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The Board of Zoning Appeals (BZA) met in a virtual (Zoom) meeting at 5:30 p.m. Members present: Barre Klapper, Cassandra Huskey, Flavia Burrell, Susan Sandberg and Jo Throckmorton.

APPROVAL OF MINUTES: November 19, 2020

****Sandberg moved to approve the minutes as distributed. Throckmorton seconded. Motion carried unanimously by voice vote.**

REPORTS, RESOLUTIONS, COMMUNICATIONS:

Jackie Scanlan announced this would be Cassandra Huskey's last meeting and she thanked her for serving on the BZA the past couple of years. A new board member will be appointed to replace Huskey in the near future.

PETITIONS CONTINUED TO: June 24, 2021

- CU/V-19-20 **Robert Iatarola**
1504 W. Arlington Rd.
Request: Conditional Use approval for a Home Occupation in the R2 zoning district. Also requested are variances to allow a Home Occupation to be located within an accessory structure and to allow deliveries (of pallets) to the property.
Case Manager: Ryan Robling
- V-05-21 **Nancy Armstrong**
619 S. Fess Ave.
Request: Variance from rear yard setback requirements for a detached Accessory Dwelling Unit (ADU).
Case Manager: Ryan Robling
- V-06-21 **David Kerber**
2400 W. 3rd St.
Request: Variance from front yard parking setback requirements.
Case Manager: Keegan Gulick

PETITIONS:

- AA-02-21 **Acacia Investments, LLC (Fairview Terrace Apts.)**
615 W. 15th St.
Request: Administrative Appeal of the Notice of Violation (NOV) for failure to comply with outdoor storage standards.
Case Manager: Liz Carter

Liz Carter presented the staff report. The subject property is located on the southeast corner of N. Fairview Street and W. 15th Street, and is zoned Residential Small Lot (R3). Surrounding properties are also zoned Residential Small Lot (R3). The petitioner is requesting an Administrative Appeal from a *Notice of Violation (NOV)* issued by the Planning Department on January 6, 2021. This violation is related to outdoor storage compliance, specifically a dumpster enclosure on the property. On July 17, 2019 a grading permit was issued for a parking lot and site work at this location for Fairview Terrace Apartments. Site work included repaving and restriping the parking lot along with landscaping, bicycle parking, a dumpster enclosure, internal sidewalks and compliant ADA-accessible parking. Carter conducted a final occupancy inspection of the site on or about November 18, 2019; however, during the course of that inspection several deficiencies were identified, one of which was a dumpster not being fully enclosed. The Unified Development Ordinance (UDO) states that “Dumpsters shall be effectively screened on all sides by a fence or wall that is constructed of wood, brick, stone, chain link with opaque slats, or exterior building materials similar to those used on the primary structure. At least one (1) side of such fence or wall shall incorporate a movable gate for access. The height of the structure shall be a minimum of six (6) feet, and shall be high enough to ensure that the contents of the enclosure are not visible from adjacent parcels or public rights-of-way.” The UDO reference above is from the version of the UDO that was in place when the grading permit was issued on 7/17/19 and when the occupancy inspection was conducted. The current UDO which was adopted in January 2020, with an effective date of April 18, 2020, has the same requirements relative to dumpster enclosures found in *Section 20.04.080(m)(3) – (Development Standards& Incentives; Landscaping, Buffering, and Fences; Screening; Loading, Service, and Refuse Areas)*. Upon meeting with the property manager about said inspection deficiencies, the property manager communicated to the Planning staff that they did not agree with the department’s interpretation of the UDO. To that end, the petitioner would like to keep the non-screened dumpster in place to allow for it to be easily accessible by people with disabilities. Legal Counsel for the property owner notified Planning and Transportation in writing on January 13, 2021 that they wished to appeal the (NOV) issued by Staff. Carter pointed out that this site has been non-compliant since at least November of 2019 when staff performed a requested occupancy inspection. Staff recommends denial of AA-02-21 based on the findings outlined in the staff report.

Christine Bartlett, Ferguson Law, is representing the petitioner. The property is located at the corner of 15th and Fairview. A few years ago, the owner wanted to do improvements to the parking lot. This is a lawful, non-conforming property that needed a lot of work. The scope of work at the time didn't require a building enclosure. The dumpster which was sitting off to the side on its own (picture shown to BZA) didn't look very attractive so the owner wanted to move it to the other side of the property and build an enclosure. This work was done voluntarily. Bartlett said there wasn't an addition to the building at that time, change of use, expansion, or enlargement of the use. When the owner submitted plans to the City, it did depict that the dumpster would have an opening—no fencing material and no retaining wall. The City stated that the plans submitted didn't show the height of the retaining wall. Bartlett said it didn't make sense those plans would show a retaining wall and gate at the same height because the two would have been abutted up against each other. Otherwise, the retaining wall itself could have served as the enclosure. Again, the plans clearly depict two openings within the enclosure. This was done intentionally so that people with mobility issues coming up to the dumpster could walk through the enclosure and then go out the other opening. It still has an aesthetically pleasing appearance to it. The enclosure was built per the plans that were submitted to the City. No changes were made to the submitted plans. Had the owner known there was an issue after construction, there would have been a substantial redesign of the enclosure. At this point, there are some issues with trying to bring the enclosure into compliance. The dumpster is only visible in one small portion of the alleyway. It isn't visible at all from the public road. In closing, she urged the BZA to grant their appeal.

