

**ADMINISTRATIVE APPEAL BEFORE THE CITY COUNCIL
OF THE CITY OF BEXLEY**

AJAY GARLAPATI, et al.. <i>Appellants,</i>	: : :	ADMINISTRATIVE APPEAL FROM THE CITY OF BEXLEY BOARD OF ZONING AND PLANNING
v.	: : :	
CITY OF BEXLEY BOARD OF ZONING AND PLANNING, et al.,	: : :	Bexley City Council Case No. 21 - 2 BZAP Case No. 20 - 48 2300 E. Livingston Avenue, Bexley, Ohio 43209
<i>Appellee.</i>	: : :	

**BRIEF IN SUPPORT OF AFFIRMING BZAP’S DECISION, SUBMITTED BY
APPLICANT, THE COMMUNITY BUILDERS**

I. STATEMENT OF THE FACTS

The Community Builders, a non-profit organization, (“TCB” or “Applicant”) is a national leader in the development, ownership and management of mixed income and affordable housing (See 2/25/21 BZAP Hearing 00:50:15-00:53:49). On January 26, 2021, TCB submitted an application to the City of Bexley requesting a conditional use permit and a certificate of appropriateness to build a mixed-income, multi-family building consisting of 27 dwelling units at 2300 E. Livingston Avenue in Bexley, Ohio (“Property”) (See TCB's Application). The Property is in a Commercial Services Zoning District (“CS District”) in a mixed-use corridor: a transition area from single-family residential to the east to commercial development to the west (See TCB's Application, BZAP Staff Report & TCB’s BZAP Presentation). TCB is in contract to purchase the Property, and it intends to tear down the existing single-family residence and funeral home at the site (See TCB’s Application). BCC¹ 1254.09 provides that “dwelling units on first floor” and

¹ “BCC” refers to the Codified Ordinances of the City of Bexley.

“dwelling units above first floor” are conditionally permitted in a CS District. No variances are required, and the site will comply with all CS District regulations as interpreted and administered by the City of Bexley (See TCB's Application & BZAP Staff Report). Subject to conditions, Planning Staff is supportive of TCB's request (See BZAP Staff Report).

On January 24, 2021, the Architectural Review Board (“ARB”), unanimously approved a recommendation to BZAP for a Certificate of Appropriateness, subject to conditions, including a final design review and approval (See ARB Decision and Record of Action). On January 28, 2021, TCB appeared before BZAP on the application, and after approximately a two-hour hearing, the application was tabled by BZAP to give additional notice to the neighbors (See 1/28/21 BZAP Hearing 04:40:30-06:53:45 & 1/28/21 BZAP Hearing Minutes). Thereafter, on February 11, 2021, another Notice was mailed out for the February 25, 2021 BZAP hearing (See 2/11/21 Public Notice).

At the February 25, 2021 BZAP hearing, which lasted approximately three and a half hours, BZAP members were presented with a Staff Report and oral summary from City's Planner Jason Sudy (See 2/25/21 BZAP Hearing 00:29:00-00:37:49). Then, BZAP heard testimony from TCB's representatives, Attorney David Hodge, Nicole Boyer, and Jeff Beam, as well as expert testimony from Traffic Engineer Drew Laurent and Professor Rachel Kleit, an expert on mixed-income communities. The Applicant utilized a power point to go over BCC 1226.12(a)-(h) and articulate reasons why the project meets the criteria (See 2/25/21 BZAP Hearing 00:45:46-01:18:32 & TCB's BZAP Presentation). After that, Bexley residents with standing (and some without) were given the opportunity to be heard and present evidence, which they did (See 2/25/21 BZAP Hearing 00:27:15-03:56:27). Based on extensive evidence, BZAP approved the application by a vote of 6-1, subject to certain conditions (See 2/25/21 BZAP Hearing 00:27:15-03:56:27 & 2/25/21

BZAP Decision). Dissatisfied with BZAP’s decision, on or about April 23, 2021, Appellants filed this appeal to Bexley City Council (“Council”).

II. STANDARD OF REVIEW

In accordance with BCC 1226.19(h), in order to prevail on an administrative appeal before Council, Appellants must prove by clear and convincing evidence that the decision of the BZAP is not supported by the record or is unreasonable or unlawful. If Appellants fail to meet their burden of proof, BCC 1226.19(h) provides that Council “shall affirm” the decision.

