Zoning Board of Appeals

Regular Meeting Minutes

Monday, August 26, 2013
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, Wittkop, Lewis
   Absent: None

3. **Approval of Agenda**

   Motion by Paull, second by Bugge to approve the agenda as presented.

   All in favor. Motion carried.

4. **Approval of Minutes** – June 24, 2013

   Motion by Bugge, second by Wittkop to approve the June 24, 2013 minutes as written.

   All in favor. Motion carried.

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

   None at this time.

OLD BUSINESS – PUBLIC HEARING

6. **Kal-Haven Variance Request from Zoning Ordinance Section 1716-2, Nonresidential Access.**

   Lewis clarified that the applicant is Kal-Haven Bikes, Inc. and requested the background from Anderson, Planning and Zoning Administrator.

   Anderson noted that Mr. Nixon of Kal-Haven Bikes came to the city a year ago in October seeking a variance from the portion of the Zoning Ordinance that does not permit non-residential access through a residential property, that is, commercial access through a residential property. At that time, his request was denied by the Zoning Board of Appeals. He has since then gone to court and the judge has ruled that the case should come back to

the Board of Appeals for further clarification. That brought us to tonight. We decided to go through the entire process over again; notifying the neighbors, putting an ad in the papers and treating it as a new application because there are so many new members on the Zoning Board of Appeals. Rather than have everyone try to fit into what was done last time, it was determined it would be better to start over with the discussion. So tonight we will be hearing that variance request and treating it as new.

Lewis called for a motion to open the public hearing.

Motion by Wittkop to open the public hearing on Item 6. Second by Miller.

All in favor. Motion carried.

Lewis asked if the applicant wished to speak.

Steve McKown, Allegan, identified himself as Kal-Haven Bike's attorney. Noted that he and the applicant did appear here in October and last year for essentially the same request in front of the Zoning Board of Appeals, regarding the nature of the private easement that provides access to this property. McKown made the assumption that the members of the Zoning Board had access to the nine (9) exhibits provided last time and was responded to in the affirmative by Lewis and Anderson.

McKown noted that those exhibits demonstrate that David Nixon, his wife Jennifer at that time, and another corporation they set up bought the property on land contract in 1987. The only access to the property at that time was by way of a private easement described in the land contract which is the same easement that we are dealing with today except that at that time is was described as being a rod wider, or 16.5 feet.

McKown reiterated that David Nixon, his then wife and their corporation purchased the property in 1987 ~~to~~ ***for*** $100,000; "It is the property shown in yellow on your map up there," (as he points to an exhibit displayed on a screen in council chambers), "You can see Blue Star Highway and the Black River Road that comes in at the top of the picture, just to the right of the Black River. That road curves around and comes into the property owned by the applicant."

McKown noted that it was in 1994 that the deed was given in fulfillment of the land contract by the applicant. It was in 1998, after the property had been transferred, that the City adopted Section 1716.2 which restricted non-residential access through residential property. So at the time the property was purchased; at the time the deed was delivered, this Section (of the Zoning Ordinance) that we are talking about was not in effect and was not a part of the ordinance. "And there was no restriction under the ordinance regarding access to the property," McKown summed up, and noted that that property has been, since at least 1998, in the B-3 commercial zoning district. McKown indicated the map exhibit again and noted that the property to the north, where the easement is located, is in a residential zoning district, so the applicant does not disagree with the statement that the easement crosses residential property. "It certainly does, ever since 1998."

McKown pointed out that in 2005 there was another transfer from the corporation that initially took title to the present corporation, Kal-Haven Bikes, which Mr. Nixon has been a shareholder, officer, and director of corporations since the beginning of 1987. McKown

noted that there has been a continuity of ownership going back to 1987 and this issue of Section 1716.2 came about initially when a request for a land division was made and it was denied by the city. McKown explained that Mr. Nixon's corporation had submitted a request to split a part of the property off and the response of the city was that there was not a road that provided access to the property. McKown noted that last year in July he and Nixon came before the Zoning Board of Appeals and the board made the decision, interpreting the ordinance based on the evidence produced at that hearing, that the easement is a private road under the city's ordinance.

Pointing to the map, McKown noted that the easement is a private road that has several residential properties that use it to gain access to Blue Star Highway. McKown pointed out that the private road is partly located in the township and partly located in the city.

McKown explained that the applicant requested a variance to the zoning ordinance last year in October, because under the zoning ordinance, as adopted, there was no use that could be made of this property. The property is located in a commercial zoning district, the B-3 waterfront zoning district and the ordinance provides the uses that can be undertaken in this district, according to McKown. McKown read directly from Ordinance Section 901 enumerating the permitted uses in the B-3 Waterfront Business district, noting that none of those permitted uses are only residential; in all cases a residential use must be connected or tied in with a commercial use.

