

**BEFORE THE BOARD OF ZONING AND PLANNING OF  
THE CITY OF BEXLEY, OHIO**

In the matter of:  
Property – 2200 E. Main Street  
Owner – Continental Real Estate Co.

BZAP File # 23-23  
*Requests for Certificate of Appropriateness,  
Special Permit, and Variances*

**MEMORANDUM OF THE ALEXANDER CONDOMINIUM ASSOCIATION, INC.  
CONCERNING THE REQUESTS FOR A CERTIFICATE OF APPROPRIATENESS,  
SPECIAL PERMIT, AND VARIANCES FOR THE PROPERTY LOCATED AT  
2200 E. MAIN STREET, BEXLEY, OHIO**

**I. INTRODUCTION**

The Alexander Condominium Association, Inc., an Ohio not for profit corporation (“the Association”), is a condominium association formed pursuant to Chapter 5311 of the Ohio Revised Code. It exists to administer, govern, and oversee the Alexander Condominium (“the Condominium”), a residential condominium consisting of thirty-one (31) units. The Association, through its Board of Directors, possesses the authority to commence, defend, intervene in, settle, or compromise any land use planning or administrative action or proceeding that impacts zoning, or otherwise relates to matters affecting the Condominium’s property.

Continental Real Estate Companies (“Continental”) intends to redevelop property that is adjacent to the Condominium at 2200 E. Main Street, Bexley, Ohio 43029 (“the Property”) into a high-density, mixed-use development. The proposed development will significantly and detrimentally affect the Condominium and its many unit owners as demonstrated herein, and thus the Association opposes the ill-suited mixed-use development that Continental intends to construct on the Property.

As a threshold matter, it should be stressed that the Association does not blindly oppose *any* redevelopment of the Property. Rather, the Association merely desires, encourages, and demands that any future development of the Property be reasonable and compatible with the

structures and uses in the existing area. This includes recognizing the distinct historic architectural features and styles found along Main Street in Bexley, Ohio (“the City”), as well as taking into consideration the effect that any development of the Property will have on surrounding residential properties, including the Condominium in particular.

In this case, the Association’s concerns regarding the proposed development of the Property are reasonable and practical because of the effects the development will have on the Condominium, specifically, as well as other surrounding neighborhoods. For example, because of an ingress and egress easement that crosses the Condominium from South Parkview Avenue to the Property – an easement that will be used as a primary entrance to and exit from the development – and the Condominium’s location and proximity to the development, the Association and the Condominium’s unit owners stand to be impacted by the development of the Property in a way unique from any other residential or commercial property owner in the City.<sup>1</sup> For these reasons, which are set forth in greater detail below, the Association requests that the Board of Zoning and Planning (“BZAP”) deny Continental’s requests for a certificate of appropriateness, special permit, and variances.

## **II. BACKGROUND**

The Property is approximately 2.97 acres of land located at 2160 – 2184 East Main Street<sup>2</sup> that is currently developed with five buildings. The five buildings include three (3) apartment buildings with a total of thirty six (36) one-bedroom units, and two townhome style buildings that together contain a total of ten (10) three-bedroom units and fourteen (14) two-

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<sup>1</sup> The Association does not concede or accept that Continental’s intended use of the easement is lawful and permitted. To the contrary, the Association contends that the nature of the redevelopment of the Property proposed by Continental will constitute an unlawful and unreasonable expansion of the scope of the easement, and thus is not allowed. The Association reserves all rights to bring any action related to or otherwise defend against any unlawful use of the easement.

<sup>2</sup> The City has assigned an address of 2200 E. Main to the Property.

bedroom units; accordingly, there are currently sixty (60) dwelling units containing a total of ninety-four (94) bedrooms located on the Property, which represents a current density of roughly 20.20 dwelling units per acre.

The Property is comprised of three parcels (identified by the Franklin County Auditor as Parcel Nos.: 020-000217; 020-000350; and 020-000836) and is primarily located in a Mixed-Use Commercial (MUC) district and Main Street (MS) overlay district. The Property is bounded to the west by Bexley Gateway, the Condominium, and single-family homes. To the north of the Property are single-family residences, and to the east is Bexley Square where City offices and other businesses are located. The south side of the Property fronts Main Street.

Continental proposes to construct a six-story mixed use building on the Property that will include residential, restaurant, retail, and office uses (“the Development”). The Development will specifically contain two hundred thirty-two (232) residential units (**a proposed growth in density from the existing 20.20 dwelling units per acre to approximately 78.11 dwelling units per acre, which is an increase of almost 287%!** ), approximately 6,100 SF of restaurant space, 5,050 SF of retail space, and 12,500 SF of office space. At its tallest point, the Development will be a towering sixty-six (66) feet above the surrounding properties.

Continental also proposes to provide approximately 300 parking spaces, despite the required minimum number of parking spaces in the Main Street district being at least 414.<sup>3</sup> The proposed number of parking spaces raises additional concerns given that the Property may be benefitted by certain tax increment financing (“the TIF”) that designates the parking and parking garage as a “public improvements,” and thus the parking spaces will be available for public use.

