



City of Ann Arbor

301 E. Huron St.
Ann Arbor, MI 48104
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Meeting Minutes Zoning Board of Appeals

Wednesday, December 7, 2011

6:00 PM

City Hall, 301 E. Huron Street, 2nd Flr.

1 **CALL TO ORDER**

Chair Kuhnke called the meeting to order at 6:05 PM.

2 **ROLL CALL**

Chair Kuhnke called the roll.

Present: 8 - Candice Briere, Wendy Carman, David Gregorka, Chair Carol A. Kuhnke, Erica Briggs, Alex Milshteyn, Jason Boggs, and Perry Zielak

Absent: 1 - Sabra Briere

3 **APPROVAL OF AGENDA**

A motion was made that the Agenda be approved. On a voice vote, the Chair declared the motion carried.

4 **APPROVAL OF MINUTES**

4-a 11-1505 Zoning Board of Appeals Meeting Minutes of November 16, 2011

A motion was made by C. Briere, seconded by Milshteyn, that the minutes be approved by the Board and forwarded to the City Council. On a voice vote, the Chair declared the motion carried.

5 **APPEALS AND ACTIONS**

5-a 11-1506 ZBA11-020 415 and 425 South Fifth Avenue
The property that is the subject of this request is 415 and 425 S. Fifth Avenue. An application for review of decisions related to the property has been submitted by Tom and Sue Whitaker, Tom and Martha Luczak, 309 E. Jefferson LLC, and Limited Resources LLC. Review of the following actions is requested:

1. City Council approval of Resolution R-11-445 (File No. 11-1336), City Place Landscape Modification Request, on October 17, 2011 and approval after reconsideration of said resolution on October 24, 2011.

2. City Council approval of Resolution R-11-449 (File No. 11-1345), City Place Revised Building Elevations Request, on October 17, 2011 and approval after reconsideration of said resolution on October 24, 2011.

3. The Planning and Development Services Manager's decision that proposed amendments to the City Place Site Plan are subject to review under Chapter 55,

Section 5:122(5) Administrative Amendments to Approved Site Plans.

E. Briggs noted that the Board had received material from the petitioner late in the afternoon, which they hadn't had time to review. General discussion pursued whether to continue with the hearing or postpone in order to allow adequate time to review all documentation presented. Hearing continued.

Matt Kowalski reviewed the staff report and provided responses to claims outlined in the petitioners' appeals.

SUMMARY:

Tom and Sue Whitaker, Tom and Martha Luczak, 309 E. Jefferson LLC, and Limited Resources LLC, are requesting review of decisions related to the property at 415 and 425 S. Fifth Avenue. Review of the following actions is requested:

A. City Council approval of Resolution R-11-445 (File No. 11-1336), City Place Landscape Modification Request, on October 17, 2011 and approval after reconsideration of said resolution on October 24, 2011.

B. City Council approval of Resolution R-11-449 (File No. 11-1345), City Place Revised Building Elevations Request, on October 17, 2011 and approval after reconsideration of said resolution on October 24, 2011.

C. The Planning and Development Services Manager's decision that proposed amendments to the City Place Site Plan are subject to review under Chapter 55, Section 5:122(5) Administrative Amendments to Approved Site Plans.

QUESTIONS TO STAFF BY THE BOARD:

D. Gregorka asked if the Administrative Amendment requests of October 17, 2011, included any massing changes of the building.

Kowalski answered, no, they were material related.

A. Milshteyn asked what material changes were proposed.

Kowalski said that the original plan proposed hardiplank on the elevation plan, which had been altered with the appearance of shingles on the top upper level to create a delineation between the top and bottom levels.

A. Milshteyn asked how many windows had been added as a part of the revised elevation plan.

Kowalski said he didn't have the exact count but noted that the additional windows were included in the revised elevation package that was approved by City Council.

C. Briere asked if the petitioner were to bring the southern area of the landscaping plan into compliance with the newly revised Chapter 62 Landscape Ordinance how many additional trees would they have to add.

Kowalski responded that the current site plan shows seven (7) trees, which is in accordance with the newly revised Chapter 62 Landscape Ordinance.