“The standard of ‘clear and convincing evidence’ is defined as ‘that measure or degree of proof which is more than a mere preponderance of the evidence,’ but not to the extent of such certainty as is required ‘beyond a reasonable doubt.’” *State v. Schiebel*, 55 Ohio St. 3d 71, 74, 564 N.E.2d 54 (1990). **Council shall give deference to the findings and conclusions of BZAP** being appealed from and **shall not substitute its judgment for the judgment of the Board**. BCC 1226.19(i) (Emphasis added). Pursuant to BCC 1226.19(j), concurrence of two-thirds of the members of Council is required to reverse, vacate or modify any decision of the Board. Absent such a two-thirds majority, the decision of the BZAP is affirmed.

III. ARGUMENT

None of the statements of error asserted by Appellants provide a sufficient basis for reversing, vacating or modifying the decision of BZAP. To prevail, Appellants must prove their case not by mere preponderance of the evidence, but by clear and convincing evidence. BZAP properly interpreted the law, and its decision is reasonable and supported by the record. Accordingly, BZAP’s decision must be affirmed.

A. Appellants’ Statement of Error No. 1

Appellants erroneously assert that BZAP’s decision was not supported by competent, reliable and/or admissible evidence. TCB’s representatives, David Hodge, Nicole Boyer and Jeff Beam, provided sworn testimony, explaining the details of the project and how the criteria under

BCC 1226.12 was met (See 2/25/21 BZAP Hearing 00:28:00-00:31:04, 00:45:46-01:13:30). Further, Drew Laurent, a traffic engineer, testified about a traffic and parking impact study he completed for the site (See 2/25/21 BZAP Hearing 00:59:25-1:03:53). Lastly, Rachel Kleit, a Professor of City and Regional Planning at Ohio State, testified in support as well (See 2/25/21 BZAP Hearing 01:14:22-01:18:32). TCB's evidence must be treated as competent and reliable because it was subject to questioning at the hearing and not proven otherwise.

Appellants' assertion that BZAP relied on inadmissible evidence is inaccurate. The Ohio Rules of Evidence do not directly apply in administrative proceedings. *Plain Local Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 130 Ohio St.3d 230, 2011-Ohio-3362, 957 N.E.2d 268, ¶ 20. "Statements or evidence that would be excluded as hearsay elsewhere are admissible in an administrative proceeding where they are not inherently unreliable and are sufficient to constitute substantial, reliable, and probative evidence." *MNH Truck Leasing Co., LLC v. Dir., Ohio Dept. of Job & Family Servs.*, 10th Dist. Franklin Nos. 16AP-301, 2017 Ohio 442, 2017 WL 496697, ¶12. "[T]he crucial question in determining whether an administrative agency acted improperly in considering hearsay evidence is not whether such evidence was in fact considered, but whether such evidence was considered in an arbitrary fashion." *Concerned Citizens of Spring Valley v. Spring Valley Twp. Bd. of Zoning Appeals*, 2d Dist. Greene No. 01 CA 0059, 2002-Ohio-540. BZAP was permitted to rely on hearsay as long as it was not done in an arbitrary fashion. Here, BZAP liberally allowed both sides to present evidence in favor of their respective positions. Therefore, reliance on hearsay evidence was not inappropriate.

B. Appellants' Statement of Error No. 2

Appellants falsely assert that BZAP did not give proper weight to the evidence before it. Appellants want Council to declare that unsubstantiated opinion testimony of neighbors at the BZAP hearing should have been given more weight than data presented by TCB's representatives

and expert witnesses. “Public comment at an adjudicatory hearing does not rise to the level of ‘reliable, probative, and substantial evidence’ unless ‘there are facts included as part of those opinions’” *Lofts v. The City of Kent Planning Commission*, 11th Dist. Portage No. 2018-P-0004, 2018-Ohio-5342. In *Kent*, the court determined that a planning commission’s decision was not supported by competent and credible evidence due to its reliance on unsubstantiated and speculative public comments over expert evidence and the features of the site plan. *Id.* BZAP properly weighed the evidence and gave more weight to expert witness testimony and data presented by the Applicant.