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<sup>3</sup> Pursuant to B.C.O. § 1254.13(II), the required spaces for new buildings in the MS district are 1.5 per housing unit (lower and upper floors), 4 per 1,000 SF of restaurant space, 3 per 1,000 SF of non-destination (i.e. less than 10,000 SF) retail, and 2 per 1,000 SF of upper floor office.

If that is the case, a reasonable presumption arises that many of the 300 parking spaces planned for the Development will be used at any time by vehicles that do not belong to residents, occupants, invitees or guests of the Property, which will only further cause congestion and other parking issues.

The Development will have numerous detrimental effects on the surrounding neighborhoods and properties. First and foremost, the Development will forever change the aesthetics and character of this unique area of the City. No longer will Bexley's Main Street be thought of as a unique, quaint, and historic corridor. Instead, it will simply become the next target of contemporary development and a product of calls from a few individuals of a need for "more density." Ironically, and practically proving the point, Continental has submitted drawings from other developments (Kingsdale, Arlington Gateway, and Norton) which show how similar the proposed plans for the Property are to other new construction projects. Just as has happened in these other areas, the unique and historic characteristics of the Main Street district and surrounding neighborhoods will be eroded, and in due time the area will hardly be distinguishable from other "up and coming" regions around Columbus, Ohio.

Aside from the Development's complete and utter failure to consider the aesthetics of the Main Street district in its designs, the detrimental effects that the Development will have on parking, congestion (vehicular and pedestrian), and safety, just to name a few things, are all-but-certain. For instance, how can adding such substantial residential and commercial uses as proposed in the Development, but without nearly the required amount of parking, not be expected to cause future issues with parking and traffic for everyone? It takes only a cursory review of the proposal and plans for these concerns to become apparent, and it is nonsensical to pretend that they will not be serious issues to contend with in the future.

To be sure, if the Development proceeds the Condominium residents and the Association will undoubtedly suffer the most direct adverse effects from the project. As the Development's site plan reflects, a twenty-two (22) foot wide roadway will exist no more than ten (10) feet away from the east side of the Condominium. Occupants of units on that side of the Condominium will thus be required to contend with the noise, odors, fumes, vibrations, and other negative externalities that will naturally arise from the heavy traffic associated with the two hundred thirty-two (232) residential units, as well as the significant office, retail and restaurant use. Additionally, those on the north side of the Condominium incur the same type of nuisances from the increased traffic that will avail itself of the easement that crosses over the property – a private drive easement that will effectively be converted into a public thoroughfare, thereby creating significant safety and congestion issues for Condominium unit owners seeking to enter and exit from their garages located thereon. Additionally, the placement of the building will detrimentally impact the Condominium eastern units' access to natural light and views. All told, at least twenty-two (22) of the Condominium's thirty-one (31) units, over two-thirds of the units, will be significantly and negatively impacted by the Development.

The Development cannot proceed without several approvals from BZAP. Specifically, BZAP must approve a certificate of appropriateness, a special permit, and two variances. The certificate of appropriateness is required for any development in the MS district. The special permit is necessary because Continental intends to build a five story building in the MS district, and the variances are for necessary because Continental seeks a reduction in the required number of parking spaces (surprisingly, a specific variance amount has not been identified) and to allow a sixth floor on the building.

BZAP should not approve the certificate of appropriateness, special permit, and variances necessary for the Development to proceed. Broadly speaking, the detrimental effects that the Development will bestow on the surrounding properties vastly outweigh any benefits that it stands to deliver to the current residents or the City (indeed, in what way does the Development stand to benefit the *existing* residents or the City at all?). Further, Continental has completely failed to show how it has encountered practical difficulties which are required for it to be entitled to the variances that are sought. When these considerations are taken into account and properly weighed, the only proper, fair, and just choice for BZAP to make here is to withhold approvals for Continental's requests for a certificate of appropriateness, special permit, and variances.

### **III. APPLICABLE LAW**

- A. *BZAP should not grant a certificate of appropriateness as the Development is not compatible with the existing architecture in the area and will otherwise be detrimental to neighboring properties.*

Pursuant to B.C.O. § 1220.02(q), it is BZAP's duty to hear, review and determine certificates of appropriateness regarding new development, alterations, or additions in the MS district. Certificates of appropriateness are products of the architectural review set forth in Chapter 1223 of the Bexley Code. As Chapter 1223 makes clear, the purpose behind architectural review arises from the recognition that:

High quality architecture and overall aesthetic and physical attributes in the residential, commercial, and mixed-use districts of Bexley have played a large part in maintaining residential property values and the overall quality of life in the City. Residential property values have been maintained, in significant part, due to the City's unique physical attributes such as high quality homes built primarily in the early and mid 20th century and reflecting the diverse architectural styles and sizes of that period, distinctive established neighborhoods, and plentiful mature trees and landscaping on both public and private property.