McKown noted that the property is currently zoned commercial, but according to the city's ordinance there is no way to use the property for commercial uses. McKown pointed out that the property is bordered on the south and east by the Kal-Haven Trail, which is state of Michigan property and there is no motor vehicle ingress and egress past that in that location and noted that the state has the capability of granting access but has not in this particular case. McKown also noted that the Kal-Haven Trail intersects Black River Road where it is part of the road right-of-way, but the Kal-Haven Trail is not part of any road right-of-way adjacent to Nixon's property. McKown noted that the applicant's property, on the west, is bordered by the Black River and on the north is bordered by residentially zoned property where the easement is located.

McKown noted that the easement, not only for the applicant's property, but for the other property owners that use that easement, initially was a narrower easement but was expanded by court action and those two judgments are part of the record in the applicant's case. Kal-Haven Bikes brought an action, just as some of the other property owners did, who have homes that are located on the Black River Road, to have the court determine the location of the easement, the width of the easement. "It is a twenty-four (24) foot wide easement," McKown stated, noting that does not mean twenty-four (24) feet of it is being used, but the legal easement is twenty-four (24) feet wide. McKown also pointed out that the easement is for ingress and egress, vehicular as well as pedestrian, and also for utilities.

The difficulty for the applicant, McKown pointed out, is that there is no way to access the property for a commercial use, or for a customer to access any business unless by walking across the Kal-Haven Trail. McKown is not sure whether a customer could even reach the applicant's property for a commercial use, because the zoning ordinance does not say "vehicular access", it says, "access," which could include walking, biking, everything including motor vehicles. McKown also explained that he is not sure that a commercial use could even be established on the property, because if a cement truck, which would be

considered a commercial vehicle, would not be able to use the easement since that would be a commercial use, not only can the property not be used for a commercial use, a commercial use cannot even be built on the property the way the ordinance is drafted. "There is no way to get heavy equipment in there except by truck and the only way to get there is on that private easement. You cannot get cement in there, you cannot get roof joists in there, drywall, all the things it would take even to build a residential use, has to come over that easement," McKown stated. McKown summarized that the applicant is left with a situation where the city is saying, "It is zoned commercial but you cannot use it."

McKown distributed copies of two pieces of information he did not have last time he came before the board. These are taken off public websites, one of which is the Van Buren County website, which has the property tax information, according to McKown, who pointed out that in 2012, summer taxes were assessed in the amount of $5,542.00 and for the winter taxes, $1,070.27. The reason for providing this information is that this record goes back to 2009, showing the applicant's property being assessed several thousands of dollars' worth of taxes for property he cannot even use for the purpose it is zoned for. The applicant cannot use it for residential, either, because he cannot put residential uses by themselves in that zone. The second document provided by McKown is general property information provided by the City of South Haven, which indicates the 2013 tax information showing a slight increase in taxable value for a property which the applicant cannot access or use.

McKown then addressed some issues that came up before regarding the condition of the road. "We would submit that your city attorney was correct at the last meeting when he said the condition of the road is not really the subject of this hearing," McKown noted. McKown then pointed out that if Kal-Haven Bikes or someone the applicant might sell the property to, should decide to pursue a commercial use on that property; it would require a site plan. The city ordinance requires a site plan that includes access to the property, according to McKown, and that issue is one that has to be addressed depending on what goes in there. The applicant cannot tell you what use might be made of the property because no use can be considered the way the ordinance currently reads, because of Section 1716.2. There is not a way to assess any disruption on neighboring properties, because there is not a use that can be made of the property now, so which of the fifteen or twenty uses that might be permitted on the property could be made of it. McKown stated that if someone had a use, they could bring the issue of access up, but we cannot even get to that point without knowing we can access the property. McKown's point in bringing up the condition of the road, he explained, is that this is not the end of the issue. The Zoning Ordinance, the building inspector, the Department of Environmental Quality (DEQ); all of those kinds of things are involved when it comes to construction on the property and a use being made on the property. "We are just concerned with getting access to the property," McKown pointed out.

McKown said they argued that point before the court and the court agreed that there was not enough information provided about why the board decided not to grant the variance. That is why the request was sent back, McKown noted, "Not because the court made a decision on the merits, the judge just could not tell why you did what you did." McKown volunteered that he is available, as well as Mr. Nixon, tonight, if the board has specific questions you do not think were addressed last time, or in the record on appeal. We can certainly address those.

Bugge requested that Attorney McKown clarify something he mentioned about a date and rezoning. McKown said he is not sure exactly when the property was zoned commercial, but he knows the property was zoned commercial in 1998 and the Section 1716.2 was adopted after Mr. Nixon and his company owned the property. “Before that time there was no restriction on access,” McKown remarked.

Boyd asked whether the property was wetlands when the applicant purchased it. McKown requested clarification and Boyd said, “His property,” and indicated the applicant, Mr. Nixon. McKown attempted to clarify why he asked the question and was interrupted by Boyd who stated, “I asked a simple question, sir, yes or no.” McKown asked if he was not going to be allowed to explain. Boyd repeated that he did not ask for an explanation just a simple yes or no. McKown said there were wetlands then and there have probably been wetlands on it for decades, and pointed out that whether or not there were or are wetlands on the property is completely irrelevant to the hearing tonight, which addresses the question, “Can you get to the property for any use?”

