE,

Petitioner,

v.

THE BOARD OF ZONING APPEALS
OF THE CITY OF MORGANTOWN,
WEST VIRGINIA, a municipal
corporation; and,
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAUN, and
AVERY GASKINS,
Respondents.

LAW ACTION NO. 80-A 116
ON PETITION FOR A WRIT OF
CERTIORARI

PETITION FOR A WRIT OF CERTIORARI

1. That on, about or before the 9th day of April, 1980, petitioner applied for a certificate of occupancy to open a restaurant situate at 2129 University Avenue, in the Fourth Ward of the City of Morgantown, Morgan District, Monongalia County, West Virginia. At that time the certificate of occupancy was denied by the City of Morgantown. The reasons set forth by the City Planner, Robert Gosler, was that petitioner could not open his proposed business in a B-1 area. The City Planner determined in his administrative decision that the petitioner's business could not be a restaurant since petitioner planned to sell beer for consumption on the premises.

2. That petitioner filed an administrative appeal with the Board of Zoning Appeals in order to have the earlier administrative ruling overturned and a certificate of occupancy issued. At a public hearing held on June 18, 1980, the petitioner presented evidence as to the type of business that he would be operating. Petitioner testified that he would sell for consumption on the premises, many food and related beverage items. The petitioner's menu included spaghetti, lasagna, hamburgers, pizza, steak subs, various sandwiches, meatball subs, salads, pepsi, seven up, beer, milk and coffee. Petitioner further testified as to the general set-up of the restaurant. He described that the area will

contain tables and chairs and that no seats would be placed at the service bar area. Petitioner further testified as to the equipment that he had or would purchase for the restaurant. The evidence showed the restaurant would be equipped with a refrigerator, a grill, burners built onto the grill, pizza pans, french fryer, soda pop cooler, silverware, dishes and many other kitchen type equipment. After the presentation of the evidence by the petitioner, then the Board of Zoning Appeals would determine whether or not the petitioner's business was a restaurant or other business which is permissible in an area zoned B-1 in the City of Morgantown. After a lengthy discussion in an executive session the Board of Zoning Appeals moved, passed and approved two motions. The Board of Zoning Appeals determined that from the evidence presented at the public hearing that the petitioner had made a substantial commitment to the preparation of food and that petitioner's business was a restaurant and therefore should be granted a certificate of occupancy. The petitioner recognizes that the Board of Zoning Appeals did have the authority to make that determination and does not appeal that action by the Board.

However, the Board took further action at the meeting on June 18, 1980. It took it upon itself to place restrictions upon the petitioner's business which included that:

- (1). Beer could only be served to persons who have ordered food,
- (2). No seating arrangement be provided at the service bar area, and
- (3). that beer is dispensed from the service bar only to persons in booths or at tables separate from the service bar.

It is the contention of your petitioner that the action by the Board with respect to placing restrictions upon a person's business was an exercise of power not delegated to the Board of Zoning Appeals by the Zoning Ordinance of the City of Morgantown. It was an exercise of power which was legislative in nature and could not be exercised by the Board of Zoning Appeals. Petitioner therefore believes that the action by the Board of Zoning Appeals with regard to the restrictions placed upon petitioner was

illegal, invalid and contrary to the law and evidence in this matter.

Therefore, the petitioner alleges that he is aggrieved by the said illegal decision, action and/or order of the Board of Zoning Appeals on June 18, 1980, which placed restrictions upon petitioner's business and alleges that the illegality consists of the following matters and grounds:

(a). The Board of Zoning Appeals is not a state legislature, State Beer Commission, or city law making body. The Board of Zoning Appeals is judicial in nature and has been given no power by the State of West Virginia or the City of Morgantown to place restrictions of the type complained of in this petition. Petitioner believes that the Board's misunderstanding in this matter may have been due to instructions received from the City Planner in his memorandum to the Board which is attached hereto and marked as "Exhibit B", and made a part of this petition. Although made in good faith, the City Planner advised the Board that it could impose restrictions on petitioner's business. That the Board could:

"limit the amount of beer sales in relation to food sales, prohibit the serving of beer without food, prohibit the serving of beer at no other place but a table or prohibit a seating arrangement at the servicing bar, or other similar restrictions."

It is petitioner's contention that the Board of Zoning Appeals did not have the power to impose these restrictions any more than it could place a restriction on a grocery as to what food items it could sell.

Since Prohibition was repealed, the sale of beer has been a legal food item in the State of West Virginia. The West Virginia Code places restrictions upon who may be granted a beer license. The petitioner passed all the requirements of the State and was granted a beer license. Since petitioner had a beer license he should be allowed to serve beer to his restaurant customers who desire to order a beer.

Petitioner contends that every restaurant in the City of Morgantown which serves beer is allowed to serve just a glass of beer to a customer. The Board of Zoning Appeals however has now ruled that if you want to go to a restaurant and order just a beer you will have to go to some restaurant other than petitioner's.

(b). Even if the Judge believes that the Board does have the power to place restrictions on the foods and beverages sold by a restaurant, whether it be hamburgers or beer, petitioner further contends that these restrictions could not be imposed after the fact on Petitioner's business. Petitioner applied for his certificate of occupancy on or before April 9, 1980. Therefore the granting or denying of the certificate of occupancy should have been granted or denied in accordance with the then applicable rules for allowing restaurants to sell beer without food.

The Board, however, after making the restrictions applied the restrictions retroactively to only petitioner and not other restaurants which had been granted certificates of occupancy since November 3, 1959.

(c). Even if this Court finds that the Board of Zoning Appeals does have the power to place restrictions of the type petitioner herein complains and that the Board of Zoning appeals does have the power to retroactively enforce these restrictions against one business and not others, the petitioner still contends that the June 18, 1980 restriction order by the Board was illegal in that it constituted a violation of petitioner's constitutional rights to equal protection of the law. The Zoning Ordinance of the City of Morgantown was adopted by City Council on November 3, 1959. At that time there were only one or two businesses selling beer for consumption on the site. Since that time (November 3, 1959) many more businesses were granted certificates of occupancy to operate businesses which sold beer for consumption on the premises. Redbeards, Headspace, Vagabond, Marios's in Suncrest, Pizza Den and Finnerty's are some examples. Petitioner contends that the Zoning Ordinance to be constitutional must not only be valid on its face but must also be enforced equally and without discrimination to all businesses. For the Board of Zoning Appeals to now legislate and enforce new restrictions and enforce them against only petitioner is a denial of petitioner's constitutional rights.

(d). Petitioner also would contend that the City of Morgantown, City Planner and Board of Zoning Appeals has been under the mistaken idea that only a restaurant and a delicatessen which prepares food for consumption on site are allowed in a B-1 zoning District. This is contrary to the express language of Section 15, Subsection 5 (Page 14 of Zoning Ordinance) which specifically states that the food service allowable in a B-1 area include but are not limited to a restaurant.

Petitioner contends that the Zoning Ordinance has been interpreted to allow a restaurant-tavern type of business in a B-1 zoning area. The fact is many businesses which sell beer with much less food than petitioner or no food at all have been granted certificates of occupancy in B-1 zoning areas since November 3, 1959. Petitioner therefore contends that selling of beer is permissible in a B-1 area. The restrictions on the sale of beer would be those set forth by State law and city ordinances. Petitioner has complied with these.

(e). The order and/or decision by the Board of Zoning Appeals on June 18, 1980, was arbitrary, capricious and discriminatory in that it placed restrictions upon petitioner's business that weren't placed upon other similar businesses which came into existence after November 3, 1959.

(f). Any and all other grounds which the recording of evidence taken may disclose on its face.

WHEREFORE, the petitioner prays that this Court issue an order directing to the respondents to show cause why a Writ of Certiorari should not issue in this proceeding; that a hearing be held upon said order to show cause and from the evidence adduced at said hearing that the Court issue a Writ of Certiorari directed to the respondents, the Board of Zoning Appeals of the City of Morgantown, West Virginia, and the City of Morgantown, West Virginia, a municipal corporation, requiring said respondents to certify and deliver to the Court a full and complete record

of all proceedings had and taken, so that said matter may be reviewed by the Court; that after the Court has reviewed the same that it declare illegal the action taken by the Board of Zoning Appeals on June 18, 1980, with regards to those certain restrictions placed upon the manner in which petitioner sold beer in his restaurant and such other relief as the Court may deem fit and proper to grant in this matter.

Mottie William Pavone
MOTTIE WILLIAM PAVONE

Michael Smith
MICHAEL SMITH
Markusic and Smith
Attorneys at Law
P.O. Box 660, 467 Chestnut St
Morgantown, West Virginia 26505

STATE OF WEST VIRGINIA,
COUNTY OF MONONGALIA, to-wit:

MOTTIE WILLIAM PAVONE, the petitioner named in the foregoing
Petition, being duly sworn, says that the facts and allegations therein
contained are true, except so far as they are therein stated to be on
information, and that so far as they are therein stated to be on
information, he believes them to be true.

Mottie William Pavone
Mottie William Pavone

Taken, sworn to and subscribed before me this 18 day of
July, 1980.

My Commission expires: Jan. 4, 1982.

Darlene J. Hartley
Notary Public in and for Monongalia County,
West Virginia

Commissioner
Darlene J. Hartley

FILED July 18, 1980
Jean P. Friend

CASE #3 - 2129 University Avenue

The petitioner is before the Board seeking an administrative review of the Zoning Administrator's decision to refuse an occupancy permit for a restaurant which serves beer located in a B-1 zoning district. In addition, the petitioner is requesting relief from the parking requirements of a B-1 zoning district.

The Zoning Administrator denied an occupancy permit for a restaurant and tavern in a B-1 zoning district because only a restaurant and a delicatessen which prepares food for consumption on site are allowed in a B-1 zoning district. Once beer is sold on the premises the Zoning Administrator cannot make a determination whether the proposed establishment is a restaurant with incidental beer sales or a beer parlor or tavern with incidental food sales. The Board should examine the characteristics of operations of this business to determine whether it is a restaurant or tavern. The Board may impose restrictions on the restaurant to assure that the characteristics of operation do not change. The Board may limit the amount of beer sales in relation to food sales, prohibit the serving of beer without food, prohibit the serving of beer at no other place but a table, or prohibit a seating arrangement at the serving bar, or other similar restrictions.

The petitioner contends that the serving of beer is only incidental to his food service. He contends that beer is only one of a number of beverages served to aid in the digestion of the food served at the business.

Section 23, paragraph E, sub-paragraph 1 of the Zoning Ordinance delegates the authority to the Board of Zoning Appeals to hear administrative reviews regarding enforcement of the zoning ordinance. The Board must determine on what grounds the Zoning Administrator, acting on behalf of the City Manager, made the decision. After hearing testimony from the aggrieved party and other affected parties, the Board must reaffirm or overrule the Zoning Administrator's decision based on the literal interpretation of the zoning ordinance. If the Board overrules the Zoning Administrator's decision, they, in effect, are acting as the Zoning Administrator.

Section 23, paragraph E, sub-paragraph 3 of the Zoning Ordinance delegates the authority to the Board of Zoning Appeals to hear this request for a parking variance.

The petitioner has converted the first floor of a multi-family residential structure to a restaurant. The upper floor of the structure remains as a multi-family residential use. The size of the building has not been changed but the characteristics of land use have changed by the conversion.

The building is required to have fourteen (14) off-street parking spaces, whereas, the petitioner proposes to accommodate six (6) off-street parking spaces located in the back of the building. This is the maximum number of off-street parking spaces which can be supplied on this undeveloped portion of the site. The alleyway serving this parking area is very narrow and probably this will cause the near parking area to not be frequently patronized. However, most businesses in this area depend on walk-by pedestrian traffic for patronage.

The exceptional or extraordinary circumstances or conditions in this case are that many of the businesses in this area do not meet minimum off-street parking

requirements. Most of the businesses in this area depend on pedestrian traffic for a major portion of their patronage.

Many businesses in this area supply no off-street parking spaces or less than the required number of off-street parking spaces. The businesses located on the 2000 block of University Avenue and the Stadium Inn supply no off-street parking spaces. The Fred Wyant Insurance Company supplies one (1) off-street parking space. The Vagabond supplies three (3) off-street parking spaces. Ceramic Tile supplies six (6) off-street parking spaces. Sunnyside Superette supplies seven (7) off-street parking spaces. The office complex located at 2139 University Avenue supplies nine (9) off-street parking spaces.

The alleyway located behind the questioned site is narrow. It is questionable that if more off-street parking spaces could be placed in the back of the building that utilization of these off-street parking spaces would be heavy. The remaining portion of the questioned site is covered by building.

The author of this paper believes that the granting of this parking variance will 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 will 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 street.

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

MOTTIE WILLIAM PAVONE,

Petitioner,

v.