B.C.O. § 1223.01(a)

To that end, architectural review was established to meet several goals:

1. to balance the benefits of preserving the City's existing quality and character against the benefits of responsible renewal and redevelopment of the City's aging commercial and housing stock;
2. to maintain the quality of residential neighborhoods and commercial corridors in the City;
3. preserve and enhance the existing character of various residential neighborhoods in the City by encouraging the retention of buildings which have historic, architectural or cultural value or which are otherwise worthy of preservation, maintaining lot size and building scale appropriate to each neighborhood, and minimizing or avoiding the adverse potential impacts of vacant lots within fully developed neighborhoods;
4. protect and preserve property values and the City's tax base; and
5. to promote the general welfare by regulating the demolition or removal of existing structures, the exterior characteristics of new structures and the modification of existing structures throughout the City.

B.C.O. § 1223.01(b).

Also pertinent is B.C.O. § 1220.07(a), which provides in part that:

No building, structure or space within the Main Street District \* \* \* shall be constructed \* \* \* unless and until the plans and specifications for such building, structure or space, including the landscape plan for the premises on which it is or will be located (if relevant), have been approved by the Board of Zoning and Planning. \* \* \* The BZAP will also consider the architectural style and building composition (including design elements such as entrances, storefronts, upper stories and mechanical screening), and exterior building materials and color, based upon a recommendation of the Architectural Review Board as requested by the BZAP.

The Board, in deciding whether to approve an application under this section, shall determine that the site and design plans for such buildings, structures and spaces as proposed by the applicant are in keeping with the purpose and intent of the Main Street District, the applicable sub-district and the design guidelines contemplated by subsection (b) hereof [i.e. the Main Street Guidelines], \* \* \*, and that such plans would not have a substantial detrimental impact on neighboring properties.

In this case, the primary structure that will comprise the Development falls short of many of the factors that would warrant a certificate of appropriateness being issued. First, the Development conflicts with several provisions of the Main Street Guidelines, including: i.) that building heights for mixed-use buildings on the north side of Main Street from Alum Creek to South Dawson Avenue be limited to four (4) floors or 50 feet (pg. 49, Table 4 of MS Guidelines); ii.) Section 14.1, which requires that new buildings be architecturally compatible with and complement existing buildings currently on Main Street;<sup>4</sup> iii.) Section 14.3, which requires that architectural design should take “cues” from the best elements on Main Street; iv.) Section 14.4, which requires that rear elevation of buildings be attractively designed; and v.) Section 14.5, which requires that all buildings consist of four-sided architecture.

Indeed, the building set forth in the Development conflicts with many of these guidelines by exceeding the recommended height along Main Street, being overly massive in scale, lacking compatibility or complimenting features of existing buildings, being out of harmony with the existing buildings on Main Street, and failing to incorporate four-sided architecture.

Aside from those issues, public comments from residents have diametrically shown utmost concern about the effects that the Development will have on nearby residential neighborhoods, and in particular, residential properties. To be sure, no opinion or belief has been shared by any Condominium residents or residents from Bryden Avenue that the Development is compatible with the existing properties and uses, let alone that it will enhance them.

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<sup>4</sup> Land use compatibility has been defined as “[t]he characteristics of different uses or activities or design which allow them to be located near or adjacent to each other in harmony. Some elements affecting compatibility include height, scale, mass and bulk of structures. Other characteristics include pedestrian or vehicular traffic, circulation, access and parking impacts. Other important characteristics that affect compatibility are architecture, landscaping, lighting, noise and odor. Compatibility does not mean ‘the same as’. Rather, compatibility refers to the sensitivity of development proposals in maintaining the character of existing development.” Land Use Compatibility, <https://www.fairfaxcounty.gov/planning-development/sites/planning-development/files/assets/documents/complanamend/sspa/land-use-compatibility-tutorial.pdf> (citing A Planners Dictionary, PAS Report #521/522, American Planning Association, Chicago, IL, 2004, page 243).



There is also a great concern about the effect that the Development will have on the significant property values in the area. The Franklin County Auditor's records show that the assessed property values of the residences in the immediate area are estimated to be approximately \$45,467,100.00.<sup>5</sup> This not only reflects the incredibly high value of the properties that stands to be impacted, but also the tremendous investment that has been made in the City by its current residents. That the Development will detrimentally impact and likely diminish such a large value of real estate cannot be ignored, and in fact is an expressed basis under the Bexley Code to withhold a certificate of appropriateness.

For all these reasons, the Association requests that BZAP deny a certificate of appropriateness for the Development.

*B. BZAP should deny the request for a special permit to allow a five story building on the Property as none of the considerations set forth in the Bexley Code to justify such a special permit are met in this case.*

Continental seeks to construct a building that will have a maximum height of five to six stories. Pertinent here, B.C.O. § 1254.10 restricts the maximum height of principal buildings in the MS district to three (3) stories, and thus the proposed building is not permitted by right in the MS district. However, with a special permit a principal building on the Property may be constructed up to five stories (taller buildings may be constructed on properties in the MS district that are west of Sheridan Avenue and south of Main Street). Thus, Continental seeks a special permit to allow construction of the building.