Kowalski explained that the City Place development has the 15 foot required conflicting land use buffer along the south side except for the portion where the shared access driveway is located, approximately along half the distance of the

building, which is only 6 feet. He stated that there is a provision in Chapter 62 (Section 5.63 Conflicting Land-Use Buffer) that allows for varying of the width in order to reach an average of 15 feet.

E. Briggs asked about the trees that City Council had suggested they plant.

Kowalski responded that those additional trees are a part of the Administrative Amendment that is still under review by the City Planning Division.

E. Briggs asked staff to explain why they felt the landscape met the intent of the code language in Chapter 62 Landscaping Ordinance.

Kowalski said that they felt it allows for the flexibility in landscaping as well as the landscape buffer between the neighboring driveway and the development site. He added that there is no conflicting land use in the sense that both parcels are zoned R4C and allow for the same density and there is no vehicular usage on that side. He noted that the site plan was an approved site plan from 2009 that had been approved before the landscape code changes that called for the addition of a 15 foot landscape buffer. They felt that the developers for City Place were meeting the intent of the code under their Administrative Amendment request.

W. Carman asked if the developer was required to follow the new Landscape Requirements of Chapter 62 when applying for an Administrative Amendment.

Kowalski answered, yes, or they could request a landscape modification from City Planning Commission and City Council. He explained the code allows for such a provision on lots that become non-conforming, due to the code changes.

W. Rampson explained that when Chapter 62 changes were done in June 2011, the non-conforming section was moved into the modification section.

W. Carman asked if the changing of the landscape code coincided with additions in the modification section.

W. Rampson responded that the modification section had always been there, but that the City's Systems Planning Dept requested that the non-conforming section be moved to the modification section of the code.

W. Carman requested copies of the revised Chapter 62 Zoning code section, that had been approved by City Council recently.

PRESENTATION BY THE PETITIONER:

Susan Morrison, Attorney for the applicants, requested additional time beyond the 10 min. allotted time and handed out tabbed packets of material to the Board, and explained the request presented.

Tom Whitaker, property owner at 444 and 450 S. Fourth Ave. Ann Arbor, applicant, read from his presented affidavit.

Tom Luczak, 438 S. Fifth Ave, Ann Arbor, neighbor to City Place developer, said that half of his lot to the south of the south boundary is directly looking out on the new development. He said that if he, as a neighbor, didn't have standing in this case, then who does. He also said that he believed the neighboring development driveway would be used for vehicular traffic in his understanding.

Peter Webster, Dickinson/Wright PLLC, attorney for the City Place developer, spoke in regards to the 'standing' issue of the appeal brought before the Zoning Board of Appeals, noting that 'standing' is a legal issue. Webster stated that he believed together with the City that the petitioner didn't have 'standing' to bring an appeal before the ZBA. He outlined the reasons and read from his written rebuttal to the petitioner's appeal which was part of the material presented to the Board.

S. Morrison, objected to the statements presented by Webster.

D. Gregorka asked staff who had been notified of the appeal.

Kowalski answered that every one living and owning property within 300 ft of the address of the development.

C. Briere asked staff if they knew how many of the adjacent properties were being used as single family residences vs. rentals or multi-family dwellings.

Kowalski said that the unit directly to the south is registered as a 2-unit rental, and the one that was part of the appeal is a 5-unit rental.

C. Briere inquired if the City had heard from the owners or residents of the nearby parcel at 441 S. Fifth, immediately to the south, with the driveway easement on their property.

Kowalski responded, no, as of 1 or 2 pm. today, he hadn't received anything.

A. Milshtyn asked what stage of construction the development is in.

Kowalski said that at this time, the developer does have an approved foundation permit, based on the approved 2009 site plan. He noted that the demolition of the houses is complete and there is currently on-going construction.