C. Appellants’ Statement of Error No. 3

Appellants inaccurately assert that TCB failed to prove all of the factors under BCC 1226.12(a)-(h) (See attached TCB’s Exhibit A). BZAP properly concluded that TCB’s development meets the intent of the Zoning Code and CS district and fits harmoniously with adjacent uses and structures and complies with all other provisions of this Zoning Code. BCC 1254.09 provides that “dwelling units on first floor” and “dwelling units above first floor” may be conditionally permitted. “When an ordinance is unambiguous and conveys a clear meaning, a court must only read and follow the words of the ordinance.... “[A] court must adhere to the plain language of the statute or ordinance unless an ambiguity exists”... If ambiguity exists, “courts must strictly construe restrictions on the use of real property in favor of the property owner.”” *Bierlein v. Grandview Heights Bd. of Zoning Appeals Grandview Heights*, 10th Dist. Franklin No. 18AP-874, 2020-Ohio-1395, 153 N.E.3d 817. The CS District unambiguously conditionally permits TCB’s proposed use. However, even if ambiguity existed, BZAP properly strictly construed such restrictions in favor of the Applicant.

Further, BZAP reasonably determined that the proposed use is consistent with the goals and policies of any adopted plans of the City, including Main Street Guidelines. (Emphasis added).

The project aligns with the Main Street Guidelines because it will include a parking area in the rear, a 10' setback from the corridor, and incorporate encouraged architectural design (See 2/25/21 BZAP Hearing 01:12:15-01:13:30 & TCB's BZAP Presentation). The use is further supported by the City's Diversity, Equity, and Inclusion Strategy Plan Goal #3 which is to create an inclusive Greater Bexley Community by encouraging CIC in their efforts (such as here) to identify affordable housing opportunities for people with low incomes as part of new development (See 2/25/21 BZAP Hearing 00:54:05-00:57:28, 00:45:46-00:50:07 & TCB's BZAP Presentation). Lastly, the project is supported by City of Bexley Strategic Plan which provides, "Our vision is a Bexley that is a top-tier community of extremely high quality and excellence that is...centered on families of all kinds" and encourages meaningful redevelopment of Livingston Avenue and affordable housing options (See 2/25/21 BZAP Hearing 00:54:05-00:57:28 & TCB's BZAP Presentation). BZAP properly concluded that the project is consistent with several adopted plans.

Also, BZAP properly concluded that the use will not have a negative impact on neighboring land uses and the larger community because of the differences between the proposed use and existing uses. Appellants are owners of six single-family homes, and all except one are on Francis Avenue. They represent only a segment of the neighboring land uses and are not representative of the larger community. BZAP objectively considered the criteria and correctly recognized the Property as located in a transition between residential and commercial development (See 2/25/21 BZAP Hearing 00:57:30-00:59:20, TCB's Application & TCB's BZAP Presentation). Further, the proposed use is more similar to Appellants' use (and the uses to the north and east) than the previous funeral home (See Staff Report). Lastly, by expert testimony, TCB demonstrated that alternative uses which are **permitted by right** in the CS District, **such as auto centers and fast-food establishments**, are more likely to have a negative impact due to their nature as high-trip

generating uses (See 2/25/21 BZAP Hearing 00:57:30-01:03:53, 02:10:21-02:17:34). BZAP correctly concluded that BCC 1226.12(b) was met.

Further, BZAP appropriately determined that TCB's use will not be hazardous or have a negative impact on existing or future land uses. First, the construction will comply with all environmental requirements (See 2/25/21 BZAP Hearing 00:59:25-01:00:30). Second, Appellants' parking concerns are unfounded. Mr. Laurent's traffic study shows the peak parking for a multi-family development at 10pm-5am, while for other permitted uses, such as a fast casual restaurant, it's during the day and more parking is needed (See 2/25/21 BZAP Hearing 01:00:50-01:03:53 & TCB's BZAP Presentation). Further, TCB studied a cross section of properties they manage in comparable markets and counted the parked cars at different times for one week. The data was compared to parking data for similar apartment buildings in Bexley and the conclusion was that the average parking utilization per number of units for Bexley apartments is 0.54 cars/unit, and for comparable TCB's properties, it is 0.51 cars per unit. Also, the average parking utilization compared to the number of bedrooms is 0.34 cars per bedroom in Bexley, and for TCB's properties, it is 0.35 cars per bedroom (See 2/25/21 BZAP Hearing 01:03:55-01:06:20 & TCB's BZAP Presentation). TCB's study further found that while the average number of parking spaces for the Bexley apartments is 1.29 per unit, **the utilization rate is 42%**, suggesting that 1.29 parking spaces per unit is more parking than necessary (See 2/25/21 BZAP Hearing 01:03:55-01:06:20, 02:17:50-02:22:17 & TCB's BZAP Presentation). TCB evidence provided a proper basis for BZAP's conclusion.

