

Transcript

City of College Park City Council

BPV-2007-01: Baiza Appeal
Continuation of Oral Argument

April 1, 2008

8:00 p.m.

1 Present: Mayor Brayman, Councilmembers Molinatto, Wojahn, Catlin, Perry, Stullich
2 (arrived 8:06 p.m.), Mark Cook (arrived 8:06 p.m.), Hampton and Mary Cook.
3 Also Present: Steve Groh, Acting City Manager; Janeen Miller, City Clerk; Sara
4 Imhulse, Assistant to the City Manager; Suellen Ferguson, City Attorney; Jeannie Ripley,
5 Code Enforcement Manager; Christopher Warren, Economic Development Coordinator;
6 Dorothy Friedman, Planning Department; Terry Schum, Director of Planning; Bob
7 Stumpff, Director of Public Works; Bob Ryan, Director of Public Services; Danielle
8 Kogut, Student Liaison.

9 **Mayor Brayman:** Now as to what is really our number one is Continuation of Oral
10 Argument on BPV-2007-01, the Baiza, is that it?, Baiza appeal, um, pardon, Baiza, all
11 right, OK, thank you Ms. Schum, Baiza. All right. And we are going to let Ms. Ferguson
12 see if she wants to add or correct anything I say here and then Mr. Wojahn, we'll come
13 right to you for a question or clarification. Ah, I think tonight is programmed for us to
14 ah, ah, deliberate. I think the parties of record have been informed that we are going to
15 be deliberating at this evening, um, but that we would take action April 8th, and so since
16 we've notified them of that, it would be nice for us to follow that, although I guess if we
17 need more time we'll deal with that accordingly. So as we, uh, deliberate, one, it would
18 probably be nice for us to come to some sense and maybe if we need to give some
19 direction if there's anything needed to be prepared, but we're not going to vote tonight.
20 But also, as we go through this, if we have questions, I think Ms. Ferguson might point
21 out that those questions she would feel more comfortable either answering them right
22 now, which she would, or in Executive Session. And so we have properly posted so we
23 can go into Executive Session um to consult with Counsel if necessary what I would

1 propose is that we go in to some deliberation regarding this and if we um well as we rack
2 up questions Ms. Ferguson indicates that she wants to discuss in Executive Session um
3 then we would ah look to adjourn see if we ... we'll leave the room and have, you know,
4 a brief Executive Session if we are go into Executive Session though we need to be
5 mindful, and I propose that we just you know just one on one be able to propose our
6 questions to Ms. Ferguson and that not be a conversation amongst ourselves because that
7 could be construed as deliberating and so we would bring back what we want to
8 deliberate. But um is that fair, I've covered enough of that? And hopefully I wasn't too
9 long winded. Um so let's just ah, ah, dive into this a little bit, and we'll just ah check and
10 balance ourselves as we go. Mr. Wojahn?

11 **Councilmember Wojahn:** Um yeah well that was mostly my question was was what the
12 status the ah status is. One question I still had though it seems um ah its unclear from the
13 record that we received this time around whether Mr. Baiza is indeed still pursuing the
14 appeal? Have we can somebody talked to him and confirm that?

15 **Mayor Brayman:** As far as we know, um, I'm sensing the attorney's, ah, nodding of her
16 head yes that the appeal is still in force; it has not been withdrawn by the applicant.

17 **Ms. Ferguson:** Is there a reason that....

18 **Mr. Wojahn:** Ah, Its just not entirely clear from Mr. Baiza's letter um uh whether he's
19 um still wishing to pursue it or whether he's just sort of given up out of frustration. But
20 ah....

21 **Ms. Ferguson:** You know, that, uh, I've read the letter also, its not clear how much of
22 that wall would be coming out. The, the wall, the part of the wall in question is all of that

1 in the front yard...anything in front of the building line. Its not clear what he considers to
2 be a side wall.

3 **Mayor Brayman:** There is a part that is in front of the house that is on the side though is
4 that not correct?

5 **Ms. Ferguson:** You have, ah, prohibited front wall fences and...I'm sorry, front yard
6 fences and walls. That's anything in front of the front building line.

7 **Mayor Brayman:** Ah, OK.

8 **Ms. Ferguson:** So...

9 **Mayor Brayman:** All right....

10 **Councilmember Hampton:** But can, can we, when we are making our final decision
11 can we also add...(blank).

12 **Ms. Ferguson:** You have no basis for doing that. You have not regulated, ah, side and
13 rear yard fences unless, you know, unless there is some other reason, but it is not through
14 your fence ordinance because you only regulated front yard fences and side yard fences
15 when its a corner lot but, ah, the only restrictions that are there for the side yard is six feet
16 high and the County restrictions....

