

BEFORE THE CITY COUNCIL OF THE CITY OF BEXLEY, OHIO

Ajay Garlapati, <i>et al.</i> ,	:	
	:	City Council Appeal Case No. 21-2
Appellants,	:	
vs.	:	BZAP Application No. BZAP-20-48
	:	
City of Bexley Board of Zoning and Planning, <i>et al.</i>	:	On remand from Franklin County Court of Common Pleas Case No. 12CV3635
	:	
Appellees	:	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND DECISION OF COUNCIL**

This matter comes before City Council on remand from the Franklin County Common Pleas Court in Case No. 12CV3635. In that case, Appellants herein, Leah Turner and Jesse Turner, who is not a party to this action, appealed the decision of this Council assigning as one error council recusing itself from consideration of this case due to actual or perceived conflicts of interests of a majority of its members and finding the decision of the Bexley Board of Planning and Zoning (“BZAP”) was the final decision in this case. Four council members stated on the record they believed they had a conflict, three because they, along with other city officials, are members of the City of Bexley Community Improvement Corporation (“CIC”) who is the designated development authority of the City and a partner in the proposed mixed income housing development that is the subject of this appeal and one who following the BZAP decision and perceived CIC conflicts had brief discussions on alternative development solutions. The court found the recusal improper and remanded this matter for determination by council. Each of those council members affirmed at the hearing that they would follow the direction of the court and would be fair and impartial in their review and determination of the case.

The Parties

The Community Builders, Inc. (“TCB”), a non-profit corporation, is the applicant requesting a conditional use permit to allow dwelling units on the first floor, and dwelling units above the first floor in a proposed new building at the northeast corner of Livingston Avenue and Francis Avenue in the Bexley CS District and the Appellee in this appeal. TCB also requested a certificate of appropriateness for the proposed building. The CIC is collaborating with TCB on this and other projects in the City to create affordable housing opportunities in the city. A CIC representative testified at the hearing but the CIC is not a party to this appeal.

Eight appellants opposed the application and timely filed a notice of appeal of the BZAP decision in this case, including residents Ajay Garlapati, 981 Francis Avenue; Timothy Madison, 956 Pleasant Ridge Avenue; Fehd Massen and Anna Massen, 994 Francis Avenue;

Susan Plaisted, 718 Francis Avenue; Dustin Snow and Tiffany Canfield, 990 Francis Avenue; and Leah Turner, 993 Francis Avenue, Bexley, Ohio 43209. Following the remand, Appellants, Ajay Garlapati and Timothy Madison withdrew as parties from the appeal. Six appellants remain.

The Application

The Applicant intends to demolish the existing funeral home, residential structure and parking lot currently located at 2300 E. Livingston Avenue and proposes to replace it with a three-story mixed-income multi-family building with 27 dwelling units and a 30 space parking lot in the rear. Vehicular access would be from one curb cut on Francis Avenue and two curb cuts would be eliminated on Livingston Avenue.

The property is located in the CS - Commercial Service Zoning District. TCB's proposed development requires a conditional use permit from BZAP to allow dwelling units on the first floor and dwelling units above the first floor. Bexley City Code Section ("BCC") 1254.09. The project met all other development standards of the CS District and the Bexley City Code. A certificate of appropriateness is also required for a new structure that was required to be considered by the Architectural Review Board ("ARB") for review and recommendation to BZAP. ARB recommended BZAP approve the certificate of appropriateness subject to some conditions relating to final design.

BZAP Proceedings and Determination

BZAP conducted a more than 5½ hour virtual hearing on the application commencing on January 28, 2021 and continuing to February 25, 2021. All witnesses were sworn and subject to cross-examination. The city's planning consultant, Jason Sudy, presented a report and testified at the hearing. TCB presented its application and testimony from two of the applicant's representatives, a representative from the Bexley CIC, Nate Green, supporting the project, a traffic expert and an expert in affordable (mixed income) housing in support of the application. Approximately fifteen residents testified, all in opposition to the application stating their personal concerns and observations on a variety of issues including traffic, parking, safety, scale and density, property values and privacy. There was no other opposition testimony.