LAW ACTION NO. 80-P 116
ON PETITION FOR A WRIT OF
CERTIORARI

THE BOARD OF ZONING APPEALS OF
THE CITY OF MORGANTOWN, WEST VIRGINIA;
THE CITY OF MORGANTOWN, WEST VIRGINIA,
a municipal corporation; and,
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAUN, and
AVERY GASKINS,
Respondents.

TO: WILLIAM KAWECKI, Chairman of the
Board of Zoning Appeals of the
City of Morgantown, W.Va.

The City of Morgantown, W.Va.,
a municipal corporation,

RICHARD CSAMER

ROBERT BEHLING

ART HAUN

AVERY GASKINS

Mary Lee Miller
2134 University Avenue
Morgantown, WV

Helen Vanderport
2126 University Avenue
Morgantown, WV

John Sanders
Bruceton Mills, WV

NOTICE

Each of you are hereby notified that the petitioner, on the 18th day of July, 1980, filed a petition for a Writ of Certiorari in the above Court praying for a review of the decision and/or order of the Board of Zoning Appeals of the City of Morgantown, West Virginia, in placing certain restrictions upon petitioner's restaurant business situate at 2129 University Avenue, Morgantown, West Virginia. The decision and/or order of restrictions was approved by the Board of Zoning appeals on June 18, 1980.

Michael Smith

MICHAEL SMITH

Markusic and Smith

P.O. Box 660, 467 Chestnut Street
Morgantown, West Virginia 26505

COUNSEL FOR PETITIONER

"For Return"

Jean Evans
MONONGALIA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

MOTTIE WILLIAM PAVONE,
PETITIONER,

V.

THE BOARD OF ZONING APPEALS OF
THE CITY OF MORGANTOWN, WEST
VIRGINIA; THE CITY OF MORGANTOWN,
WEST VIRGINIA, a municipal corporation, and
WILLIAM KAWECKI, RICHARD CSAMER,
ROBERT BEHLING, ART HAHN, and
AVERY GASKINS,
RESPONDENTS.

LAW ACTION NO. 80-P-~~113~~¹¹⁶
ON PETITION FOR A WRIT
OF CERTIORARI

ORDER AWARDING WRIT OF CERTIORARI

On the 4th day of August, 1980, came the petitioner by his attorney, Michael Smith, and came the City of Morgantown, West Virginia, and the Board of Zoning Appeals of the City of Morgantown, West Virginia, by their attorney, Mike Magro, Jr., pursuant to an order to show cause entered in the above action on July 18, 1980, and the Court having considered the petition and exhibit filed therewith and the argument of counsel, is of the opinion to and does hereby award the petitioner a Writ of Certiorari directed to the respondents, Board of Zoning Appeals of the City of Morgantown, West Virginia, and the City of Morgantown, West Virginia, a municipal corporation, commanding each of them to certify to the Clerk of this Court the record and proceedings had before the Board of Zoning Appeals of the City of Morgantown, West Virginia, on June 18, 1980, in connection with the petitioner's appeal from the Zoning Administrator's denial to issue an Occupancy Permit to petitioner, together with a transcript of all evidence taken and copies of all exhibits filed and a certified copy of the minutes prepared and preserved upon the permanent records of said respondents as the same relates to said appeal, on or before September 8, 1980, or within a reasonable time thereafter if additional time is needed to prepare said records and transcript so that this Court may review the entire record before argument is heard by counsel on the 19th day of September, 1980, at 1:30 o'clock p.m.

It is further ORDERED that those three (3) restrictions placed upon the petitioner's business by the Board of Zoning Appeals on June 18, 1980, with regard to the sale of beer, not be enforced by the City of Morgantown pending the review by this Court of the entire proceedings in this matter.

It is further ORDERED that the Clerk of this Court issue certified copies of this order to be served upon George DeFrench, City Manager, on behalf of the City of Morgantown, and William Kawecki, Board Chairman, on behalf of the Board of Zoning Appeals, which when served upon each of said respondents to this proceeding shall operate as and be in lieu of a formal Writ of Certiorari and deliver the same to the Sheriff of Monongalia County, West Virginia, for service upon each of the respondents as provided by law.

ENTER: August 18, 1980
Frank J. DePaul
Judge

Seen and Approved by:

Michael Smith
Michael Smith
Attorney for Petitioner

Mike Magro, Jr.
Mike Magro, Jr.,
Attorney for Respondents
on to form only

ENTERED August 18, 1980
Jean Friend, CLERK
CIVIL ORDER BOOK 32 PAGE 303

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

MOTTIE WILLIAM PAVONE,

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v.

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THE BOARD OF ZONING APPEALS OF
THE CITY OF MORGANTOWN, WEST VIRGINIA;
THE CITY OF MORGANTOWN, WEST VIRGINIA,
a municipal corporation; and,
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAUN, and
AVERY GASKINS,
Respondents.

TO: WILLIAM KAWECKI, Chairman of the
Board of Zoning Appeals of the
City of Morgantown, W.Va.

Mary Lee Miller
2134 University Avenue
Morgantown, WV

The City of Morgantown, W.Va.,
a municipal corporation,

Helen Vanderport
2126 University Avenue
Morgantown, WV

RICHARD CSAMER

John Sanders
Bruceton Mills, WV

ROBERT BEHLING

ART HAUN

AVERY GASKINS

N O T I C E

Each of you are hereby notified that the petitioner, on the 18th day of July, 1980, filed a petition for a Writ of Certiorari in the above Court praying for a review of the decision and/or order of the Board of Zoning Appeals of the City of Morgantown, West Virginia, in placing certain restrictions upon petitioner's restaurant business situate at 2129 University Avenue, Morgantown, West Virginia. The decision and/or order of restrictions was approved by the Board of Zoning appeals on June 18, 1980.

Michael Smith

MICHAEL SMITH
Markusic and Smith
P.O. Box 660, 467 Chestnut Street
Morgantown, West Virginia 26505

COUNSEL FOR PETITIONER

A TRUE COPY

ATTEST Jean Freund CLERK
MONONGALIA COUNTY CIRCUIT COURT

"For Return"

STATE OF WEST VIRGINIA, SS:

In the Circuit Court of Monongalia County, West Virginia, on the 18th day of July, 1980, the following ORDER was made and entered:

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

MOTTIE WILLIAM PAVONE,

Petitioner,

v.

LAW ACTION NO. 80-P-116
ON PETITION FOR A WRIT OF
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THE BOARD OF ZONING APPEALS OF THE
CITY OF MORGANTOWN, WEST VIRGINIA;
THE CITY OF MORGANTOWN, WEST VIRGINIA,
a municipal corporation, and

~~WILLIAM KAWECKI,~~

RICHARD CSAMER,
ROBERT BEHLING,
ART HAHN, and
AVERY GASKINS,

Respondents.

ORDER TO SHOW CAUSE

This day came the petitioner by his attorney, Michael Smith, and presented his verified petition praying that a Writ of Certiorari be issued to review the action of the Board of Zoning Appeals of the City of Morgantown, West Virginia, in placing restrictions on petitioner's restaurant business located at 2129 University Avenue, Morgantown, West Virginia. The said order and/or decision was made and entered on the 18th day of June, 1980.

And the Court having seen and inspected said petition does hereby Order that said petition be filed.

The Court having considered said petition, hereby directs that the respondents, the Board of Zoning Appeals of the City of Morgantown, W.Va., and the City of Morgantown, W.Va., a municipal corporation, and William Kaweck, Richard Csamer, Robert Behling, Art Hahn, and Avery Gaskins, show cause within twenty (20) days from the date of entry of this order, why a Writ of Certiorari should not issue, more specifically, on the 4th day of August, 1980, at 2:00 o'clock.

The Clerk of this Court is directed to certify copies of this order and deliver the same to the Sheriff of Monongalia County for service upon each of the respondents, without delay.

ENTER: _____

July 18, 1980

Frank J. O'Neil

Judge

Prepared & Presented by:

Michael Smith

MICHAEL SMITH
Markusic and Smith
Attorneys at Law
P.O. Box 660, 467 Chestnut St
Morgantown, West Virginia 26505
COUNSEL FOR PETITIONER

A
John Friend
Clerk of Court

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

MOTTIE WILLIAM PAVONE,

Petitioner,

v.

LAW ACTION NO. 80-P-116
ON PETITION FOR A WRIT OF
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THE BOARD OF ZONING APPEALS OF
THE CITY OF MORGANTOWN, WEST VIRGINIA;
THE CITY OF MORGANTOWN, WEST VIRGINIA,
a municipal corporation; and,
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAUN, and
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Respondents.

TO: WILLIAM KAWECKI, Chairman of the
Board of Zoning Appeals of the
City of Morgantown, W.Va.

Mary Lee Miller
2134 University Avenue
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The City of Morgantown, W.Va.,
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Michael Smith

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P.O. Box 660, 467 Chestnut Street
Morgantown, West Virginia 26505
COUNSEL FOR PETITIONER

Jean Freund
MONONGALIA COUNTY CLERK

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

MOTTIE WILLIAM PAVONE,

Petitioner,

v.

THE BOARD OF ZONING APPEALS
OF THE CITY OF MORGANTOWN,
WEST VIRGINIA, a municipal
corporation; and,
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAUN, and
AVERY GASKINS,

Respondents.

LAW ACTION NO. 80-P-116
ON PETITION FOR A WRIT OF
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PETITION FOR A WRIT OF CERTIORARI

1. That on, about or before the 9th day of April, 1980, petitioner applied for a certificate of occupancy to open a restaurant situate at 2129 University Avenue, in the Fourth Ward of the City of Morgantown, Morgan District, Monongalia County, West Virginia. At that time the certificate of occupancy was denied by the City of Morgantown. The reasons set forth by the City Planner, Robert Gosler, was that petitioner could not open his proposed business in a B-1 area. The City Planner determined in his administrative decision that the petitioner's business could not be a restaurant since petitioner planned to sell beer for consumption on the premises.

2. That petitioner filed an administrative appeal with the Board of Zoning Appeals in order to have the earlier administrative ruling overturned and a certificate of occupancy issued. At a public hearing held on June 18, 1980, the petitioner presented evidence as to the type of business that he would be operating. Petitioner testified that he would sell for consumption on the premises, many food and related beverage items. The petitioner's menu included spaghetti, lasagna, hamburgers, pizza, steak subs, various sandwiches, meatball subs, salads, pepsi, seven up, beer, milk and coffee. Petitioner further testified as to the general set-up of the restaurant. He described that the area will

contain tables and chairs and that no seats would be placed at the service bar area. Petitioner further testified as to the equipment that he had or would purchase for the restaurant. The evidence showed the restaurant would be equipped with a refrigerator, a grill, burners built onto the grill, pizza pans, french fryer, soda pop cooler, silverware, dishes and many other kitchen type equipment. After the presentation of the evidence by the petitioner, then the Board of Zoning Appeals would determine whether or not the petitioner's business was a restaurant or other business which is permissible in an area zoned B-1 in the City of Morgantown. After a lengthy discussion in an executive session the Board of Zoning Appeals moved, passed and approved two motions. The Board of Zoning Appeals determined that from the evidence presented at the public hearing that the petitioner had made a substantial commitment to the preparation of food and that petitioner's business was a restaurant and therefore should be granted a certificate of occupancy. The petitioner recognizes that the Board of Zoning Appeals did have the authority to make that determination and does not appeal that action by the Board.

However, the Board took further action at the meeting on June 18, 1980. It took it upon itself to place restrictions upon the petitioner's business which included that:

- (1). Beer could only be served to persons who have ordered food,
- (2). No seating arrangement be provided at the service bar area, and
- (3). that beer is dispensed from the service bar only to persons in booths or at tables separate from the service bar.

It is the contention of your petitioner that the action by the Board with respect to placing restrictions upon a person's business was an exercise of power not delegated to the Board of Zoning Appeals by the Zoning Ordinance of the City of Morgantown. It was an exercise of power which was legislative in nature and could not be exercised by the Board of Zoning Appeals. Petitioner therefore believes that the action by the Board of Zoning Appeals with regard to the restrictions placed upon petitioner was

illegal, invalid and contrary to the law and evidence in this matter.

Therefore, the petitioner alleges that he is aggrieved by the said illegal decision, action and/or order of the Board of Zoning Appeals on June 18, 1980, which placed restrictions upon petitioner's business and alleges that the illegality consists of the following matters and grounds:

(a). The Board of Zoning Appeals is not a state legislature, State Beer Commission, or city law making body. The Board of Zoning Appeals is judicial in nature and has been given no power by the State of West Virginia or the City of Morgantown to place restrictions of the type complained of in this petition. Petitioner believes that the Board's misunderstanding in this matter may have been due to instructions received from the City Planner in his memorandum to the Board which is attached hereto and marked as "Exhibit B", and made a part of this petition. Although made in good faith, the City Planner advised the Board that it could impose restrictions on petitioner's business. That the Board could:

"limit the amount of beer sales in relation to food sales, prohibit the serving of beer without food, prohibit the serving of beer at no other place but a table or prohibit a seating arrangement at the servicing bar, or other similar restrictions."