17 **Mayor Brayman:** OK, everybody aware of that? OK, um, Ms. Cook, then Ms. Stulich.

18 **Councilmember Mary Cook:** Um, is it possible, ah, to make some mention that the
19 fence must stay in good repair, cause it sounds like the fence is already you know got
20 some cracks in it, it, uh,....

21 **Ms. Ferguson:** That is stating something that already is the case, uh, uh, homeowners
22 are not allowed to have fences or walls in particular that go out of repair. That's part of

1 our exterior property code. They would have to make it safe and, so that's there already,
2 but sure you can you can refer to that though, there's no problem referring to that...

3 **Ms. Cook:** Yeah, I think that's important. Thank you.

4 **Mayor Brayman:** Uh, Ms. Stullich?

5 **Councilmember Stullich:** Yes, so I just wanted to clarify that when we say that our
6 ordinance doesn't address side yards it, it addresses the side yard up to the point where
7 the house begins but not from the beginning of the house towards the rear of the
8 property?

9 **Ms. Ferguson:** Right.... Except in a corner lot, but we're not talking about that....

10 **Ms. Stullich:** Right, right.

11 **Mayor Brayman:** Wow. Uh, well, um, let me throw some meat and potatoes on the
12 table here. Uh, Ms. Hampton?

13 **Councilmember Hampton:** Um, yeah, after this, I mean after the hearing in February, I
14 got a letter from Mr. Vecchiarelli that he put in my door and he said he copied the
15 Council on it but I didn't see it as part of this, uh, packet.

16 **Councilmember Wojahn:** Its, uh, page 18.

17 **Ms. Miller:** Is that the same one that's.....?

18 **Ms. Ferguson:** This one.

19 (Unintelligible)

20 **Councilmember Hampton:** Yes, sorry about that, OK.

21 **Mayor Brayman:** OK, what's with page 18?

22 **Councilmember Hampton:** Well I just wanted to make sure that this was included as
23 part of the packet. Page 18. This letter.

1 **Mayor Brayman:** OK...Mr. Wojahn.

2 **Councilmember Wojahn:** Yes, I do have another question. The, um, we've heard,
3 we've heard some about, about Mr. Baiza putting in fill dirt behind the fence, um, ah, and
4 I was wondering if that, if he needed to have a permit for that, and if so, if that's, um, an
5 issue here, or if ah, or what the deal is with the fill dirt that he's allegedly placed behind
6 the fence.

7 **Ms. Ferguson:** To my knowledge that is not something that he's been cited with, and
8 there is no outstanding violation about that, ah, we would generally, the County would
9 generally require a grading permit for moving of a certain amount of dirt. Uh, and I'm
10 not, you know I don't have that off the top of my head as to how much that is, I don't
11 know that that would be the case here. I think County inspectors were asked to come out
12 to the property by one of the neighbors some time ago and no violation notice issued
13 from that.

14 **Councilmember Wojahn:** Do we know if the County inspectors actually visited the
15 property, or...?

16 **Ms. Ferguson:** I believe that they did, I, you know, that's second hand, there's been no
17 testimony about that that I recall, but, ah, I, I did hear that that did occur. And, uh,
18 regardless, the County hasn't issued any violation notices, and generally speaking, we
19 issue a permit if the County issues a permit when it comes to that, except for fences.

20 **Mayor Brayman:** Ms. Cook, uh, then Ms. Stulich, sorry Ms. Stulich.

21 **Councilmember Mary Cook:** Um, but somewhere here I read that he's going to have to
22 uh....go ahead....

1 **Ms. Ferguson:** If I could, um, um, Ms. Ripley has pointed out to me that the permit that
2 was obtained from Prince George's County to do this work for ah, also allowed for a
3 retaining wall and for grading. So. Thanks.

4 **Councilmember Mary Cook:** But didn't I read here somewhere that he's going to have
5 to, ah, he would have to take down the front part of the wall restore the property as it
6 was? No?

7 **Ms. Ferguson:** That's, that's an option. It would be very difficult to tell where it was...

8 **Councilmember Mary Cook:** OK

9 **Ms. Ferguson:** ...at this point, um, I don't know, I don't know how that would happen,
10 because there's nothing that shows, at least through the record, what shows where it was.
11 You'd have to, uh, depending on what you did, you'd want to make sure that, uh, dirt was
12 not going to slide off the property and erode somewhere, certainly.

13 **Councilmember Mary Cook:** That's my concern, because that's just such a big mound
14 of dirt now that's just going to come washing off into the street and into people's yards
15 probably.

