



MEMORANDUM

Objection A.1.a.i “The City Planner and Contractor erred in their FAR calculations.”

Response: This objection is an incorrect representation of Staff’s related conformity determination. The undersigned maintains the maximum FAR determination was correctly calculated. Specifically, Page 7 of 9 of Staff’s Conformity Report dated 06 NOV 2015 clearly describes, by providing the related calculation, that the area used for parking spaces in excess of the maximum parking standard is in fact included in site’s maximum floor area ratio (FAR) calculation thereby *penalizing* the development program for exceeding the maximum parking standard.

If the proposed FAR, including the area used for parking spaces in excess of the maximum standard, exceeded the maximum FAR standard, than variance relief would be required to exceed the maximum FAR standard. This is, however, not the case. Specifically, the proposed FAR, including the area used for parking spaces in excess of the maximum standard is 490,999 square feet, which is less than the maximum FAR standard of 594,594 square feet for the subject development site.

Staff did not represent conformity with the maximum FAR standard as an exemption or giving the developer the opportunity to exceed the maximum parking standard. Specifically, the FAR calculation is not and cannot be used to permit the maximum parking standard to be exceeded. The FAR standard, in terms of structured parking spaces, specifically limits the parking exemption from including parking spaces that exceed the maximum parking standard. In fact, requisite variance relief to exceed the maximum standard was identified by the undersigned and a related variance petition has been submitted under Case No. V15-70. The merits of approving or denying the related variance petition are matters for the BZA to determine.

Objection A.1.b. “The transparency variance requested for the Project to avoid the minimum transparency requirement violates Section 1351.01 of the Code and will likely not be approved by the BZA.”

Response: Developing less than the minimum percentage of clear windows does not involve permitting land uses that are otherwise prohibited in the zoning district. Developing less than the minimum percentage of clear windows does not involve changing the zoning classification of the subject realty. As



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such, the petitioner may seek variance relief accordingly. However, the merits of approving or denying the related variance petition are matters for the BZA to determine.

Objection A.1.c. “The air flow and sunlight distribution variance requested for the Project must be considered and decided upon solely by the BZA; therefore, any consideration or approval of the Project by the Planning Commission is premature.”

Response: As explained under Objection 1.A. above, a proper order or sequence of approvals is not established in the City’s Planning & Zoning Code nor in West Virginia State Code for developments requiring approvals by both the Planning Commission and the BZA. When developments require approvals by both reviewing authorities, approvals by each authority are conditioned upon the granting of approval(s) by the other authority.

The BZA’s review concerning the minimizing canyon effects provision is to determine whether or not the Board concurs with the petitioner’s Air Flow Analysis and Sunlight Distribution Analysis that resultant conditions do not warrant mitigating design elements. If the BZA agrees, then it rules accordingly. If the BZA does not agree, then it determines whether or not to grant variance relief accordingly.

Objection A.2. “Consideration and approval of the Project by the Planning Commission is premature due to outstanding decision by third parties, such as the West Virginia Division of Highways and the Morgantown City Council.”

Response: As explained under Objection 1.A. above, a proper order or sequence of approvals is not established in the City’s Planning & Zoning Code nor in West Virginia State Code for developments requiring approvals by both the Planning Commission and the BZA. When developments require approvals by both reviewing authorities, approvals by each authority are conditioned upon the granting of approval(s) by the other authority. Additionally, Planning Commission and/or BZA approvals for developments that also require annulment(s) include condition(s) that their respective approval(s) are contingent upon City Council’s approval of the related annulment(s). Final access agreement(s)/permit(s) by the West



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Virginia Division of Highways (WVDOH) are not required prior to Planning Commission and/or BZA consideration of development elements for which WVDOH must grant approvals. WVDOH approvals must be obtained by the developer prior to building permit issuance.

Objection A.2.a. **“The BZA cannot render a decision on the variance regarding the maximum width of a driveway at the curb line and the maximum width of a driveway at the street right-of-way line because there are outstanding issues that need to be determined by the West Virginia Division of Highways.”**

Response: The petitioner has, as required under 1385.08(D)(2), submitted with the subject Type III Site Plan petition written/electronic correspondence from WVDOH documenting its approval of the petitioner’s traffic impact study (TIS). An approved WVDOH access permit/agreement is not required for Planning Commission’s site plan review, but is required prior to the issuance of a building permit. WVDOH’s stated conditions in its approval of the petitioner’s TIS are matters that must be addressed prior to WVDOH’s approval of the petitioner’s access permit/agreement, which must be obtained prior to the issuance of a building permit.