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Petitioner contends that every restaurant in the City of Morgantown which serves beer is allowed to serve just a glass of beer to a customer. The Board of Zoning Appeals however has now ruled that if you want to go to a restaurant and order just a beer you will have to go to some restaurant other than petitioner's.

(b). Even if the Judge believes that the Board does have the power to place restrictions on the foods and beverages sold by a restaurant, whether it be hamburgers or beer, petitioner further contends that these restrictions could not be imposed after the fact on Petitioner's business. Petitioner applied for his certificate of occupancy on or before April 9, 1980. Therefore the granting or denying of the certificate of occupancy should have been granted or denied in accordance with the then applicable rules for allowing restaurants to sell beer without food.

The Board, however, after making the restrictions applied the restrictions retroactively to only petitioner and not other restaurants which had been granted certificates of occupancy since November 3, 1959.

(c). Even if this Court finds that the Board of Zoning Appeals does have the power to place restrictions of the type petitioner herein complains and that the Board of Zoning appeals does have the power to retroactively enforce these restrictions against one business and not others, the petitioner still contends that the June 18, 1980 restriction order by the Board was illegal in that it constituted a violation of petitioner's constitutional rights to equal protection of the law. The Zoning Ordinance of the City of Morgantown was adopted by City Council on November 3, 1959. At that time there were only one or two businesses selling beer for consumption on the site. Since that time (November 3, 1959) many more businesses were granted certificates of occupancy to operate businesses which sold beer for consumption on the premises. Redbeards, Headspace, Vagabond, Marios's in Suncrest, Pizza Den and Finnerty's are some examples. Petitioner contends that the Zoning Ordinance to be constitutional must not only be valid on its face but must also be enforced equally and without discrimination to all businesses. For the Board of Zoning Appeals to now legislate and enforce new restrictions and enforce them against only petitioner is a denial of petitioner's constitutional rights.

(d). Petitioner also would contend that the City of Morgantown, City Planner and Board of Zoning Appeals has been under the mistaken idea that only a restaurant and a delicatessen which prepares food for consumption on site are allowed in a B-1 zoning District. This is contrary to the express language of Section 15, Subsection 5 (Page 14 of Zoning Ordinance) which specifically states that the food service allowable in a B-1 area include but are not limited to a restaurant.

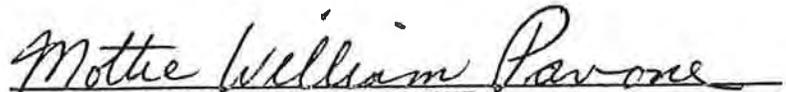
Petitioner contends that the Zoning Ordinance has been interpreted to allow a restaurant-tavern type of business in a B-1 zoning area. The fact is many businesses which sell beer with much less food than petitioner or no food at all have been granted certificates of occupancy in B-1 zoning areas since November 3, 1959. Petitioner therefore contends that selling of beer is permissible in a B-1 area. The restrictions on the sale of beer would be those set forth by State law and city ordinances. Petitioner has complied with these.

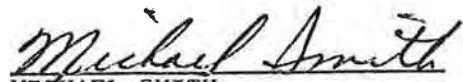
(e). The order and/or decision by the Board of Zoning Appeals on June 18, 1980, was arbitrary, capricious and discriminatory in that it placed restrictions upon petitioner's business that weren't placed upon other similar businesses which came into existence after November 3, 1959.

(f). Any and all other grounds which the recording of evidence taken may disclose on its face.

WHEREFORE, the petitioner prays that this Court issue an order directing to the respondents to show cause why a Writ of Certiorari should not issue in this proceeding; that a hearing be held upon said order to show cause and from the evidence adduced at said hearing that the Court issue a Writ of Certiorari directed to the respondents, the Board of Zoning Appeals of the City of Morgantown, West Virginia, and the City of Morgantown, West Virginia, a municipal corporation, requiring said respondents to certify and deliver to the Court a full and complete record

of all proceedings had and taken, so that said matter may be reviewed by the Court; that after the Court has reviewed the same that it declare illegal the action taken by the Board of Zoning Appeals on June 18, 1980, with regards to those certain restrictions placed upon the manner in which petitioner sold beer in his restaurant and such other relief as the Court may deem fit and proper to grant in this matter.


MOTTIE WILLIAM PAVONE


MICHAEL SMITH
Markusic and Smith
Attorneys at Law
P.O. Box 660, 467 Chestnut St
Morgantown, West Virginia 26505

STATE OF WEST VIRGINIA,
COUNTY OF MONONGALIA, to-wit:

MOTTIE WILLIAM PAVONE, the petitioner named in the foregoing
Petition, being duly sworn, says that the facts and allégations therein
contained are true, except so far as they are therein stated to be on
information, and that so far as they are therein stated to be on
information, he believes them to be true.

Mottie William Pavone

Mottie William Pavone

Taken, sworn to and subscribed before me this 18 day of
July, 1980.

My Commission expires: Jan. 4, 1982.

Darlene J. Hartley
Notary Public in and for Monongalia County,
West Virginia

*Commissioned
Darlene J. Rose*

Jean Freund
COUNTY CIRCUIT COURT

CASE #3 - 2129 University Avenue

The petitioner is before the Board seeking an administrative review of the Zoning Administrator's decision to refuse an occupancy permit for a restaurant which serves beer located in a B-1 zoning district. In addition, the petitioner is requesting relief from the parking requirements of a B-1 zoning district.

The Zoning Administrator denied an occupancy permit for a restaurant and tavern in a B-1 zoning district because only a restaurant and a delicatessen which prepares food for consumption on site are allowed in a B-1 zoning district. Once beer is sold on the premises the Zoning Administrator cannot make a determination whether the proposed establishment is a restaurant with incidental beer sales or a beer parlor or tavern with incidental food sales. The Board should examine the characteristics of operations of this business to determine whether it is a restaurant or tavern. The Board may impose restrictions on the restaurant to assure that the characteristics of operation do not change. The Board may limit the amount of beer sales in relation to food sales, prohibit the serving of beer without food, prohibit the serving of beer at no other place but a table, or prohibit a seating arrangement at the serving bar, or other similar restrictions.

The petitioner contends that the serving of beer is only incidental to his food service. He contends that beer is only one of a number of beverages served to aid in the digestion of the food served at the business.

Section 23, paragraph E, sub-paragraph 1 of the Zoning Ordinance delegates the authority to the Board of Zoning Appeals to hear administrative reviews regarding enforcement of the zoning ordinance. The Board must determine on what grounds the Zoning Administrator, acting on behalf of the City Manager, made the decision. After hearing testimony from the aggrieved party and other affected parties, the Board must reaffirm or overrule the Zoning Administrator's decision based on the literal interpretation of the zoning ordinance. If the Board overrules the Zoning Administrator's decision, they, in effect, are acting as the Zoning Administrator.

Section 23, paragraph E, sub-paragraph 3 of the Zoning Ordinance delegates the authority to the Board of Zoning Appeals to hear this request for a parking variance.

The petitioner has converted the first floor of a multi-family residential structure to a restaurant. The upper floor of the structure remains as a multi-family residential use. The size of the building has not been changed but the characteristics of land use have changed by the conversion.

The building is required to have fourteen (14) off-street parking spaces, whereas, the petitioner proposes to accommodate six (6) off-street parking spaces located in the back of the building. This is the maximum number of off-street parking spaces which can be supplied on this undeveloped portion of the site. The alleyway serving this parking area is very narrow and probably this will cause the near parking area to not be frequently patronized. However, most businesses in this area depend on walk-by pedestrian traffic for patronage.

The exceptional or extraordinary circumstances or conditions in this case are that many of the businesses in this area do not meet minimum off-street parking

requirements. Most of the businesses in this area depend on pedestrian traffic for a major portion of their patronage.

Many businesses in this area supply no off-street parking spaces or less than the required number of off-street parking spaces. The businesses located on the 2000 block of University Avenue and the Stadium Inn supply no off-street parking spaces. The Fred Wyant Insurance Company supplies one (1) off-street parking space. The Vagabond supplies three (3) off-street parking spaces. Ceramic Tile supplies six (6) off-street parking spaces. Sunnyside Superette supplies seven (7) off-street parking spaces. The office complex located at 2139 University Avenue supplies nine (9) off-street parking spaces.

The alleyway located behind the questioned site is narrow. It is questionable that if more off-street parking spaces could be placed in the back of the building that utilization of these off-street parking spaces would be heavy. The remaining portion of the questioned site is covered by building.

The author of this paper believes that the granting of this parking variance will 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 will 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 street.

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
MOTTIE WILLIAM PAVONE,

Petitioner,

VS.

LAW ACTION NOS. 80-P-103

THE BOARD OF ZONING APPEALS
OF THE CITY OF MORGANTOWN,
WEST VIRGINIA; THE CITY OF
MORGANTOWN, WEST VIRGINIA,
a municipal corporation; and,
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAHN and
AVERY GASKINS,

80-P-116

Respondents.

MEMORANDUM/OPINION

STATEMENT OF CASE AND FACTS: The Petitioner, Mottie William Pavone, hereinafter referred to as "Pavone", instituted two actions, each seeking a Writ of Certiorari against the City of Morgantown, hereinafter referred to as "City" and the Board of Zoning Appeals of the City of Morgantown, hereinafter referred to as "Board" and its five members individually, hereinafter referred to as "Board Members".

In 80-P-103 Pavone challenges the Board's refusal to grant a variance as to the parking spaces requirement applicable to his business under the City's zoning ordinance and in 80-P-116 Pavone challenges the restrictions placed upon his business property by the Board.

After the filing of said petition and a response to the

show cause Order, the Board was required to show to the Court its records relative to the matters involved herein. Thereafter, each side was permitted to argue the matters in issue and permitted to file legal memorandums in support of their position.

From the pleadings and testimony taken at these meetings before the Board on May 21, 1980, June 18, 1980 and July 16, 1980, the following facts are adduced:

Pavone is the owner of property located at 2129 University Avenue, in a section of town more commonly referred to as Sunnyside. The building located on the property had been used by Pavone exclusively as an apartment rental property until April, 1979, Pavone's building was fire-damaged when the building next to his building was destroyed by fire. The building inspector informed Pavone that due to the damage that he would have to rewire the apartment building. Therefore, Pavone on June 22, 1979, applied and was granted a building permit to rewire the building and repair other fire damage. (Petitioner's Exhibit No. 1)

While rewiring the building, Pavone decided to convert one floor of the building to a restaurant due to the fact that his family business of forty-seven (47) years located on Beechurst Avenue had decreased considerably due to the closing of one glass factory and reduction of workers in the other glass factory in the Seneca area. After the rewiring was completed, he applied and was granted a building permit on November 9, 1979, to enclose the front porch of the building, construct a new stairwell, construct and install an exterior door and other additions.

(Petitioner's Exhibit No. 2).

The City Planner, Robert Gossler, and other City officials were aware that Pavone planned to open a restaurant. The City Planner advised Pavone that he could not open a restaurant on his property, since the property was zoned R-2. If Pavone wanted to operate a restaurant business in the Sunnyside area, his property had to be rezoned to B-1.

Pavone went to the Planning Commission on November 29, 1979, and requested the Planning Commission to recommend to the City Council that his property be rezoned to a B-1 area. The City Council did thereafter rezone Pavone's property to a B-1 area. Thereafter, Pavone continued to convert one floor of his building to a restaurant.

On April 9, 1980, Pavone applied for and was denied a building permit to do paneling, drywall work and plumbing work. (Petitioner's Exhibit No. 3). Pavone was further denied a Certificate of Occupancy for his restaurant on the following two grounds:

(1) Pavone needed fourteen (14) parking spaces for his restaurant and three apartments, but could only provide for six parking spaces. (a survey later revealed that Pavone could actually provide for seven spaces).

(2) The Zoning Administrator ruled that only a restaurant and delicatessen are allowed in a B-1 zoning district and that he was not going to

determine whether or not Mutt's Place could be considered a restaurant.

In order to open his business, Pavone applied to the Board for a parking variance and further filed an administrative appeal to have the Board determine whether Pavone could be classified a restaurant or other business which is allowed in a B-1 zoning area.

A public hearing was held before the Board on May 21, 1980, after which the Board denied Pavone's request for a parking variance. Pavone filed a petition for a Writ of Certiorari and assigned several grounds to reverse the action taken by the Board on May 21, 1980.

The administrative appeal filed by Pavone was decided in his favor after a public hearing was held on June 18, 1980. The Board found that Pavone had made a substantial financial commitment to the preparation of food and should be granted a Certificate of Occupancy for a restaurant. However, the Board placed restrictions on Pavone's Certificate of Occupancy. They are as follows:

- (1) Beer may be served only to persons who have ordered food.
- (2) No seating arrangement may be provided at the service bar area.
- (3) That beer be dispensed from the service bar only to persons in booths and tables separate from service bar.