16 **Ms. Ferguson:** But you can make provision for that without requiring that it be put back
17 to where it was because you don't know where it was. You know that there was a slope
18 in the yard but that's about it, you know. I don't know anybody could say that.

19 **Mayor Brayman:** I'll follow up to that. Would it be proper or are we able to, ah,
20 request a proposal, ah, for us to review as to what restoring, you know, how the, ah, how
21 the applicant would restore if such action were required?

1 **Ms. Ferguson:** That is in fact what the APC did. They asked that the applicant come
2 with a proposal as to how the property would be restored, I think it was within 30 days,
3 and then they would make, uh, they would move from there.

4 **Mayor Brayman:** OK. Ms. Stullich.

5 **Councilmember Stullich:** Well this is the issue I wanted to bring up, too, and that
6 sounds like a good idea, to, having him submit a proposal, but I wonder if it should be
7 specific, specifically address the issue of the fill dirt, because I, I do worry that if you
8 have a big mound of dirt with nothing to retain it, that it is going to gradually slide on to
9 the street and the neighbor's property and continue to be, um, ah, aggravation so I was
10 wondering if the request for, I guess the APC has already uh, in their decision, asked for
11 him to submit an proposal, or in their recommendation?

12 **Ms. Ferguson:** Yes, they did.

13 **Councilmember Stullich:** And...

14 **Ms. Ferguson:** You know, the record so far indicates that, uh, at least in Mr. Halpern's
15 opinion, based upon what he can see, he's not testing on the property, he didn't think that
16 the wall was necessary to hold the dirt now. But you know that could change; its just
17 going to depend on the actual conditions.

18 **Mayor Brayman:** I believe there's probably some county regulations about allowing
19 soil to get into the Stormwater system, um, that would, they'd, they'd need to comply
20 with.

21 **Ms. Ferguson:** Well, there's, there's, there's requirements concerning construction that
22 uh, dirt not be allowed to erode that way, definitely.

1 **Mayor Brayman:** Such a proposal to restore could include how they're going to, if they
2 were required to remove the wall, um, the fence, whatever, ah, that, um, they, ah, that
3 they, you know, show us the proposal prior to commencing the work. Um, additionally
4 too I would imagine that the, uh, um City Manager, through the City Engineer, ah, might
5 also be authorized to, ah, review and evaluate, um, not sure if, ah, if they, they both
6 would like that or not, um, but, it might be more expedient. So, ah, Ms. Ferguson, if one
7 wanted to, ah, require removal of the wall would a motion to, um, reject the issuance of a
8 permit be, um, the proper course of action? Or deny the issuance of a...

9 **Ms. Ferguson:** Um, well, to go through the history of this, there was a permit issued for
10 the purpose of creating the wall. Then that permit was revoked because a) it was in the
11 right of way, where its not supposed to be at all, and b) it was improperly issued. So
12 that's a revoked permit. The, now the applicant has asked that it be validated, in essence,
13 that the permit issued in error be validated. So that's what you're being asked to do, is to
14 validate what happened before. So the...

15 **Mayor Brayman:** If I didn't want to do that, would I reject, or not issue, or what
16 would...?

17 **Ms. Ferguson:** You would deny the applicant's request for validation.

18 **Mayor Brayman:** OK, All right, so if I wanted to, ah, if someone wanted to deny the
19 applicant's request, and then put forward, ah, a reasonable but necessary, ah, remediation,
20 ah, effort, um, I think it would be one similar to what the APC already, ah, decided so,
21 um, people may be comfortable with, you know, following similar although possibly
22 worded differently, ah, the tack that the APC put forward, um, might be a proposed
23 course of action, well I guess it would be a valid course of action, correct Ms. Ferguson?

1 **Ms. Ferguson:** Yes, ah, requiring that a plan be made that makes the, ah, property safe
2 and intact would do it. I think asking them to put the property back the way it was would
3 be impossible to determine whether that had been complied with.

4 **Mayor Brayman:** Mentioning erosion and sediment control, ah, would, would be
5 germane?

6 **Ms. Ferguson:** Yes, it would have to be stabilized; the front yard would have to be
7 stabilized. I mean, you know, there's a number of ways of saying it, ah, depending on
8 what you want to do, but it needs to be stable and not moving so that's....

9 **Mayor Brayman:** Are there other, ah, are there other things that would be consistent
10 with APC's direction that I have not covered or are you comfortable with identifying any
11 other issues that you think if we were heading in this direction, um, that you would
12 suggest that we consider including, or not including?

13 **Ms. Ferguson:** Well, you'd certainly want to put a time limit on when the stabilization
14 had to occur. You know, I think what the APC did is it gave 30 days for the plan and
15 then I think it also stated a time by which the action had to be taken – you'd want to do
16 that.