Objection A.2.b. **“Consideration and approval of the Project by both the BZA and the Planning Commission is premature due to the outstanding right-of-way annulment request concerning Wall Street by the Morgantown City Council.”**

Response: Again, Planning Commission and/or BZA approvals for developments that also require annulment(s) include condition(s) that their respective approval(s) are contingent upon City Council’s approval of the related annulment(s).

Objection A.3. **“The height measurements for the apartment complex building violate the City of Morgantown Planning and Zoning Code and should not be permitted.”**

Response: This objection is based on an incorrect determination of the proposed building’s height in feet. The undersigned maintains the maximum FAR determination was correctly calculated. Specifically, Section 1329.02



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provides that “BUILDING HEIGHT IN FEET” is, “The vertical distance measured from the lot ground level to the highest point of the roof for a flat roof...Building height calculation shall not include chimneys, spires, elevator and mechanical penthouses, water tanks, radio antennas, and similar projections.”

Section 1329.02 provides that a “PARAPET” is, “The portion of a wall which extends above the roofline.”

By definition, the parapet extends above the roofline and is a “similar projection” excluded from calculating BUILDING HEIGHT IN FEET.

The proposed building’s height in feet was therefore correctly calculated as having a halfway point between the highest and lowest elevations of the building footprint of less than the 120 foot maximum standard.

Objection A.4. “The Fire stairway on the Level 1 Floor Plan of the Building violates the National Fire Projection Association’s 101 Life Safety Code and should not be permitted.”

Response: The task of determining compliance with the State Building Code and the State Fire Code are matters for the jurisdictions having authority, which are the City’s Chief Building Code Official and the City’s Fire Marshal respectively. The Planning Commission and the BZA do not have the authority to determine compliance with said Codes. Any decision by the Planning Commission or the BZA based on factors other than those under its authority could be reversed.

Objection A.4. “Consideration and approval of the Project by the Planning Commission is premature due to the unresolved interpretations of the Lot Density provisions, Sections 1349.07 and 1713.02 of the Code, which are confusing, ambiguous, and have unintended consequences as written.”

Response: The undersigned maintains the maximum residential density determination was correctly calculated for the subject Site Plan petition as stated in the Planning and Zoning Code. Whether or not the City’s present residential density standard best reflects a housing market uniquely driven by unrelated occupants rather than related occupants is not the matter before



Development Services

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the Planning Commission. The only measure in determining compliance with the present maximum residential density standard is what City Council has enacted in the Planning and Zoning Code. Any decision by the Planning Commission or the BZA based on factors other than those under its authority could be reversed

Conclusion

It is the opinion of the undersigned that the objections presented by Mr. Giuliani are matters for which he appears to oppose the subject development. Mr. Giuliani's objections are not matters for which the Planning Commission cannot fulfill its duties and exercise its authority to consider the subject Type III Site Plan petition and render a decision to: 1.) approve; 2.) deny; or, 3.) approve with conditions, modifications, and restrictions.

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Chris Fletcher

From: Catherine S. Loeffler <loefflercs@hh-law.com>
Sent: Thursday, December 10, 2015 11:11 AM
To: Chris Fletcher
Cc: Samuel H. Simon
Subject: James Giuliani Objection Brief
Attachments: Executed copy of the Obejction to Planning Commission re Standard Building (H1170418x9CF62).pdf

Mr. Fletcher:

We represent James Giuliani, and attached is his Objection to the Morgantown Planning Commission's Consideration of the Standard at Morgantown Project at the December 10, 2015 Meeting. We ask that you please review it prior to the meeting this evening. We overnighted 10 copies of the Brief to the members of the Planning Commission as well. Mr. Giuliani intends to explain his arguments at the meeting tonight.

Please let me know if you have any questions.

