

Zoning Board of Appeals

Regular Meeting Minutes

Monday, August 27, 2012
7:00 p.m., Council Chambers



City of South Haven

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

2. Roll Call

Present: Apotheker, Henry, Lewis, Paull, Wheeler, Wittkop, Ingersoll
Absent: None

3. Approval of Agenda

Motion by Wittkop, second by Henry to approve the August 27, 2012 Agenda as presented.

All in favor. Motion carried.

4. Approval of Minutes – July 23, 2012

Motion by Henry, second by Apotheker to approve the July 23, 2012 regular meeting 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.

NEW BUSINESS –Variance Requests

6. Kal-Haven Bikes, Inc., (represented by David Nixon), 1073 E. Wells Street, request an interpretation of two (2) zoning ordinance sections. The sections in question are found in Article XVII General Provisions, Section 1716, Access Standards and involve the definition of a private road as used in the city and the right of access through residential neighborhoods to nonresidential uses.

Anderson introduced the application for interpretations of the Zoning Ordinance, noting that when a Zoning Ordinance interpretation is requested, the board is not looking at this specific piece of property. This interpretation will be in relation to the entire City now or in the time to come.

Attorney Steve McKown, Allegan, Michigan, representing David Nixon noted that the City Attorney has issued an opinion which McKown has not seen due to confidentiality. McKown explained that the first question has to do with the easement issue. The definition of "**Right-of-Way**" from the city's Zoning Ordinance is: *A street, alley, or other thoroughfare or easement permanently established for passage of persons, vehicles, or the location of utilities. The right-of-way is delineated by legally established lines or boundaries.* McKown pointed out that the Van Buren County Circuit Court has ruled that this is a definition of private road several times in the past. The title holder can only be responsible if the titleholder also uses the Right of Way for passage. Owner, defined in the Zoning Ordinance fairly broadly includes tenants, lessees, holders of receiverships and anyone who has control over property. McKown stated that everyone that uses this road has a slice of use; they have the right to use it, but not to do anything else with it. Any easement that looks like this one would fit the same analysis but he thinks the board does need to look at this particular piece of property to determine this interpretation. The decision regarding this property will also affect the other property owners.

Addressing the second question, Attorney McKown spoke to the meaning of Zoning Ordinance Section 1716.2 which states: *Nonresidential Access - No nonresidential access shall cross residentially-zoned property.* McKown noted that this property has been in ownership of the current corporation since 1995, and the predecessor corporation, also in Mr. Nixon's ownership, prior to that. McKown requested that the Zoning Board of Appeals look at the Zoning Ordinance as it is drafted much as a court would. The Zoning Ordinance should not be interpreted in a way that would prevent an owner from using his or her property. That would be a taking. Is there another way to get to the property? The Kal-Haven trail is adjacent to the property on the south. McKown used a survey map to illustrate where the property, easement/private drive, Kal-Haven Trail and Black River are in relationship to each other. The Department of Natural Resources did give limited use to Nixon's company to cross that trail. It is a very limited use and must yield to allow users of the trail to pass.

McKown concluded by saying that the Zoning Board has the City Attorney's opinion and McKown just wanted to let the Authority know what his client's position is. McKown noted that Nixon's property is zoned commercial and taxed commercial.

Ingersoll called for questions and comments from the board.

Lewis asked if the current zoning was in force at the time Mr. Nixon acquired this property. McKown said the commercial zoning was in place for many years before Nixon purchased the property, while the change regarding use changed after Nixon acquired the property. Lewis asked if the other adjacent property owners have an easement. McKown said there are several court judgments stating the easements are for the use of those property owners along that easement.

Ingersoll asked if the easement were used for commercial use, would the residential property owners still be able to use the easement. McKown stated, "Yes, that is a basic property right".

No further comments at this time.

Ken Lane, Clark Hill, City Attorney, explained that the request before the Zoning Board of Appeals tonight is for a Zoning Ordinance interpretation. This is specifically to look at and

respond to the questions posed by the applicant. Michigan law says when the Zoning Board of Appeals is interpreting the Zoning Ordinance they must be very clear and cannot change or remove words.

Lane noted that the easement at issue, and the scope, is rather broad. It allows for ingress and egress for pedestrian and vehicular access and utilities. Looking at that language we can view this request from that broadly worded easement. Whether this is a private road, looking at the Zoning Ordinance, there is a definition for a private road, alley, right-of-way and alley. The definition for right-of-way and street both include the word "easement". You could say because the word easement is not in the definition of the private road that this particular easement meets the definition of a private road. So looking at this easement and the definition of the private road, we believe this easement meets the criteria.