BZA Discussion:

Jo Throckmorton asked Staff if the grading permit for the parking lot prompted a requirement for an upgrade to the dumpster to be within code. Jackie Scanlan, Development Review Manager, responded that it was the moving of the dumpster that required an upgrade to be within code. Throckmorton asked if the petitioner could have done the work to the parking lot and then left the dumpster as-is without any fencing. Scanlan said theoretically, yes. Throckmorton asked Staff why the initial plans were approved without understanding the height, including the fact there was no door or wall there. Scanlan explained that Staff approved a plan view set. Often times there are specs in the plans that show the height. Staff didn't know what the height of the retaining wall was but Staff knew what the requirement was based on the code. An assumption was made by that staff person that the height would be met with the retaining wall. Scanlan pointed out that even "if" an oversight was made by Staff and it was accidentally approved, which didn't happen in this case, but even if it had Staff could still come back and say that the submitted plans didn't meet the code requirement of 6 feet. Throckmorton asked Staff if trash totes are viewed by the City in the same way dumpsters are viewed. Scanlan responded that outdoor regulations are different for single-family, multifamily, and commercial so "no" they aren't treated the same. Throckmorton confirmed that trash totes and dumpsters are completely irrelevant of each other. Throckmorton wondered if a sliding wall would meet code or if there are other options for the appellant. Liz Carter, Sr. Zoning Compliance Planner, said a swinging door would be an option as well as a sliding door. Additionally, the wall and fence aren't really separate. The fence that is on top of the wall, could be extended

forward to the corner and over so the entire thing is screened. It doesn't necessarily need to be a fence or gate just as long as the 6 foot wall was built on top of the retaining wall to continue around to fully screen the gap, if you will, from the neighboring property. Susan Sandberg asked how many tenants are residing in Fairview Terrace. Also, are any of them handicapped at this time and have to utilize a walker or some sort of wheelchair where this design actually would be accommodating? Bartlett responded there are 24, one-bedroom units and some of those are first floor. She didn't know if any of their tenants currently have mobility issues but they have had tenants in the past with mobility issues. She added that they have at least one handicapped parking spot. Barre Klapper suggested extending the screen on top of the wall just a little to overlap the screens. This is seen a lot around town where you just have the screens that kind of overlap to provide that complete closure from the outside but still allows people to get in and around without having to manipulate a door. Klapper asked if the petitioner would be amendable to that. Bartlett said she didn't know if that would be feasible but it's a possibility. Klapper asked Staff to clarify whether that would be acceptable to the City and meet ordinance requirements. Carter said, yes. Staff sees other developments that do something similar, where they have sort of a "tunnel way" into the side where there's no gate for those with accessibility needs. Klapper responded so that would mean it would meet the full screening requirement. Carter said the goal of course is so neighboring properties cannot see the dumpster and that it's fully screened.

No public comments.

Bartlett urged the BZA to grant the Appeal because this wasn't work that the owner had to do to begin with. When the plans were submitted to the City, they were submitted accurately and the City approved them. The dumpster enclosure was built exactly as the plans indicated.

****Throckmorton moved to deny AA-02-21 based on the recommendation outlined in the staff report. Huskey seconded.**

BZA final comments:

Sandberg had empathy for the petitioner because it's certainly more aesthetically pleasing than what had been there; the work was also done on a voluntary basis. On the other hand, a workaround has been offered and she would hope that the petitioner would be amendable to that option for enclosure and still keep the entryway for accessibility. Throckmorton said the property owner wanted to move the dumpster so they have to come into compliance with code. It's up to the builders to know what the code is and there appears to be a solution that is easily achieved. Klapper commended the owner for wanting to make the property better. There seems to be an easy modification that meet the petitioner's needs and also meet the ordinance that everyone in the City needs to meet.

Roll Call: 5:0—Administrative Appeal is denied.

AA-03-21 **Whitehall Associates, L.P.**

3477 W. 3rd St.

Request: Administrative Appeal from an administrative decision to deny a sign permit application.