This statement was followed by discussion by the board regarding the request for a land division, which McKown pointed out was depicted by the yellow portion of the map previously referred to. Miller asked whether the portion of the property on which the recreational vehicles park and the rest of the property are one property. McKown clarified that they are two separate properties and are taxed separately, pointing out that there are two parcels and the lines can be seen up there (on the screen) below the Kal-Haven Trail.

Lewis asked for clarification of whether Mr. Nixon owns the property directly across the trail; McKown confirmed that, “Yes, the corporation does.” Lewis suggested that pedestrian traffic could cross the Kal-Haven Trail from one property to the other, and McKown agreed that he did not think the state would object to that. Wittkop noted that “they do currently.” McKown said there was an easement requested at one time, and noted “I’ve seen the one that Mr. Nixon signed, but not the one that the state signed.”

Lewis asked if the attorney had stated that because of the private road issue, there was no way to get building materials to the site, to which McKown agreed that would be correct without the state’s approval. Lewis begged to differ, and said there is another form of transportation available, not the most convenient, but it is available. McKown queried whether Lewis was referring to the river, then noted that the last point he would like to make is the standard for this type of variance is whether there is a practical difficulty in meeting the requirements of the ordinance. McKown noted that here the board suggests that customers should be required to walk to get to a business, to which Miller stated, “They already do, they currently do, they have camping down in that section, so how do they get there, fly? They walked.” McKown asked if Miller means there is camping on this property. Lewis reminded the audience not to speak until recognized. McKown indicated that he does not believe that Miller’s statement is factually correct. Miller responded to McKown’s question regarding camping, “I do. I live across the way.” Bugge attempted to clarify where the confusion was coming from, noting that there is a dirt road that comes off of Blue Star which goes to the northern part of the southern parcel, and in visiting the site she observed fire pits and picnic tables, and wondered if that was what Miller is referring to. Miller indicated that is part of it, yes. Bugge reiterated that is on the southern parcel, not the northern parcel and it is accessed from Blue Star Highway. McKown noted the essence of “practical difficulty” is not “is it impossible?” but “is it unnecessarily difficult?” McKown believes the applicant meets

the unnecessarily difficult provision for a use variance, in essence saying that the only way customers could get to a commercial place would be to walk there.

Miller interrupted by asking, "What are the nine criteria we, I mean you, are required to meet?" McKown retrieved some documents from the table next to him and Miller stated he was asking the city where the nine criteria are, at which point Anderson interjected that the criteria are in the packet she provided to the board. As she began to explain, Miller interrupted, saying, "The first one, please." Anderson reviewed how a public hearing is structured and conducted; explaining that the applicant is not restricted in the amount of time allowed for presenting their request, but the public comment is limited to three (3) minutes per person.

Bugge asked if she could ask a couple of question and McKown said, "Sure." Bugge asked if the thirty-three (33) foot ingress/egress, based on McKown's comments, was never recorded although it is shown on the drawing. McKown agreed that is not a recorded easement.

Bugge also noted that in visiting the site, she noticed a little bridge, and wondered if that is to access another portion of the southern property. McKown noted there is a bridge across a creek in there, "Is that what you are referring to?" Bugge said yes, and referenced a second little bridge which seemed to be part of a footpath and wondered if that was also part of the twenty-four (24) foot easement. McKown clarified that the bridge is past the turnaround area, and Bugge agreed, to which McKown stated that bridge is not a part of the easement. McKown added that the easement ends at the north line of the property, that back in 1992, when the property owner got a permit from the state to put a marina in, the plan was to put a cul-de-sac or turnaround on the north end of the property in question. Bugge noted that on the survey there is an indication of an easement going from the turnaround to which McKown noted that is a potential easement if the property was going to be split. Bugge said the board does not have a survey of that; McKown said to look at the legal description in the judgment and the deeds which indicate that the easement goes to the property line not through the property.

McKown noted that when he was here in October he did review all nine of those factors and is happy to do so again.

1. Such variance will not be detrimental to adjacent property and the surrounding neighborhood.

McKown noted that as before, the applicant does not believe the variance will have a detrimental impact on the adjacent properties. One of the difficulties is if you do not have any ability to use the property for a particular purpose, it is hard to show what that use would do in terms of how much traffic would be generated, how many customers would go in there.

Lewis stated, "Because we do not know that we have to assume worst case."

McKown remarked that is not correct legally, but understands Lewis' point. McKown suggests the correct answer is the one the city's attorney, Ken Lane, gave at the last hearing. Reading from the minutes of the October 22, 2012 meeting, McKown quoted, "Lane said without knowing what the private road, stated to be for pedestrian and vehicular access, will be used for, it is hard to say whether or not the easement traffic will be an

issue." McKown said he thinks that is exactly right and explained that without knowing the use, it is impossible to determine what impact there would be, citing the differences between a residential use and a commercial use on the subject property. McKown pointed out that the word "detrimental" in the ordinance does not mean "change"; it means "harm." McKown stated that the applicant understands that if that piece of property is going to be given a use, the road will need to be improved, and he or a developer will bear the brunt of improving that road to accommodate what is needed for that purpose and noted it could be of benefit to the property owners, by having a road that is in better condition than the one that is there now.