Additionally, BZAP properly found that 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. The site will comply with all required regulations and design standards (See TCB's Application & Staff

Report). Also, TCB will meet the parking space requirement by providing 30 parking spaces while 27 are required (See 2/25/21 BZAP Hearing 01:06:10-01:08:36). Appellants may disagree with the parking standard applied, but BCC 1254.09 does not give guidance on which parking standard should be applied in a CS District when residential uses are conditionally approved. It was reasonable for BZAP to rely on the Residential - Mixed Use Commercial District parking standard considering existing zoning, the nature of the project, and its location in a mixed-use corridor (See 2/25/21 BZAP Hearing 00:36:00-00:38:50).

Also, BZAP properly concluded that the proposed use does not create an undue burden on existing public facilities and services such as street, utilities, schools or refuse disposal. The development will utilize existing water and sewer connection where feasible (See 2/25/21 BZAP Hearing 01-08:45-01:09:20). Further, the site has been designed to maximize off-street parking at a ratio of 1.11 spaces per unit, exceeding residential parking requirements for a Mixed Use Commercial District (See 2/25/21 BZAP Hearing 01:09:20-01:09:33). Also, TCB reached out to the local school board and confirmed that there is no anticipated impact on school district's capacity (See 2/25/21 BZAP Hearing 01:09:33-01:09:56). Finally, refuse will be collected by a private company so there will be no burden on public refuse services (See 2/25/21 BZAP Hearing 02:24:23-02:27:37). BZAP's correctly concluded BCC 1226.12(e) was met.

Moreover, BZAP properly concluded that the proposed use is consistent with and/or furthers the City's economic goals and will not decrease property values or have a negative economic impact. The project is consistent with City's goals of equitable housing development and redevelopment of Livingston Avenue (See 2/25/21 BZAP Hearing 01:10:00-01:12:05, 00:31:30-00:35:40, 00:38:15-00:38:50 & TCB's BZAP Presentation). Nicole Boyer presented BZAP with findings of a study referenced by National Low Income Housing Coalition and Furman Center of NYU which looked at the potential impact of affordable housing on property values and

concluded that tax credit housing has little negative or positive impact on it (See 2/25/21 BZAP Hearing 01:10:00-01:12:05 & TCB's BZAP Presentation). Rachel Kleit, an expert on mixed income housing, testified that national research shows that property values may go up when mixed income housing is properly designed, managed and maintained and that TCB is considered a "model" for quality affordable housing development (See 2/25/21 BZAP Hearing 01:14:22-01:18:32). Finally, Jeff Beam presented testimony that TCB recently researched values of homes closest to TCB's affordable housing developments in markets similar to Bexley's, as well as other affordable housing developments in Columbus, measuring home values from the date the housing was built until now. The data was compared to data for each area's respective zip code, and it showed that homes immediately adjacent to affordable housing outperformed the zip code in terms of increase in home sale value (See 2/25/21 BZAP Hearing 02:31:08-02:33:49). While Appellants may complain that TCB should have provided realtor testimony or other studies, the evidence presented was more than sufficient for BZAP to conclude BCC 1226.12(f) was met.

Next, BZAP reasonably determined that TCB's proposed use is in character and keeping and compatible with the adjacent structures and uses. Again, this factor is objective and considers all adjacent structures and uses, not just those represented by the Appellants. The project will conform with applicable regulations, and it is more in character with uses to the north and east of the Property than the previous funeral home use (See 2/25/21 BZAP Hearing 00:35:00-00:36:22, TCB's Application & Staff Report). The proposed use will engage Livingston Avenue and promote it as a mixed-use corridor, consistent with the City's vision for the area (See 2/25/21 BZAP Hearing 01:12:15-01:13:30, 00:36:00-00:38:50). Further, the project's architectural design will follow Main Street Guidelines (See 2/25/21 BZAP Hearing 01:12:15-01:13:30). Therefore, BZAP's conclusion that TCB satisfied the criteria was appropriate.

Lastly, BZAP correctly determined that the proposed construction will not result in the destruction, loss, or damage of a natural, scenic, or historic feature of major importance. The development will include the demolition of the existing funeral home and adjacent single-family home fronting East Livingston Avenue, neither of which is of historic significance or major importance (See 2/25/21 BZAP Hearing 01:13:32-01:13:55). BZAP properly found that BCC 1226.12(h) was met.

