The Zest case: some observations (14)

The Bethlehem Gadfly 306 S. New St., Gadfly's posts, Serious Issues February 24, 2019

(14th in a series of posts on 306 S. New St.)

Gadfly began this miniseries on 306 S. New St. in post 10.

The long prologue is finally over.

Let's see if he can demonstrate what's kept this case fresh in his mind.
Gadfly followers will recognize that he has been troubled by the tension and contention surrounding developers and development for a long time.
In post 10, he formulated it this way: "The reason Gadfly can't let this 'case' go is that it highlights so well the recurring tension between development and history in the City, and a sense that many have that developers are shady, that developers get their way, that Council tends to buckle under to developers (and worse things are intimated), that historical ordinances aren't worth the paper they were printed on and the breath with which they were conceived, that what the 'people' want doesn't matter. So this is an important case."
Gadfly's dis-ease goes way back to a post on the 2 W. Market case in which he ruminated over the "Great Divide" between CM Callahan and CW Negron's visions of the Southside.

Especially to CM Callahan's typifying critics of development as "CAVE people":
"Some people call them CAVE people, Citizens against Virtually Everything. No matter what you do, no matter what you say, it's always, there always a group that comes out of the woodwork."
That's a harsh view, an indictment of the entire race of Gadflies, and deserves some defense.
Here and especially in the next post, Gadfly will try to see 306 S. New through Gadfly eyes.
Here is a list of observations that, Gadfly feels, can help explain why some people have good reason to feel troubled by the way the case was handled.
The numbers in parentheses refer to the excerpts from the audio recording of the Dec. 4 meeting compiled in post 12.

1. The compromise idea to meet HCC's concern about the height of the 306 building by recessing the 6th fl. came from the building architect (1). That very same architect did the plans for the restaurant that violate the agreement with HCC. That architect should have known the restaurant plans were in violation. That architect should be called out.
2. The developer professes lack of knowledge of the HCC stipulation and a complete laissez-faire posture about lease negotiations and arrangements with the restaurant (5,8). This seems quite disingenuous and will be the

sole subject of the next post. There was no doubt in the mind of Council and the HCC that height was an issue and recess a condition (1,2,7,8,11).

3. Approval of design plans by the City green-lighting construction occurred two weeks before the violation was discovered. But we do not know exactly when construction of the restaurant began. And we do not know exactly when work on the exterior portion began. So it's hard to judge how far construction had progressed before the violation was discovered.
4. Image 4, one of 2 images presented to Council for deliberation at the Dec. 4 meeting, indicates that the roof was done before the violation was discovered. It is not clear if construction on the visible exterior of the building (probably even visible from City Hall) could have gotten that far without discovery of the violation.
5. A "stop work" order was not issued when the violation was discovered. Why? So it is not clear exactly when work stopped. Apparently, work in other areas of the restaurant never stopped. It is not clear whether a "stop work" order, if issued, would have covered the whole project, not just this portion.
6. Quadratus Construction filed the application to HCC for Certificate of Approval (COA) after the violation was discovered. What standing does the contractor have to do this? Shouldn't it have been the developer? The line of true responsibility for the design that produced the violation is not clear.
7. Quadratus attended the HCC meeting and not the developer. The developer attended the Council meeting and not Quadratus. Both should have been present at both meetings so that a full range of questions could be answered and a full range of possible solutions considered. All key parties were not "at the table." The absence of Quadratus at Council suggests that the developer was not even considering a construction compromise or construction reversal when he went to Council.
8. The exact state and nature of the work performed before the violation was discovered is not clear. AW says the work was more than half-done (3), but that's a judgment better made by the contractor. Before Council minds were made up, it should have been authoritatively determined exactly what had been done and what was left to do.
9. Though the HCC chair said that "going backward" would be "difficult" (4), the possibility of reversing the work in violation was not explored fully. AW got close but backed away (10). It was his feeling that deconstructing at this point was not something anybody on Council would ask.
10. The strong implication/impression was that the work in violation was somehow now irreversible, had progressed beyond the point of no return (4,9). But there is nothing concrete to demonstrate definitively that was so. And, on the surface, without explanation, it does not make good sense.

Going backward may have been difficult, but that's not to say it was impossible.

11. Quadratus could weigh in significantly on the last several points but has not responded to three attempts for an interview by this inquirer.
12. The City accepted responsibility for a mistake but provided no guidance about a solution. One wonders how the City handles cases (there must be some) in which a developer/homeowner violates a building permit, even to the point of completing the project in unauthorized fashion. More to the point, one wonders how the City handled projects (it must have happened!) in which it mistakenly issued a permit and the project was in process or even complete. In other words, what previous experience or precedent relevant to this specific situation could the City offer to Council?
13. The restaurateur was not directly asked an obvious key question. He was not asked what he would do if Council backed HCC and denied the COA. If he had to operate without that extension, would the impact of the extra expense to deconstruct be destructive? But no even ballpark estimate of "repair" cost was given. So, ok, what if the City paid the expense for its mistake – would that be ok with him? Or would he then argue the irreparable loss be indoor seating in his business plan (Gadfly figures roughly 30 seats in that area)? Or is the problem timing – he aimed at opening in the holiday season, and he would miss the opening surge of business that would bring? The restaurateur says he would be pretty much "ruined" if Council didn't approve (6). Why? In what way?
14. The idea that the City might pay to correct its mistake was not considered.
15. This claim of imminent ruin is connected with an odd piece of dialogue between AW and the restaurateur in which "catastrophic" is used to describe the impact of a denial on the restaurateur. AW gives the restaurateur this powerful word to describe his own situation – puts it in his mouth (10). CM Waldron: "Ok, that's fair, but it would be easy to say that to take that area out would be catastrophic." Restaurateur: "That's a very exact, perfect statement." CM Waldron: "There you go." Maybe this inquirer watches too much Perry Mason (dating himself), but this feels like "leading the witness." Without more specific explanation, "catastrophic" seems melodramatic.
16. ON does not make a motion but she does make a suggestion that would escape the horns of the either/or dilemma formulated by AW and JWR (12). It's been assumed all along that there will be service on the terrace. Is it agreeable – even keeping the new roof perhaps – having outdoor service there with heaters as with restaurants elsewhere in the City as ON suggests? Could more conversation with HCC effect such a compromise?

17. There seemed to be a need Dec. 4 to rush to judgment. The planned restaurant opening is imminent, etc., etc. But it was 3 weeks from discovery of the violation to the HCC meeting and then another 2 weeks to the Council meeting. Is there no provision in various guidelines to permit a compression of time to meet the need for an urgent decision? There was a lot of dead time that might have been used to take the heat off Dec. 4. On Dec. 4 a feeling of "too late" to do anything else but approve was in the air.
18. Several Council members were quite perturbed by the City mistake that put them in such a "difficult, impossible, terrible" position. And certainly a segment of residents were/are quite angry at how the historical district guidelines and decision played out. The City promised to amend its procedures to eliminate a repeat of the situation. The City evaluation and procedural revisions should be publicly shared with Council and residents as an act of good faith that steps have been taken to ensure that this kind of error does not happen again.

But it's the developer on which we must focus most attention. Next post.