Lane explained the answer to the second question as clear and unambiguous: **Section 1716.2 Nonresidential Access** - *No nonresidential access shall cross residentially-zoned property.* The Zoning Board of Appeals does not have the legal authority to change the Zoning Ordinance other than to read it and interpret it as it is written. Lane said he does not say this could be a taking as the applicant could ask for variances or other remedies before it could be considered a taking. There are some gray areas in the Zoning Ordinance that a court might agree that the easement is a private road. The second question says what it says and that is all we can allow it to say.

The third question is whether the easement is the only means of accessibility for the applicant's property. That is not a question of interpretation.

Ingersoll understands the first question with the easement in this situation but asked whether this interpretation could be limited to this particular case since not all easement situations will be the same. Lane thinks the Zoning Board could since there are already two court cases and rulings; this will likely be a limited decision.

Ingersoll called for audience comments or questions. There were none at this time.

Ingersoll asked that the board split these questions up into the three separate issues and consider each one individually.

Interpretation #1. Lewis believes this easement does meet the criteria to be a private road. Lewis noted there are several private roads in town that have these same easements within them. Ingersoll said in this particular situation the easement fits the criteria of a private road. Henry concurred, looking at the definition as provided: **Private Road:** *A private way or means of approach to provide access to two (2) or more abutting lots, and which is constructed and maintained by the owner or owners and is not dedicated for general public use and the easement has been there for many years.*

Motion by Henry that this particular easement agreement complies with the definition of a private road and the standards for a private road provided it meets all other standards and ordinances. Second by Wheeler.

A roll call vote was taken.

Ayes: Henry, Lewis, Paull, Wheeler, Wittkop, Apotheker, Ingersoll.

Nays: None

Motion carried.

Interpretation #2. Right of access for commercial use.

Lewis said this is cut-and-dried. Wittkop concurred that there really is not anything the Zoning Board can do about it.

Motion by Wittkop, second by Lewis to deny the request for an extended interpretation of the regulation for commercial use of the easement over residential property due to the plain and unambiguous wording in the Zoning Ordinance and the fact that the zoning board of appeals lacks authority to add text to the zoning ordinance.

A roll call vote was taken.

Ayes: Lewis, Paull, Wheeler, Wittkop, Apotheker, Henry, Ingersoll

Nays: None

Motion carried.

Interpretation #3.

Attorney for applicant noted that since the Zoning Board denied the second issue, the third issue does not need to be considered. All agreed.

- 7. Deb LaPenna of Kalamazoo, MI requests a front setback variance for property at 64 Lakeshore Drive. Section 404-1 of the zoning ordinance requires a three (3) foot minimum front yard building setback. Ms. La Penna is asking to extend a deck to the property line on the north side of the house. The parcel number for the property is 80-53-805-016-00.**

Mike Parker, 71221 CR 388, Representative of the LaPennas, noted that the LaPennas have a concrete wall that was established around their residence. Looking at the survey map, this indicates the LaPennas have less than 1'1" from what appears to be a revised right-of-way (ROW) line. However, the wall, or the back of the curb, has been there for many years; it appears that the revised ROW road plan came in after the fact. They are asking to stay within the boundaries of the wall and build a second story deck. Five feet, ten inches to the west and a little less than that to the east.

Ingersoll said it appears that the LaPennas have use of the property all the way to the curb. Parker noted that the cottage to the north, which is three stories, probably goes into that same radius. Ingersoll asked if we were to grant that encroachment what the next step will be. Ingersoll noted that the Zoning Board can only grant a 1'1" variance because they cannot give permission all the way to the wall. They could allow something to go from the edge of the house to the curved line, or property lines but not into the ROW.

Parker said there have been precedents set all along Lakeshore because last year there was an encroachment that went right to the wall. Ingersoll said you need to approach the

City and work out some arrangements. That is City property and we as the Zoning Board of Appeals cannot grant you that variance.

Anderson said the way the property is set up right now the applicant has about 1'1" of private property to the road right-of-way. The Zoning Board of Appeals cannot grant anything on public property and the City Council cannot grant a license agreement to extend into the ROW unless the Zoning Board of Appeals grants this request.