17 **Mayor Brayman:** Is that doable?

18 **Ms. Ferguson:** Yes.

19 **Mayor Brayman:** OK...

20 **Ms. Ferguson:** You'd want to do that because first of all, regardless of what happened in
21 your decision the wall in the right of way has to come down and, um, I don't know that
22 any of us is familiar enough with how the dirt is placed on the property now to think that

1 even if that wall just came down and got put back some that something else wouldn't
2 have to happen in terms of moving dirt.

3 **Mayor Brayman:** So possibly notifying the City Engineer, um, when demo of the wall
4 is about to occur, would allow the Engineer or someone to be scheduled to be out there
5 to, ah, possibly witness and, ah, ah, um, try to insure that the environmental health and
6 safety is, is, uh, adhered to with respect to, um, erosion.

7 **Ms. Ferguson:** I'm feeling a little light on part of this. Yes, we should have someone
8 looking at what's happening. I don't know from a technical standpoint what will be
9 necessary there. You can require that, um, a plan that includes those steps necessary to
10 stabilize the area be created. I don't know what that's going to, whether that's, what that
11 means. So you'll need someone to look at that other than...you'll need the Engineer to
12 look at that.

13 **Mayor Brayman:** Also too maybe the notification might be too high of a bar that we
14 have, ah, City staff go out and document the, you know, the condition of the street and
15 maybe the condition of some of the storm drains and if, um, after the project they are all
16 filled in with, ah, with dirt, that would be suitable evidence to say that there was not
17 proper erosion control. Um...I'm not saying we resolve that in there. Um...Ms. Stulich?

18 **Councilmember Stulich:** Yeah. I'm wondering, and I'm a little uncertain cause I don't
19 think we have the language of the APC's recommendation in front of us, but what I
20 wasn't hearing there is, is, and I think it sh...it would be good to include, um, specific
21 language about, ah, removing the wall up to the point of the front of the house, as
22 opposed to general language.

1 **Ms. Ferguson:** Oh certainly, well if that's, if that's what you decided, I mean you would
2 want

3 **Ms. Stulich:** That's what I...

4 **Ms. Ferguson:** wording, if you wanted wording, you're going to want wording that says
5 whatever it is you want done.

6 **Mayor Brayman:** Right, well let's go by right now I'm suggesting and I think Ms.
7 Stulich has just, ah, ah, confirmed that she would also follow suit, that it would be the
8 entirety of the wall and or fence or posts or whatever in front of the building line....

9 **Ms. Stulich:** Right

10 **Mayor Brayman:** ...and that that is the entirety of what we regulate in this instance.
11 Um, and I'm just trying to, so, you know, I'm proposing we explore this and try to cover
12 all the angles. Um, OK, um, I don't see anybody objecting at this point. Um, not that
13 I'm soliciting objection, but, um....Mr. Molinatto?

14 **Councilmember Molinatto:** So what you are saying is what we typically would not
15 allow, correct? We want him to remove just what we would typically not allow?

16 **Mayor Brayman:** Well we regulate, ah, all fences and ah, ah, this structure, you know,
17 falls into the definition of our fence ordinance, from the front of the building line. Ms.
18 Ferguson expanded upon it – in the instance of a corner lot, which this is not, our
19 regulation goes to the side yard since a corner lot side yard is somebody else's front yard.
20 Um, so yes, in this instance that's what we regulate. I'm not, I'm avoiding saying that
21 this is typical, um, because I'm not sure that this is, but, that's what we regulate, and so
22 that's where our authority I think is limited to.

23 **Councilmember Molinatto:** OK.

1 **Mayor Brayman:** Um, all right?

2 **Councilmember Molinatto:** Well you were carefully making sure there are no
3 objections so I was just wondering if there was something I was missing....

4 **Mayor Brayman:** Well, I, I, look, there's some practicality to this, too, because
5 normally, ah, the, um, City Attorney, either, you know, prior to or afterwards, will
6 resolve this all to writing. My thought was, is that, um, ah, she might be able to make
7 some headway with resolving it in writing ahead of time, if that is our desire. I don't
8 want her to spend though several hours writing something that, um, isn't likely to have,
9 ah, due consideration. Additionally, too, I would be trying to see, are others going to be
10 suggesting additional writings, I think it gets to be problematic if we all call her up and
11 said, "Hey, write an opinion" or, you know, "write something" um along these lines, we
12 would, we would be working very inefficiently. My sense is, is that, uh, the deliberation
13 is heading in this direction. I'm suggesting that we, uh, we look at um, having the City
14 Attorney prepare us based upon this discussion as soundly as possible, um, for someone
15 to bring this forward next week, uh, as a motion. Again, I think that, uh, next week, I
16 would encourage you to, you know, re-deliberate a little bit, maybe with your comments,
17 as to, um, why you're where you're at, because, ah, although we've had our public
18 hearing, so will not be opening it up to additional public comment, um, but we may find
19 that the parties of record and the applicants are listening tonight but they may not be, they
20 may be actually showing up next week so I'm just trying to put as much as we can on the
21 formal record, but my sense is, is that, uh, we're done deliberating and...all right? So
22 why don't we, then, um, Madam Attorney, I'm fairly confident, well, Ms. Hampton?

