

Planning Commission Meeting
January 9, 2014
Verbatim Excerpt

PCA 2000-MV-034/SEA 80-L/V-061-02/2232-V13-18/2232-V13-17 – FURNACE ASSOCIATES, INC.

During Commission Matters

Commissioner Hart: Thank you, Mr. Chairman. Last night on Commissioner Flanagan's motion, the Commission voted to defer the public hearing on the pending Furnace Associates cases from February 5 to April 24. Commissioner Flanagan mentioned that these are significant and complicated applications, which is correct. They also may have countywide implications. I voted for the deferral, but at that time I was unaware of several significant circumstances which we did not debate last night. I hope that we may revisit the deferral date and I'm going to make a motion to that effect. The applicant did not agree to the deferral, which was the second deferral in this case. The applicant had previously agreed to defer once already. More importantly, the applicant also believes that the April 24 date may have severe negative consequences of which the Commission was unaware. The applicant and staff disagree as to the legal consequences of last night's deferral and whether a recently adopted State statute extending certain site plans gives the applicant sufficient protection. The applicant has a current Special Exception approval with a site plan that has been approved and extended, but would prefer instead to go forward with their pending applications. As I understand it, the applicant believes that the deferral to a date as far out as April the 24th may jeopardize their current status and for complex procedural reasons, that date may require them to, in the meantime, commence construction on a \$7 to \$8 million building so as to not forfeit their current approval. It's fair to say that the applicant and the County Attorney's office disagree sharply as to whether the application was effectively killed last night by pushing them past a drop dead date or the effect of the statute extending site plans and the interaction with that statute on other statutory deadlines, at least as to how those apply to the current approvals. As Commissioner Flanagan knows, I'm very reluctant to get into the details of a specific district case and a deferral date. I don't recall ever having done something like this before and I don't recall any of my colleagues having done this. I also recognize this is a very complicated case and we have not yet seen the staff report. We want to allow sufficient time for citizen review and comment. Most importantly, I don't want to pre-judge this application one way or the other. I haven't seen the staff report and I don't really know whether I would support this or not. It needs to work its way through the process. But I also recognize that it can be very difficult to determine definitively who is correct as between an applicant and the County Attorney's office on sharply disputed and subtle legal points. That sort of judgment call is the province of judges or appellate courts. And many learned attorneys and judges can disagree on that sort of issue. We can't resolve the disagreement tonight, as to the effect of those statutes on this particular applicant. But if the applicant is correct, our April 24 deferral date last night had considerable consequences which we did not review. I would have preferred, with the benefit of that information, to allow the issues about the consequences of the deferral date to have been aired out more clearly with the Commission and to allow us to give a little more time as to what the consequences might be. My suggestion for the purposes of the night will be that we would reconsider last night – last night's decision about the deferral and revisit the deferral date, giving everyone some breathing room. A shorter deferral than April the 24th prejudices nobody and it

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may keep the applications alive in the meantime. My intention will be, if a reconsideration motion passes, to suggest a deferral date of February the 27th, which I understand at least for the time being, is not a date that has the same consequences as April the 24th. Any pending discussion between the applicant and staff or the applicant and the community can continue in the meantime. Under the circumstances, I think it's a reasonable approach to this to defer the public hearing date approximately six weeks ahead to a date that, at least, no one is saying is a deal-killer. Therefore, Mr. Chairman, first I MOVE TO RECONSIDER THE PLANNING COMMISSION'S DECISION LAST NIGHT TO DEFER THE PUBLIC HEARINGS ON THE FURNACE ASSOCIATES CASES, PCA 2000-MV-034, SEA 80-L/V-061-02, 2232-V-13-18, AND 2213-V13-17 [sic]. THAT MOTION LAST NIGHT TO DEFER THE PUBLIC HEARINGS FROM FEBRUARY 5TH TO APRIL 24TH AND I'M MOVING THAT WE RECONSIDER THAT VOTE. I was on the prevailing side last night.

Commissioners Hall, Hedetniemi, and Migliaccio: Second.

Chairman Murphy: Seconded by Ms. Hall, Mr. Migliaccio, and Ms. Hedetniemi. Is there a discussion of the motion?

Commissioner Flanagan: Would you let the maker of the motion say something first?

Chairman Murphy: Of course – discussion of the motion.