ISSUES

1. Were the findings made by the Board pursuant to the provisions of 23H (1)(2)(3) and (4) of the Morgantown Zoning Ordinance supported by the evidence?
2. Did the Board have authority to place restrictions on Pavone's property?

LAW AND ARGUMENT

(1) DENIAL OF THE PARKING VARIANCE

Section 23H of the Zoning Ordinance provides as follows:

"No variance in the application of the provisions of this ordinance shall be made by the Board relating to buildings, land or premises now existing or to be constructed, unless after a public hearing, the Board shall find:

- (1) That there are exceptional or extraordinary circumstances applicable to the property or to the intended use that do not apply generally to the other property or class of use in the same vicinity and District.
- (2) That such variance is necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and District but which is denied to the property in question.
- (3) That the granting of such variance will 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.
- (4) That the granting of such variance will not alter the land use characteristics of the vicinity and District, diminish the marketable value of adjacent land and improvements or increase the contestation in the public streets."

The Board, on July 16, 1980 made the following findings of fact:

- "1) That there are no exceptional or extraordinary circumstances or conditions

applicable to the property or to the intended use that do not apply generally to other property or class of use in the same vicinity and District, in that this is typical property in that B-1 area and no other parking variances have been granted to our knowledge.

- 2) That such variance is not necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and District but which is denied to the property in question, in that the square footage of the proposed restaurant could be reduced sufficiently to allow existing parking spaces to satisfy the requirements of the existing Zoning Ordinance.
- 3) That the granting of such variance will 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, in that there was testimony that there already is a problem with parking in the area and granting of this variance would only aggravate this problem.
- 4) That the granting of such variance will 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 street, in that this variance would increase the congestion in the public streets through providing insufficient space for parking."

In denying the variance the Board found that Pavone could not satisfy any of the provisions of 23H (12) (2) (3) and (4) of said Zoning Ordinance. To determine whether the Board's findings are supportive of its decision, it becomes necessary to examine the evidence available for its findings.

The facts available to the Board under 23H (1) are: The city planner stated and found that many businesses in the area did not meet the minimum off street parking requirements. In fact, he could mention only five businesses in the Sunnyside

area which had any parking at all and that all businesses in the 1200 block of University Avenue and Stadium Inn provided no off-street parking spaces. Said planner also indicated that there is a narrow alley behind Pavone's property and even if additional parking spaces are acquired by Pavone in that area, it is questionable if anyone would use the additional spaces. Pavone indicated that his business would rely entirely upon pedestrian customers. This assertion was supported by the city planner.

The Board was correct in finding Pavone's property is typical of properties in this B-1 area. However, there was no evidence to support the Board's finding that no other businesses were granted variances. This is speculation on their part. There was also no evidence that any parking variance was denied or required even though several businesses have opened in recent years.

Facts available to the Board under 23H (2) are: Pavone has 1,375 square feet available for restaurant use and three (3) apartments in the same building. The city ordinance required one parking space for every 125 square feet used for the restaurant. This means that eleven (11) spaces are required for the restaurant. Also required is one parking space for each apartment, making a total of fourteen (14). Pavone provides seven (7) spaces. Additional spaces would necessitate leasing or property purchase.

The Board found that the square footage of the proposed restaurant could be reduced to meet the requirements of the Zoning Ordinance.

Since the square footage of the kitchen and storage area are included in the square footage determination of the spaces necessary, the reduction of the square footage would leave Pavone with an unusually small restaurant area. In addition, a substantial area could not be used for any purpose. This would amount to a loss of substantial property right and no evidence other businesses were required to do the same.

Facts available to the Board under 23H (3) are: Several residents and other persons having businesses in the area stated that parking, littering and noise were problems in the Sunnyside area and they objected mainly to another beer garden. Pavone showed that he would rely mostly on pedestrian trade and the city planner supported this contention. There was no showing that Pavone's restaurant would aggravate the existing parking situation.

Facts available to the Board under 23H (4) are; Pavone spent \$21,000.00 for materials plus one year of labor to remodel his property. The city planner, an expert in zoning and variances for the past twelve years, found that most businesses in the area in question rely upon pedestrian traffic for a major portion of their business, and that the restaurant would not increase the congestion in the public street. Since there were considerable improvements to Pavone's property, the Board could not find that these improvements would in any way diminish the market value of adjacent properties and improvements in the area.

Zoning ordinances not only must be non-discriminatory and reasonable, but must be applied in a non-discriminatory and

reasonable manner and are to be strictly construed in favor of the land owner. Yokley Zoning Law & Practice pages 466-467.

The fact that the city is not enforcing the parking requirements would not of itself be sufficient to warrant the granting of a variance. The petitioner relies upon a number of factors, such as, (1) area is primarily for walk-in-travvid due to the facts that there is a high concentration of students thereon; the terrain is hilly; businesses are up against each other; few businesses which have established in the area have been permitted to operate in this area without complying with the parking requirements of the Zoning Ordinance.

Is the Board's position in denying the parking variance under all the facts reasonable and non-discriminatory?

An issue may be said to be fairly debatable when evidence offered in support of opposing view would lead objective and reasonable persons to reach different conclusions; evidence to be sufficient for the purpose must not only meet a quantitative but also a qualitative test. It must be evidence which is not only substantial but relevant and material as well. Board of Supervisors of Fairfax County v. Williams, 216 SE 2d 33 at page 49, 216 Va. 49, (1975).

The facts shown by Pavone are substantial and material. The Board in denying the variance would be acting unreasonable and discriminatroy in requiring full compliance with the parking requirements.

In the final analysis after reviewing the facts one needs only to read the definition given to the word "variance" when the Zoning Ordinance was adopted. The definition can be found on Page 59 of the Zoning Ordinance and reads as follows"

"variance - a modification of the specific requirements of this ordinance granted by the board in accordance with the terms of this ordinance for the purpose of assuring that no property because of special circumstances applicable to it shall be deprived of privileges commonly enjoyed by other properties in the same vicinity and district." No property fits this definition any better than Pavone's property.

Therefore, the matter of a parking variance shall be returned to the Board to proceed in accordance herewith.

(2) Restrictions Placed Upon Pavone's Business by the Board

The Board ruled on June 18, 1980, that Pavone's business was a restaurant, since he had made a substantial commitment to the preparation of food. The Board, however, went further by placing restrictions on Pavone's business. These restrictions are (1) to serve beer only to people who ordered food; (2) serve beer only to persons in booths or at tables separate from the service bar; and (3) no seating arrangement be provided at the service bar area.

The Zoning Ordinance provides that a restaurant is permissible in a B-1 area. The Zoning Ordinance does not provide any restrictions for the operation of a restaurant as would be applicable to all restaurants.

Pavone contends that the Board of Zoning Appeals acted beyond its powers when it tried to restrict, guide and manage and

direct him how to operate his business. A Board of Zoning Appeals is merely an administrative agency acting in a quasi-judicial capacity and has no power to amend the Zoning Ordinance under which it functions. Wolfe v. Forbes, 217 SE 2d 899, at 906 (W.Va. 1975).

Boards of Zoning Appeals are creatures of statutes possessing only those powers expressly conferred upon them. Board of Zoning Appeals of Fairfax County, v. Cedar Knall, 232 SE 767, at 769, 217 Va. 740 (1977).

Chapter 23, Subsection E of the Zoning Ordinance sets forth the powers, authorities and duties of the Board of Zoning Appeals. It sets forth that the Board shall (1) hear and determine appeals from and review any order made by the City Manager. (2) hear and decide all permits for conditional uses, developments and plans and other uses; (3) authorize upon appeal in specific cases variances from the ordinance as will not be contrary to the public interest where owing to special conditions fully demonstrated on the basis of facts presented a literal enforcement of the provisions of this ordinance will result in unnecessary hardship.

Even more importantly, Section 23, Subsection F makes clear that the Board in modifying any order or decision appealed from shall have all the powers of the City Manager from which the appeal is taken. Since the City Manager has no power to place restrictions, the Board has none.

The Board, in this instance, exceeded its authority by attempting to legislate conditions applicable to a business use. Legislating is a function of Council and not the Board or the City Manager.

Also to permit the Board to place restrictions on Pavone's business would not effect like businesses. This would be discriminatory against Pavone's business.

Therefore, the restrictions placed upon the Certificate of Occupancy by order dated June 18, 1980 are invalid and of no effect.

This Court realizes the Board's position in deciding delicate zoning situations including the present one. Certainly the Board's position is commendable in attempting to secure the required parking spaces and to maintain this position when other properties are taken into the B-1 zoning designation.

Council rezoned Pavone's property to B-1. In doing so Council was well aware of the area problems, especially the availability of parking spaces. In fact, the Sunnyside area has been permitted to grow in the same manner as the downtown area where businesses provide very little parking and most of the parking is provided by the city.

CONCLUSION

From the foregoing finding the Court concludes that the denial of a parking variance for Pavone's property would be unreasonable and discriminatory; that the Board's order of May 21, 1980 denying a parking variance be set aside and that a parking variance for parking be granted for the Pavone' property.

The Court further concludes that the restrictions placed upon Pavone's business by order dated June 18, 1980, are invalid and of no effect.

That an Order be prepared in accordance herewith.

Dated this 14th day of November, 1980.

Frank J. O'Connell

JUDGE

FILED Nov. 14, 1980
Jean Freund

CIRCUIT CLERK

STATE OF WEST VIRGINIA, SS:

In the Circuit Court of Monongalia County, West Virginia, on the 6th day of October, 1980, the following order was made and entered:

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
MOTTIE WILLIAM PAVONE,

Petitioner,

v.

LAW ACTION NO. 80-P-¹¹⁶103

THE BOARD OF ZONING APPEALS OF
THE CITY OF MORGANTOWN, WEST
VIRGINIA; THE CITY OF MORGANTOWN,
WEST VIRGINIA, a municipal corporation,
and WILLIAM KAWECKI, RICHARD CSAMER,
ROBERT BEHLING, ART HAUN, and
AVERY GASKINS,

Respondents.

ORDER AWARDING WRIT OF CERTIORARI

On the 19th day of September, 1980, came the petitioner by his attorney, Michael Smith, and came the City of Morgantown, West Virginia, and the Board of Zoning Appeals of the City of Morgantown, West Virginia, by their attorneys, Mike Magro, Jr. and Michael Callen, pursuant to an Order to Show Cause entered in the above action on 23rd day of June, 1980, and the Court having considered the petition and exhibits filed therewith and the argument of counsel, is of the opinion and does hereby award the petitioner a Writ of Certiorari directed to the respondents, Board of Zoning Appeals of the City of Morgantown, West Virginia, and the City of Morgantown, West Virginia, a municipal corporation, commanding each of them to certify to the Clerk of the Court the record and proceedings had before the Board of Zoning Appeals of the City of Morgantown, West Virginia, on May 21, 1980, in connection with the petitioner's request for a parking variance, together with a transcript of all evidence taken and copies of all exhibits filed and a certified copy of the minutes prepared and preserved upon the permanent records of said respondents as the same relates to said appeal, on or before the 20th day of October, 1980, or within a reasonable time thereafter if additional time is needed to prepare said records and transcript so that the Court may review the entire record.

It is further ORDERED that the Clerk of this Court issue certified copies of this Order to be served upon George DeFrench, City Manager, on behalf of the City of Morgantown, and William Kaweck, Board Chairman, on behalf of the Board of Zoning Appeals, which when served upon each of said respondents to this proceeding shall operate as and be in lieu of a formal Writ of Certiorari and deliver the same to the Sheriff of Monongalia County, West Virginia, for service upon each of the respondents as provided by law.

ENTER: October 6, 1990

[Signature]
Judge

Seen and Approved by:
Michael Smith
Michael Smith
Attorney for Petitioner
Michael Callen
Michael Callen
Attorney for Respondent

SEARCHED
SERIALIZED
INDEXED
FILED
OCT 10 1990
FBI - MORGANTOWN
JEAN FREUND

STATE OF WEST VIRGINIA, SS:

In the Circuit Court of Monongalia County, West Virginia, on the 26th day of November, 1980, the following ORDER was made and entered:

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

MOTTIE WILLIAM PAVONE,

Petitioner,

v.

LAW ACTION NOS. 80-P-103
80-P-116

THE BOARD OF ZONING APPEALS
OF THE CITY OF MORGANTOWN,
WEST VIRGINIA; THE CITY OF
MORGANTOWN, WEST VIRGINIA,
a municipal corporation, and
WILLIAM KAWECKI,
RICHARD CSAMER,
ROBERT BEHLING,
ART HAHN and
AVERY GASKINS,
Respondents.

