

# Zoning Board of Appeals

## Regular Meeting Minutes

Monday, September 22, 2014  
7:00 p.m., Council Chambers



City of South Haven

### 1. Call to Order by Lewis at 7:00 p.m.

### 2. Roll Call

Present: Boyd, Bugge, Miller, Paull, Wheeler, Lewis  
Absent: Wittkop

### 3. Approval of Agenda

Motion by Bugge, second by Wheeler to approve the September 22, 2014 ZBA Regular Meeting Agenda, with the withdrawal of the Monroe Boulevard request.

All in favor. Motion carried.

### 4. Approval of Minutes – July 28, 2014

Motion by Bugge, second by Paull to approve the July 28, 2014 Regular Meeting Minutes as corrected and clarified.

All in favor. Motion carried.

### 5. Interested Citizens in the Audience Will be Heard on Items Not on the Agenda

None at this time.

### 6. New Business – PUBLIC HEARINGS

#### a. Administrative appeal to Zoning Administrator decision to deny a requested land division at 38 North Shore Drive.

Anderson noted that the Zoning Board and Planning Commission are aware that the city has been working with the applicant regarding this property for quite some time. Anderson explained that in addition to the request before the ZBA, the applicant also has a request for rezoning from B-3 to R1-A before the planning commission. The matter before the ZBA and tonight's appeal is in regard to the requested land division. This is an administrative appeal

to the Zoning Administrators' decision to deny a requested land division of the subject property, according to Anderson.

Anderson continued to explain that the applicant asked to split a lot in the B-3 zone, however this request came in after an amendment had been adopted by City Council in March 2014 to allow, by special use permit, single family homes to be constructed on "existing lots when it is documented that the development of any other permitted use is not possible due to lot size or configuration." Anderson noted that it was the intent of the Planning Commission to not allow lots that could support a waterfront business to be split to accommodate single family development. The Planning Commission wanted to protect the business properties in the B-3 zone and their intent was to allow existing lots that were too small for such businesses to be used for single family homes.

When the request came in, it was Anderson's determination that, if split, there would be no use for the resulting lots because they would be non-conforming lots and without an allowable use under the Zoning Ordinance. The applicant appealed, according to Anderson, and in the packet is documentation of the denial and the reasons for that and the applicant's response related to the zoning ordinance and the state Land Division Act. Also in the packet were copies of the city attorney's confidential opinion related to the concerns about the land division act.

Bugge asked if there was any use that the property could have aside from a single family house to which Anderson responded, "No, and the applicant and I worked for quite some time to come up with another use in the B-3 zone. But we could not find a use that fit there, even looking at something very small like an ATM, or a walkup business such as a Dairy Queen. There is not room for parking for staff much less customers. Even when the lot across the street was the parking lot for the former business on this property, there was not enough required parking for the business use there. The applicant agreed that it was not conceivable to have a business use there; the only use was a single family home. And that was the reason the Planning Commission initiated the idea of allowing a single family home to be built on certain properties in that zone.

Bugge commented that the zoning board is just looking at an appeal of the denial and nothing else, to which Anderson responded, "Yes, that is all we are looking at tonight. We are strictly looking at my decision to deny it and the filed appeal. This is a responsibility given to the ZBA through the state statute, the zoning ordinance and your bylaws."

Motion by Paull, second by Miller to open the public hearing.

All in favor. Motion carried.

Matthew VanDyke, Miller Canfield, 277 South Rose Street, Suite 5000, Kalamazoo, Michigan. Representing Tom Brussee, the applicant. VanDyke began by assuming that the board had a chance to read the appeal, which he stated comes down to a property owner's right to split property where the Land Division Act (LDA) is satisfied. VanDyke referenced a subsection of real property law which provides a finite list including depth to width ratio, width and area of the subject property. VanDyke stated that this section precludes a municipality from imposing conditions not in the Land Division Act, commenting that this is not a standard the city has the authority to deny. VanDyke stated that the Zoning