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<sup>5</sup> This valuation is the aggregate value of single family residences on Bryden Road between S. Parkview Avenue and Drexel Avenue, the ownership interests comprising the Condominium, and townhouses and single-family residences on the east side of S. Parkview south of Bryden Road. Ex. A.

Pursuant to B.C.O. §§ 1220.02(p) and 1226.13, BZAP is charged with granting special permits as authorized in the Zoning Code. Given that the Property is in the MS district, B.C.O. § 1254.14 is applicable here and provides the following:

Special permits to allow the maximum height of a structure as provided in Section 1254.10 of up to 5 stories or up to 7 stories west of Sheridan Avenue and south of Main Street, may be granted based upon any of the following considerations:

- (a) The extent to which the proposed property and site design conform to the intent of the Main Street Design Guidelines.
- (b) The extent to which the proposed development represents exceptional architectural and site design.
- (c) The extent to which the design helps to mitigate a substantial impact upon adjacent single family residential uses.
- (d) Compatibility of architecture and site design to the surrounding uses and structures.
- (e) The extent to which the development creates meaningful pedestrian and public amenity spaces.
- (f) The extent to which the development provides public parking.

Here, the Development falls short on each of these considerations, which would make any approval of a special permit completely arbitrary, capricious and unsupported by any evidence or justification. First, as discussed above the proposed design fails to conform to the intent of the Main Street Design Guidelines, and in fact runs afoul of many of them. Second, there has been no showing that the Development incorporates “exceptional architectural and site design,” which is evident by the Architectural Review Board’s past and ongoing concerns about the Development’s design (in particular, the architecture and impact of the building), as well as the City’s Tree Commission’s recent recommendation that “the landscape plan be found not to represent exceptional design insofar as the landscaping design is considered in determining under [B.C.O. § 1254.14].” Third, nothing suggests that the building’s design mitigates substantial

impact on adjacent single family residential uses. Fourth, the architecture and sight design lack any meaningful compatibility to the surrounding uses and structures. In fact, the contrary is evident by the massive scaling of the project and the many concerns that have continually been raised by property owners in the area—including, specifically, concerns about the effects of the twenty-two foot wide roadway that is planned to run directly next to the Condominium. There also has been no showing that the Development will create meaningful pedestrian and public amenity spaces. Finally, while the TIF proposed for the Development does designate the parking garage and parking as being “public improvements,” there is no indication how much of the parking will in fact be designated as for the “public,” as opposed for the use of the residents, occupants, guests and invitees of the Development.

Therefore, there is no basis to grant a special permit that will allow the Development to be comprised of a building that is five floors tall, and BZAP should deny the request.

- C. *BZAP should deny the requests for a parking variance and height variance because there is insufficient evidence to demonstrate that any practical difficulties exist that relate to the Property.*

Two sources of law must be consulted to determine the factors that BZAP must consider and the fundamental analysis which must be followed to grant the requested variances. The first source of authority is Ohio case law, which provides substantive requirements that are relevant and which closely resemble those found in the Bexley Code of Ordinances. In particular, the holdings of *Duncan v. Village of Middlefield*, 23 Ohio St.3d 83 (1986), and of several cases decided since the *Duncan*, are applicable.

In *Duncan*, the Ohio Supreme Court discussed the concept of “practical difficulties,” the standard that a property owner must establish in order to be granted an area zoning variance, as follows:

In adopting the lesser, practical difficulties standard for area variances, we relied, in part, upon the analysis of the New York Court of Appeals in *Matter of Hoffman v. Harris* (1966), 17 N.Y. 2d 138, 269 N.Y. Supp. 2d 119, 216 N.E.2d 326. In *Harris*, the court effectively determined that in reviewing an application for an area variance, where "neighborhood considerations are not as strong as in a use variance," *id.* at 144, the "spirit" rather than the "strict letter" of the zoning ordinance should be observed so that "substantial justice [is] done," *id.* at 147. In observing the spirit of an ordinance and attempting to do substantial justice, a zoning board of appeals or a reviewing court necessarily must weigh the competing interests of the property owner and the community. ***When an area variance is sought, therefore, the property owner is required to show that the application of an area zoning requirement to his property is inequitable.***

While existing definitions of "practical difficulties" are often nebulous, it can safely be said that a property owner encounters "practical difficulties" whenever an area zoning requirement (e.g., frontage, setback, height) unreasonably deprives him of a permitted use of his property. ***The key to this standard is whether the area zoning requirement, as applied to the property owner in question, is reasonable.*** The practical difficulties standard differs from the unnecessary hardship standard normally applied in use variance cases, because no single factor controls in a determination of practical difficulties. A property owner is not denied the opportunity to establish practical difficulties, for example, simply because he purchased the property with knowledge of the zoning restrictions. *Kisil, supra*, at 33; cf. *Consolidated Mgmt., Inc. v. Cleveland* (1983), 6 Ohio St.3d 238.

*Duncan* at 86 (emphasis added).