ORDER

This 19th day of September, 1980, came the petitioner, Mottie William Pavone, by his attorney, Michael Smith, and also came the Respondents, The Board of Zoning Appeals of the City of Morgantown, West Virginia, and George DeFrench, City Manager of the City of Morgantown, West Virginia, a municipal corporation, by their attorneys, Mike Magro, Jr., and Michael Callen, to be heard upon two Writs of Certiorari heretofore issued by this Court to review the actions of the Board of Zoning Appeals of the City of Morgantown in reference to petitioner's challenge of the Board's refusal to grant petitioner a variance as to the number of parking spaces required for his property on University Avenue under the zoning ordinance of the City of Morgantown, and petitioner's further challenge to the restrictions placed upon his business property by the Board of Zoning Appeals.

The Court after reviewing the evidence and hearing argument of counsel and reviewing the original evidence which was before the Board of Zoning Appeals at its meetings of May 21, 1980, and June 18, 1980, and allowing counsel the opportunity to submit memoranda, and further after review of the law applicable to this matter, the Court does hereby ORDER that the Board of Zoning Appeals' Order of May 21, 1980, denying the petitioner a parking variance be set aside

and that a parking variance be granted for the petitioner's property.

The Court further ORDERS that the restrictions placed upon petitioner's business by Order dated June 18, 1980, are invalid and of no effect.

The Court realizes the Board's position in deciding delicate zoning situations of this type. The Board's position is commendable in attempting to secure the required parking spaces and to maintain this position when other properties are taken into the B-1 zoning designation. However, with regard to the parking variance requested by petitioner there were facts available before the Board to support granting petitioner's parking variance. The Sunnyside area has been permitted to grow in a manner similar to the downtown area where businesses provide very little parking and most parking is provided by the City. The evidence showed that most of the businesses in the Sunnyside area did not have the required parking spaces, and that most of the businesses in the Sunnyside area rely upon pedestrian customers as would the petitioner, and that there is a narrow alley behind petitioner's property and that even if he could supply the additional parking spaces, it is unlikely that customers would use them. The evidence further showed that petitioner spent over Twenty-One Thousand (\$21,000.00) Dollars for materials plus one (1) year's labor to remodel his property, and that these improvements in no way could diminish the market value of the property adjacent to petitioner's in the Sunnyside area. That in view of these facts and the others appearing on the record, it is apparent that due to the special circumstances of this case, it would be unreasonable and discriminatory to deny petitioner his parking variance.

Therefore, it is ORDERED that the Board of Zoning Appeals' Order dated May 21, 1980, denying the petitioner a parking variance as to his property on University Avenue be set aside and that the matter of the parking variance be returned to the Board of Zoning Appeals and that said parking variance be granted to the petitioner.

The restrictions placed upon petitioner's business by Order dated June 18, 1980, must also be held invalid. The Zoning Ordinance does not provide for any restrictions for the operation of a restaurant. The Board of Zoning Appeals has no power to amend the zoning ordinance and place restrictions on one particular restaurant. The Board was exceeding its authority by attempting to legislate conditions applicable to petitioner's business. A board in modifying any order or decision appealed from shall have only the powers of the City Manager from which the appeal is taken. Since the City Manager has no power to place restrictions on a particular business, the Board of Zoning Appeals has none. Also, to permit the Board to place restrictions on petitioner's business that would not effect similar businesses, would be to discriminate against petitioner's business.

Therefore, it is ORDERED that the restrictions placed upon the petitioner's Certificate of Occupancy by Order dated June 18, 1980, are invalid and of no effect.

ENTER: November 26, 1980
Frank J. DePaul
Judge

MS
[Handwritten signature]

[Handwritten notes]
Nov 26, 1980
111' ... 33 ... 497
... Friend ...

[Handwritten signature]
Jean Friend

STAFF REPORT

Board of Zoning Appeals
March 20, 2002

V02-03 / Corwin

EXHIBIT B

REQUEST and LOCATION:

Request by Don Corwin, Jr. for variance approval for property located at 263 Beechurst Avenue.

TAX MAP NUMBER (s) and ZONING DESCRIPTION:

Tax Map #19, Parcel #22.01; a B-3, Service Business District.

SURROUNDING ZONING:

North: B-3, Service Business District
South: B-3, Service Business District
East: M-U, Mixed Use District
West: IND, Industrial District

BACKGROUND and ANALYSIS:

Don Corwin, Wincor Properties, LLC, is requesting variance approval from §12.E.23.b, *Minimum Parking Spaces Required, Residential Uses*, for property located at 263 Beechurst Avenue.

WinCor Properties would like to renovate an existing building to include commercial/retail space that would front Beechurst Avenue and require 4 parking stalls; and remodel the remainder of the building to include residential. The residential would be comprised of one 3-bedroom apartment, two 2-bedroom apartments, and two 1-bedroom apartments. WinCor may be able to provide four of the 11 spaces required, thus asking for a variance of seven spaces. Since he cannot provide the stalls on the same premises as the building, he will also be required to ask for and receive conditional use approval for off-premise parking in order to get the 4 stalls he wishes to provide.

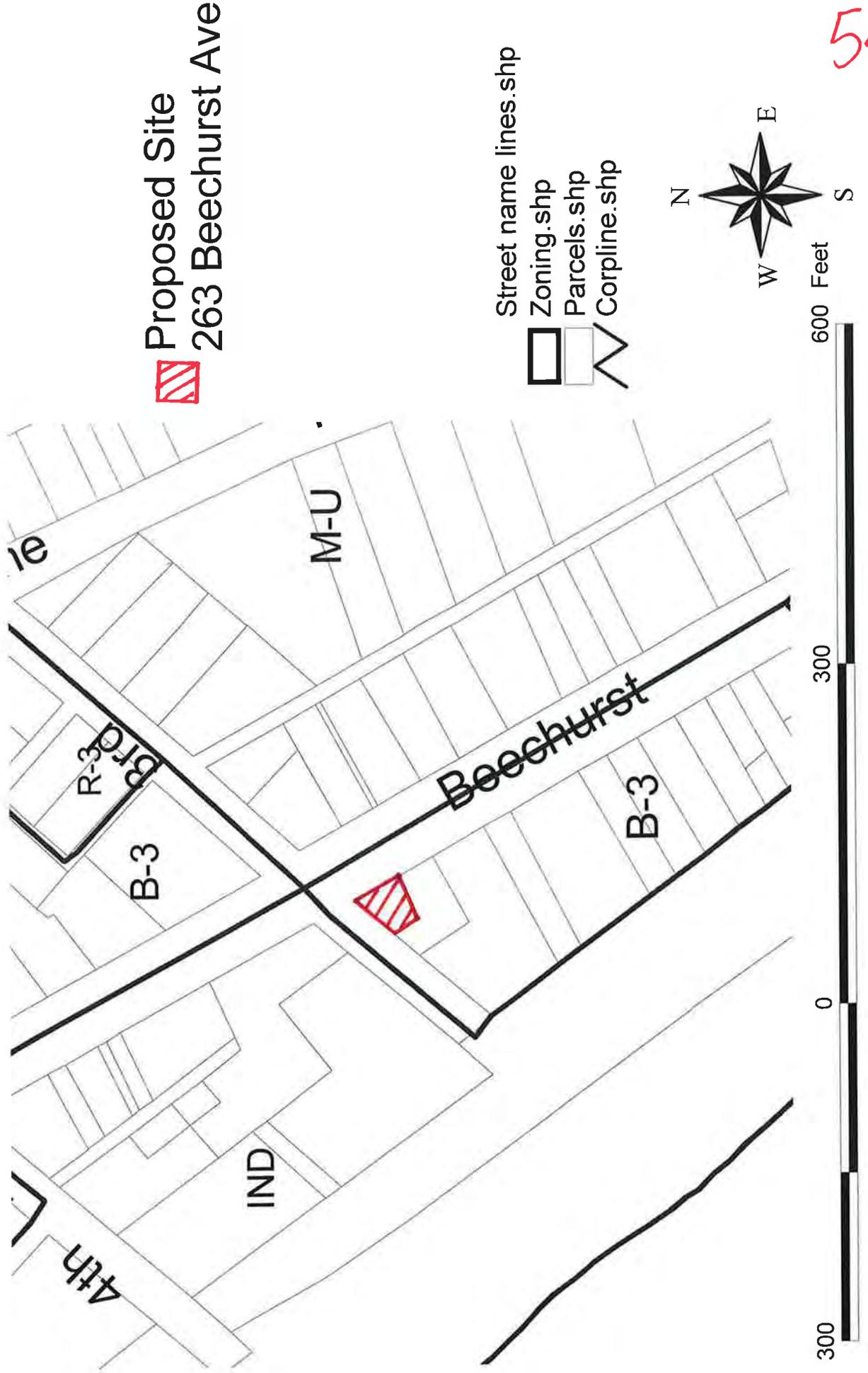
He did not want to apply for the conditional use at this time, rather, he prefers to wait and see if he will be granted this variance that would allow him to provide 4 stalls instead of 11. IF the variance is approved, he would need to come back at a later meeting and apply for conditional use for off-premise parking in order to provide the 4 stalls.

STAFF RECOMMENDATION:

Staff makes no recommendation on this variance, but if the Board is inclined to approve it, please add the condition that it the approval becomes valid only if the applicant successfully applies for and receives conditional use approval to provide the requested 4 stalls on an off-premise parking lot.

Enclosure(s) Map prepared by staff
Application
Supporting material

V02-03 / Corwin



BOARD OF ZONING APPEALS
APPLICATION FOR ZONING VARIANCE

55

(Please Print)

CASE # V 02-03

PROPERTY ADDRESS 263 Beechurst Ave

ASSESSOR # 19/22.01

APPLICANT'S NAME Don E. Corwin Jr.

PHONE() 292-0400

MAILING ADDRESS P.O. Box 2129 Westover

ZIP 26502

PROPERTY OWNER NAME Keith DeBiase

PHONE() 599-7467

MAILING ADDRESS _____

ZIP _____

Describe what you want to do that requires Variances, and the extent of Variances requested: Renovate

the building and restore to its original purpose of residential and commercial use. This requires a parking variance of 7 spaces (4 proposed vs. 11 required by code.)

The Board of Zoning Appeals may grant the request only if it determines positive Findings of Fact for the following criteria. Each applicant must give their own responses to these statements as a basis for the Board's evaluation of the request. You may use the other side of the page for your separate responses. (Bold type text is the actual question in the law).

(1) ***That there are exceptional or extraordinary circumstances or conditions applicable to the property or to the intended use that do not apply generally to the other property or class of use in the same vicinity and District.***

What is unusual and different about your property or its intended use as it relates to other properties in your vicinity under the same zoning rules which make it difficult or impossible for you to comply with the zoning regulations?

(2) ***That such Variance is necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and District but which is denied to the property in question.***

Are there several/others in your area doing with their property what you want to do with your property? (Please list what properties, their owners' names and addresses, and what is done on the property).

(3) ***That the granting of such Variance will 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.***

If you are allowed to do what you ask, will others in the same area be able to say they are injured in any manner by what you propose to do? (Traffic increases, congestion, no parking, blocking fire and police departments, etc.)

(4) ***That the granting of such variance will 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.***

Will your proposed use devalue the property of others in the same area? Why? Will it cause more congestion in the streets? Why not?

You or your representative must be present at the scheduled hearings to present the request and answer questions.

[Signature]
Applicant's Signature

ZONING: _____

Don E. Corwin Jr.
Applicant's Name (PRINT)

FEE: \$75.00





**P.O. Box 2129
Westover WV 26502
(304) 292-0400**

February 16, 2002

To: Morgantown Board of Zoning Appeals

Re: Renovation of 263 Beechurst Avenue
Request for Parking Variance

Zoning Board Members,

WinCor Properties respectfully requests your consideration of our proposal for a parking variance for the 263 Beechurst renovation project. The following are responses to the statements on the variance application:

- 1. That there are exceptional or extraordinary circumstances or conditions applicable to the property or to the intended use that do not apply generally to the other property or class of use in the same vicinity and District**

The building 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.

We propose to completely renovate the building to include six apartments and one commercial space. Historically, the building contained four apartments and one commercial space and did not have any parking. Strict application of the current building code would require 10 parking spaces for the building's current configuration. The proposed new building configuration would require 11 spaces. Rather than submit a request for full waiver of parking requirements, WinCor will provide 4 designated spaces within our existing parking lot to accommodate this building, thus the request for the variance of 7 spaces. This is summarized in the table below:

Unit	No. of Parking Spaces Required for Current Configuration	No. of Parking Spaces Required for Proposed Configuration
Commercial	6 (1400 sq ft)	2.5 (700 sq ft)
1 BR Apt	4	2
2 BR Apt	0	4.5
3 BR Apt	0	2
TOTAL	10	11
Spaces to be provided by WinCor		4
Variance Request		7

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.