D. Appellants' Statement of Error No. 4

Appellants inaccurately assert that TCB failed to prove that the conditional uses will not be detrimental to the public health, safety or general welfare of the City of Bexley or the neighborhood in which it is proposed. BCC 1226.12 provides, “[t]his 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 [factors listed in Section 1226.12(a)-(h)].” By demonstrating at the BZAP hearing how all of the factors under BCC 1226.12 have been satisfied, TCB has also proven that the use will not be detrimental to the public health, safety, or general welfare.

E. Appellants' Statement of Error No. 5

Appellants assert that the proposed use is prohibited in the CS District, or in the alternative, the law is ambiguous, and therefore, it was improper for BZAP to review and approve the application. First, nowhere in the CS District regulations does it state that multi-family use is a prohibited use. Second, BCC 1254.09 is not ambiguous but clearly states “dwelling units on first floor” and “dwelling units above first floor” - plural “units” - may be conditionally permitted. The regulations clearly contemplate multi-unit development. While Appellants may conveniently prefer that BZAP skirt its obligation to review TCB’s application, BCC Sections 1220.02(b) and

1226.12 make it abundantly clear that BZAP has the sole authority to determine Conditional Use Permit requests. BZAP properly acted in accordance with its legal authority in reviewing and approving TCB's application.

F. Appellants' Statement of Error No. 6

Appellants assert that BZAP erred by not requiring a rezoning of the Property to a Planned Unit Development (PUD). The statement naively disregards the constitutionally protected right of the property owner to use the property as permitted by law. Pursuant to a purchase agreement, TCB is asserting the rights of the owner. Here, BCC 1254.09 unambiguously conditionally allows "dwelling units on first floor" and "dwelling units above first floor" in a CS District. TCB, Bexley's Zoning Staff and BZAP reasonably agree that this is the correct reading of Bexley City Code. However, even if ambiguity existed, real property restrictions must be strictly construed in favor of the property owner, or in this case, TCB. *Bierlein v. Grandview Heights Bd. of Zoning Appeals Grandview Heights*, 10th Dist. Franklin No. 18AP-874, 2020-Ohio-1395, 153 N.E.3d 817. The CS District unambiguously conditionally allows the proposed use. The Applicant has a constitutionally protected right to pursue a conditional use permit for the Property, and it would have been unlawful for BZAP to require otherwise.

G. Appellants' Statement of Error No. 7

Appellants assert that proper notice was not provided prior to one or more of the hearings involving the application. The City of Bexley mails out notices for public meetings via USPS within the required timeframe; however, it does not control when or if those notices are delivered. On December 31, 2020, notices were mailed out with the agenda for the January 14, 2021 ARB meeting and January 28, 2021 BZAP hearing (See 12/31/20 Public Notice). On January 11, 2021, second notices were mailed out with site specific information for the upcoming meetings (See 1/11/21 Public Notice). The meeting details along with the agenda were also posted on the City's

website in advance, and in fact, many neighbors appeared at both meetings. However, out of abundance of caution, BZAP tabled the January 28, 2021 hearing when some of the neighbors in attendance complained about the notice (See 1/28/21 BZAP Hearing 04:40:30-06:53:45 & 1/28/21 BZAP Hearing Minutes). Thereafter, on February 11, 2021, the City mailed out notices for the February 25, 2021 BZAP hearing and posted the meeting information and agenda on its website (See 2/11/21 BZAP Hearing Notice). The residents who were most upset about the notice were in attendance at the February BZAP hearing, and any notice issues that may have existed at the January BZAP hearing were corrected by the re-issuance of the notice.

H. Appellants' Statement of Error No. 8

Appellants assert that the determinations by BZAP as to standing were arbitrary and unlawful. Pursuant to BCC 1226.19, any Bexley property owner that is directly and adversely affected by BZAP's decision has standing to appeal to Bexley City Council. At both BZAP hearings, BZAP liberally allowed members of the public to speak on the matter even though some speakers, including some of the Appellants, never demonstrated how they are directly and adversely affected. TCB's counsel objected on the record to the testimony of all speakers without standing, and that objection is reiterated here (See 2/25/21 BZAP Hearing 02:10:30-02:11:44). Considering that BZAP did not withhold from Appellants or others with standing the opportunity to be heard, Appellants' assertion provides no ground to overturn BZAP's decision.