McKown also pointed out that under our laws, a government entity cannot take a person's property and use the analogy of a zoning variance application to decide whether the city is going to tax the property as if it is usable but not let you use it. McKown noted that the subtext here is that the government does not have the right to take peoples' property without paying for it.

2. Such variance will not impair the intent and purpose of this Ordinance.

McKown stated that we assume that the intent and purpose of the Zoning Ordinance is what it states in its introduction, "the orderly use of land." The orderly use of land does not zone a property commercial and then say you cannot get to it, McKown noted.

3. Exceptional or extraordinary circumstances or conditions apply to the property in questions or the intended use of the property that do not apply generally to other properties in the same zoning district. . . .

McKown noted that this is the "practical difficulty" standard of the zoning ordinance which speaks to unique circumstances or physical conditions, and pointed out that as he mentioned in the application, in 1987 this was not an issue when the property was purchased. In 1994, when the deed was given for that property, it was not an issue because this rule was not in the ordinance at that time. McKown pointed out that this is an after-the-fact rule that changed the property rights of an existing property owner and, in fact, literal enforcement of this ordinance will deprive the applicant of meaningful use of the property.

4. Such variance is necessary for the preservation and enjoyment of a substantial property right similar to that possessed by other properties in the same zoning district and in the vicinity. The possibility of increased financial return shall not of itself be deemed sufficient to warrant a variance.

McKown pointed out that in this situation, there is no financial return, because there is nothing the property can be used for, feasibly. McKown noted that one could talk about using a boat to bring in cement, or having a business that people can only walk to, not drive to.

Miller interrupted with the word, "Eco-tourism," which McKown countered that he believes that here in South Haven, businesses suffer when you close down the road in front of their business for any length of time or when parking in front of their business is restricted for any period of time.

McKown concluded that the preservation and enjoyment of a substantial property right, in this case, is simply to use the property for a use that is allowed under the zoning ordinance.

McKown noted that in effect, if this does not change, the city will have taken this property, without compensation.

5. The condition or situation of the specific piece of property or of the intended use of said property, for which the variance is sought, is not of so general or recurrent a nature as to make reasonably practicable the formulation of a general regulation for such conditions or situations.

McKown noted that as far as he is aware, this is the only property which is a commercial property with the only access being over private property. McKown said that there are public roads that go through residential properties to get to commercial properties, and he assumes that is not what the city council meant when they passed this ordinance, or there would be innumerable complaints about the public traveling through residential neighborhoods to get to a commercial property. McKown stated that this is a very unique circumstance and not one that is easily provided for in the ordinance. It is not clear to the applicant why this provision is even in the ordinance, but McKown noted that it must be there for some reason, presumably not to take away this applicant's ability to get to his own property.

6. The condition or situation of the specific piece of property or of the intended use of said property, for which the variance is sought, shall not be the result of actions of the property owner. In other words, the problem shall not be self-created.

McKown said this problem is not self-created; it is not self-created because the ordinance did not exist when the property was purchased. It was imposed as a result of a new ordinance provision by the city.

7. That strict compliance with area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose, or would render conformity unnecessarily burdensome.

McKown stated that he has not seen, in thirty years of zoning law, a case this difficult. This is not merely inconvenient; this is taking away the ability to use the property reasonably for a commercial purpose.

8. That the variance requested is the minimum amount necessary to overcome the inequality inherent in the particular property or mitigate the hardship.

McKown explained that there really is not an alternative available for this purpose. That is why the applicant is asking for the variance request. McKown noted again that there will be many other issues that need to be addressed when a particular use is made of this property; the applicant is going to have to jump through the hoops and provide the assurances, such as the condition of the road, at that time.

Lewis asked what would happen if the board would grant this variance request, and the DEQ comes along and says, "No way!"

McKown noted that the DEQ does not care about commercial use; they care about wetlands and wetlands mitigation. McKown pointed out that the DEQ could say you can't use some percent of the property or if you use it you have to do wetlands mitigation.

Lewis stated that the DEQ could say the road improvements cannot be done because of the wetlands. McKown stated that the road is not in the wetlands. Lewis said one portion could very well be in the wetlands to which McKown responded that, having driven it this evening to refresh his memory, there is one small portion of the road that might be within ten (10) feet of some weeds that might be considered wetland plants, but that most of the road is considerably further away from the wetlands than ten (10) feet. However, McKown noted that if that were the case, the applicant would likely be required to do wetland mitigation, which might involve turning a part of the property that is not wetland into wetland, pointing out that is where the DEQ has its say.

Lewis countered that he just used that as an example to which McKown stated that there may be circumstances where the uses of this property may be limited but the DEQ authorized it as a marina back in the 1990s.