2. That such Variance is necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and District but which is denied to the property in question.

The variance is essential to allow preservation of this property. Currently, the property is unoccupied and in a state of disrepair. The building is not habitable due to leaking roof and severe deterioration of the interior. If repairs are not made in the near future, the building could be left for abandon with no prospects for restoration. The current condition of the building is an "eyesore" along Beechurst Avenue and is not consistent with the City's intention to enhance the appearance of this area.

In addition, there are several adjacent apartment buildings that do not provide sufficient parking to meet the strict definition of the code.

3. That the granting of such Variance will 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

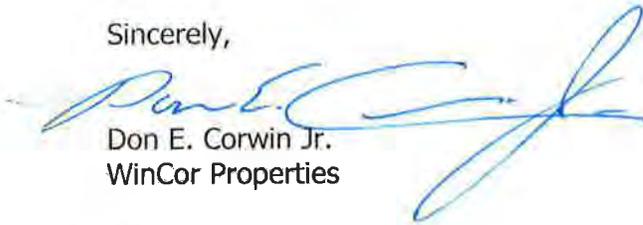
This variance will allow the property to be restored to its original purpose which is for commercial and residential use. The public welfare will be served by improvements to the property exterior and interior. The front of the building has broken glass and a boarded-up door. Also, transients have been gathering at the front and rear of the building to consume alcohol. They often leave trash, including broken bottles, on the sidewalk along Beechurst Ave. These transients have also made attempts to break into the building. WinCor's presence in this area will ensure the safety and security of the buildings occupants. As with our other properties, we will maintain the building exterior, including the daily removal of trash and debris.

4. That the granting of such variance will not alter the land use characteristics of the vicinity and District, diminish the marketable value of adjacent land and improvements, or increase the congestion on the public streets.

This building is located in an area with significant numbers of mixed use commercial and residential properties. The property next door is a 6 unit apartment building and WinCor's other properties are immediately adjacent to this. Panco Properties new apartment buildings are directly across the Beechurst Ave.

We strongly believe that our improvements to this building will significantly **enhance** the market value of adjacent properties. The current state of the building is detrimental to the area and value of adjacent properties. This project is also consistent with the City's desire to improve the appearance of the area. The City currently plans to replace sidewalks along this side of Beechurst and there is approximately 40 ft of frontage for this building that would be included.

Sincerely,



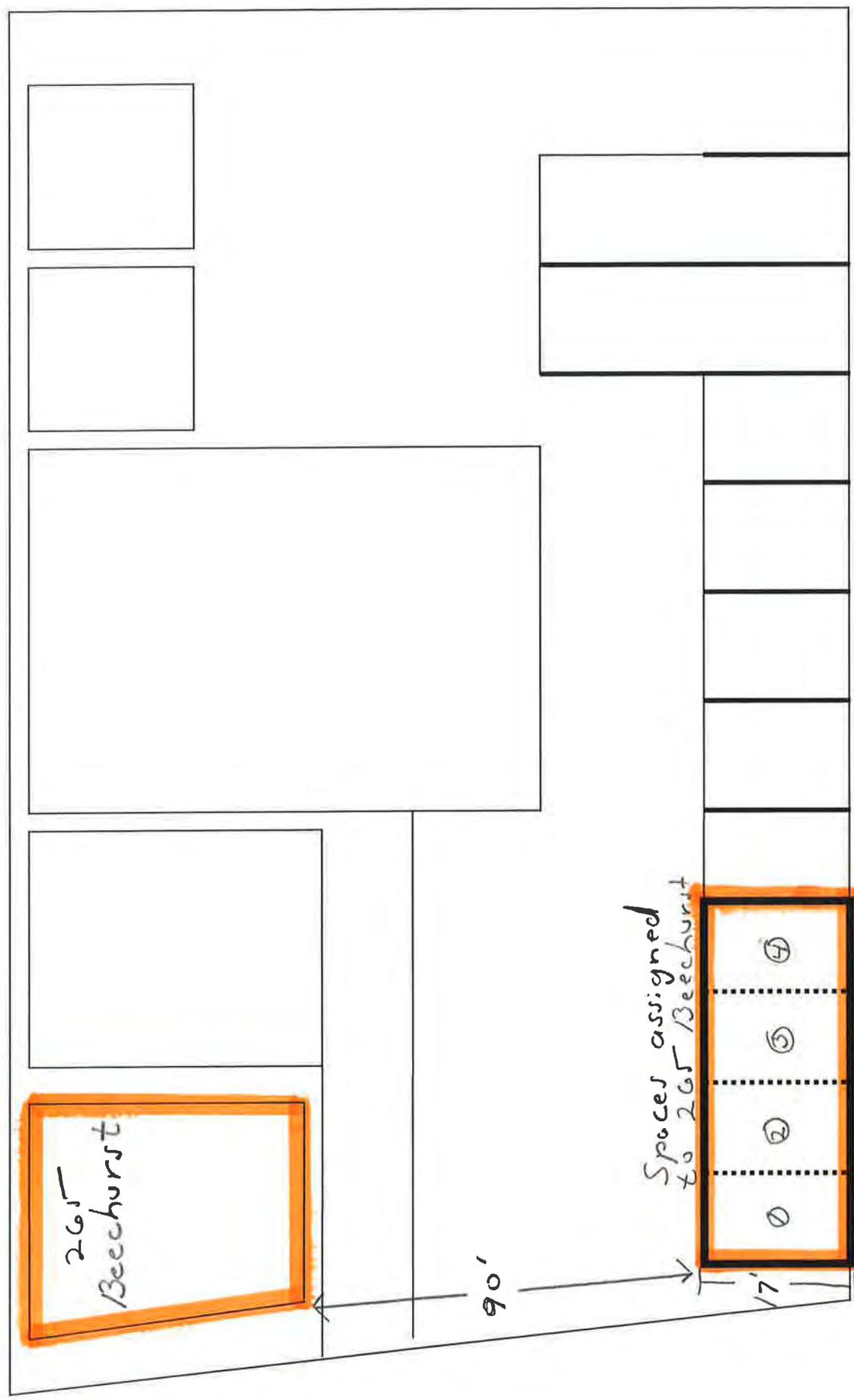
Don E. Corwin Jr.
WinCor Properties

Cc: Mr. Frank Scafella
3rd Ward Councilman

Mr. Mike Stone
City of Morgantown Inspector

Win Cor Properties
265 Beechurst Renovation
Parking Plan
3-15-02

Beechurst Ave

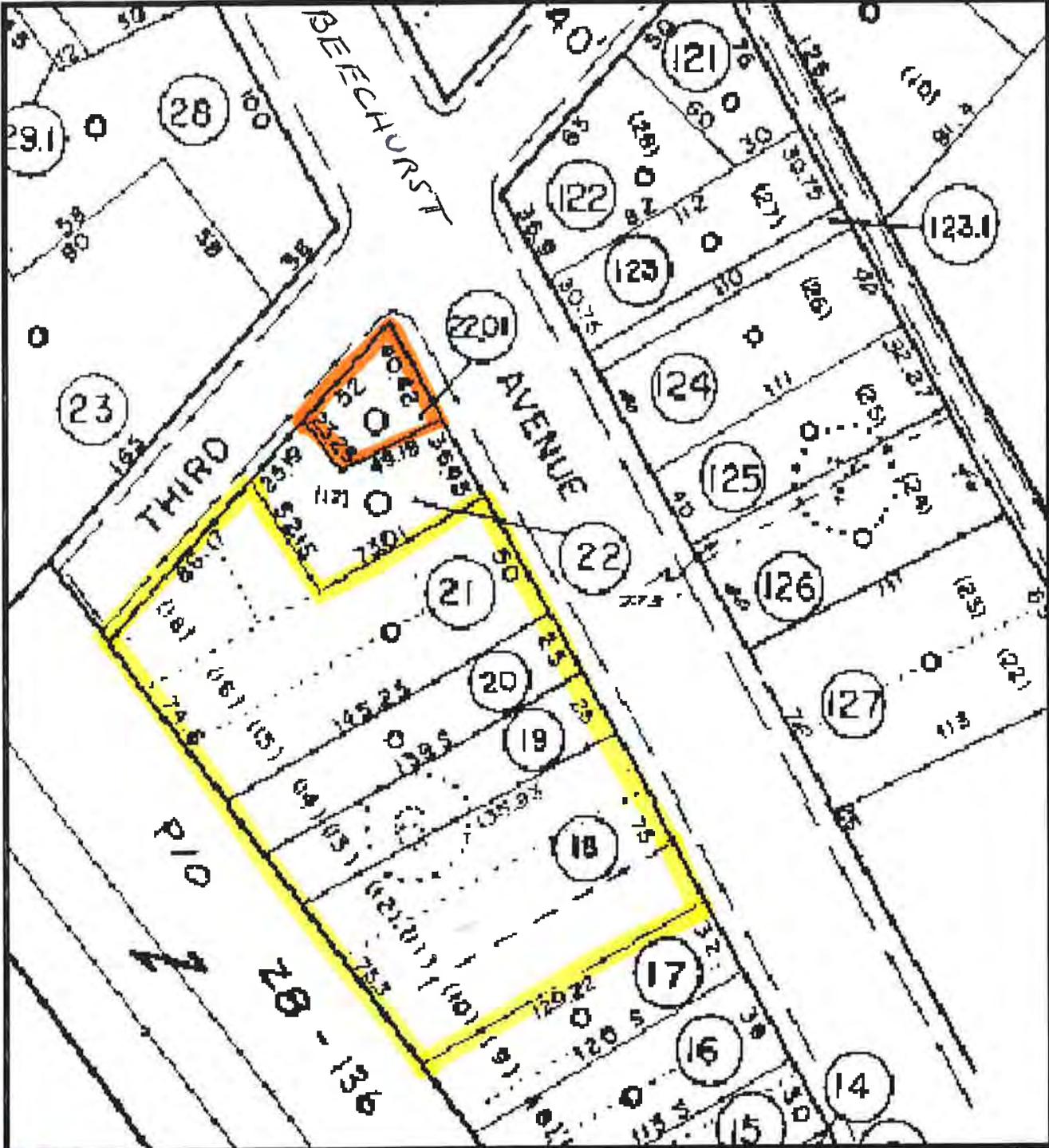


Spaces assigned
to 265 Beechurst

alley

Third St.

WinCor Properties
Location of Proposed Renovation of 263 Beechurst Avenue Property
February 15, 2002



- Orange box: Location of Proposed Renovation
- Yellow box: Location of Property currently owned by WinCor Properties

Morgantown Corporation
District 1 Map 19
Assessor Map Enlargement



263 Beechurst Avenue



60B

Proposed parking area





WinCor Properties

**P.O. Box 2129
Westover WV 26502
(304) 292-0400**

February 8, 2002

Morgantown Planning Authority
389 Spruce Street
Morgantown WV

Re: Proposed Remodel of 263 Beechurst Avenue Property

Planning Authority,

Attached for your review is a proposed plan for the remodel of the property on 265 Beechurst Avenue. Although WinCor does not own this property, we have a purchase option from the current owner. Proceeding with this purchase is contingent on the ability to secure approval from the commission for our proposal.

This building is currently unoccupied and in very poor condition. In addition to being an eyesore along the Beechurst corridor, a leaking roof is causing further deterioration of the structure. WinCor believes that the property can be reconditioned for habitation and commercial use, enhancing the appearance of this area.

The 263 Beechurst location is a three story building with a walk out lower level. The building is currently configured for approximately 1400 square feet of commercial space on the ground floor and two large one-bedroom apartments on each of the upper floors for a total of five units.

Proposed reconditioning would include the following:

- Remodel the lower level to include a 3 bedroom apartment.
- Remodel the ground floor to include a commercial/retail space with Beechurst frontage and a two bedroom apartment in the rear.
- Remodel the upper floors to include renovation of the existing apartments. The larger one bedroom will be converted into a two bedroom while the second one bedroom will be preserved.

This remodel will require extensive demolition, replacement, and reconstruction of the interior of the structure including.

- Installation of a new roofing system needs to be performed immediately to prevent further deterioration.
- Demolition of the interior walls to replace deteriorated plaster and allow installation of utility service.
- Installation of new wiring, plumbing, and HVAC throughout the building.
- Removal of rear decking and installation of new rear access.

61

62

- Re-facing the Beechurst frontage to provide a more attractive and marketable commercial space. Painting of block exterior and replacement of deteriorated wood shingling on upper floors is also necessary.

Numerous safety improvements will be made to include hard wire smoke and carbon monoxide detection, fire suppression sprinkler system, improvement to rear decking and secondary egress.

Your consideration of our request is appreciated. Please contact me if you have any questions.