The *Duncan* Court then went on to enumerate the following seven factors that, at a minimum, a board ***must*** examine when deciding whether to grant a landowner an area variance:

- (1) whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance;
- (2) whether the variance is substantial;
- (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance;

(4) whether the variance would adversely affect the delivery of governmental services (e.g., water, sewer, garbage);

(5) whether the property owner purchased the property with knowledge of the zoning restriction;

(6) whether the property owner's predicament feasibly can be obviated through some method other than a variance;

(7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.

*Id.*

As the *Duncan* Court further observed, while no single factor is dispositive, all the factors should be considered to answer the fundamental question as to whether an area variance should be granted under the "practical difficulties" standard and whether the zoning requirement, as applied to the property owner in question, is reasonable and practical. *Id.*

The second source of law is the Bexley Code of Ordinances, B.C.O. § 1226.11(c), which states:

The BZAP shall have the power to grant area (non-use) variances from the provisions of this Zoning Code except for a variance from the minimum lot requirements of any district, which may only be determined by City Council applying the standards for an area variance. \* \* \* BZAP and City Council ***shall only approve a request for an area (non-use) variance in cases where the evidence demonstrates that the literal enforcement of this Code will result in practical difficulty and the granting of a variance complies with the purpose and intent of this Code.*** The following factors ***shall be considered and weighed*** by the Board when making a determination upon any area (non-use) variances by a preponderance of the evidence:

(1) Whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance;

(2) Whether the variance is substantial;

(3) Whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance;

(4) Whether the variance would adversely affect the delivery of governmental services (e.g., water, sewer, garbage);

(5) Whether the property owner purchased the property with knowledge of the zoning restriction;

(6) Whether the property owner's predicament feasibly can be obviated through some method other than a variance;

(7) Whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.

Clearly, B.C.O. § 1226.11(c) mimics the standards set forth in *Duncan*, and together the two authorities establish several important points. First, BZAP must weigh all of the factors to determine whether practical difficulties exist. Second, the burden is on the applicant, i.e. Continental in this case, to establish by a preponderance of the evidence that practical difficulties are present. And finally, if all the factors are not weighed or the applicant fails to meet its burden, the variances cannot be approved.

Here, each of these factors weighs against granting the variances, or at best a select few of them are neutral. Thus, no basis exists that justifies granting the requested variances.

Factor No. 1: Whether the Property in question will yield a reasonable return or whether there can be any beneficial use of the Property without the variances.

To date, Continental has not produced any evidence or argument that the Property cannot yield a reasonable return or that there can be no beneficial use of the Property without the variances. Indeed, that is not the case.

First and foremost, the Property *is already developed* and capable of being put to beneficial use. As set forth above, there are numerous residential units on the Property in apartment and townhome style arrangements. This use has been going on for many years, and nothing suggests that it must end. Additionally, Continental originally intended that the

Development consist of a five-story building. The sixth story of the building only came about in response to comments and suggestions from the Architectural Review Board – put differently, the height variance to for a sixth story does not arise from practical difficulties related to the property and regulations in the City’s zoning code, but rather is an attempt to satisfy the aesthetic preferences of certain decision-makers.

It is significant that the *Duncan* Court stressed that it was not an error to prevent a property owner from the greatest possible use of a lot. *Duncan* at 88. In other words, just like the property owners in *Duncan*, Continental *could* have a beneficial use of the Property without the variances, and BZAP is not required to ensure that Continental can use the Property to its greatest possible benefit. *See also Consolidated Management, Inc., et al. v. City of Cleveland, et al.*, 6 Ohio St.3d 238, 452 N.E.2d 1287, paragraph 2 of syllabus (1983) (stating, in a case involving a review under unnecessary hardship, that the mere fact that one’s property can be put to a more profitable use does not, in itself, establish an unnecessary hardship where less profitable alternatives are available within the zoning classification). Thus, it is reasonable and proper to apply the area standards for the MS district to the Property, and this factor weighs against granting the variances.

Factor No. 2: Whether the variance is substantial.

The requested variances are substantial. First, the request for a sixth floor is unprecedented in the MS district, and it constitutes a one hundred percent (100%) increase in the three-floor maximum building height permitted in B.C.O. § 1254.10. Likewise, it goes beyond the maximum amount allowed through a special permit (which, in and of itself brings into question the appropriateness of granting such a variance in this case), as well as the recommended height in the MS district found in the Main Street Guidelines.

The variance requested for the parking is also substantial. The amount of parking being provided for the proposed uses in the Development is approximately twenty-five percent (25%) less than what the City's zoning code requires. While this is already a significant deviation from the required number of parking spaces, the difference becomes even more significant when one takes into consideration that the parking garage has been designated in the TIF as a "public improvement." Typically a variance will be measured by the number of spaces provided compared to the number of spaces required, but that analysis does not apply in this case since a number of parking spaces will undoubtedly be used by the public (to be sure, the exact number of parking spaces that will be used by the public is unknown). In other words, a parking variance in this case is even more substantial given that the number of parking spaces available for the residents, occupants, guests and invitees of the Development could vary based upon public demand.

Thus, this factor weighs against the variances.