9. That the variance will relate only to property under the control of the Applicant.

McKown noted that the applicant is not asking for any ***variance regarding the use of the property that the applicant owns (outlined in yellow on the overhead map). We are asking for an exemption from Section 1716.2 that relates only to the applicant's property and is not going to affect the access the other people have; they will still have access to their property over that private road.*** ~~on the property that the applicant owns it is the part outlined in yellow that we are actually asking the exemption from and that is not going to affect the variance the other people have, they will still have access to their property over that private road.~~ Their ability to access their homes is not going to be impaired because the law does not allow another easement holder to block access or make it not usable. McKown does not believe there will be any impact on the easement itself as far as the ability of other people to use it.

After consulting with Mr. Nixon, McKown noted that his only comment is regarding the DEQ and noted that "we are not asking for any carte blanche approval of anything we want to do" and that the Applicant is aware that this is not the end, but just the beginning.

Lewis called for any members of the public who would like to speak and reminded that the public is given three minutes to speak, and staff will give the speaker a warning when the time is about up.

Larry Chambers, 863 Black River Road. Stated he has been on the Black River for thirty-nine years, has been flooded out three times; stated he is "against this project" and "we want our peace and quiet."

Robin Abshire, 835 Black River Road. Stated that she passed the attorney tonight on Black River Road, they were both driving small vehicles and it was difficult to pass. Also noted the proliferation of wildlife and that adding a commercial enterprise in the yellow zone would detrimentally affect property owners, whether or not the road was improved.

Richard Docksteder, 600 Virginia Avenue and 500 Kentucky. Stated he owns thirteen (13) slips in Oak Harbor and a house right next door; is kind of a caretaker of Oak Harbor. Enumerated seeing dump trucks bringing dirt and pickups bringing railroad ties, people doing things they shouldn't and building bridges and roads and a turnaround without permits. Qualified that he is not sure there were not permits but the owner knows. Stated he Is against development on that property since it is a wetland and refuge for wildlife.

Maureen Moravec, Oak Harbor, 500 Kentucky Avenue. Spoke on behalf of residents, both human and all the wildlife they currently enjoy. Mentioned Mr. Heron, the Duck family and Mrs. Swan, as well as the benefits of wetlands and fish to the environment.

Sue Fritz, 430 Cherry Street and 553 LaGrange. Stated that when we lose wetlands to commercial enterprise we lose a piece of what draws people in for agra-tourism. Asked the board to help preserve our nature lands.

Don Bain, 500 Kentucky Avenue, slip 11. Bought his property because of the wetlands across the river. Expressed his opinion that in allowing development in the wetlands the board would be taking away some of the very thing that draws people here to relax from wherever they come from. Against any development in the wetlands.

Dixie Capps, 809 Black River Road. Asked the ZBA members if they had all visited the site. The members responded that they all had. She noted that this is a little complicated with the state, the township and the city. Informed the board of some of the back history of property owners acquiring ingress and egress to their properties. Said the city calls that a road but according to the township supervisor that is still private property.

David Nixon, 1063 E. Wells Street. Stated he has paid over $250,000 in taxes since he bought this property. Noted that nothing has been done illegally and that there is no plan to disturb wetlands. Had DNR approval for everything he has done including the turnaround. He had approval from the DNR and the Harbor Commission to put in 34 boat slips. Noted that this meeting is about ingress, egress and use of the property; "our property rights have been usurped by that clause in the ordinance".

Lewis asked confirmation of the amount of taxes Nixon paid since he owned the property; then asked whether Nixon is just now trying to use the property. Nixon declared that he has tried to use it; in 1998 the City put a moratorium on campground development and made it more restrictive to put in campgrounds and that is when the clause was added to the Zoning Ordinance, about accessing commercial property through residential property. Stated that in 1996 he tried to put in the boat slips and the campground, and at that time the City put a moratorium which lasted for two years and at that time they changed the zoning ordinance.

Nixon added that most of the septic systems on the Black River Road do not meet the standards of the health department and are a big part of the problem of the river polluting the beaches.

Lewis asked if anyone else wished to speak; seeing none, Lewis called for a motion to close the public hearing.

Motion by Wittkop to close the public hearing. Second by Miller.

All in favor. Motion carried.

Lewis noted that he would like to have some discussion but ultimately would like to go through the nine standards one by one. Boyd asked whether all nine of the standards must be answered with a yes. Lewis agreed that is true. Boyd inquired whether if even one of the standards is not met, the rest of the standards are irrelevant, to which Lewis responded that is true. Bugge said she would like to hear some discussion. Boyd stated that is what he is trying to do, discuss the first standard regarding the variance, if granted, would be detrimental to adjacent properties. Bugge stated all nine need to be discussed. Lewis said the board will discuss all nine, and Miller responded that the judge sent it back, requesting that the board discuss more than one. Lewis repeated that the board will discuss all nine.

Bugge would like to discuss alternate access to this property. After discussion regarding asking questions during or after the public hearing, Bugge requested to hear from the applicant or his attorney regarding what other options have been looked into.