Commissioner Flanagan: Right. I would like to urge my fellow Commissioners to confirm the vote that they made last night. The concerns that Commissioner Hart has were fully vetted, you know, prior to my motion last night. In fact, as of Wednesday morning – yesterday morning, we had a meeting with Supervisor Hyland and staff and legal staff. And they all supported the motion that I made last night because the concerns that Mr. Hart shares with the applicant are not borne out by legal reading of the statute. And I have here – of course, our attorney is Beth Teare, and she's the one who indicated to me that what I motioned last night was – did not jeopardize the applicant's ability on the permit that – the site permit that he now has. So I would like to have that passed around to the Commissioners for them to read the legal opinion, if I could get my asleep Commissioner here.

Commissioner Lawrence: Not quite.

Commissioner Flanagan: Not quite, okay.

Chairman Murphy: All right, is there –

Commissioner Lawrence: I was focused on –

Chairman Murphy: I presume we want to enter that into the record. Without objection, so ordered. Is there further discussion of the motion?

Commissioner Hall: Yes, Janyce.

Chairman Murphy: Ms. Hedetniemi and then Mr. Litzenberger.

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Commissioner Hedetniemi: Thank you, Mr. Chairman. I was not present yesterday at last night's meeting because Commissioner Hurley and I were at an RSU meeting in Braddock District. But had I been here, I would have asked about the same deferral because I feel that there's an opportunity here for us to hear more, to learn more, and I think a two-month – almost three-month deferral does not permit that kind of dialog to take place.

Chairman Murphy: Further – Mr. Litzenberger.

Commissioner Litzenberger: Thank you. Mr. Hart, when is the expiration date on the current site plan, if in fact the County Attorney made a mistake?

Commissioner Hart: I can't quote chapter and verse on these dates and I really don't want to be in the position of arguing the appellants – or, excuse me, the thing is a BZA case – I don't want to be in the position of arguing somebody's side on this. I think it's sufficient to say there is a very sharp disagreement about whether the statute that automatically extends certain site plans, which is, I think, the statute that has been referred to in this handout. Whether that controls the current approvals, and particularly the interaction of this statute with some other statutes, which establish appeal deadlines for certain steps in the process – appeal deadlines to the BZA or the circuit court or beyond – which change the character of an existing approval. I don't want to argue who's right or who's not.

Commissioner Litzenberger: Hold on. I'm trying to get a date. I need a date. I want to know if the 27th of February is reasonable. That's my question.

Commissioner Hart: My understanding from the applicant is that they would need to commence – if – I think their position, with which the County Attorney certainly disagrees, but they may have to commence construction of the building by the first week of April if they don't have the decision on the pending applications. That is, if the pending applications are not resolved by then, they would have to begin construction of the – of at least one building – this \$7 to \$8 million building irrespective of this particular statute about site plans. The respective arguments of both sides are quite sophisticated. I would expect it would take a very long time to go through. My point in bringing this up to simply – suffice it to say, there is a disagreement. These are subtle points. February the 27th, as I understand it, is a date that they are comfortable with, at least for the purposes of – as I understand it, February the 27th – I mean, I think they would have preferred to have gone forward February the 5th, which was the date before then. But February the 27th doesn't kill the application the way that April the 24th would. I may be putting words in someone's mouth, but again – to my way of understanding this – there's a dispute which we can't sort out. February the 27th is not a deal-killer. April the 24th may be.

Commissioner Litzenberger: One last question. Who is the enforcing office within the State or the local government as far as these dates?

Commissioner Hart: Who is the enforcing offices to dates?

Commissioner Litzenberger: Do the State Police enforce this? Or does the County police? Or do the County zoning folks? Who enforces these dates on the applicant?

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Commissioner Hart: Well I don't – it's not a question of enforcement if something expires. It's – if somebody did something without an approval, maybe there's a violation. A judge might have to interpret should a controversy arise – should an adjacent landowner appeal some sort of approval or appeal a determination that something has a certain status and is approved or was automatically approved or something like that. A judge, I think, would probably have to sort out a legal question like that. I don't – I'm not aware and maybe I don't know enough about this – I don't believe there's any pending violation or any pending enforcement activity. This would be a technical question of a status of an earlier approval that hasn't commenced construction.

Commissioner Litzenberger: Okay, the reason I asked the question – if it's the County is the enforcing office, then the County said it's okay to go to the 24th of April, I don't see how the County can contradict themselves and enforce it prior to that.

Commissioner Hart: I don't think the County is necessarily enforcing anything. And the County can't control what a neighboring homeowners association chooses to file in court or a neighboring landowner – someone objecting to something – the County doesn't really – the County can't control what somebody else does.