Factor No. 3: Whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance.

Continental has failed to show that the essential character of the neighborhood will not be substantially altered or that adjoining properties will not suffer a substantial detriment as a result of the Development. To the contrary, the very drawings and plans submitted by Continental demonstrate that the Development will cause the character of the surrounding neighborhood to be substantially altered due to the building's massive scale, height, and architecture, each of which is unlike any other structure currently existing in the City.

Additionally, there is irrefutable evidence that adjoining properties will suffer a substantial detriment because of the variance. As set forth above, the Condominium, in



particular, stands to suffer numerous unique harms from: i.) an increased burden on its property via an easement to enter and exit the Development; ii.) a twenty-two (22) foot wide road planned to run no more than ten (10) feet from the Condominium's eastern edge; and iii.) the loss of practically all natural light and views for the eastern units.

For these reasons, this factor weighs against granting the variances.

Factor No. 4. Whether the variance would adversely affect the delivery of governmental services (e.g. water, sewer, garbage).

At this point, there is still a question as to whether the Development, as proposed, will adversely affect the delivery of governmental services. Of particular concern to the Association is the ability of emergency personnel (firefighters and EMS in particular) to respond to emergencies at the Development and other surrounding properties (including specifically, the Condominium). Until it is unequivocally established that the delivery of such governmental services will not be impeded, BZAP must err on the side of caution and find that this factor weighs against granting the variances as well.

Factor No. 5: Whether the property owner purchased the property with knowledge of the zoning restriction.

Pertinent to this factor, it is not believed that Continental has, in fact, purchased the Property. Rather, it appears to be under contract to purchase the Property, and thus it has knowledge of the zoning restriction. Importantly, too, given that Continental has knowledge of the zoning restrictions prior to purchasing the Property, it still has an opportunity to negotiate with the seller (Capital University) to structure an agreement that will allow for development of the Property without the need for any variances. This factor, therefore, weighs against granting the requested variances.

Factor No. 6: Whether the property owner's predicament feasibly can be obviated through some method other than a variance.

There is no evidence that the predicament cannot feasibly be obviated through some method other than a variance. Alternative designs, including simply building a smaller structure with more parking, would remove the need for any variances. As set forth above, Continental previously proposed a design that would not have required a variance for height at all, and it still has an opportunity to negotiate a transaction with the current owner that will remove the need for any variances. Thus, this factor weighs against granting the variances as well.

Factor No. 7: Whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.

The spirit and intent behind the zoning requirement would not be observed and substantial justice would not be done by granting the variance. Pertinent here, the intent behind the MS district is to add additional protections and guidelines for the development of properties located along Main Street. This intent is buttressed by the substantial, and detailed, Main Street Guidelines that are supposed to be used as a tool in assuring quality development in the corridor. That the requested variances will allow for a project which deviates so significantly from the established guidelines demonstrates that the spirit and intent behind the zoning requirements would not be served.

Additionally, a substantial **injustice** will occur if the variances are granted. Nothing in the City's zoning code or comprehensive plans suggest that a project of the Development's mass and scope would ever be constructed upon the Property. Therefore, surrounding property owners, including those that comprise the Association, were never given any type of notice whatsoever that such a development of the Property could ever occur. That they should be made to suffer from the effects of the Development under these circumstances is certainly not just.

Finally, the Association is responsible for maintaining, repairing, and replacing the portion of the Condominium property where the private-drive easement is located. The additional traffic and use of that easement that will arise from the Development will certainly cause the maintenance, repair, and replacement needs to increase, and thus the costs incurred by the Association will increase as well.<sup>6</sup> It is entirely unjust to allow the Development to proceed against the interests of the Association while at the same time saddling the Association (in actuality, the Condominium's unit owners) with increased costs to facilitate access to the Development.

Therefore, this factor weighs against granting the variances as well.

*D. Additional considerations pertaining to the Development.*

Aside from the points raised above, there are several other concerns pertaining to the feasibility and legality of the Development's proposed design that BZAP must take into consideration. The first, which has been briefly discussed, is the easement that burdens the Condominium property and which is intended to be used as an ingress and egress for the future residential and business uses. That easement was established almost twenty years ago, and it provides that it is intended to be a "perpetual non-exclusive easement for purposes of ingress and egress, **and for all customary private drive purposes** for use by vehicles and for pedestrians' use, from South Parkview Avenue to and from [the Property]." Indeed, the easement has been used for such purposes since its inception.

The Development's proposed design raises multiple issues related to the easement. First, the easement will no longer be used to access a moderately dense residential development, and

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<sup>6</sup> The costs to maintain, repair and replace common elements in a condominium are funded through assessments paid by unit owners. Therefore, it is the Condominium's unit owners who will bear the increased costs that arise from the use of the easement related to the Development.

instead it will be converted into an access point for a high-density, multi-use development composed of many more residential units and substantial commercial uses. Additionally, it is unquestionable that individuals who are not residents, occupants, invitees or guests at the Property will avail themselves of the easement. To be sure, the easement will be used to access properties to the east of the Property (including, without limitation, Bexley Square), and other properties as well – which appears to be an intended purpose of the Development given the parking garage’s designation as a public improvement. As such, the easement’s use will effectively change from that of a “customary private drive” to a public drive for use by the general public. Each of these constitutes a use of the easement that goes beyond its scope, and which will result in the termination of the easement. Thus, any reliance upon the easement as an ingress and egress point to the Development is misplaced.