McKown stated that Kal-Haven Bikes attempted to acquire the property to the north, or access across the property, in an effort to provide access. He further stated that "negotiations broke down" and have not been resumed. McKown noted that while the state may permit, it does not encourage, motorized access across the Kal-Haven Trail, and there is no way to force the state to allow them to do so. After further questions from Bugge regarding vehicular access, not foot access, and what efforts the applicant has made to acquire another way to access the property, McKown reiterated that over a period of years, the applicant has attempted to purchase or acquire access through the property to the north and east, which is privately owned. The owner does not want to sell or communicate regarding access, so the applicant cannot buy. That is why there have been a series of lawsuits regarding the private road, including Ms. Capps, who spoke, had a lawsuit to establish her easement.

Boyd stated that there is access by foot across the Kal-Haven Trail and that it has been used and a path has been improved, and there is a fire pit, a place to sit and "keep out" signs are posted.

Lewis read the first criteria and asked for discussion. Boyd stated that approving this variance will be detrimental to the surrounding neighborhood. Lewis noted that the property owners have stated that on multiple points, to which Boyd agreed, pointing out that since we do not know what commercial use will go in there, no commercial use should be allowed.

Bugge pointed out that anything that goes there, even ten (10) houses, will have an effect but how much effect is undeterminable at this time and that happens any time a property is developed. Noted that there will be consequences.

Paull pointed out that there is a potential for all kinds of vehicular traffic, including vehicles with campers and boat trailers, along what has been a residential road. The ordinance was placed to protect just such a residential development from an influx of commercial traffic. Wildlife is not an issue at this time.

Wheeler noted that the board does not need to prove that such development will be detrimental, just consider that it could be. Paull agreed.

Miller suggested that the first criteria is somewhat vaguely written, and he believes that is deliberate and the board is looking at a very subjective situation. Miller pointed out that other than the developer (applicant) there have been no favorable comments at all.

Wittkop feels that just the interpretation of this easement as a private road, which was determined through the zoning ordinance, has already impacted the residents negatively, so "if just calling it a road is detrimental, how could building a road not be detrimental?"

Lewis noted that he believes the City Council has before them a definition of a private road, which came out of this situation. Anderson stated that is true, and that will come before the council for second reading and possible adoption. Anderson noted it is just to clarify what an easement is or is not, and the issue of private roads which were hardly defined at all. Lewis explained that part of the definition of private road indicates that it is maintained by the owner or owners and is not dedicated for public use.

Lewis and Anderson discussed the use of straw polls after each item discussion and Anderson noted that each standard needs to have a majority for or against. If a straw poll looks mixed, the chair can call for a roll call.

Bugge asked for clarification of whether the Zoning Board of Appeals determined that this easement is a private road, to which Anderson responded, "Yes, the way this easement was written it did meet the qualifications for a private road. We did try to make it very clear that every easement is not a private road, but in this particular case it was, and the board was very clear about that."

A straw vote unanimous that the criteria in **Standard One (Sec. 2205-1)**, "Such variance will not be detrimental to adjacent property and the surrounding neighborhood" has not been met.

Lewis read the second standard and Wittkop commented that he believes the ordinance is very clear that access to commercial property through residential property is not allowed. After discussion, Lewis stated that he thinks a very important distinction is being made by Bugge that this road is through residential property. Paull noted that item number two of the ordinance is written, as is the whole ordinance, to protect property rights, thus the request does not meet this part of the ordinance.

A straw vote is six to one that the variance request does not meet the criteria in **Standard Two (Sec. 2205-2)**.

Boyd asked if, since two standards have not been met, it is necessary to continue through all nine. Lewis stated he believes the board should go through all nine. Wheeler asked Anderson what her feeling is on that; Anderson deferred the question to the city attorney.

Ken Lane, City Attorney. Stated it is a good idea to go through all nine, that according to zoning ordinance section 2209 you have to hit all nine, so even if the applicant meets eight out of nine, that is not good enough.

Lewis read **Standard Three (Sec. 2205-3)** regarding exceptional or extraordinary circumstances. The board unanimously agreed that this standard is met.

Lewis read the **Fourth Standard (Sec. 2205-4)**. Discussion brought agreement that as the applicant's property is currently zoned this standard is met.

Standard Five Sec. 2205-5), regarding whether this is a common or recurring situation, was read by Lewis. Discussion by the board brought consensus that this standard is met by the applicant's situation and the board is not aware of any other properties in the city that have this particular situation.

Lewis skipped to **Standard Seven Sec. 2205-7)**, "Strict compliance with area, setbacks, etc." which was quickly seen as moot by the entire board.

Standard Eight (Sec. 2205-8), that the variance requested is the minimum amount necessary to overcome the inequality inherent in the particular property or mitigate the hardship, was discussed. Lewis stated there are other ways to access the property. Bugge agreed; Paull noted there already is access to the property. Foot traffic and the river were enumerated by Lewis as means of access. Bugge noted that there is another property, whether it has come to fruition yet, of acquiring access through purchase of another property. Lewis noted that it is possible that at some time the state could grant access across the Kal-Haven Trail, pointing out that he has not heard that the state has absolutely denied vehicular access across the trail.