23 **Councilmember Hampton:** (Unintelligible)

1 **Mayor Brayman:** OK, all right, uh, okey doke, and uh, Madam Attorney, do you feel,
2 do you feel that my sense of a direction, that I've, uh, illustrated enough of the situation
3 for you to prepare at this point, or would you feel better waiting until next week, until we
4 actually, ah, um, take action and then prepare accordingly after that?

5 **Ms. Ferguson:** I think I'm, I know generally, ah, what the motion maker would like to
6 put forward, but I have one question about that, if in fact, there's, there's a time frame set
7 for the presentation of a plan, the question is who reviews that plan and okays it. Um, its
8 possible to send that back to the APC to do that, its possible to have the City Engineer
9 look at that, its possible to have them do it together. I mean, you know, it's, it can go in a
10 number of ways. You can remand it to the APC or send it to the APC for a review of the
11 plan. Or not. You can just have the plan submitted and have, um, the City Engineer,
12 Engineer look at it.

13 **Mayor Brayman:** We, well...I'm just trying to adequately cover everyone and
14 including being reasonable within our own timeline. Um, if people are OK with
15 delegating that, all right, then just be wary that we're not bringing it back to us. One
16 thing is, we meet more often, though, than the APC. So you need to, you need to time
17 their 30 days to when they meet, um, which I'm not sure that that times exactly. They
18 meet at the beginning of the month. We go 30 days from when we make our decision or
19 when the decision is issued, that (unintelligible) do they have to wait until mid-June to
20 get...I'm sorry, I'm just thinking this through.

21 **Ms. Ferguson:** You, you could also retain this in your own jurisdiction, direct that
22 within so many days the plan be presented to you, you can also direct that the City
23 Engineer review that plan, and you can decide as a Council whether or not it is sufficient.

1 **Mayor Brayman:** You know, I'd almost suggest, in order that there's ample time, what
2 if we were say to time it to be ready for review at the June worksession. That's, that's
3 more than 30 days, um, but then there's a finite date. We meet then, and, how about that?
4 I'm not trying to cut the APC out, I'm just trying to make sure that, that uh, that they,
5 they get a timely review of what they're proposing.

6 **Ms. Ferguson:** You're not cutting them out. They make a recommendation that, and
7 um, and then you make the final decision about these things so you can keep it to
8 yourselves to be the final.

9 **Mayor Brayman:** I'm getting the sense people are OK with that. All right. So how
10 about that, Ms. Hampton?

11 **Councilmember Hampton:** Yes, I'm fine.

12 **Mayor Brayman:** OK, All right. Um, that would also allow us, uh, when we see it back
13 could we, ah, entertain public comment, if there was necessary. I mean, if there was,
14 ah....

15 **Ms. Ferguson:** Yes, because you will have made your decision by then. This will be
16 whether, you'll be taking comment then on whether or not the plan is sufficient to
17 accomplish its purpose. And you can take advice from whomever you care to about that.

18 **Mayor Brayman:** OK. Well, if, uh, I would, I would think that if there are some parties
19 of record that are present in the review of that that we might want to avail ourselves of
20 that. I know, I'll wait for additional feed back on that. All right. So, we're basically
21 modeling APC adding in some additional uh, uh, um, parameters or ideas that we've had,
22 and Ms. Ferguson is going to take that and start crafting something. OK. All right,
23 fantastic. We'll see if that, uh, prevails next week. If, uh, if there's a different direction

1 next week, I would imagine that Ms. Ferguson will need additional time though to craft
2 what the final decision is...

3 (Background talking – laughter)

4 **Mayor Brayman:** So, I mean, I don't know for sure whether that's going to be ah,
5 successfully voted, I just have a good sense that a lot of people at this point in time are,
6 uh, heading in that direction. All right. OK. All right. Um. Fantastic, then. All right,
7 so, um, Item A....

8

9 [That concluded the discussion of Item BPV–2007-01.]