Regards,

Catherine

Catherine S. Loeffler

Attorney At Law

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**OBJECTION TO THE MORGANTOWN PLANNING COMMISSION'S
CONSIDERATION OF THE STANDARD AT MORGANTOWN PROJECT
AT THE DECEMBER 10, 2015 MEETING**

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

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

James Giuliani (“Mr. Giuliani”) hereby formally objects to the Morgantown Planning Commission’s consideration of the Standard at Morgantown Project at the December 10, 2015 Meeting, which involves numerous variances and a Type III Development of Significant Impact Site Plan approval at 1303 University Avenue in Morgantown, West Virginia. Mr. Giuliani requests to be heard, and that this objection be considered, at the Morgantown Planning Commission hearing scheduled for December 10, 2015.

I. INTRODUCTION

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

Commercial: 13,351 square feet

Retail: 8,486 square feet

Parking: 225,554 square feet (692 spaces)

Housing: 419,947 square feet

Total: 667,338 square feet

Total Less Parking: 441,784 square feet

On or about October 1, 2015, the Contractor applied to the City of Morgantown for the approval of a Type III Development of Significant Impact Plan and also applied for several variances associated with the Project. The matter is scheduled to be heard on December 10, 2015 at the Morgantown Planning Commission hearing. For the reasons that follow, Mr. Giuliani contends that any consideration and/or approval of the Standard at Morgantown Project by the Planning Commission is premature.

II. OBJECTIONS

A. Consideration and approval of the Standard at Morgantown Project by the Planning Commission is premature due to numerous outstanding decisions by third parties, including the determination of the variance petitions by the Morgantown Board of Zoning Appeals, decisions and approvals by the West Virginia Division of Highways and the Morgantown City Council; violations of various ordinances and codes; and a necessary interpretation of confusing, ambiguous Code provisions.

1. Consideration and approval of the Standard at Morgantown Project by the Planning Commission is premature due to the outstanding variance petitions that can only be decided by the Morgantown Board of Zoning Appeals.

In relation to the Project, the Contractor applied for seven (7) variances to the City of Morgantown, all of which can only be approved by the Morgantown Board of Zoning Appeals (“BZA”) pursuant to Sections 1389.02 and 1389.03 of the Morgantown Planning and Zoning Code (the “Code”). The Planning Commission has no authority to make variance determinations, and the most it can do is provide recommendations to the BZA. Therefore, it is not logical for

the Planning Commission to even consider the Standard at Morgantown Project until the BZA has either approved or denied the variances. This is a classic example of putting the cart before the horse, and it would be a complete waste of the Planning Commission's time and resources to entertain a hearing on a project with pending variance requests that the BZA will likely not approve due to the violations of numerous Code sections, which is discussed below.

a. The variance petition requesting 692 parking spaces for 866 occupants on 1.95 acres in a B-4 zoning district violates Sections 1365.04 and 1349.06 of the Code and will likely be denied by the BZA.

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

Regarding the maximum number of spaces, Section 1365.04(I) titled "Determining the Number of Spaces Required" states: In all non-residential districts the maximum number of spaces provided *shall not exceed 115 percent* of the minimum parking requirement, except for research and development centers, where there shall be no maximum." (Emphasis added). Therefore, the maximum number of residential parking spaces permitted according to the Code is 485 (422 x 1.15). However, the Code also provides for loading spaces in 1349.08(D): "Loading—Residential uses containing thirty (30) or more dwelling units shall conform to the

loading requirements set forth in Section 1365.10 as a ‘Type II Use.’” The table in Section 1365.10 illustrates:

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

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

The Code sections stated above all use the word “shall,” which is a term that is always mandatory, not discretionary. Under both the Zoning Code and West Virginia law, the word *shall* represents an imperative command. Section 1329.01(H) of the Code states: “The word ‘shall’ is always mandatory and not discretionary.” Thus, the Code itself defines the term *shall* as mandatory. Moreover, the West Virginia Supreme Court has repeatedly held that the use of the word *shall* in a statute represents an “imperative command” that “leaves no way open for the substitution of discretion.” See *Crusenberry v. Norfolk & W. Ry. Co.*, 180 S.E.2d 219, 222, 155

W.Va. 155, 159 (1971) (modified on other grounds by *Talkington v. Barnhart*, 264 S.E.2d 450, 164 W.Va. 488 (1980)); *see also* Syl. Pt. 7, *J.A. Street & Associates, Inc. v. Thundering Herd Development, LLC*, 228 W.Va. 695, 724 S.E.2d 299 (2011) (“It is well established that the word ‘shall,’ in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation”).