Case Manager: Keegan Gulick

Keegan Gulick presented the staff report. The subject property is located on the southwest corner of W. 3rd Street and I-69 and is zoned as a Planned Unit Development (PUD). Surrounding properties are also zoned PUD. The petitioner is requesting an Administrative Appeal from a decision to deny a sign permit application for this property location. This PUD allows four (4) pole signs on the property. Three (3) existing pole signs have been permitted on-site since the 1980's. The fourth and final pole sign was applied for and approved on November 25, 2020 and a permit was issued on February 9, 2021. An additional sign permit application was received by Planning and Transportation on February 9, 2021 for the same property; however, that particular request was denied on February 23, 2021 because the allotment for allowable signage had already been used and therefore no new signage could be approved. Again, the petitioner is requesting an Appeal of the decision to deny sign permit application #C21-060. Staff recommends denial of AA-03-21 based on the recommendation outlined in the staff report.

Mike Carmin, legal counsel for the petitioner, said the permit issued on February 9, 2021 was improperly issued. The fourth pole sign available for this PUD is owned by Whitehall Associates and it was their sign to apply for. Bryan Rental, the party identified on the permit application for the signs that were approved, had no sign rights and no right to the full sign and they knew it. The City's Corporation Counsel already said that in December of 2018. Carmin referenced the first approved sign that Gulick showed which had a tenant panel as (At Home) at the top. The huge Kmart sign that used to be located there is now At Home, and that is one of the four pole signs that Kmart owned. Carmin went on to say that Planning staff files are full of documents that demonstrate that Whitehall Associates owns the fourth (allowed) sign and that Bryan Rentals shouldn't have been granted a sign permit. He directed the BZA to look at pages 44 through 49 or 50 of the BZA's information packet which outlines the deed for this property. Bryan Rentals is not even the owner of the property involved. He talked about the history of the PUD including the phasing of the development and how it's broken into 5 phases. The permit issued to Bryan Rentals needs to be overturned and denied. He didn't understand why the City didn't act to suspend the permit since they've known since early February this Administrative Appeal was coming. He said Whitehall remains the developer with the right to that fourth pole sign. The denial of his client's permit application should be reversed.

BZA Discussion:

Jo Throckmorton asked Staff to respond to the issue that was outlined on page 28 of the information packet regarding the email from Philippa Guthrie. The email appears to state clearly that Whitehall must release their sign rights. What is Staff's response to that argument? Mike Rouker, City Attorney, said he wanted to clarify that he didn't agree with Mr. Carmin's characterization of the final sentence that is highlighted. It does not indicate that Whitehall Associates is the owner. Regarding sign rights; it simply states that if

either Bryan Rentals or Whitehall Associates were to obtain approval, Staff would require approval from the owner. It's unfortunate but the City would prefer that these two parties, these two separate owners—Bryan Rentals and Whitehall Associates, speak to each other and communicate to sort out their private dispute before they come to the City. Rouker believes it's unclear that there was such a requirement and doesn't know where any such requirement exists in code or in any of the PUD documents. He said he's never seen such a requirement that consent would be required from another owner in this particular circumstance. Barre Klapper said there is nothing in our ordinance right now that requires an owner to define who has permitting privileges? Rouker responded that is precisely the issue. He said he's spoken to Mr. Carmin about this on some level and the City's strong preference would be for Bryan Rentals and Whitehall Associates to take their dispute to a Judge to sort out who's got rights to what sign, or try to come to some sort of agreement privately between the two of them. Obviously, the dispute has been going on for many years and the Planning staff has been placed in the middle of it. Rouker went on to say that the City doesn't have a preference for either party having the sign; four signs are permitted though. Scanlan advised what is at issue is whether or not Staff's decision to deny the fifth permit application was valid. The petitioner is also asking the BZA whether or not Staff's decision to deny their permit was valid. Scanlan reiterated that their permit was denied because only four permits could be issued for the PUD and Staff couldn't issue anymore. Discussion ensued regarding rights on appeal. Rouker explained that if someone wanted to appeal the issuance of the assigned permit and this Board believed that it was issued improperly, and that the design of the sign was flawed, or that it was in excess of the number of permits permitted then the BZA could do that. There are rights to appeal any decision of the BZA which has happened multiple times to the Monroe County Circuit Court. Rouker added that the City believes the owner has the sign rights and not the developer. We've said from the beginning that if we were to get a subsequent order from a Judge agreeing with Mr. Carmin's interpretation, we would be happy to be compliant with that decision but we don't think that is the case.

No public comments.

****Throckmorton moved to deny AA-03-21 based on the recommendation outlined in the staff report. Sandberg seconded. Motion carried 5:0—Administrative Appeal is denied.**

Meeting adjourned.