Henry asked about the patio to the west that borders up to the cement wall. Parker said it has been there for a little over a year. Parker noted he cantilevered the patio over the wall. Paull asked Anderson if the City approved this. Anderson said if so, it was before she worked here. Ingersoll stated that City Council did that and Paull said it should not have done it because the Zoning Board of Appeals was not consulted. Parker said it looks like at one time there was a concrete wall barrier at almost every cottage along Lake Shore.

Anderson received correspondence from the owner of 64 Kalamazoo Avenue north of the LaPenna property. Fears her taxes will go up when the view goes down.

Daniel Liehr, 668 Kalamazoo, year round resident, stated that granting this variance will cut off the view from his home which will adversely affect his property value.

Parker pointed out several details regarding the views from the neighboring properties and the effect of LaPenna's request.

Paull said the presenter has already pointed out several issues erroneously handled that were approved in the past. Paull said until the City as an entity decides what it wants to do with Monroe Park; the Zoning Board should follow the ordinance, and perhaps request an overlay zone or something similar in the near future. Each time we allow another home to build inconsistently with the Zoning Ordinance, it changes things. The Zoning Board needs to sit down and study the area; in an area this congested, it is not appropriate to consider these requests individually. Every variance affects many other properties.

Wittkop said it is a unique area and when the Zoning Ordinance was set up there were parameters set and now everyone wants to change those parameters; we are wiping out the ordinance, basically.

Henry said looking at this parcel, where it is located and the western patio/deck, that it is a pretty nice access to Lake Michigan. Henry did not understand the request was for a two-story deck when he looked at this. Henry understands this variance could be a first step.

Lewis asked what right the neighbors have that the LaPennas do not have already. Apotheker said the wall is the problem. Ingersoll agreed the walls are the problem and he finds himself in the unusual position of agreeing with Mr. Paull. Ingersoll noted that the board met on a similar request recently in this same area. If we continue the granting of zero lot line variances, the board would be promoting keeping the status quo which means this area needs to be looked at more closely and the whole problem dealt with. Lewis noted that one solution could be for the City to vacate this property.

Motion by Paull to deny the request because 1.) the applicant has not demonstrated unusual circumstances, 2.) the applicant is not being denied any rights enjoyed by their neighbors

and 3.) the setback encroachment problem is of so general a nature in the immediate area that the city should consider amending the district regulations. Second by Henry.

A roll call vote was taken:

Ayes: Paull, Wheeler, Wittkop, Apotheker, Henry, Lewis, Ingersoll

Nays: None

Motion carried.

8. Todd Johnson, 317 Superior Street, request variances from zoning ordinance sections 402 - §2 and 5 in order to construct garage two (2) feet from the west property line and to exceed the maximum lot coverage by four (4) percent. The parcel number for the property is 80-53-016-014-00.

Anderson introduced the request noting that she had received a letter from a neighbor in support of the request.

Todd Johnson said he can only fit one car in the garage and will store a car on dollies in the other part of the garage. There is a big beautiful tree that he does not want to remove. After explaining how the entire neighborhood was surveyed recently and all of their property lines were found to be two feet off, he noted that he has a two-foot easement for his driveway.

Ingersoll noted this is a large garage by garage standards and that there are people in that area whose structures are right up to the zero lot line. Regarding the lot coverage issue, Ingersoll wondered if there any way the Zoning Board can stick to just one variance rather than having to do two variances. Johnson said he does not think he could get two cars in there if he reduced the size.

Wittkop asked if he is going to reduce the size of the house to which Johnson said he actually plans to remove the one obstructing part of the house within the year so access to the garage would be straight in.

Paull asked what is immediately behind your proposed garage. Johnson responded that his neighbor's back yard fence and the garage would be three feet from that fence. Lewis asked if the three feet is measured from the wall or the eave and Johnson said it is the eave. Ingersoll noted that the applicant would still have to conform to all other codes, such as fire code and building code. Anderson noted the building official would require a fire wall if needed.

Lewis pointed out that the first request is a one foot variance to the wall. Ingersoll said the proposed garage should not be a problem where it is located. Lewis said the proposed garage is an example of something that is enjoyed by other neighbors and reiterated that he would want to have the eave be at least 1' from the property line.

Motion by Lewis to approve this variance, since 1.) this is a property right enjoyed by others in the area, 2.) the proposed garage will be located in the back of the property

and does not adversely affect any other property owners, 3.) this is not a self imposed hardship and with the condition that the drip edge not less than one foot from the property line. Second by Paull.