There are no exceptions to these Code provisions, and the Contractor should not be permitted to exceed these maximums and endanger the welfare and interests of residents living in the City of Morgantown simply to increase its monetary return on investment by packing in as many people into one building as possible. It is important to remember that the Contractor is not requesting a mere increase of 3 or 4 spaces—*the request exceeds the maximum number by almost 200 spaces!*

i. The City Planner and Contractor erred in their FAR calculations.

Remarkably, the City Planner, in the Staff Report and Nonconformity Report, attempts to justify the parking variance requested by the Contractor by manipulating the Floor Area Ratio (FAR) calculations in Section 1349.06. That section, titled “Floor Area Ratio (FAR)” states: The *maximum* FAR for all development in this district [B-4] is 7.0. The area designed, constructed, and utilized to provide parking structure facilities shall be exempt from the maximum FAR, provided such area *does not* exceed 115% of the minimum parking requirement.” (Emphasis added). Importantly, in the definition section of the Code (Section 1329.02), it states that the FAR is an expression of the *intensity of development* and determines the amount of square footage of a building area compared to the square footage of a lot area. The FAR calculation is the gross floor area of the principal and accessory buildings on a lot divided by the area of the lot. Thus, a FAR of 7.0 would allow 7 square feet of building area for each square foot of lot

area. In this case, the *maximum square footage* of the building area for this Project in the B-4 district based on the subject lot area is **594,594** (7.0 x 84,942).

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

As designed, the Standard at Morgantown Project violates these Code provisions, and the Contractor should not be permitted to skirt such important safety measures through a variance request that will likely not be approved by the BZA upon reviewing the above evidence. Therefore, consideration and approval of the Project is premature, and the Planning Commission should refrain from making a decision on the Standard of Morgantown Project at this time.

b. The transparency variance requested for the Project to avoid the minimum transparency requirement violates Section 1351.01 of the Code and will likely not be approved by the BZA.

The Project indicates that the Contractor is requesting variance relief to avoid the minimum transparency requirement in Section 1351.01, which pertains to the performance standards for buildings in a B-4 district. In particular, Section 1351.01(K)(1) states that “A minimum of sixty percent (60%) of the street-facing building façade between three (3) feet and eight (8) feet in height *must* be comprised of clear windows that allow views of indoor nonresidential space or produce display areas.” (Emphasis added). The word “must” like the word “shall” means that it is always mandatory. *See Crusenberry v. Norfolk & W. Ry. Co.*, 180 S.E.2d 219, 222, 155 W.Va. 155, 159 (1971). Additionally, there are no exceptions to this Section of the Code.

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

As designed, the Standard at Morgantown Project violates Section 1351.01 of the Code, and the Contractor should not be permitted to skirt such important safety measures through a variance request that will likely not be approved by the BZA upon reviewing the above evidence.

Therefore, consideration and approval of the Project is premature, and the Planning Commission should refrain from making a decision on the Standard of Morgantown Project at this time.

- c. **The air flow and sunlight distribution variance requested for the Project must be considered and decided upon solely by the BZA; therefore, any consideration or approval of the Project by the Planning Commission is premature.**

The Contractor for the Project does not want to comply with the Code, or the Morgantown Urban Design Guidelines (the “Guidelines”) specifically adopted by the Code, by incorporating design elements that preserve adequate light and airflow to public spaces, including streets and sidewalks surrounding the proposed massive apartment/retail complex. Obviously, such aesthetic components are very important to the City of Morgantown and its residents, since such provisions were included in the Guidelines and Section 1351.01(I) of the Code:

(I) To minimize canyon effects created by tall structures, buildings taller than three (3) stories **shall** incorporate design elements that preserve adequate light and airflow to public spaces including streets and sidewalks . . . Site plan applications for buildings taller than three (3) stories **must** include the following:

(1) An air flow analysis conducted by a licensed architect or professional engineer, describing and illustrating 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 within a 300 foot radius of the site.

(2) A sunlight distribution analysis conducted by a licensed architect or professional engineer, describing and illustrating the impact of the proposed building on sunlight distribution in the general vicinity, with special emphasis on predicting light blockage and shadow casting onto all properties within a 300 foot radius of the site. (Emphasis added).