Sincerely,

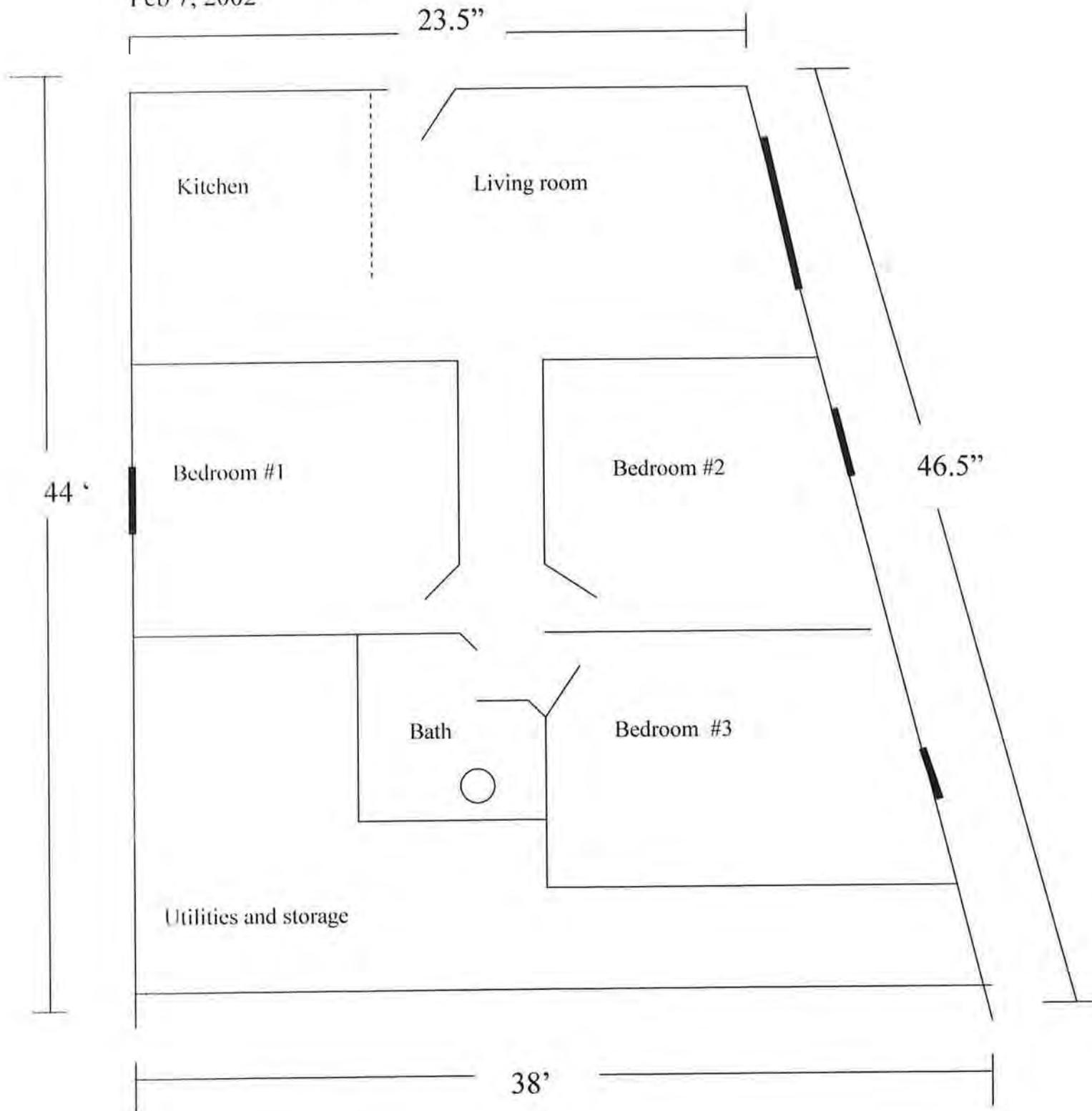


Don E. Corwin Jr
WinCor General Manager

Cc: Mike Stone – City Inspector

63

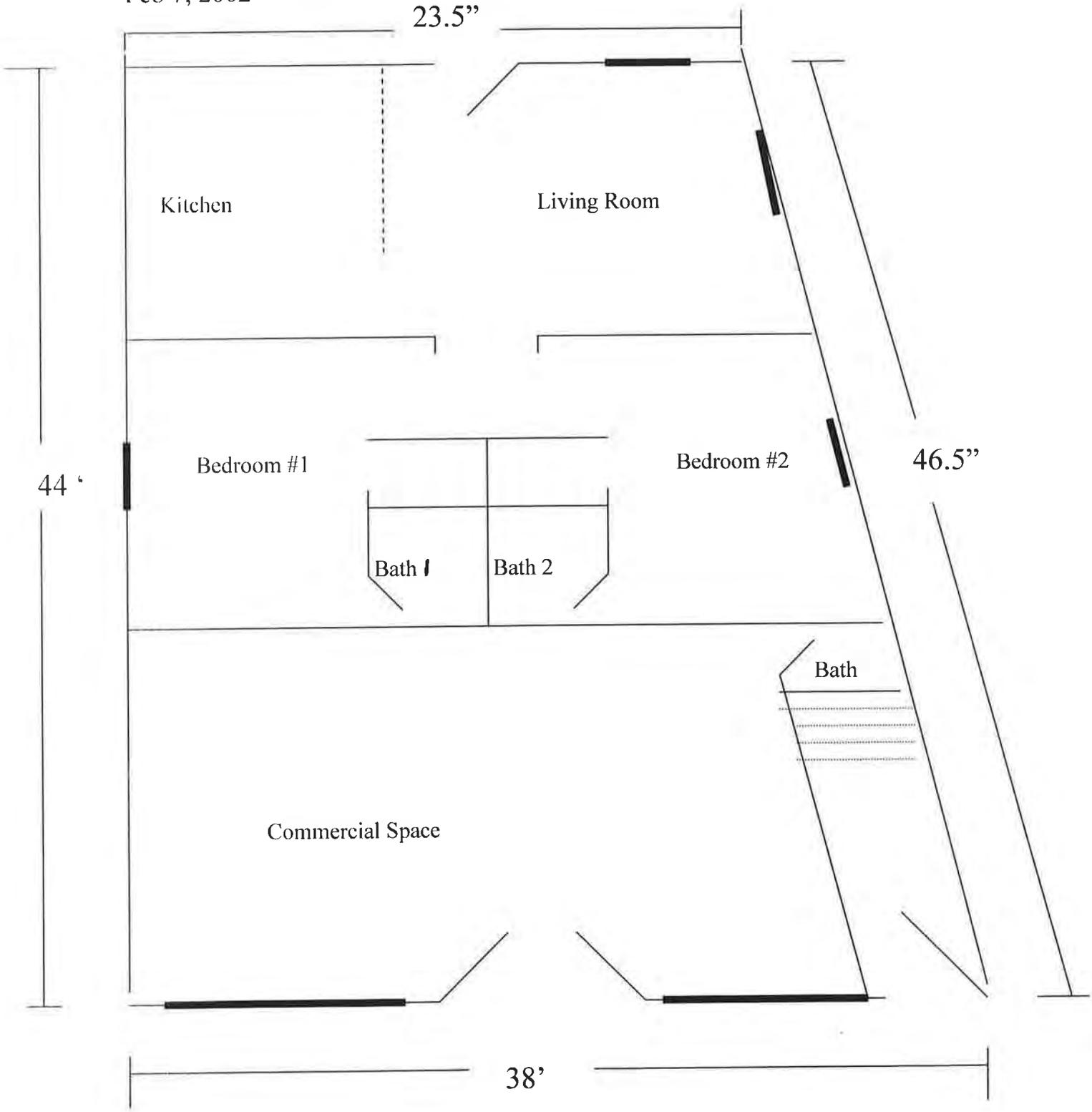
WinCor Properties
Proposed Remodel Plan for 263 Beechurst Ave
Feb 7, 2002



Lower level 1400 sq ft
One – 3 bedroom apartment
One – storage area

64

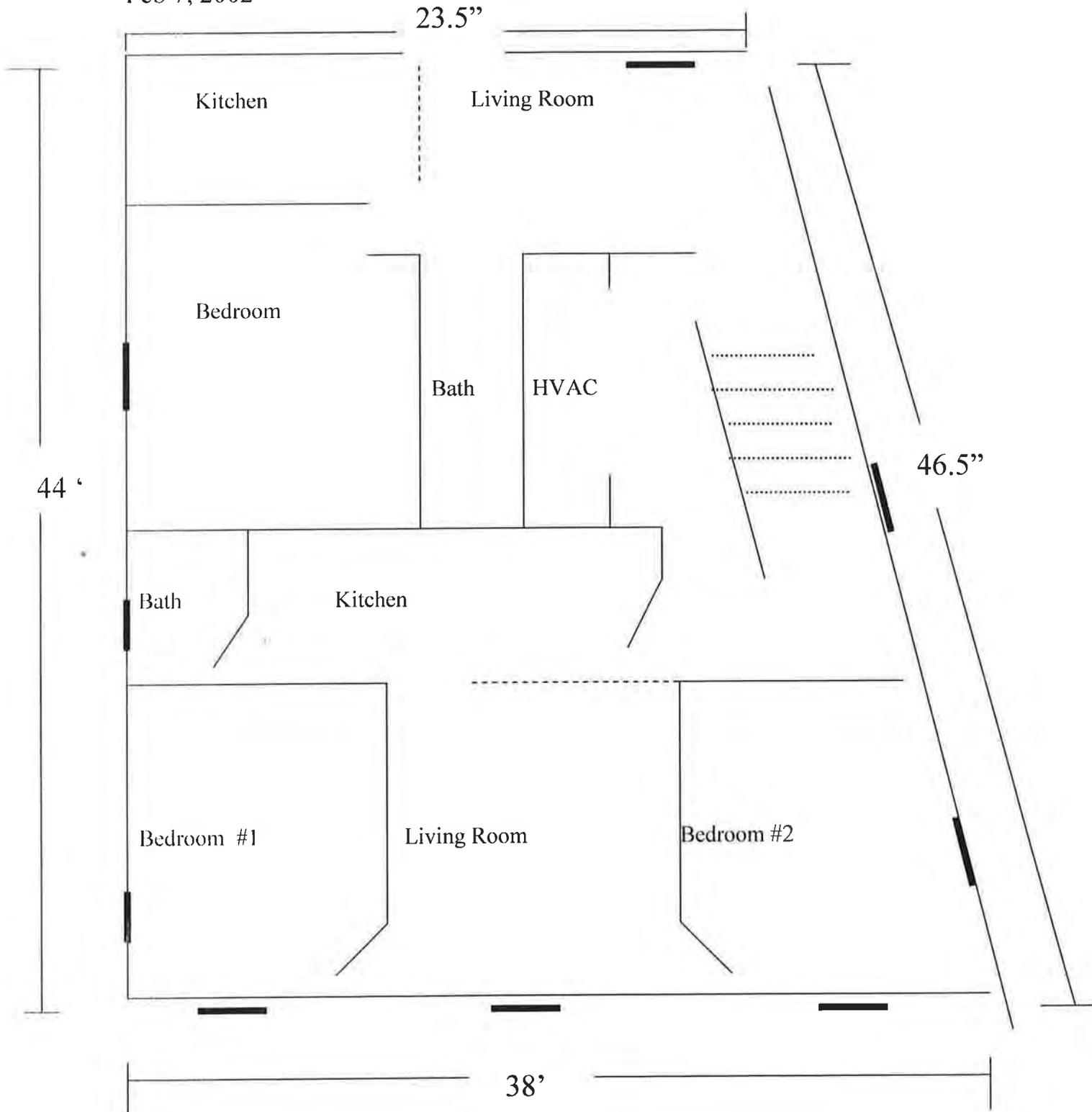
WinCor Properties
Proposed Remodel Plan for 263 Beechurst Ave
Feb 7, 2002