Following the close of the hearing, BZAP discussed the applicable ordinances, their interpretation and application of the Bexley City Code, and the evidence. BZAP then applied the law to the facts before it and found by a vote of 6 to 1 that the applicant had proven that all the criteria to grant a conditional use in accordance with BCC 1226.12(a)-(h) were met and granted a Conditional Use to allow dwelling units on all 3 floors of this proposed new 3-story building in substantial conformance with the plans submitted to and before the Board on February 25, 2021. BZAP imposed conditions that: final design approvals of a certificate of appropriateness be made by the ARB; final landscaping be approved by the Tree and Public Gardens Commission before the existing structure may be demolished; TCB and any property management company continue to be engaged with the community and participate in the South Bexley Neighborhood Association; and the owner/property management company shall restrict the number of total permitted cars of tenants in the building to no more than thirty (30) cars total. A copy of BCC 1226.12 is attached.

The Appeal

Council considers and determines this appeal pursuant to Section 1226.19 of the Codified Ordinances of the City of Bexley (“Bexley City Code” or “BCC”) upon remand of the initial appeal filed April 30, 2021 of the Decision of the Bexley Board of Zoning and Planning on Application No. BZAP 20-48. Council had before it the decision remanding the case, the entire record including the decision of BZAP, Appellants’ thirteen (13) assigned errors and the briefs of the parties. Proper notices were provided following the remand and oral arguments were held on a date mutually agreed upon by the parties with each party waiving time.

Bexley City Code Sections 1226.19(h) and (i) provide the standards council must apply when consider this appeal as follows:

(h) If upon oral argument, consideration of the record and decision of the Board, and briefs filed pursuant to section (f), Council finds that Appellant has failed to prove, by clear and convincing evidence, the decision of the Board appealed from is not supported by the record or is unreasonable or unlawful, it shall affirm the same.

(i) Council shall give deference to the findings and conclusions of the Board being appealed from and shall not substitute its judgment for the judgment of the Board.

Although Appellants identified thirteen Assignments of Error in their Notice of Appeal, for their brief and argument, Appellants identified and presented arguments on three errors: (1) the Applicant failed to meet all of the criteria of BCC 1226.12 necessary for a conditional use asserting during argument none of the conditions of 1226.12(a)-(h) were met; (2) the granting of the conditional use effectively rezoned the property which was tantamount to unlawful spot zoning; and (3) BZAP’s determination that the BCC parking requirements were met for the proposed use was arbitrary and capricious.

Following its review of the entire record, BZAP decision and arguments and briefs of the parties, Council finds that Appellants failed to prove, by clear and convincing evidence, that the BZAP erred in determining that all of the criteria of BCC 1226.12 were met. The decision of the Board is supported by a preponderance of substantial, reliable and probative evidence on the whole record and is not unreasonable or unlawful. BZAP did not err in determining that the proposed use met the intent of the Bexley Zoning Code and CS District, fits harmoniously with the area, and will not be detrimental to the public health, safety, or general welfare of the City or the neighborhood. BCC 1226.12. The intent of the Bexley Zoning Code is set forth in BCC 1240.02, the intent of the CS District is set forth in BCC 1254.05 and the intent of both is also set forth in the other provisions of the Bexley Zoning Code that implement those intents with uses, and standards that apply in the district and throughout the City. Likewise, BZAP did not err when it found TCB proved that all the criteria of BCC 1226.12(a)-(h) were met.

The provision and preservation of affordable housing in Bexley is a goal and policy of Council that was adopted as part of the 2020 City of Bexley Diversity and Inclusion Strategy amendment to the Bexley Strategic Plan. It is also identified as a community need and goal in

southwest Bexley and the Southwest Bexley Strategic Framework adopted by Council. BCC 1226.12(a). The proposed development would also allow for some replacement housing for the Mayfield-Ferndale development just west of this location.

There was sufficient evidence to support BZAP's determination that the criteria of BCC 1226.12(b), (c) and (g) were met. This property is located at the eastern end of the CS District along the Livingston Avenue corridor, a primary road on Bexley's southern boundary with interstate access west of the property. East and north of the property is R-6 high density single family zoning and homes. West (Bexley) and south (Columbus) of the property are commercial uses and zoning and multi-family uses including affordable housing in Bexley.

The City planning consultant, Mr. Sudy, testified on the existing conditions along the Livingston Avenue corridor which were also illustrated on the TCB power point on page 8. (Record, p. 105). Mr. Sudy also reported and testified that the mixed income housing in the CS District along that corridor will not have a negative impact on neighboring land uses or the larger community or be hazardous to or have a negative impact on existing or surrounding uses. BCC 1226.12(b) and (c). He testified a multi-family use was more similar to and would have less impact on neighboring residential land uses east and north of the property than many other commercial uses that are permitted in the CS District that would have to be allowed without any conditions. There was no credible evidence that the proposed use would be hazardous or that existing and future residential uses prevalent along the Livingston Avenue Corridor are hazardous.