Administrator's reasons are not included in the LDA, thus the decision is not supported and were described by VanDyke as arbitrary and capricious. VanDyke noted that the city has made a legal determination that public safety, health and welfare do not require a minimum lot size in the B-3 zone. VanDyke stated that the LDA is clear that a complete application will be approved if the criteria in Sections 108 and 109 are met. VanDyke pointed out that there are no published opinions by the Supreme Court to reference. VanDyke's conclusion is that Section 901(17) of the Zoning Ordinance is erroneous because the term existing lot is not defined. Further, VanDyke stated that the existing lot requirement should only apply after application for site plan approval. VanDyke described this as consistent with other sections of the Zoning Ordinance, concluding that whether a lot can be put to other uses is not a standard authorized by the LDA.

Bugge asked about other sections of the LDA that pertain to other divisions, referencing platted lots. VanDyke said, "Regarding platting, we are not asking for a platted subdivision under Sections 108 and 109 of the LDA, which is what we are talking about." Bugge questioned if VanDyke was saying that once platted, that does not apply, to which Vandyke responded, "No." Bugge stated, "Then we have a disagreement."

Lewis asked what the applicant will do if the Zoning Board denies the appeal and VanDyke said they will file an appeal to the circuit court.

With that, VanDyke stated he will be happy to answer further questions if they come up.

Kirk McCreary, 50 North Shore Drive, #5, South Haven. Stated that he has a question as a point of information: "If at some point the split is allowed, what guarantee is there as to setbacks that would be required on this property?"

Lewis responded that all setbacks would apply to each new parcel, if the property in question were split.

Motion by Miller, second by Boyd to close the public hearing.

All in favor. Motion carried.

Paull stated that this appeal is based on work the Planning Commission has been doing relative to property in the B-3 area and noted the fact that there is currently a potential remedy that will be decided by the Planning Commission, noting, "It's complicated and weird." Paull explained that the Planning Commission made a decision to allow single family homes to be built in this zoning district based on a certain number of criteria, one being single family homes would be allowed on properties that could not be used for the other allowed uses in the B-3 zone. Paull noted that when the B-3 district was first established it was created with a broad brushstroke; every property along the waterfront was zoned B-3 Waterfront Business. A number of pieces of property were clearly too small for Waterfront Business, such as marinas and similar uses, which require pretty large land areas. Paull went on, "So one of the ways the Planning Commission figured they could resolve the issue of this property sitting fallow was to allow single family homes to be built on it. The idea was carefully written; questioned by city council and rewritten so that these properties would not be split up. If we weren't careful, properties that were in the B-3 and already had marinas or other businesses on them could be split up and made available for single family homes. We

didn't want to discourage waterfront businesses from continuing. So we were careful that we didn't leave verbiage that allowed properties to be split up for that purpose. That is what we are being asked to do here; a request that a too small B-3 property be split again and two homes be built on it. One possible option is pending with the Planning Commission, a request to rezone the property. Currently the property is surrounded by property that is more appropriate for residential zoning. Maybe this property should never have been zoned B-3; maybe rezoning is the solution. We don't need to allow this property to be split; it's asking to go against the common practice of the B-3 zoning it is in, creating a conundrum; leave it B-3 and there are other solutions the property owner could use to make use of his property." Paull stated that he believes the board should uphold the Zoning Administrator's decision.

Lewis worries about setting a precedent; opening the door for someone to split up a marina property and allow it to be developed into a number of single family homes.

Boyd wanted to know what the time frame is for the solution Paull mentioned to which Paull responded "The next Planning Commission meeting," which Anderson clarified is the first Thursday in October.

Boyd stated that he hears Paull saying the cart is before the horse; that if the Planning Commission were to allow the property to be rezoned, this request would not matter; that if the applicant wanted to split the subject property after it was rezoned it would be perfectly allowable.

Lewis reminded the board that they have only this specific issue before them that needs to be decided.

Bugge asked what the zoning is of the condominium property to the north of the subject property to which Anderson responded that the surrounding properties are all B-3 except the historic Monroe Park, which is composed of very small lots with very small setbacks.