Commissioner Litzenberger: Okay, thank you.

Chairman Murphy: Further discussion? Mr. Flanagan.

Commissioner Flanagan: Mr. Chairman?

Commissioner Hall: Mr. Chairman?

Chairman Murphy: And then Ms. Hall.

Commissioner Flanagan: Yes, I would like to clarify what has just been discussed. The – there is no appeal. As you read in Ms. Teare's opinion, there is no appeal so there is no neighborhood that can object to the extension of the permit. And so the only thing that occurs is that by law, the permit is extended automatically – by automatically it's extended. There's no County person involved in it. There is no State person involved in it. There's no – it just gets deferred. Now the community has been told that the start date of April 1st was required because they would lose – they couldn't get their permit extended. And it was not true. The community was not told right – was not given the right information. And when I had – attempted to have that confirmed by legal staff, they rendered the opinion that you see in front of you on the piece of paper saying that there is no reason why they can't proceed with that building with that permit that they already have at some later date. So I just want to be clear. We're talking here about a procedural matter that has nothing to do with the Special Exception that is now before the Commission.

Chairman Murphy: Ms. Hall and then Mr. de la Fe.

Commissioner Hall: Thank you, Mr. Chairman. I'll even push the magic button. The one thing I know for a fact is in Fairfax County, you can get lots of opinion and there are lots of people going, "This is true and that isn't," and all this other stuff. If there is a valid concern that maybe one person's understanding is not shared another person who might be adversely affected, it is

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reasonable, I think, that we reconsider what we did the other night and maybe shorten the deferral. Nothing stops you from deferring it again on the 27th of February. I don't see any harm. And maybe I'm missing something, but if there is a real concern that financially somebody is going to be harmed or whatever and it's not that clear or it may be a little too fuzzy for that person to be comfortable, I see no problem with moving that up to the 27th of February. And again, if that's not sufficient, then you defer it again and you're still in control. This way we're giving the, I'm assuming, the applicant or their representative an opportunity to make sure whatever their understanding is or the County's understanding is correct and nobody is harmed. I'm sure it's frustrating for you as a Commissioner of a district that you're relying on something – information and you have a right to and you made certain decisions, but if that's at all fuzzy, I think it's prudent to consider this motion. That's just my two cents.

Chairman Murphy: Mr. de la Fe.

Commissioner Hall: I don't see a harm.

Chairman Murphy: I'm sorry.

Commissioner Hall: That's the difference. I don't see any harm by moving it up and then if you have to defer it again, you defer it again.

Chairman Murphy: Mr. de la Fe.

Commissioner de la Fe: I don't – I going to be confusing this a little bit more.

Commissioner Hall: Go ahead.

Commissioner de la Fe: But I believe that there are two 2232s related to this and don't 2232s have time limits? And I wasn't concentrating on – you know, what extending that 2232 date to April without the consent the applicant does because if I remember correctly, then they are considered approved. So I would hate that by virtue of the deferral the 2232s are approved.

Chairman Murphy: Mr. Mayland?

William Mayland, Zoning Evaluation Division, Department of Planning and Zoning: My understanding from the County Attorney's office, the 2232 deadline for action is on telecom facilities only. So that would not rely on these 2232s, which relate to public utility uses.

Commissioner Hall: Really? That's interesting. That's new.

Commissioner de la Fe: That – that is different.

Commissioner Hall: I didn't ever hear that before.

Commissioner de la Fe: Yes, I haven't either.

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Chairman Murphy: I never did either. Maybe we ought to have a meeting. All right, Mr. Lawrence, please. I'm sorry.

Commissioner Lawrence: Thank you, Mr. Chairman. I'm not jumping in front of anybody, am I?

Chairman Murphy: No.

Commissioner Lawrence: Okay. If I understand the situation correctly, the point has been made that reconsidering the deferral date constitutes no harm to anyone because it can be extended again if it approaches and no action has happened. On the other hand, if any of the fears held by whoever is holding the fears are true, then there's a chance that the application essentially is killed simply by the passage of time. Am I correct in that?

Commissioner Hart: Yes.

Commissioner Lawrence: Then here's the second point. None of this has anything to do with us hearing the application on its merits according to the criteria as we always do with SEs. Is that point true?

Chairman Murphy: You're correct, as I understand it, on both points.

Commissioner Lawrence: Thank you, Mr. Chairman.

Commissioner Donahue: Mr. Chairman?

Chairman Murphy: Is there further discussion? Mr. Donahue.