Ground Floor 1400 sq ft
One – 2 bedroom apartment
One – Office/ Commercial

65

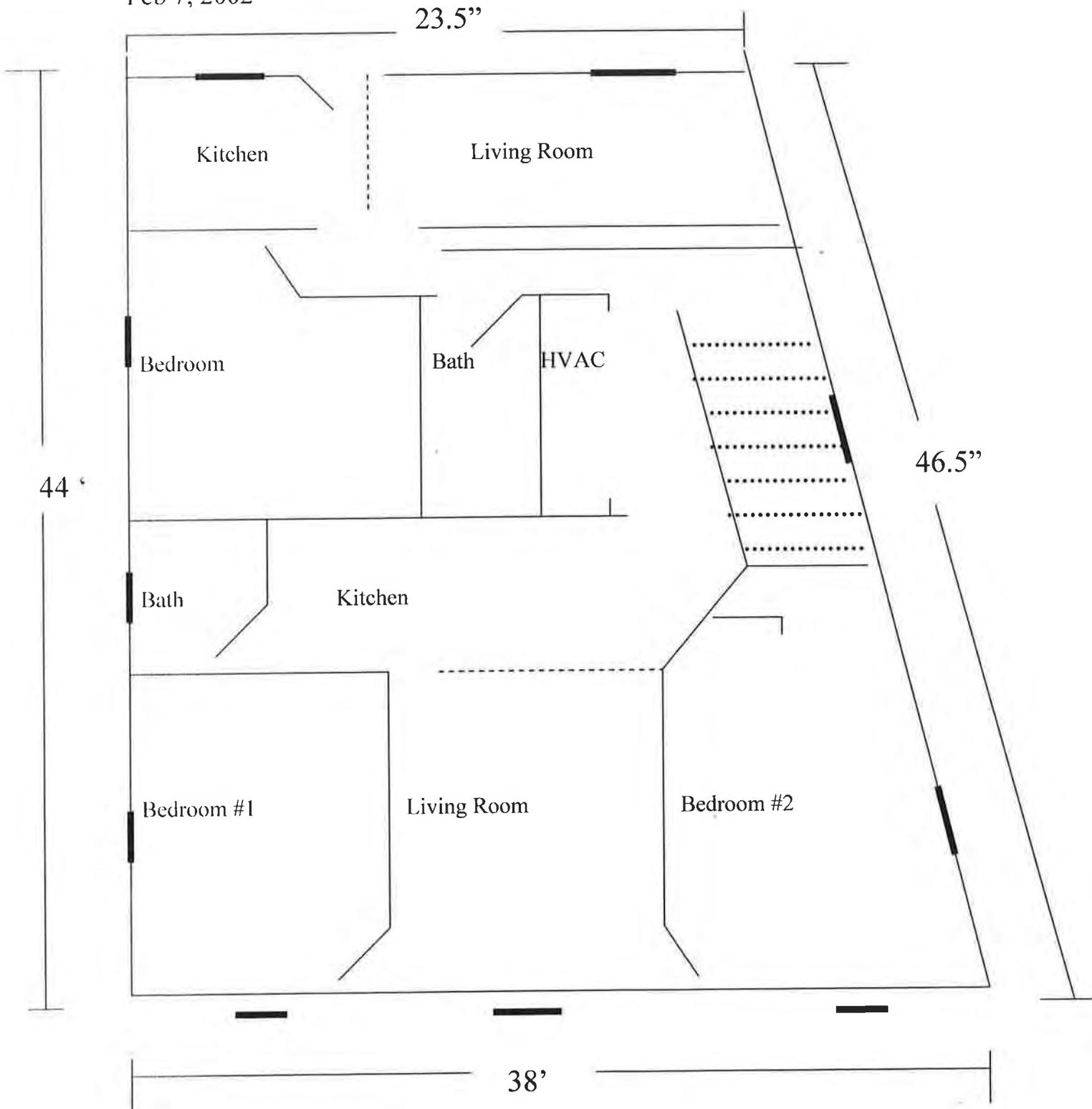
WinCor Properties
Proposed Remodel Plan for 263 **Beechurst Ave**
Feb 7, 2002



First Floor 1400 sq ft
One – 2 bedroom apartment
One – 1 bedroom apartment

66

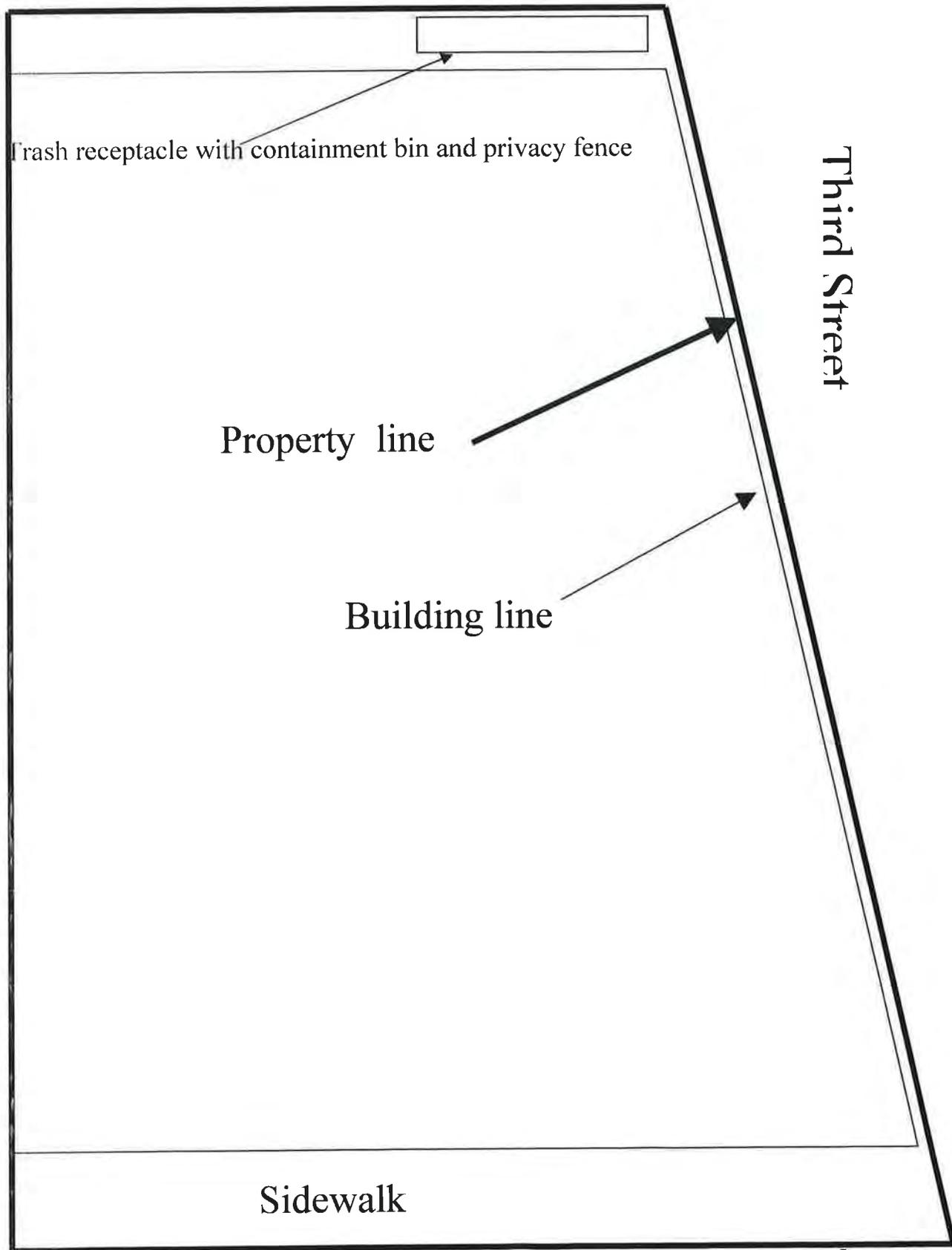
WinCor Properties
Proposed Remodel Plan for 263 Beechurst Ave
Feb 7, 2002



Second Floor 1400 sq ft
One – 2 bedroom apartment
One – 1 bedroom apartment

67

263 Beechurst Ave
Property Layout



Beechurst Ave

L. Martin read the staff report. She stated that the request is for the division and/ or establishment of two separate condominiums to be located on the 2nd floor of the building and for one owner-occupied condominium unit to be located on the 3rd floor.

Michael Corrigan presented the request to the Board. He stated that the Mon Art Gallery formerly occupied one space in the proposal, but no longer present.

R. Hawkins asked for public comment. There was none. The public portion was closed.

No discussion ensued.

J. Rockis made a motion to accept the findings of fact as written by the applicant, seconded by T. Shamberger. Motion approved unanimously.

T. Shamberger made a motion to approve the conditional use requests as presented, seconded by J. Rockis. Motion approved unanimously.

V02-03 / Wincor Properties / 263⁷ *Beechurst Av.* Request by Wincor Properties, LLC for variance approval from §12.E.23.b, *Minimum Parking Spaces Required, Residential Uses*, for property located at 263 Beechurst Avenue. Tax Map #19, Parcel #22.01; a B-3, Service Business District.

J. Wood read the staff report. He stated that WinCor Properties would like to renovate an existing building to include commercial/retail space that would front Beechurst Avenue and require 4 parking stalls; and remodel the remainder of the building to include residential. He added that the residential would be comprised of one 3-bedroom apartment, two 2-bedroom apartments, and two 1-bedroom apartments, and that WinCor may be able to provide four of the 11 spaces required, thus asking for a variance of seven spaces. J. Wood also added that if the variance were approved, the applicant would need to come back at a later meeting and apply for conditional use for off-premise parking in order to document his ability to provide the 4 stalls.

Don Corwin, Jr. and Don Corwin, Sr. presented the request to the Board.

Discussion ensued on surrounding property that Wincor owns. Mr. Corwin added that he could provide some off-premise parking, and that he would be willing to meticulously look for other options. Mr. Corwin also added that the building is in extreme disrepair and if Wincor did not renovate, the building would eventually be torn down.

J. Rockis added that the Board rarely grants a parking variance. Discussion ensued on various uses and configurations for the building that would reduce the parking requirement. Mr. Corwin added that Wincor would like to retain the retail space on Beechurst Avenue. J. Rockis asked for clarification on nonconforming uses. J. Wood stated that had the building not been vacant for more than a year, a new tenant similar to

the previous one could have moved in and the parking requirement would not matter. He also added that grandfathered status goes with the property.

Discussion ensued on guidance to the applicant.

R. Hawkins asked for public comment. There was none. The public portion was closed.

R. Hawkins made a motion to table the request until April 17, 2002, seconded by T. Shamberger. Motion approved unanimously.

V02-02/ Moser / 153 Mineral Avenue: Request by George Moser for variance approval from the *Table 2, Residential Development Standards*, minimum front yard setback for property located at 153 Mineral Avenue. Tax Map #24 Parcel #327; an R-1A, Single-family Residential District.

Applicant requested that the request be tabled.

J. Rockis made a motion to table the following requests: CU02-01 & V02-04 / Liberatore, CU02-05 & CU02-06 / Castle, and V02-02 / Moser until the April 17, 2002 meeting, seconded by T. Shamberger. Motion approved unanimously.

OTHER BUSINESS

Public Comments:

Dan Nagowski, 1125 University Avenue, stated that he had concerns with regards to the requests made by Michael Castle and the impact of traffic on University Avenue.

Staff Comments: None

ADJOURNMENT

Meeting Notes

Purpose: BZA Site Visit – CU13-05 / Mutts’s Place Inc. / 263 Beechurst Avenue

Date: Thursday, April 4, 2013 Time: 6:00 PM Place: 263 Beechurst Avenue

George Vrooman, Seth Wilson, Bill Morlino,
Bernie Bossio, Leanne Cardoso, George
Papandreas, Tom Shamberger, and Chris

Meeting Called By: BZA Attendees: Fletcher

Items Discussed:

The BZA tabled Case No. CU13-05 during its March 20, 2013 hearing for the purpose of scheduling a site visit to further study the subject conditional use petition.

- The present status of the parking below the PRT facility was discussed.
- The present status of WVU’s restricted parking lots along Beechurst Avenue toward Stansbury Hall was discussed.
- Vrooman advised those in attendance that garbage is picked up three times a week at the former 2129 University Avenue location.
- Morlino advised those in attendance that the setback between the side of the subject building and Third Street is seven (7) feet.
- Attendees examined alternate design and location solutions for the dumpster facility.
- Attendees examined the basement area; Vrooman advised attendees that the basement will be used for back-of-house storage, 6’ X 10’ beer cooler area, and possibly a small kitchen.
- Attendees discussed the merits of the petitioner contacting the Morgantown Fire Marshal to learn what Fire Code requirements may be necessary for occupancy and whether or not related standards would affect the economic viability of the contemplated location.
- Attendees discussed the merits of the petitioner researching off-premise parking opportunities within 300 feet of the site; Vrooman advised attendees that the Ashbrooke Liquor store closed at 12:00 AM.

Action Items:

Board members in attendance requested the following actions:

- Vrooman to contact Allied/Republic to discuss dumpster facility design and location solutions and report same to the Board through Staff.
- Fletcher to research previous planning and zoning cases relating to the Mutt's Place establishment and the 263 Beechurst Avenue location.
- Fletcher to research the width of the adjoining Third Street right-of-way.
- Fletcher to research the status of existing parking, parking restriction signage, and dumpster facility observed near the PRT facility and understood to be within the rail-trail realty.
- Fletcher to research the uses permitted under the Beechview Place Planned Unit Development (PUD).

As of Friday, April 12, 2013, the Planning Division is continuing efforts to complete research requested by the Board of Zoning Appeals. As such, Exhibit D to be distributed and posted on the City's website prior to the Board of Zoning Appeals' April 17, 2013 hearing