Bugge asked, "As we look at this, the language adopted in March 2014 states that a one family detached dwelling is allowed when no other use is allowable under the B-3 zone. However, if we overturn your decision, would the applicant be going before the Planning Commission under the new regulations?"

Anderson pointed out that the ordinance, which was revised again in July, states that no single family homes shall be permitted on lots that were split after January 1, 2014. Whether the ZBA in an approval of the split would be giving tacit approval for the development of two single family homes would be something Anderson would want to get a legal opinion on from the city attorney before she commented.

Bugge noted that this creates a 'Catch 22'.

Miller asked if this request could be tabled to which Lewis responded that it could but in Lewis' opinion it does not need to be tabled; Anderson's denial was correct according to current zoning law.

Bugge said her concern is the fact that the lot could only be used for a single family house, whether divided or not. The way the ordinance is constructed Bugge would tend to be comfortable with Anderson's decision as it stands.

Lewis asked if a single family home could be put there right now to which Anderson responded that it could with a special use permit, which requires the applicant to show there is no other permitted use that could go on the property. Anderson noted that is what she would recommend if it came before the Planning Commission because, as is, the land is not usable for any of the other permitted uses.

Boyd asked what steps the applicant would have to go through, if not through this appeal, to put two houses on this property, noting, "If something is going to happen down the road anyway, let's take away the clutter, and make something happen." Boyd commented that he does not want to mess things up for other properties down the road, and asked,

"What is a reasonable course of action the applicant could take to make two parcels out of this one to be used for single family residential?"

"If the board overturns the staff decision, the applicant would likely be able to build two houses," per Anderson. "The other option is to rezone the property to R1-A; if rezoned it would be allowable for the applicant to split the lot. It would be in the R1-A zone and treated like any other split where the lot was large enough to be split. That is the option before the Planning Commission right now and that decision has to be made at their next meeting." Anderson pointed out that that request also has to go to City Council since it is a zoning amendment.

Boyd asked what other steps would be required to which Anderson responded that if rezoned and enacted, the applicant could apply for the lot split."

Boyd asked for clarification that the broad stroke approach to zoning is what put us in this situation to which Anderson pointed out, "Just be clear, that B-3 zoning happened a long time ago, and that is why when the Planning Commission subcommittee started looking at the vacant properties, mapped them and had the GIS technician measure the lots. It appeared to the planning commission that it made more sense to allow single family homes rather than having each owner coming in for a use variance."

"How many properties were there that fall into that criterion?" Lewis asked and Anderson responded about thirteen (13).

Bugge asked how many of those properties are large enough that a division is possible, according to the B-3 criteria and Anderson responded that there were a couple but any lots that are unusable for anything but single family homes would not qualify to be split. Anderson said if someone came in now with a land split they would be denied because the ordinance now reads that they cannot split lots after January 1, 2014.

Paull reminded that this needs a motion. Discussion ensued regarding what would happen if the board overturns the Zoning Administrator's decision and Boyd said the applicant would be off and running. Bugge said there would still be other processes. Anderson said there still would be the step of the special use approvals.

Miller asked about tabling and said he is thinking, in fairness to the applicant; if the board were to table the issue until the next meeting, the Planning Commission meeting could take place. "Not that they are necessarily related but that is what we are talking about as a point of conversation," Miller said, noting that he is trying to make it okay for the applicant and for the community. Miller said he is not making a motion, just asking for consideration. Boyd remarked that that is why he asked the question he did.

Anderson clarified, "We are not looking at special uses or variances or rezoning requests. Your assignment is to look at the law; look at the ordinance, look at what our attorney presented and what their attorney presented. You are to base your decision on the law; it is tricky and complicated and that is what you are assigned to do here. Failure to follow those rules could set the city up for legal action."

Wheeler feels the board needs to uphold the Zoning Administrator's decision and Lewis stated he would have said the same thing.

Motion by Bugge to uphold the ruling of the Zoning Administrator based on the criteria stated in her denial and on the advice we received from our attorney. Second by Wheeler.

A roll call vote was taken.