Discussion ensued regarding which standard the board is discussing, with Lewis stating the board is on **Standard Eight (Sec. 2205-8)**. After several comments, Bugge noted that **Standard Six (Sec. 2205-6)** is regarding whether the problem is self-created. The board agreed that the issue is not self-created by the applicant.

Lewis requested that the board resume discussion of **Standard Eight (Sec. 2205-8)**. Boyd said all avenues have not been exhausted and Wittkop agreed; Lewis reiterated that he has not heard testimony that the state has positively denied vehicular access across the Kal-Haven Trail. Bugge noted that although the applicant has been unsuccessful in acquiring property from the property owner to the northeast that still remains as a potential future option for access. Lewis stated that the property can be accessed by foot or the river and still be used for commercial use. A straw poll indicated that this standard is not met by the applicant.

Standard Nine (Sec. 2205-9). That the variance will relate only to property under control of the applicant, Lewis noted that he believes the board can agree to that. Anderson asked for the board to clarify this as a yes, the standard was met by the applicant, which was done.

Lewis called for a motion. Wheeler asked for clarification of how many of the standards have not been met.

Motion by Boyd to deny the variance request to 1716.2 because three of the nine Standards, Standards One (Sec. 2205-1), Two (Sec. 2205-2) and Eight (Sec. 2205-8), were not met by the applicant. Second by Paull.

Lewis stated it has been moved and supported to deny the variance and called for further discussion. Hearing none, Lewis noted that a yes vote is to deny, and a roll call vote was taken.

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

Motion carried.

Lewis noted that the variance has been denied.

Lewis commented that there is another option for this property; it could be rezoned to residential.

NEW BUSINESS – PUBLIC HEARING

7. One Apache Court Rear Setback Variance

Anderson introduced the request for a rear yard setback variance on 1 Apache Court. Anderson noted that this property has frontage on Apache Court and the rear yard is defined as being opposite the driveway entrance. The house is fifteen point six (15.6) inches from the lot line and the proposed addition would move the structure to eight (8) feet six (6) inches, where the ordinance requirement is twenty-five (25) feet. Anderson noted that the variance is being requested because the main floor does not have a full restroom or bedroom. The den which bumps out would be remodeled and added on to for the proposed addition.

There was discussion regarding the letters of approval from adjacent property owners included in the agenda packet which the board received.

Motion by Wheeler, second by Boyd to open the public hearing on Item Number Seven (7).

All in favor. Motion carried.

Kristen Dibble, Olson Brothers Contractors. Filed the application for the variance for Mr. and Mrs. Olson and Olson Brothers would be performing the work for them. Dibble explained the need for an accessible bathroom and bedroom due to recent medical issues experienced by the home owners. All bedrooms and full bathrooms are on the second floor, and while the applicants are currently in good health, looking to the future the addition of the accessible bathroom and bedroom on the main floor seems prudent. Dibble stated that she looked at various options and this is the option that would be the simplest since there is already a half bath with sewer and water lines, and an existing den that could be expanded to create a master bedroom with accessible bathroom. Other options would necessitate tearing up landscaping, retaining walls and a patio.

Dibble noted that the house was constructed forty-five years ago and is considered a non-conforming structure. Paull asked what is beyond the rear setback of the applicant's house to which Dibble responded that it is the neighbors' front yard, the neighbors who wrote a letter saying they are not opposed to the project. The board requested information on how close the addition would be to the neighboring house; Dibble said there is about forty feet between the two houses.

Bugge commented that there is ample space to the east of the house that other accommodations could be made to add a bathroom and bedroom. Dibble countered that in

speaking with Anderson; she understood that this board would not require massive changes to make this addition happen. Bugge suggested that there are various other options open to the homeowner, including turning garage space into living space. Discussion ensued leading to a comment by Lewis that the cost of the improvements is not the problem of this board.

Donald Olson, 1 Apache Court. Stated that the garage is considerably larger than the space that we want to add, and noted that when he built, he was told that the property we are considering was a side yard, not a backyard.

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

All in favor. Motion carried.

Paull asked for clarification regarding front, rear and side yards. Anderson stated that the ordinance defines a rear yard as the yard opposite the driveway.

Bugge asked for clarification of what zone the properties on Apache court are; Anderson noted that all of Apache Court is R1-A but the property to the north is R1-B.

Lewis brought up the issue of other alternatives which was first noted by Bugge. Bugge pointed out that this addition will increase the non-conformity of an already non-conforming structure. There was discussion regarding the proposal being a modest and fiscally realistic solution to a problem the applicant wants to address; however Bugge pointed out that financial issues cannot be considered when considering a variance. Bugge also stated that there is nothing unique about this issue.

Anderson asked whether the board was considering a particular standard with their discussion to which Lewis responded they were not, but it would be good to go through the standards on this and all proposals that the board considers.

Standard One (Sec 2205-1). Discussion by the board occurred regarding the adjacent property versus the adjacent property owner being the consideration of the board, since a variance goes with the property. Lewis took a straw poll and the majority of the board agreed that Standard One was met by the applicant.