A sunlight distribution analysis is included at Sheet Nos. 6.17 and 6.18 in the Project documents, and an air flow analysis is provided at Sheet No. 6.19, but to date, the BZA has not reviewed or heard argument regarding said documents. It is up to the BZA to analyze these

documents and either approve or deny the variance in accordance with the Code and the intentions of the City of Morgantown as provided in the Guidelines.

Therefore, consideration and approval of the Project is premature, and the Planning Commission should refrain from making a decision on the Project at this time.

2. Consideration and approval of the Project by the Planning Commission is premature due to outstanding decisions by third parties, such as the West Virginia Division of Highways and the Morgantown City Council.

The BZA, the Planning Commission, and other authorities often must wait to render decisions on project plans based upon the determinations of other entities that have an interest in certain aspects of a project. In this case, decisions on the Project by both the Planning Commission and the BZA are premature due to outstanding determinations by the West Virginia Division of Highways and the Morgantown City Council.

a. The BZA cannot render a decision on the variance regarding the maximum width of a driveway at the curb line and the maximum width of a driveway at the street right-of-way line because there are outstanding issues that need to be determined by the West Virginia Division of Highways.

The Project Contractor has requested a variance to avoid the requirements of Section 1351.01(D) of the Code regarding curb cuts. This Section states, in relevant part: “The maximum width of any driveway leading from a public street **shall** not exceed twenty-six (26) feet at the curb line or twenty-two (22) feet at the street right-of-way line.” (Emphasis added). Regarding the maximum width of a driveway at the curb line, the Plan proposes 55.77 feet on University Avenue (an excess of 29.77 feet) and 104.39 feet on Walnut Street (an excess of 78.39 feet). Regarding the maximum width of a driveway at the street right-of-way line, the Plan proposes 27 feet on University Avenue (an excess of 5 feet) and 58.75 feet on Walnut Street (an excess of 36.75 feet). When dealing with such precise measurements, especially on such a busy thoroughfare as University Avenue frequented by a high volume of vehicles and pedestrians,

these excessive measurements can have a significant impact on the surrounding area. Clearly, these measurements proposed by the Contractor violate Section 1351.01 and will likely not be approved by the BZA.

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

The most recent letter is dated September 21, 2015, which states that the WVDOH provides conditional approval of the Study subject to certain stipulations that still have not been resolved by the Contractor and its affiliates. In particular, the WVDOH was concerned with the retiming of the traffic signals to minimize queueing of traffic at the two intersections near the apartment complex (University Avenue/Walnut Street and High Street/Willey Street). Such a significant request should not be ignored, and the Project should not be considered or approved until the WVDOH has received the additional information requested in order to render an informed decision on this issue.

If this Project was to be approved as submitted, the potential for more significant traffic jams and accidents on University Avenue and entrapment of residents attempting to enter or leave the apartment garage during periods of high volume traffic is extremely likely. Ultimately, the site location for such a large, mixed-use complex on a busy thoroughfare like University

Avenue that includes numerous intersections, traffic signals, and is in close proximity to a bridge is problematic to say the least. University Avenue is a 5-lane roadway that is busy enough as it is. Imagine the result of adding an extra 692 vehicles into the mix that are attempting to enter and exit the garage while pedestrians are trying to cross at the same time. The garage entrance on University Avenue is located between traffic signals and is only a short distance from the bridge. If the WVDOH determines that the Project designs will back up traffic on University Avenue and block through traffic to the bridge, it will likely not approve the Project, and the Contractor will have to go back to the drawing board.

Therefore, consideration and approval of the Plan by both the Planning Commission and the BZA is premature, and they should refrain from making a decision on the Project at this time.

b. Consideration and approval of the Project by both the BZA and the Planning Commission is premature due to the outstanding right-of-way annulment request concerning Wall Street by the Morgantown City Council.