C. Kuhnke acknowledged the following email correspondence received and filed by the Board; from Cathleen Connell, 445 South Fourth Avenue; Peter Deininger, 432 Hamilton Place and 318 E. Jefferson; Robert Hightower, 416 S Fifth Ave. and 402-404 S. Fifth Ave. and 212 E. William; Nancy Kaplan, no address given; Eleanor Linn, no address given; Peter Nagourney, 914 Lincoln Ave, Ellen Ramsburgh, 1503 Cambridge Rd., Deanna Relyea, 451 S. Fourth Ave., Donald Salberg, no address given; C. Robert Snyder for the South University Neighborhood Association; Shirley Zempel, 434 S. Fourth Ave; Peter Zetlin, no address given; Jane Belanger, 441 S. Fifth and 445 S. Fifth.

E. Briggs asked staff who in their opinion would have 'standing' to bring an appeal in this case.

W. Rampson responded that it would be an adjacent property owner who was specifically affected and could prove they have suffered damages by something that was associated with the three components mentioned earlier; the landscape buffer, the elevations, and the treatment of this as an administrative amendment rather than something else. She said the issues couldn't be the height of the building or massing.

Boggs stated that he wasn't sure that the Board could grant standing of the case.

Gregorka said that he felt it was up to the Board to hear the case.

Briggs agreed.

Motion made by Gregorka, seconded by Carman, that in the case of ZBA11-020

the Zoning Board of Appeals finds that the applicants have standing to bring forward the listed appeals. On a roll call, the vote was as follows with the Chair declaring the motion carried; 7-1 vote.

Yeas: 7 - Briere, Carman, Gregorka, Chair Kuhnke, Briggs, Milshteyn, and Boggs

Nays: 1 - Zielak

Absent: 1 - Councilmember Briere

General Board discussion pursued regarding the issue of standing.

S. Morrison continued her presentation of the petitioner's appeal as presented in their written request to the Board.

QUESTIONS FOR THE PETITIONER:

A. Milshteyn asked how much larger the window wells were and what S. Morrison meant by her statement that the height of the building had changed in a "major way".

S. Morrison deferred the question to the architect who had written the report she was referring to.

Zielak asked staff if the original window well request had been withdrawn from the developer.

Kowalski responded that an earlier Administrative Amendment plan that had been submitted to the City showing the width of the window wells away from the building had since been revised by the developer to what the original approved 2009 site plan was, which was a 5 ft width.

W. Carman asked about the depth of the window wells.

Kowalski said that the original 2009 site plan didn't specify the depth of the window wells.

D. Gregorka asked how the height could be calculated if the depth of the window wells wasn't known.

Kowalski explained that window wells are never calculated into the height of the building on any building, but that the height is measured from finished grade around the building. He added that window wells can even be allowed to project into a required setback.

Sean Smith, an architect hired by the petitioner, spoke on behalf of the petitioner and referenced documents [Exhibit C] he had presented to the Board in their packet of information. Smith acknowledged that the depth of the window wells wasn't specified on the original 2009 site plan, and added that the depth of the window wells on the 2011 Administrative Amendment is 7 ft. and the width away from the building is 5.5 ft. Smith also stated that the length of the window wells have been extended into the corners of the building on the 2011 Administrative Amendment.

A. Milshteyn asked about the earlier height references of the building made by S. Morrison.

Smith responded that he didn't solve the developer's problem of how tall the building is. He explained his factoring of slope and window well depth as 16% of the surface

area and said that using his calculation you come up with a 1.14 ft to 1.89 ft difference for average elevations taller than the approved 2009 site plan.

Further discussion pursued regarding the window wells.

A. Milshteyn asked for clarification on the statement made by S. Morrison that the architectural plans were erroneous.

Smith said that he thought there might be an 'error' on the page labeled Required Open Space, in that on the north side of the north building, there is a porch roof that extends into the setback that is only allowed to extend 2 ft but extends more than that. He also added that the egress tunnel forms a roof which is in the setback. Smith expressed his thoughts of how the 'errors' might have occurred in that the developer probably used the same elevations for both buildings. He said that since the submitted plans show the porch and tunnel on the north he has to presume and assume that the developer intends to build something in the setback.

A. Milshteyn asked how far the extensions would be into the setback.

Smith responded that the architectural drawings don't actually dimension the porch roof, but that the porch sits directly over another object that appears to be 4 ft.