The Board heard expert testimony on the impact that mixed-income housing and its traffic has on residential and commercial uses and neighbors generally and the existing or future surrounding uses and the structures and uses adjacent to this project specifically. There was evidence that the proposed development would generate less traffic and parking than many other permitted commercial uses in the CS District. TCB representatives testified about TCB's experience in the mixed-income housing industry. They testified that their proposed use would have a limited impact on surrounding properties, parking, and traffic, and the impact mitigation and buffering they are providing in their project from adjacent properties. They also provided evidence identifying many other permitted more intense neighboring land uses west and south of the property. The neighbors disagreed and many testified on their opinions on the negative impacts and hazards, many from existing Livingston Avenue conditions, they believed may result. Council recognizes the concerns of the opponents that their single-family uses will be negatively affected, but those opinions were not based upon sufficient reliable, substantial or probative evidence or data to overturn the decision of BZAP and credible contrary testimony.

There was also considerable evidence on the character of the proposed project and its keeping and compatibility with the adjacent structures and uses. BCC 1226.12(g). Mr. Sudy testified and reported that residential uses are compatible and that multi-family uses are a good transition to single-family uses from commercial uses, particularly in a busy commercial corridor. He also testified that the CS District permitted structures greater in height than proposed on the site. TCB also provided evidence on the elements of their site and building designed to minimize impacts on adjacent and surrounding structures and uses. TCB also testified that the architectural style of the building will complement the existing homes and

commercial businesses and agreed to have the final refined design and landscaping approved by city commissions with neighbor input. The opposing residential neighbors all testified they did not believe the structure or use were compatible with their neighborhood north and east of the property. The structure was too high, the proposed use too dense, and the impacts too great. There was no opposition testimony relating to compatibility with the adjacent commercial structures or uses south and west of the property. Council finds that Appellants failed to prove that BZAP's determination that BCC 1226.16(b), (c) and (g) are not supported by the record and were met or the BZAP's decision on those elements was unreasonable or unlawful.

There was also sufficient evidence to support BZAP's determination that BCC 1226.12(d), (e) and (h) were met. Mr. Sudy provided a comprehensive report and testimony that the proposed development complied with all the standards of the Bexley City Code, including the applicable off-street parking requirements, and no variances are required. There was no evidence that any of the BCC standards were not met, though Appellants unsuccessfully argued a different off-street parking standard should be applied and if applied, zoning standards would not be met. Likewise, there was no credible evidence that the proposed 27 dwelling unit structure would create an undue burden on existing public facilities and services such as streets, utilities, schools or refuse disposal. To the extent that parking and traffic of public streets is relevant, the expert testimony from TCB's traffic engineer, Drew Laurent, indicated the project would not create an undue burden on public streets. There was no evidence of any natural, scenic or historic features of major importance on the property, and there are none. Appellants failed to prove that the record does not support BZAP's determination that BCC 1226.12(d), (e) and (h) were met.

The record supports BZAP's determination that BCC 1226.12(f) was met. This mixed income housing project is consistent with and furthers the City's economic goals, diversity and inclusion strategy and adopted plans of the city to redevelop the Livingston Avenue corridor and provide and support affordable housing in Bexley. Expert testimony was provided by Professor Rachel Kleit, an expert on mixed-income housing, that affordable housing of the quality proposed here does not decrease surrounding property values or have a negative economic impact. TCB also provided studies and testimony that affordable housing does not decrease surrounding property values and that typically those values go up, which is supported by their study of affordable housing in the greater Columbus area. Again, the opponents disagreed and offered unsubstantiated opinions that their single-family home values would be negatively affected, which are not sufficient to overturn the decision of BZAP and credible contrary testimony.

With regard to Appellants' second argument, Council finds the granting of a conditional use or uses specifically provided for in the BCC does not constitute rezoning or spot zoning of the property. BCC 1254.09 specifically identifies as conditionally permitted both "dwelling units on the first floor" and "dwelling units above the first floor" in the CS District as intended and expressly provided by council in BCC 1254.09. There is no express restriction or prohibition in the BCC forbidding such conditional uses in the same building and none can be implied. Such uses may be appropriate in this zoning classification if conditionally permitted by BZAP, as they were here and do not constitute rezoning or spot zoning of the property.