Also pending is the annulment of a dead-end street, known as Wall Street, by the Morgantown City Council. Wall Street runs directly through the Project site between University Avenue and the CSX right-of-way, but it is owned by the City. Thus, an annulment is required to permit the Contractor to demolish the street in order to erect the Project on the Site. Importantly, such an annulment is a public process that requires input from local citizens and interested parties through documentation and hearings. It is not a decision that can be determined in a short period of time by only one party. A note in the Staff Report submitted by the City Planner indicates that the annulment application has been submitted, but the City's engineer is waiting for the requisite documentation from public and private utilities. Once the City obtains approval from these utilities, then it can proceed with the requisite public hearing(s) to determine whether the street can be subsumed by the Project. Until the annulment is formally

approved, no other authorities should be making decisions concerning the approval of the Project, especially since the denial of the annulment would require the Contractor to modify its designs.

Therefore, consideration and approval of the Project by both the Planning Commission and the BZA is premature, and they should refrain from making a decision on the Project at this time.

3. The height measurements for the apartment complex building violate the City of Morgantown Planning and Zoning Code and should not be permitted.

The Code provides for various minimum and maximum heights of buildings in a B-4 zoning district in Section 1349.05 titled “Building Height.” Section 1349.05(B) states, “The maximum height of a principal structure, unless otherwise restricted by Article 1362 B-4NPOD, B-4 Neighborhood Preservation Overlay District, *shall* not exceed 120 feet, except as provided in Section 1363.02(A), Height Exceptions.” (Emphasis added). None of the exceptions in Section 1363.02 are applicable to this scenario. Again, this provision utilizes the word “shall” to mean that it is always mandatory, not discretionary.

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

As a result, the Contractor’s Project designs violate Section 1363.02 of the Code. The Contractor did not request a variance on this issue, but even if it did, the variance should not be

granted. Rather, the Contractor should be required to modify its design drawings to comply with the Code. As previously stated, a considerable amount of time and consideration went into drafting the Code and determining the proper measurements to incorporate therein. A Contractor should not be permitted to skirt the Code provisions simply because it does not want to put forth the effort to alter its construction designs and drawings.

Therefore, consideration and approval of the Plan by the Planning Commission is premature, and it should refrain from making a decision on the Project at this time.

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

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

The Project drawing indicates that the Fire Exit Stairway that serves the apartments as well as the parking garage is interior to the outside and discharges directly into the open lobby space of the commercial area on Level 1 and forces individuals to exit out the front double doors past the elevator tower. According to the Fire Code, a fire stairway must have a continuous path with a two hour fire wall from the vertical stair to the exterior and cannot pass by any other vertical openings, such as an elevator. It appears that all of the other stairs in the structure have the requisite horizontal exit, but this particular stairway only has a vertical exit. Therefore, the design drawings should be modified to comply with the Fire Code.

Therefore, consideration and approval of the Project by the Planning Commission is premature, and it should refrain from making a decision on the Project at this time.

5. Consideration and approval of the Project by the Planning Commission is premature due to the unresolved interpretations of the Lot Density provisions, Sections 1349.07 and 1713.02 of the Code, which are confusing, ambiguous, and have unintended consequences as written.

Certain Code provisions provide for a maximum residential density calculation, which were drafted with the intent to determine the maximum amount of occupants a building could have based on the square footage for safety reasons. If a building is too crowded compared to its area, it could create safety concerns if an evacuation becomes necessary. Section 1349.07 of the Planning Code titled “Lot Area Per Dwelling Unit (Residential Density) states that “the minimum lot area per dwelling unit in this district [B-4] is 300 square feet.” There is no stated maximum requirement enumerated in this section. The City Planner submits that this is the end of the inquiry and finds that either the word *minimum and maximum* are the same or he simply ignores the word *minimum* altogether and interprets the Code as though the word did not exist. The City Planner will argue that each unit in a B-4 district equals 300 square feet for density calculations while, ignoring the word *minimum* in the Code. The City Planner looks at residential density permitted based on the lot area (84,942 square feet) divided by (300 square feet), which equals 283 units. He concludes that since the Contractor is only requesting 276 units, this is permitted as being below the maximum residential density. His calculations ignore the wording of the Code.¹

¹ Section 1329.02: Dwelling Unit—A single unit providing complete, independent living facilities for a single housekeeping unit. In no case shall a motor home, trailer, hotel or motel, lodging or boarding house, automobile, tent, or portable building be considered a dwelling unit. Dwelling units are contained within single-family dwellings (in which case the definition is synonymous), garage apartments, two-family dwellings, mixed-use dwellings, and multifamily dwellings. Units without self-contained sanitary facilities and kitchens (as defined herein) are not classified as dwelling units, but rather are considered to be rental rooms. See BOARDING HOUSE.