Commissioner Donahue: Yes, thank you, Mr. Chairman. Coming off some of those comments, I guess I'm wondering if anybody can explain to me in 100 words or less what the downside of moving this up is. However, I also was concerned before Mr. de la Fe brought up the point about the deadlines in 2232s. It's not that I'm not willing to take the word of current staff, but the way those deadlines work can be extremely confusing. And therefore, I'm not sure I'm ready to vote for this motion. And I don't have much time, unless that specific issue is addressed to Legal and an opinion on the 2232 deadline comes back to us that assures us we're not going to have a problem with that issue. I mean, that's the way I feel right now. It would seem to me that next week – we could do this again next week without changing anything right now. We could do this again next week after we have actually had Legal address the situation and inform us concerning how these deadlines work.

Chairman Murphy: I think you would have to reconsider the motion the next meeting.

Commissioner Donahue: Correct.

Chairman Murphy: Which is what we're doing tonight. We have to reconsider that motion made last night at the next meeting, which is tonight.

Commissioner Hall: It can't be extended.

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Commissioner de la Fe: Yes, if we don't –

Chairman Murphy: It can't be extended.

Commissioner de la Fe: We can't do it next week.

Commissioner Hart: Mr. Chairman?

Chairman Murphy: We can't do it next week. We can't motion – make a motion to consider next week. It has to be done at the next duly constituted meeting. Is there further discussion of the motion?

Commissioner Flanagan: Me.

Chairman Murphy: Okay.

Commissioner Flanagan: Well I was interested in Commissioner Hall's comments because – of course, the only reason for going for the April was to make sure that both the Land Use Committee of the Mount Vernon Council and the Land Use Committee of the South County Federation were considering the same documents. The – it has been a moving target. We've had amendments to the application right up to December 11th and January 3rd. The other aspect is that in the meantime, a 2232 was deemed to be needed. So that didn't even come before the land use committees yet at all. So I need plenty of time to get that through those land use committees because, as you all know, the results of land use committees can't be marshaled that easily. It's like herding cats so it's – so I – the reason for the time was that since it didn't jeopardize, according to legal counsel – it didn't jeopardize the site permit in any way. However, if I was convinced that there would be a determination on this permit expiring between now and February 27, I think I would be – you know, as long as during that time before February 27th, I get an opportunity to come back and extend it so that the land use committees do have sufficient time. That might be helpful if we were to do that. I don't have any problem with that as long as I have the expectation that that doesn't occur – you know, that we would be – I can go forward with another motion to defer.

Commissioner de la Fe: Is he saying that he agrees?

Commissioner Hall: Mr. Chairman?

Chairman Murphy: Ms. Hall.

Commissioner Hall: Commissioner Flanagan, I understand about land use committees, but not everybody here has the benefit of a land use committees, okay? So that's one. But I would hope – I would truly hope that in light of our willingness to reconsider this to move this up that the applicant gets his butt in gear and gets you everything you need for those land use committees. One of the frustrating things that I've always is – you know, a Commissioner with a district is, you get things in drips and drabs and everything else. And it's very hard when you're trying to get all that information to the Committee. So I would think they would be inspired to move along smartly. That's just – I hope.

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Chairman Murphy: Is there –

Commissioner Flanagan: Mr. Chairman?

Chairman Murphy: Yes.

Commissioner Flanagan: Yes, I just want to compliment Commissioner Hall for those comments. And I do agree with that that I have unusually large land use committees – two of them to deal with every month. So I –

Commissioner Hall: I'm sorry.

Commissioner Flanagan: And they deserve to be able to comment upon these as 2232s. And I know the same thing is true over in Lee District because I – Mr. Migliaccio doesn't move over there, I don't think, without having his land use committee talk about things.

Commissioner Hall: Well that's another case.

Commissioner Flanagan: So – yes, that's another case.

Commissioner Hall: We're not going to talk about Lee District.

Commissioner Flanagan: Right.

Commissioner Migliaccio: How am I thrown into this?

Chairman Murphy: Is there Hallmark card for this occasion? Is there further discussion of the motion?

Commissioner Sargeant: Mr. Chairman?

Chairman Murphy: Yes, Mr. Sargeant.