Finally, Council finds that BZAP's determination that the proposed 30 off-street parking spaces provided by TCB meets the requirements of the Bexley City Code is a reasonable interpretation of the code by the city planning consultant and BZAP and is not arbitrary and capricious. BCC Chapter 1262 provides the off-street parking requirements in Bexley. BCC 1262.02 establishes the minimum number of spaces required by use and district, however does not identify the calculation of spaces for residential uses in the CS District. The city planner recommended that the parking requirements of the most similar zoning district should be applied which is 1 space per dwelling unit as prescribed for residential uses in the Mixed Use Commercial District. That would require 27 spaces for the proposed development. In addition, the Applicant provided testimony from its representatives and a traffic expert that this would provide adequate parking for the proposed mixed income project. Various opponents testified that they did not believe this would be adequate. BZAP determined the proposed parking met the requirements of the Bexley City Code and imposed a condition that the number of total permitted cars of tenants in the building be no more than the 30 off-street parking spaces.

The Bexley City Code requires Council to give deference to the decision of BZAP. The law also requires Council to resolve any ambiguity in City ordinances in favor of the property owner and against the restriction of the use of their property. As a result, Council finds that Appellants failed to prove, by clear and convincing evidence, the decision of BZAP is not supported by the record or is unreasonable, unlawful, arbitrary or capricious and, accordingly, Council affirms the decision of BZAP.

Adopted by a vote of 6 years, 0 nays and 0 abstentions on January 11, 2022.



Troy Markham
President of Council



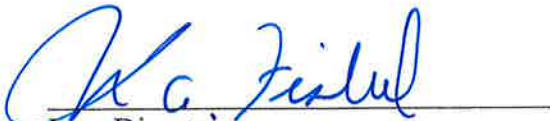
Jessica Saad
Planning and Development Chair, 2020

Attest: January 11, 2022



Clerk of Council

Approved as to Form:



Law Director

1226.12 CONDITIONAL USES.

The Board of Zoning and Planning shall have the power to approve applications for Conditional Uses specified in Chapters 1252 and 1254. The proposed use shall be approved if, and only if, it meets the intent of this Zoning Code and the intent of the zoning district in which the property is located, fits harmoniously with adjacent uses and structures and complies with all other provisions of this Zoning Code. The Board of Zoning and Planning has no obligation to approve a Conditional Use. This Zoning Code assumes that conditionally permitted uses are not appropriate unless an applicant proves that the use will not be detrimental to the public health, safety, or general welfare of the City or the neighborhood in which it is proposed. Such uses shall only be approved if the applicant proves all the following factors are met:

- (a) The use is consistent with the goals and policies of any adopted plans of the City of Bexley, including, but not limited to, the Main Street Guidelines.
- (b) The use will not have a negative impact on the neighboring land uses and the larger community because of the differences between the proposed use and existing uses in the community.
- (c) The use will not be hazardous to or have a negative impact on existing or future surrounding uses.
- (d) The property and any proposed modifications meet or satisfy the lot/yard or height requirements in the code and other general code provisions including landscape requirements, parking standards, and storm drainage requirements as existing or as may be adopted, except that BZAP may grant minor area variances necessary for the proposed conditional use.
- (e) The use does not create an undue burden on existing public facilities and services such as street, utilities, schools or refuse disposal.
- (f) The use is consistent with and/or furthers the City's economic goals and will not decrease property values or have a negative economic impact.
- (g) The use is in character and keeping and compatible with the adjacent structures and uses.
- (h) Any proposed construction will not result in the destruction, loss, or damage of a natural, scenic, or historic feature of major importance.

An approved Conditional Use must be substantially operational within 2 years of its approval. Applications for any construction permits necessary for the operation of the Conditional Use must be filed within 1 year of approval. A Conditional Use permit may be revoked by BZAP if the Board finds the conditions of approval of the existing Conditional Use permit are not met or maintained, the property ceases to be operated as an approved Conditional Use, or the continuance of the Conditional Use would pose a substantial risk to the public health, safety and welfare. A Conditional Use permit shall not be revoked without providing notice to the permit holder and the opportunity to be heard. A Conditional Use permit shall automatically expire if it ceases operation for more than one year.

(Ord. 29-16. Passed 11-15-16; Ord. 08-20. Passed 7-14-20.)