I. Appellants' Statement of Error No. 9

Appellants erroneously claim that BZAP's decision was based upon certain statements, advice, insight and opinions provided by City Staff that were arbitrary, included incorrect interpretations and applications of the law and/or were otherwise misleading. City Staff, including Jason Sudy, properly interpreted and applied the zoning regulations as they relate to TCB's project, based on policy and plain language of the Bexley City Code (See 2/25/21 BZAP Hearing 00:29:00-

00:37:49 & Staff Report). TCB's proposed use is conditionally permitted under BCC 1254.09. Further, per BCC 1226.12(a), the project conforms with the Main Street Guidelines as well as other adopted plans. Lastly, the parking standards applied are reasonable in light of the zoning and the site's location in a mixed-use corridor (See 2/25/21 BZAP Hearing 00:36:00-00:38:50). City Staff's statements, advice, insight and opinions do not provide a basis for reversing or vacating BZAP's decision.

J. Appellants' Statement of Error No. 10

Appellants assert that it is unclear from the record whether one or both of the conditional uses were granted by BZAP. This is incorrect as the record clearly shows that both of TCB's conditional use requests were granted. TCB applied for a conditional use permit in accordance with BCC 1254.09 to allow "dwelling units on first floor" and "dwelling units above first floor" in a CS District (See TCB's Application). A conditional use was approved to permit dwelling units on all 3 floors of the proposed new 3 story building in substantial conformance with the plans submitted to and before the Board on February 25, 2021 (See BZAP's Decision and Record of Action – February 25, 2021). BZAP clearly and unambiguously approved TCB's request.

K. Appellants' Statement of Error No 11

Appellants assert that the decision is unconstitutional because it represents a taking of property without compensation. The claim has no basis in the law. The Fifth Amendment to the United States Constitution provides, in part, "nor shall private property be taken for public use, without just compensation." The prohibition applies to the states as well as the federal government. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239, 241, 17 S. Ct. 581 (1897).

Two types of regulatory actions are deemed to be per se takings for Fifth Amendment purposes: first, those government actions that cause an owner to suffer a permanent physical invasion of property, and second, government regulations that completely deprive an owner of "all

economically beneficial uses” of the property. *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs.*, 115 Ohio St.3d 337, 341, 875 N.E.2d 59 (2007). Neither of those are applicable here. The last type of a taking is a partial regulatory taking, which requires a landowner to prove that the application of the ordinance has infringed upon their rights to the point that there is no economically viable use of their land. *State ex rel. BSW Dev. Group v. Dayton*, 83 Ohio St.3d 338, 343, 699 N.E.2d 1271 (1998). Appellants cannot demonstrate a taking because there has been no physical invasion by the City, nor have they been deprived of all economically beneficial uses of their property. Lastly, there has been no regulatory taking because the conditional use approval did not deprive Appellants of any rights, let alone “all economically viable use” of their property.

L. Appellants’ Statement of Error No. 12

Appellants make an attenuated assertion that BZAP’s decision is unconstitutional because it is based upon portions of Bexley City Code that are vague and/or ambiguous. Under the tenets of due process, an ordinance is unconstitutionally vague under a void-for-vagueness analysis when it does not clearly define what acts are prohibited under it. *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). In order to defeat an assertion of unconstitutional vagueness, a law must contain explicit standards as guidance for those who apply them, thereby preventing arbitrary and discriminatory enforcement. *Id.* Here, the ordinances in question convey a clear meaning. BCC 1254.09 provides: “dwelling units on first floor” as well as “dwelling units above first floor” may be conditionally permitted in a CS District. Further, BCC 1226.12 gives an explicit standard in the form of a list of factors which must be met in order for a conditional use permit to be approved. The plain language of both ordinances is clear and the void-for-vagueness doctrine does not apply.

M. Appellants' Statement of Error No. 13

Appellants wrongly assert that the decision of BZAP was otherwise unsupported by the record, is unreasonable and/or unlawful. TCB objects to this overbroad statement of error because it fails to sufficiently specify the error Appellants seek to correct.

IV. CONCLUSION

The decision of BZAP is supported by the record, and it is reasonable and lawful. For the foregoing reasons, TCB respectfully requests that Council affirm BZAP's decision.

Respectfully submitted,

/s/ David Hodge

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