Second, the Condominium unit owners possess an easement right upon the Property for sixteen (16) parking spaces. Thus far, there has been no mention of this right by Continental, or how the Development will accommodate the right that the Condominium’s unit owners have to sixteen (16) parking spaces on the Property (which, to be sure, is an additional consideration when evaluating the appropriateness of the requested parking variance). Given the parking situation created by the Development, should this issue not be determined ahead of any approvals that allow the Development to proceed?

Third, the Traffic Impact Study dated November 22, 2023, appears to contain fundamental flaws which draw into question the accuracy of its conclusions. For instance, the proposed site trip generation summary found in Table 1 on page 4 of the study reflects proposed site trips arising from multi-family (mid-rise) housing of 232 dwelling units, general office building of 12,450 SF, strip retail plaza of 5,000 SF, and high-turnover (sit-down) restaurant of

6,000 SF. It does not, however, account for the fact that the parking garage is being designated as a public improvement and that trips will be generated for uses not associated with those in the Development. Indeed, if the parking garage could be used for patrons of other restaurants, businesses, and uses in the area, but that is not taken into account, does the study not omit a material element or circumstance that warrants consideration?

That this technical traffic study was released to the public on November 27th, only three business days ahead of the BZAP meeting, is troubling, unacceptable, and a violation of due process. Three days is an insufficient amount of time for interested parties to have the study independently reviewed, or to perform a review on their own. Such a small timeframe also draws into question the extent to which City officials could have conducted a thorough and meaningful review. Therefore, given the extent to which traffic in the City is a concern and will be impacted by the Development, BZAP must, at a minimum, continue the hearing to a later date to allow a thorough and independent review of the study.

Fourth, B.C.O. § 1254.13(jj) explicitly and unambiguously states that “[a]dditional curb cuts are not permitted” in the MS district. Here, the Development *does* include an additional curb cut on the western side of the Property despite such features being explicitly prohibited and no variance being sought. To the extent that closing the right-out only cut from the Bexley Square parcel is taken as a trade-off, nothing in the Bexley Code of Ordinances contemplates or allows for such manipulation of the ingress and egress points along Main Street. Moreover, the curb-cut that is proposed to be closed off is a right-out only, whereas the curb-cut that is proposed to be opened is a right-in & right-out point. Thus, the two are not comparable, and the new curb-cut is not permitted. Any approval that is reliant upon and incorporates that ingress and egress point, then, would be inherently defective and subject to reversal.

These additional issues are simply other factors which are pertinent to BZAP's decisions to approve a certificate of appropriateness, special permit, or variances and, as demonstrated, weigh against granting said requests. If nothing else, however, they show that additional time is warranted and necessary to allow these concerns to be addressed so that any redevelopment of the Property has a likelihood of success in the future.

For these reasons, BZAP should deny the requested certificate of appropriateness, special permit, and variance at this time.

#### **IV. CONCLUSION**

As set forth herein, the Development is not compatible with neighboring properties or the standards of the Main Street district. Additionally, the Development will have numerous serious and detrimental effects on adjacent and other nearby properties, and Continental has not shown any "practical difficulties" that entitle it to any of the variances. As a result, Continental is not entitled to, nor should BZAP grant, the requests for a certificate of appropriateness, a special permit, or the variances. Accordingly, BZAP should deny those requests.

Alternatively, and at a minimum, BZAP should table this application to a later date so that it, and the traffic study in particular, can be given a thorough and meaningful review.

Respectfully submitted,

By: /s/ Bryan S. Hunt  
Bryan S. Hunt (0095519)  
Loveland Law, LLC  
3300 Riverside Drive - Suite 125  
Upper Arlington, Ohio 43221  
Telephone: 1-614-928-9107  
Facsimile: 1-614-737-9857  
E-mail: bshunt@lovelandlaw.net