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

For example, for purposes of simplicity, consider the scenario with a 10,000 square foot lot. Under the Code as written, the lot would allow 33 units (10,000 square feet divided by 300 square feet). However, the square footage of each unit varies depending on the number of bedrooms in each unit. 33 2-bedroom units amount to 66 bedrooms. 33 4-bedroom units amount to 132 bedrooms. 33 6-bedroom units amount to 198 bedrooms. Undoubtedly, the square footage of a building with 66 bedrooms will have a vastly different square footage than a building with 198 bedrooms simply due to the amount of space needed to accommodate that many occupants. However, since the Code does not provide for a maximum square footage per unit, it does not accurately capture the residential density of a building based on the number of occupants.

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

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

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

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

Minimum Area Requirements
Minimum Area in Square Feet

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

According to the chart in Section 1713.02 each unit has a different calculation of minimum square footage depending on the number of bedrooms/occupants. For example, the calculation for a unit with 3 occupants is 410 square feet ($70 \times 3 = 210 + 120 + 80$). Using the lot area in our situation, 84,942 square feet, only 207 3-bedroom units would be permitted ($84,942/410$). In other words, only 621 occupants would be permitted to live in the building in comparison to the lot size (207×3). The calculation for a unit with 6 occupants is 670 square feet ($70 \times 6 = 420 + 100 + 150$). Using the lot area in our situation, 84,942 square feet, only 127 6-bedroom units would be permitted ($84,942/670$). In other words, only 762 occupants would be permitted to live in the building in comparison to the lot size (127×6). No one can argue that there is a big difference between 621 occupants in a building and 762 occupants in a building. Moreover, this example considers the simplest of scenarios, i.e., when all of the apartments have the same number of bedrooms. Consider the difficulty in calculating residential density when one is dealing with units with different numbers of bedrooms, which is the situation involving

this Project. A formal interpretation of these Code provisions should be issued by the City Planner and/or Planning Commission and until such time, this Project should not move forward.

When dealing with a mixed-use complex as large as this Project, it is imperative that the residential density and occupancy limits be given great consideration due to the serious safety issues with overcrowding and emergency situations that could arise. The overcrowding of this building coupled with the fire code violations in the design could be catastrophic. Therefore, consideration and approval of the Project by the Planning Commission is premature, and it should refrain from making a decision on the Project at this time.

III. CONCLUSION

For all the foregoing reasons, the Planning Commission should refrain from considering or approving the Standard at Morgantown Project Plan, and any such decision is premature due to numerous outstanding determinations by third parties, including the determination of the variance petitions by the Morgantown Board of Zoning Appeals, decisions and approvals by the West Virginia Division of Highways and the Morgantown City Council; violations of various ordinances and codes; and a necessary interpretation of critical life safety Code provisions.

Any decision regarding the Project by the Planning Commission at this time would be arbitrary and capricious since the Contractor is trying to rewrite the Code to meet solely its needs without any regard for the community and the safety of its citizens. If the Planning Commission allows this Contractor on this Project to skirt numerous safety provisions in the Code by approving these variances and this Project as submitted, it sends a clear message that the Commission will allow others to violate the Code by simply filing variance petitions.

Moreover, the inconsistent application of the Code provisions by the City Planner makes it difficult for other contractors in the future to determine which Code provisions must be

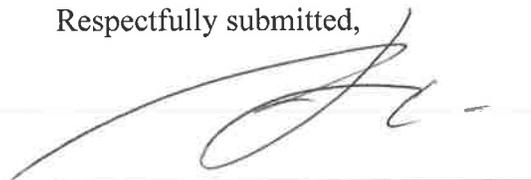
followed and which provisions can be ignored. Certainly this was not the intention of the drafters who desired for all provisions of the Code to be followed. The goal of the Planning Commission should be to level the playing field so that some contractors are not given preferential treatment, or even the appearance of preferential treatment, over other contractors. Most contractors take great care to follow the requirements of the Code, and the Contractor for this Project should be held to the same standard.

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

Thus, the Planning Commission should refrain from considering or approving the Standard at Morgantown Project Plan.

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Respectfully submitted,



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