A roll call vote was taken:

Ayes: Wheeler, Wittkop, Apotheker, Henry, Lewis, Paull, Ingersoll

Nays: None

Motion carried.

The ZBA considered the second part of the variance request, which Lewis pointed out is not a right that is enjoyed by others. Ingersoll and Paull noted that the board does not know that. Lewis said he based that opinion on the map provided. Johnson said he has one neighbor with a garage the size of his proposed garage, but the neighbor's house is smaller. Henry said he has no problem with the request. Ingersoll said he does not either, considering the overall layout of the property. Lewis said that he thinks the proposed garage and lot coverage request is too large. Wheeler asked if the issue is whether the applicant should go over the required lot coverage at all or what amount the Board should let the applicant go over. Ingersoll asked what rationale could be used.

Motion by Wittkop, second by Henry to grant the variance as requested to allow maximum lot coverage of four (4) percent because the request is 1.) not unreasonable and 2.) does it cause any negative impact on neighboring properties.

A roll call vote was taken.

Ayes: Apotheker, Henry, Paull, Wheeler, Wittkop, Ingersoll

Nay: Lewis

Motion carried.

- 9. Robert and Maryanne Schultz, 615 Church Street, request a front setback variance to allow construction of a covered porch. Section 404-1 of the zoning ordinance requires a 25 foot minimum front yard building setback. The applicant is asking to extend the porch to within 12.5 feet from the street right-of-way. The parcel number for the property is 80-53-767-012-00.**

Anderson gave an overview of the request noting that the property owner is doing extensive renovations to the house; the house is non-conforming and a covered porch will bring him to 12.5' from the edge of the road right-of-way. The only place where a variance is required is the front. Additions to the side of the house comply with zoning regulations. The current required setback is 25'. This is a dimensional variance.

Bob Schultz, 615 Church Street explained that the existing concrete steps end at 9'4" and his request is to add an 8' porch which will actually be moving back 1'4" from where the last existing concrete step is. Ingersoll asked if the concrete steps are covered and Schultz said, "No, they are not covered; never were".

Paull asked if he could describe the setbacks along Church Street. Schultz said there is an empty lot on the east side of his property, owned by the neighbor who owns the next house to the east. On the west side is the Jewish Synagogue and they are looking forward to the improvements. The neighbor's setback is probably similar to Schultz's.

Anderson said the house on the other side of the vacant lot is about the same as Schultz's and on the other side of the street there are very small front yards. Ingersoll said he would like to find some justification for granting a variance. Wittkop said the porch would enhance that house.

Henry questioned the applicant having a lot of materials being off-loaded this morning to which Schultz noted that he had gotten some materials on sale.

If granted the variance, the applicant stated he would end up with a 12'6" front yard.

Ingersoll asked if the synagogue is commercial to which Anderson responded that Schultz's property is located right off a commercial corridor and the synagogue was zoned commercial. Wittkop pointed out that the board would not be granting the applicant that much because of the location of the existing concrete step. Ingersoll said visually he will be getting more front yard and the porch would be enhancement to the house and the neighborhood, keeping in character with other houses in close proximity.

Lewis said he likes to hang his hat on exceptional circumstances and the applicant noted no exceptional circumstances in his application. Paull said the houses across the street come to the front lot line.

Anderson suggested putting the standards in the motion; 1.) this will not be detrimental to the neighborhood, 2.) there is no financial motive and 3.) the unusual circumstance is that the house is already close to the road. The owner did not build it that way and the house has been at that location for several years. It was already a non-conforming house, and while he is increasing the nonconformity it is an unusual situation.

Motion by Apotheker to grant the variance to extend a porch to twelve-and-a-half feet (12.5') of the street right-of-way considering 1.) this will not be detrimental to the neighborhood, 2.) there is no financial motive and 3.) the unusual circumstance is that the house is already close to the road. The owner did not build it that way and the house has been at that location for several years. Second by Paull.

A roll call vote was taken.

Ayes: Henry, Lewis, Paull, Wheeler, Wittkop, Apotheker, Ingersoll

Nays: None

Motion carried.

10. Member Comments

None at this time.

11. Adjourn

Motion by Wittkop, second by Lewis to adjourn at 8:18 p.m.

All in favor. Motion carried.

RESPECTFULLY SUBMITTED,

Marsha Ransom
Recording Secretary