A. Milshteyn asked for further explanation on the tunnel.

Smith said that on the north side of the building there is a porch that has to span the area well because there are windows right underneath where the porch is. He said in order for people to get out of their windows and for people on the 1st floor to cross the moat there is in essence a little bridge or structure tied back to tube steel in the building, which he believes expands into the setback.

John Jackson, Certified Planner, hired by the petitioner, revisited the window/area wells on the plans, and the conflicting land use buffer on the south side of the property which he believed had not been met. He said that the developer had increased the window/area wells and thereby encroached into the conflicting land use buffer area thereby decreasing the landscaping material. He said that the plans submitted for building permits show a different window well than what was approved on the original site plan which he said changed the perception of the height of the building.

Peter Webster, Dickinson/Wright PLLC, attorney for the City Place developer, referenced his previously submitted response to the staff report reiterating that there is no change in the window wells that are currently before the City and the approved 2009 site plan. He said that the window wells were a part of the planning review process and receiving final approval from City Council and they are not on appeal at this hearing. He said the proposed Administrative Amendment as it relates to the window wells isn't before the Board at this hearing

Webster explained that the issues of the referred to porch or stoop are related to the Development Agreement and are not a zoning issue and they aren't appealable to the Zoning Board of Appeals and therefore aren't before the Board at this hearing. Webster said that what the petitioner is 'self-defining' as a porch is actually a stoop, which has been reviewed and is allowable and entirely consistent with the City's zoning ordinances. He reiterated that they were building the window or area wells in concert with the approved 2009 site plan. He noted there are no changes to the landscape buffer on the south border. He said what was outlined in the staff report about the ability of the developer to meet a particular concern at a Council meeting to

add additional trees was not before the Board at this hearing.

W. Carman asked for clarification on which specific items were a part of the Development Agreement.

Webster offered to make a list.

The Board requested clarification from Webster if there had been changes made to the plans.

Webster stated that what he had heard and read from the petitioner/appellant is that they are complaining about changes that have been made to the revised 2011 plans that have been submitted as part of an Administrative Amendment, which isn't before the Board at this hearing, since they haven't been approved at this time. He said that what they do have before them is the approved window wells from 2009, which is what is being constructed now on the development site.

Rampson clarified that the window wells shown on the 2009 site plan were approved by the City Council, and that they didn't continue to the end of the building as a previous speaker had stated, and that they aren't dimensioned but rather, scaled. She explained that they were not considered as part of the grade because they are a component of a retaining wall next to windows for means of egress, and when standing on the sidewalk you would not be able to see them, but rather over them, because they are 5 ft deep next to the wall.

Rampson said that when the Administrative Amendment was submitted, in September 2011, the area wells on the east and west ends of the building were wider and terraces (2-teired) She said staff comments, based on feedback from the neighbors, which was provided to the developer let them know that the wider window wells weren't acceptable. As a result of those comments, the developer re-submitted revised plans with the area wells showing consistent with the 2009 approved site plan. She noted that staff has not reviewed those plans yet, because of the 'stay' that was issued when the ZBA appeal [being heard this evening] was filed.

C. Kuhnke asked if building permits had been issued based on the approved 2009 site plan and if the revised plans had been withdrawn.

Rampson said yes and explained that the plans had been revised but that the Administrative Amendment was still in for consideration, which included other items, such as changes to the parking lot and additional interior floor area on the 4th floor.

Additional discussion pursued regarding the window wells.

D. Gregorka asked what variances would be required, under the 2011 ordinances, if looking at this current proposal with changes in landscaping since it was originally approved.

Kowalski said there wouldn't be any variances to the height, only the landscape modification

Rampson explained there have been 2 zoning code changes since 2009, which are in Chapter 59, [which were a part of the A2D2 project, which doesn't apply in this case, and the Landscape Ordinance changes discussed earlier]. She said the other change is the requirement for bio-retention in landscape islands when going beyond a certain impervious surface.

Rampson noted that when an amendment to a site plan comes in they pay close attention to bringing the project up to code with any new zoning code ordinances.