Ayes: Bugge, Miller, Paull, Wheeler, Lewis

Nays: Boyd

Motion carried.

#### **b. Rear yard variance request for property at 26 Grand Boulevard**

Anderson noted that this is a request from Matthew & Cynthia Carstens to build a new house and deck on this property. Anderson explained, "Forty feet (40') back from the channel is owned by the Coast Guard; if you look at the aerials you'll see that certain other property owners have gotten license agreements with the Coast Guard for use of the property and our applicant is one of those. The previous house had a deck that went out to the property line over the Coast Guard property. What we are looking at is the point where the deck and house go up to the lot line." Anderson pointed out that the applicants are asking for a variance to have a zero rear yard setback instead of the required three (3) feet.

Bugge pointed out that in looking at the drawings, there is only one portion extending over the three feet (3') and asked, "The deck coming off of the house has to comply with the setback, so essentially we are just looking at the three feet (3') between the property line and the easement the Coast Guard has granted them?" Anderson responded, "Yes." Bugge asked, for her own information, whether the Coast Guard can go around and issue these license agreement without any consideration of what we require?" Anderson stated that yes, they can; they own the property but the city still controls whether a variance will be granted to conveniently use the easement. Bugge asked how much further this deck is extending out from the old one. Anderson deferred to the applicant.

Lewis pointed out that the Zoning Board is not discussing the deck over the Coast Guard property and asked, "Can we give them an easement such that they don't have to comply with the 3' setback requirement?" Anderson clarified that if the board denies their variance, the applicants would have to put their deck and house back three feet (3') and there would not be a connector for their new house and deck onto the existing Coast Guard easement.

Motion by Miller, second by Paull to open the public hearing.

All in favor. Motion carried.

Matthew Carstens, 12137 3½ Mile Road, Battle Creek. Stated they are asking for a zero (0') setback, explaining that the existing structure that is already there actually encroaches onto the Coast Guard property. "There was a question about whether we are gaining anything in deck space," Carstens stated, "The answer is no; we are pulling the old structure off and back, so the neighbors to the west won't be affected and neighbors to the east are not going to be affected because the house is actually moving back. The structure of the new home will be back from the eastward neighbor, so they will have a little better view."

Bugge noted that it appears that the applicants' house came forward, but the deck did not. Carstens pointed out the drawing that says "with existing home"; there is deck that goes across the three foot (3') setback and a significant portion of the structure as well. Carstens said if you took the deck completely off, it would just leave the upper and lower level. Carstens noted that the deck will be somewhat larger, lengthwise, but does not come out any further. The deck from the river side, from the south side, according to Carstens, comes out to the exact spot.

Bugge asked what the other easement on the property is used for and Carstens responded that that is a fourteen foot (14') utilities easement. Bugge commented that Carstens cannot build over that and Carstens agreed.

Marla Bruemmer, Designer of the property. Clarified that the deck agreement with the Coast Guard specifies that we cannot go larger; the shape of the deck changed but the square footage is the same as the old one. Looking at the house setback of the property to the west, that structure is significantly closer so, according to Bruemmer, the only loser of any view is the Carstens, according to Bruemmer.

Motion by Paull, second by Bugge, to close the public hearing.

All in favor. Motion carried.

Discussion followed based on the fact that there will be no additional encroachment beyond the original house and that the situation is a pre-existing condition.

Motion by Miller to approve the request as presented because the problem is not self-created; the property easement creates special circumstances for which a variance is warranted; the variance is only on the property of the applicant; the proposed house will be more compliant than the existing structure and granting the variance is not detrimental to the neighbors. Second by Boyd.

A roll call vote was taken.

Ayes: Miller, Paull, Wheeler, Boyd, Bugge, Lewis  
Nays: None

Motion carried.

**7. Other Business**

No other business. Anderson noted there is still a week before the deadline for the October meeting.

**8. Member Comments**

There were none.

**8. Adjourn**

Motion by Miller, second by Wheeler to adjourn at 7:59 p.m.

All in favor. Motion carried.

RESPECTFULLY SUBMITTED,

Marsha Ransom  
Recording Secretary