Standard Two (Sec. 2205-2). Miller commented that he feels Standards One and Two run together, not just in this case but in most cases. It was noted that this request causes a small additional non-conformance. Lewis noted that six of seven members agree that this standard has been met.

Standard Three (Sec. 2205-3). Bugge noted that there are no unique circumstances at all due to the size of the property. Miller asked whether if by approving this request the board would be accommodating a proposal that is convenient and makes sense to the homeowners; “Is that within the board’s purview?” Bugge responded, “No.” Lewis deferred to Anderson who responded that not one standard mentions convenience; that word is not in the standards. Anderson explained that as Bugge pointed out, a variance stays with the property so you are not looking at the convenience of the current owner, but at the long-term use of this property. Discussion ensued regarding whether approving a variance sets precedent and whether granting a variance that could be accommodated in an alternate way

opens the city to more requests of similar nature. Wheeler noted that what seems unusual or extraordinary to one member may not seem so to another member.

A straw poll indicates three feel this standard has been met, while four do not.

Standard Four (Sec. 2205-4). Bugge said that having a bathroom on the first floor is not a given property right. Wheeler commented that while having a bathroom on the first floor might contribute to the enjoyment of the property, such as if one takes blood pressure medication which necessitates frequent visits to the restroom.

The result of the straw poll was six for and one against.

Standard Five (Sec. 2205-5). Lewis, Bugge, Boyd and Anderson weighed in on whether this was or was not a general condition that would be recurrent enough to make changing the zoning ordinance necessary.

Straw poll result was six for and one against.

Standard Six (Sec. 2205-6). Lewis noted that this could be argued either way; Bugge noted that the homeowner self-created the need for an addition in this particular spot. Lewis said if argued that way, every variance could be called self-created.

Lewis called for a straw poll, the result of which was six for and one against.

Standard Seven (Sec. 2205-7). Discussion regarding the applicant being able to use the property for a permitted use.

A straw poll indicated that none of the board felt that the applicant had met this standard.
Standard Eight (Sec. 2205-8). Some of the board felt this one runs with Standard Seven. However, Boyd noted that fiscal issues aside, this request falls under reasonable to him.

A straw poll resulted in three board members who feel the standard has been met and four members who do not.

Standard Nine (Sec. 2205-9). Lewis commented that he does not believe anyone would argue with this standard and silence from the board indicated he was correct.

Lewis requested of Anderson which standards were not met. Anderson responded that **Standards Three (Sec. 2205-3), Seven (Sec. 2205-7) and Eight (Sec. 2205-8)** were considered not met by straw poll of the board. Lewis then called for a motion.

Motion by Wittkop to grant the variance to the Olson's for the construction of an addition to the rear of their house, taking the rear setback from fifteen (15) feet six (6) inches from the lot line to eight (8) feet six (6) inches, where the ordinance requirement is twenty-five (25) feet. Second by Miller.

Lewis requested that Wittkop give a criteria for his motion. Wittkop disagreed with the need to go through the standards in the way that was done tonight stating he has been on the Zoning Board for five years and has never been asked to go through the standards in this way; stated that if this process is followed the board will always deny anything that is

proposed. Wittkop stated if it is this black and white there would be no need for a board. Wittkop feels this is a good solid proposal that will work for the applicant, with no objections from the neighbors, it is a variance to the zoning ordinance and Wittkop agrees with it. Boyd agreed and said call the vote.

Lewis stated he does not know how he could vote to approve this variance when he knows there are three of the nine criteria have not been met. Wheeler said he thinks the same thing. Lewis noted that while we have not formally gone through the standards sometimes in the past, we have discussed them informally. Boyd noted that this line by line, bullet point by bullet point approach with the voting casts a cloud over what is a good, reasonable request by an applicant with thought for their neighbors and we are here to vote for the community.

Lewis called for discussion; hearing none a roll call vote was requested.

A request to table was overridden by the need to vote for the motion on the table.

A roll call vote was taken.

Ayes: Miller, Paull, Wheeler, Wittkop, Boyd
Nays: Bugge, Lewis

Wheeler expressed his concern that if the board becomes too taken up with the letter of the standards that we will completely obliterate the spirit of them.

Bugge said we need to have the standards and discuss whether or not the proposed variance fits the standards; our question is will it fit the ordinance? Can it fit the ordinance? Is it unable to fit the ordinance? And a variance is granted when it is unable to fit the ordinance. In this case the applicant can fit the ordinance requirements.

Paull noted that once when he testified in court he gave a statement of what good governance is and we acted in what I believe is good governance. This is a judicial board. That is the way it is chartered by the state; it is the way our city charter identifies it, and it means that it has the ability to decide on its own. It is not legislative and it is not political. It is judicial. And while there are some indications of non-compliance, judicial decisions are more than just compliance.

8. Member Comments

None at this time.

9. Adjourn

Motion by Paull, second by Boyd to adjourn at 9:15 p.m.

All in favor. Motion carried.

RESPECTFULLY SUBMITTED,

Marsha Ransom
Recording Secretary