W. Carman asked if she decided to build a 30 ft building and dug down 7 ft to allow for window wells, would she be allowed to build a 37 ft tall building allowable per code.

Rampson responded that while the code is silent on that, it does talk about average grade within 20 ft of the building. She reiterated that egress or window wells have not been used to calculate building height since the building begins at grade.

Webster stated that the areas related to the Development Agreement and not the zoning include; elevation, guard rails and lights, landscape modifications, materials and other items of esthetics.

A. Milshteyn asked why the ZBA was hearing the appeal and not the Planning Commission.

D. Gregorka stated that since it was an appeal of an Administrative decision it came before the ZBA.

AUDIENCE PARTICIPATION:

Vince Caruso, 556 Glendale Circle, spoke in support of the petitioner and that he wasn't in support of the developer and the project proposed to be built. He said the Board could provide a form of checks and balances.

Ethel Potts, 1014 Elder Blvd, read a statement that while the Board had been given complex legal issues, she as a member of the public felt it was a simple matter of the law, and that City Council had given the developer exemptions from the law by approving their landscape modification. She spoke in support of maximum landscape screening between smaller residential houses and larger developments.

Rita Mitchell, 621 Fifth Street, said she found the discussion very confusing and felt for the Board. She said if the City is to be a tree city then we need to do what needs to be done by preserving green space around these densely built areas. She said this was the ZBA's chance to help with that preservation.

PETITIONER REBUTTAL:

Susan Morrison, Attorney for the applicants, spoke of changes to the site plan and the need for the revisions to go to the Planning Commission instead of being addresses administratively. She also stated that they felt that City Council didn't act appropriately by approving the landscape modifications for the development.

Sean Smith, an architect hired by the petitioner, said he had a set of plans showing the larger window wells, which he believed was a part of the issued building permit. He offered to provide a copy for the record.

C. Kuhkne noted that the Building Department would have copies on file already.

Rampson agreed and explained that the revised building plan had been accepted by the Building Dept. and reviewed today, after it had been brought to their attention that the window wells needed to be revised to match the approved site plan.

D. Gregorka stated that the area/window wells are off discussion because it appears

that they are being constructed as per the originally approved 2009 site plan, and that the window wells therefore are not affecting the landscaping. D. Gregorka referenced Section 5:608 and said he believed that the ordinance does allow for flexibility on landscaping and screening requirements under certain conditions, which it appears have been met in this situation. He said it was unclear to him, on the intent of the section, who would allow the conditions.

Rampson read from the ordinance that stated that the modification can be approved in a motion by City Planning Commission or City Council.

General Board discussion pursued regarding building height in relation to the window wells.

A. Milshteyn asked if the City had made any decision on requests from the developer since 2009.

Rampson said that there have been two (2) changes; the landscape modification requested of City Council and the revised elevations approved by City Council.

Kuhnke said and there was the Administrative Amendment request that the Planning Division still has before them and hasn't reviewed yet due to the 'stay' imposed.

Rampson explained per code why she believed the submitted Administrative Amendment would qualify to be reviewed administratively

Discussion pursued regarding technicalities involving options on motions.

D. Gregorka asked if the City has made a determination how they will review the guard rail issue.

Rampson responded that she believed it would be safe to say the City couldn't review them since guardrails are not Site Plan items and therefore exempt from review.

Motion made by C. Briere, seconded by Zielak, to dismiss agenda item C (3) of appeal ZBA11-020 on the basis that it is premature since the Planning and Development Department has not yet made a decision regarding the submitted Administrative Amendment that is still under review and that the Zoning Board of Appeals does not have jurisdiction over this item at this time, and that the petitioner has the opportunity to appeal a decision once a decision has been made by the department. On a roll call vote, the Chair declared the motion passed and the appeal described as C(3) is dismissed; 5-3 vote.

Yeas: 5 - Briere, Chair Kuhnke, Milshteyn, Boggs, and Zielak

Nays: 3 - Carman, Gregorka, and Briggs

Absent: 1 - Councilmember Briere

W. Carman stated that she felt that the building elevations weren't outside of the ZBA's jurisdiction.

D. Gregorka stated that he felt the issue dealt with more than building elevations and was reasonable.

C. Briere noted that it was too late for the petitioner to appeal window wells or building height that was approved by City Council in 2009.