*Attorney for The Alexander Condominium  
Association, Inc.*

## **EXHIBIT A**

### **List of Property Values**

<b><u>ADDRESS/LOCATION</u></b>	<b><u>FRANKLIN COUNTY AUDITOR 2023 APPRAISED VALUE</u></b>
Alexander Unit 200	\$625,000
Alexander Unit 201	\$720,300
Alexander Unit 202	\$477,500
Alexander Unit 203	\$477,500
Alexander Unit 204	\$391,900
Alexander Unit 205	\$477,500
Alexander Unit 206	\$423,500
Alexander Unit 207	\$521,100
Alexander Unit 208	\$557,200
Alexander Unit 300	\$675,700
Alexander Unit 301	\$783,000
Alexander Unit 302	\$527,500
Alexander Unit 303	\$527,500
Alexander Unit 304	\$451,400
Alexander Unit 305	\$527,500
Alexander Unit 306	\$473,500
Alexander Unit 307	\$571,100
Alexander Unit 308	\$607,200
Alexander Unit 400	\$707,500
Alexander Unit 401	\$817,400
Alexander Unit 402	\$557,500
Alexander Unit 403	\$557,500
Alexander Unit 404	\$481,400
Alexander Unit 405	\$557,500
Alexander Unit 406	\$505,900
Alexander Unit 407	\$601,100
Alexander Unit 408	\$637,200
Alexander Penthouse 1	\$948,700
Alexander Penthouse 2	\$1,246,500
Alexander Penthouse 3	\$780,100
Alexander Penthouse 5	\$737,200
Alexander Penthouse 6	\$937,800
Alexander Garage Space N01	\$20,800
Alexander Garage Space N02	\$20,800
Alexander Garage Space N03	\$20,800
Alexander Garage Space N04	\$20,800
Alexander Garage Space N05	\$20,800
Alexander Garage Space N06	\$20,800
Alexander Garage Space N07	\$20,800

<b><u>ADDRESS/LOCATION</u></b>	<b><u>FRANKLIN COUNTY AUDITOR 2023 APPRAISED VALUE</u></b>
Alexander Garage Space N08	\$20,800
Alexander Garage Space N09	\$20,800
Alexander Garage Space N10	\$20,800
Alexander Garage Space N11	\$20,800
Alexander Garage Space S01	\$20,800
Alexander Garage Space S02	\$20,800
Alexander Garage Space S03	\$20,800
Alexander Garage Space S04	\$20,800
Alexander Garage Space S05	\$20,800
Alexander Garage Space S06	\$20,800
Alexander Garage Space S07	\$20,800
Alexander Garage Space S08	\$20,800
Alexander Garage Space S09	\$20,800
Alexander Garage Space S10	\$20,800
Alexander Garage Space S11	\$20,800
Alexander Garage Space S12	\$20,800
Alexander Garage Space S12	\$20,800
Alexander Garage Space E01	\$20,800
Alexander Garage Space E02	\$20,800
Alexander Garage Space E03	\$20,800
Alexander Garage Space E04	\$20,800
Alexander Garage Space E05	\$20,800
Alexander Garage Space W01	\$20,800
Alexander Garage Space W02	\$20,800
Alexander Garage Space W03	\$20,800
Alexander Garage Space C03	\$18,300
Alexander Garage Space C04	\$18,300
Alexander Garage Space C05	\$18,300
Alexander Garage Space C06	\$18,300
Alexander Garage Space C07	\$18,300
Alexander Garage Space C08	\$18,300
Alexander Garage Space C09	\$18,300
Alexander Garage Space C10	\$18,300
Alexander Garage Space C11	\$18,300
Alexander Garage Space C12	\$18,300
Alexander Garage Space C13	\$18,300
Alexander Garage Space C14	\$18,300
Alexander Garage Space C15	\$18,300
Alexander Garage Space C16	\$18,300
Alexander Garage Space C17	\$18,300
Alexander Dt. Garage Sp. DG1	\$10,500
Alexander Dt. Garage Sp. DG2	\$10,500



<b><u>ADDRESS/LOCATION</u></b>	<b><u>FRANKLIN COUNTY AUDITOR 2023 APPRAISED VALUE</u></b>
Alexander Dt. Garage Sp. DG3	\$10,500
Alexander Dt. Garage Sp. DG4	\$10,500
Alexander Dt. Garage Sp. DG5	\$10,500
Alexander Dt. Garage Sp. DG6	\$23,000
Townhouse 510 S Parkview	\$850,000
Townhouse 520 S Parkview	\$740,000
Townhouse 530 S Parkview	\$825,000
Columbia Place 475	\$691,500
Columbia Place 480	\$865,700
Columbia Place 485	\$799,700
Columbia Place 495	\$785,200
Columbia Place 500	\$832,300
Columbia Place 505	\$805,200
Columbia Place 510	\$1,254,800
Bryden Road 2170	\$649,700
Bryden Road 2173	\$565,900
Bryden Road 2177	\$616,900
Bryden Road 2180	\$665,900
Bryden Road 2188	\$629,000
Bryden Road 2191	\$609,600
Bryden Road 2201	\$800,900
Bryden Road 2202	\$584,400
Bryden Road 2206	\$635,900
Bryden Road 2226	\$649,500
Bryden Road 2232	\$764,700
Bryden Road 2237	\$663,400
Bryden Road 2240	\$446,800
Bryden Road 2245	\$919,800
Bryden Road 2250	\$593,600
Bryden Road 2258	\$673,100
Bryden Road 2265	\$733,600
Bryden Road 2270	\$953,800
Bryden Road 2275	\$520,900
Bryden Road 2281	\$648,100
S Parkview 464	\$920,100
S Parkview 470	\$670,500
S Parkview 474	\$683,400
S Parkview 486	\$513,400
GRAND TOTAL	<u>\$45,467,100</u>