Commissioner Sargeant: I'm going to make a follow-on motion after we do this one. But a couple of things – as a Mount Vernon resident who is very are of these two land use committees and very supportive of their initiatives, that's why I voted last night in favor of the extension to April. I certainly want to give them all the time necessary to consider this. And I want to make sure they have as much time as needed because this is indeed a very complex case in many different ways. I want to make sure staff has the appropriate time because it's a difficult case to win their way through and get all the details that are necessary. The challenge is the would-have. Normally we would have heard the words, "intent to defer," and then the deferral would have occurred on the date of the public hearing. We did not hear that last night, nor were we informed – because I was operating under the same impression that the earlier date was necessary in terms of the applicant's site plans and other issues. But we didn't have the benefit last night of the discussions that involve the County Attorney's office regarding legal differences in the interpretations. It would have been helpful to have that information at the time. We were not informed – we took for granted, I think, that the applicant was in agreement with the deferral

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until April. We were not involved that the applicant was not in agreement with a deferral until April. That makes this more complicated than it had to be. Some communication would have been very helpful from anybody involved in this thing. What makes me angry is because I am a Mount Vernon resident and I do want to represent and respect those two civic groups, who work very, very hard, as Commissioner Flanagan and I both know on these issues, to make sure they have the adequate and appropriate time that they need to make the input. Because they are working very on this one – both of them – both groups. And I appreciate them for that. So it would have been helpful to have all of that information. It would have been helpful to do an intent to defer. All the things we have done in the past, it would have been helpful to know in advance that there was this disagreement – a disagreement between the attorney for the applicant and the County Attorney's office. To me, that's quite serious. And that's something in the follow-up motion that I will address. But it makes it difficult for me not to say that an extension until the 27th is appropriate so that we can further clarify these issues. And I will extend it to June if necessary once we get some further clarification. Thank you.

Chairman Murphy: Is there further discussion of the motion? All those in favor of the motion to reconsider the motion made last night by the Commissioner from Mount Vernon.

Commissioners: Aye.

Chairman Murphy: Opposed?

Commissioners Donahue and Flanagan: No.

Chairman Murphy: Motion carries. Mr. Donahue and Mr. Flanagan vote no. Mr. Hart.

Commissioner Hart: Thank you, Mr. Chairman. I MOVE THAT WE DEFER THE PUBLIC HEARINGS ON THE FURNACE ASSOCIATES CASES, PCA 2000-MV-034, SEA 80-L/V-061-02, 2232-V-13-18, AND 2213-V13-17 [sic], and Mr. Mayland I hope I got the right numbers for all four , TO FEBRUARY 27, 2014 AND IN NO WAY IS THE MOTION TO DEFER INTENDED TO PREJUDGE IN ANY WAY THE MERITS OF THE APPLICATION OR STYMIE OR CUT OFF ANY DISCUSSION OR CITIZEN INPUT ON THAT.

Commissioner Hedetniemi: Second.

Chairman Murphy: Seconded by Ms. Hedetniemi. Is there a discussion of that motion? All those in favor of the motion, say aye – to defer the aforementioned applications to a date certain of February 27th, all those in favor, say aye.

Commissioners: Aye.

Chairman Murphy: Opposed? Motion carries.

Commissioner Sargeant: Mr. Chairman?

Chairman Murphy: Mr. Sargeant.

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Commissioner Sargeant: I would like just to make a follow-on motion here. I'm quite certain that if this disagreement persists between the applicant and the County itself and the County Attorney's office, then it will likely color the outcome of this application regardless of how we vote for it. So I WOULD LIKE TO MOVE THAT THE PLANNING COMMISSION ENCOURAGE ALL THE PARTIES INVOLVED – the County, the applicant – all the parties involved – TO RESOLVE THIS MATTER INVOLVING THE APPLICANT'S SITE PLAN PRIOR TO FEBRUARY 27TH.

Commissioner Hall: Can we do that?

Chairman Murphy: Basically, it encourages –

Commissioner de la Fe: We can encourage anything.

Commissioner Hall: We can encourage.

Commissioner de la Fe: We can encourage anything.

Chairman Murphy: We can encourage anybody.

Commissioner Sargeant: Yes.

Chairman Murphy: Who said that we aren't in agreement here? Was there a second to that motion?

Commissioners Donahue, Hedetniemi, Flanagan, and Migliaccio: Second.

Chairman Murphy: Seconded by Mr. Donahue, Ms. Hedetniemi, Mr. Migliaccio, and Mr. Flanagan. Is there a discussion? All those in favor of the motion to encourage, say aye.

Commissioners: Aye.

Chairman Murphy: Opposed? Motion carries. Thank you very much.

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(The first motion carried by a vote of 10-2. Commissioners Donahue and Flanagan voted in opposition.)

(The second and third motions carried by a vote of 12-0.)

JLC