General discussion followed.

The Board asked the City Attorney, Kevin McDonald to explain the Development Agreement.

McDonald explained that Development Agreements are negotiated and start out from a standard format. He said City Council decided years ago that in dealing with developers on issues such as elevations which aren't specified in the site plans and since there are no standards for them, it was important avoiding "bait and switch" issues. He read from the Development Agreement that outlined the elevation review process.

A. Milshteyn reiterated that he didn't understand why the appeal was before the ZBA instead of the Planning Commission.

Motion made by C. Briere, seconded by Zielak, to dismiss agenda item B (2) of petition ZBA11-102 on the basis that there is a lack of jurisdiction since building elevations do not fall under the Zoning Board of Appeal's jurisdiction but are handled through the Development Agreement which is between the Developer and the City Council and is not appealable through the Zoning Board of Appeals. On a roll call vote, the Chair declared the motion failed and the appeal is not dismissed; 4-4 vote.

Yeas: 4 - Briere, Milshteyn, Boggs, and Zielak

Nays: 4 - Carman, Gregorka, Chair Kuhnke, and Briggs

Absent: 1 - Councilmember Briere

W. Carman stated that if the site plan had come before the ZBA she believes they would have calculated and included the depth of the window wells in the total height elevation.

E. Briggs said she could understand that staff would use past practice in making their decision but she felt that since there were so many window wells on this project that it would effect the average height.

Rampson noted that window wells are considered to be below grade and are not part of the zoning ordinance.

J. Boggs felt since the issue was vague and unclear it shouldn't be part of their jurisdiction.

Motion made by Gregorka, seconded by Carman, that the Zoning Board of Appeals overturns City Council Resolution R-11-449 (File No. 11-1345) to approve City Place Revised Building Elevations Request at 407- 437 South Fifth Avenue, given the following findings of facts;

a. The revised elevations would've provided additional information on the depth of the window wells,

b. Which also would've been impacted the calculation on the building height which may have caused the building to be outside of the building height requirements.

On a roll call vote, the Chair declared the motion failed; 3-5 vote.

Yeas: 3 - Carman, Gregorka, and Briggs

Nays: 5 - Briere, Chair Kuhnke, Milshteyn, Boggs, and Zielak

Absent: 1 - Councilmember Briere

D. Gregorka said that he couldn't support a vote against the City Council's decision because the original site plan was approved in 2009 under a different zoning requirement and when the developer requested an amendment to the site plan, 2 yrs later, the code had changed in the meantime which is why they had to ask for a modification that would allow them to follow the originally approved site plan.

General discussion pursued regarding the process.

Motion made by Carman, seconded by Gregorka, that the Zoning Board of Appeals overturns City Council Resolution R-11-445 (File No. 11-1336), to approve City Place Landscape Modification Request at 407-437 South Fifth Avenue, given the following findings of facts;

a. The Request approved by City Council did not meet the requirements of Chapter 62's intent section along the south side property line.

On a roll call vote, the Chair declared the motion failed; 3-5 vote.

Yeas: 3 - Carman, Chair Kuhnke, and Briggs

Nays: 5 - Briere, Gregorka, Milshteyn, Boggs, and Zielak

Absent: 1 - Councilmember Briere

6 OLD BUSINESS

7 NEW BUSINESS

8 REPORTS AND COMMUNICATIONS

C. Kuhnke thanked D. Gregorka for his many years of service on the ZBA and notified the Board that this meeting would be his last meeting as a member; she added that he would be greatly missed.

9 AUDIENCE PARTICIPATION - (3 Minutes per Speaker)

Ethel Potts, 1014 Elder Blvd, stated that she didn't understand how a 'stay' could stop staff from reviewing the Administrative Amendment but not a stay on issuing building permits.

10 ADJOURNMENT

A motion was made by Boggs, seconded by Briere, that the meeting be Adjourned. On a voice vote, the Chair declared the motion unanimously carried.

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