

Zoning Board of Appeals

Regular Meeting Minutes

Monday, October 22, 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, Wittkop, Ingersoll,
Absent: Wheeler

3. Approval of Agenda

Motion by Wittkop, second by Henry to approve the October 22, 2012 regular meeting agenda as presented.

All in favor. Motion carried.

4. Approval of Minutes – September 24, 2012

Motion by Henry, second by Apotheker to approve the September 24, 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 Request

6. Kal-Haven Bikes, Inc., (represented by David Nixon), 1073 E. Wells Street, requests a variance from zoning ordinance section 1716-2, Nonresidential Access. The applicant is seeking to gain access to commercial property through a residential area via an existing private road/easement. The parcel number for the applicant's property is 80-53-870-010-00.

Anderson noted the applicant is looking for a variance from one line in the ordinance. Ingersoll asked if this goes hand in hand with the last issue the applicant brought before the board. Anderson responded that the last time the applicant appeared he requested an

interpretation of whether the easement he holds to the extension of Black River Road could be interpreted as a private road. The ZBA found that the wording in the easement did allow the same access as would a private street or road.

Attorney Steve McKown, Allegan, Michigan, representing David Nixon. McKown handed the chair exhibits to be distributed to the board and explained each exhibit. The first exhibit is the legal description; second is a small aerial map; third is the land contract from 1987 regarding this property; fourth is a land contract memorandum; fifth is the deed from the land contract sellers in the 1990's; sixth is a deed; seventh, for this record tonight, the application for the interpretation and the two judgments that were entered in Circuit Court in Paw Paw; eighth is the Freedom of Information Act (FOIA) request and the City's response (this is pertinent since the language in question appeared in the 1990 zoning amendment section, long after the applicant acquired the property); and ninth is a copy showing past use of the property and the Department of Natural Resources approval for boat slips.

McKown stated that the property involved is about 3.82 acres, bordered on the west by the Black River, on the south and east by the Kal-Haven trail, with the only access the easement from Blue Star Highway. The easement is shared with several residential properties and then continues on to the applicant's property. The question at the last meeting was whether or not the existing easement is a private road. McKown noted that every private road is an easement of sorts allowing access for ingress, egress or utilities. Denying this variance would deprive the owner of use of his property. Access is not defined in the ordinance so they chose to use the commonly understood meaning. Admitting that no research was done, McKown stated, "There are likely other uses like marinas that go through residential property in the city for access." McKown stated, "Resorting to the definition of access from the dictionary includes any alley or road, including public and private roads".

McKown asked, "What was the City Council intending to do when they adopted this amendment? Were they only including private roads?" McKown continued, "This amendment does not do that so it leaves uncertainty. We (the applicant) are asking for a variance; this twenty-four foot (24') easement, this private road, is the only way to get to this property so it is usable."

McKown noted that in section 901 there is a list of what can be done in the B-3 zoning district. The list includes beaches, recreation areas, dwellings above permitted use (mixed use), marinas, golf courses and hotels, among others. Planned Unit Developments (PUDs) are permitted with a commercial use included. There is no use that can be implemented on this property without this zoning variance. McKown said he and his client do not know if there is anything else like this situation anywhere else in the City; this property is taxed as commercial property but the owners can not get to it. Since 1987, when Mr. Nixon acquired the property in conjunction with his wife and a corporation, there have been commercial uses made.

Ingersoll asked how the previous owner gained access; McKown stated the previous owner (Mr. Olen) made use of the easement to get to the property.

Ingersoll asked why the access was not pursued at the time of the previous lawsuits. McKown explained that in August 2010 and December 2011 there were other lawsuits regarding issues with the easement filed by residential owners along Black River Road as well. The easement was changed to 24' from 16' at the time of those lawsuits. McKown

stated that in 1984, as demonstrated by Exhibit 5, the survivors of Mr. Olen conveyed the ownership to Mr. Nixon and the present corporation.

The predicament, according to McKown, is that there is no apparent use that can be made of this property without access. According to McKown, there have been two requests for variances. The problem is not self-created; this was created by the adoption of the Zoning Ordinance. There can not be any reasonable use of the property without the variance.

McKown noted that there are nine (9) factors required as part of the application. McKown went through the application's nine (9) factors, reiterating the responses included in the application.

Paull stated Nixon does not own the easement. McKown responded that an easement is a slice of ownership; the applicant does own that easement along with others who use it. His corporation is considered an owner by definition in your ordinance. This easement can only be used for ingress and egress and for public utilities.

Wittkop asked, "There are no other easements that cross the Kal-Haven Trail?" McKown noted that this corporation, Kal-Haven Bikes, does not own the property to the south. The group discussed the entities that do cross the Kal-Haven Trail, such as farmers and farm related businesses.

Lewis spoke to a change in use of the private road/easement being detrimental to others around the neighborhood. Heavy traffic use could be detrimental. McKown said his client has no specific plans since he is unable to access the property at this time. Here he is just trying to get a variance to use the property. McKown noted the topography is a little unusual, with one area quite steep with a hill.

Wittkop asked how much of the property is dry. McKown noted that there are different numbers out there, but said some numbers he has heard identify 60% as wetland. Whatever environmental issues are involved will control uses; there would need to be Department of Environmental Quality (DEQ) or Drain Commissioner approvals.

Ingersoll asked if the owner of the land across which the easement is located has been involved. McKown responded that the owner of that land was not responsive to their inquiries. That is what ultimately led to the past legal actions.

Paull asked how the easement grew from a 16' utility easement to a 24' road. McKown said the original 16' was for ingress and egress; the change to 24' was a result of lawsuits.

Ken Lane, Clarke Hill, City Attorney for South Haven. Lane stated that the easement was established by two court orders and two quiet title actions. The stated purpose of the easement was pedestrian and vehicular ingress and egress and that meets the definition of a private road. This request is not to change the use of the easement, or how the applicant's property can be used. This request is for relief from section 1716.2, which does not allow the private road to provide access over residential property to a commercial property. The applicant wants to use the property for typical uses under B-3 zoning. Lane explained why he did not give the board a firm recommendation, but rather gave the pros and cons as starting points for discussion.

Paull asked, "Is not the use of this road as a residential access quite different than the use as a commercial driveway, in terms of intensity?" 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. Paull asked if cars with trailers, trucks with trailers and boats on trailers will be more intense. Lane pointed out that it is still vehicular access which does not state how much traffic. Ingersoll said one section of the ordinance says the access is for vehicular access, the other section says it cannot be accessed for commercial uses. "We are parsing words", Paull stated. Henry said we need to go back and try to understand the intent of the wording of this particular ordinance. Ingersoll said the board does not look at the intent but at the wording. This easement is identified as a private road under the Zoning Ordinance. Lane returned that without knowing what this private road is going to be used for, there may need to be improvement made to this road but that is a different meeting and a different issue.

Ingersoll opened the public hearing.

Dixie Capps, resident of Black River Road since 1987; another resident has been there over thirty years and still another, both in attendance, for fifteen years. Capps stated her question to the board is, "Have any of you looked at the road?" Her deed for the easement shows 16'; the road is not that wide. Capps said she has heard a marina is going to be put in there. "This is wetlands and cattails; how is Nixon going to widen the road to 24'?" Anderson noted that the easement is 24' feet in front of her house. Capps said years ago someone wanted to put a campground in there; this is a nesting area for birds. Capps asked the board to vote no and asked the board to wait and look at that road before making a decision.

Robert Trowbridge, 01250 Blue Star Highway. Trowbridge stated that he owns the property along Black River Road which is in South Haven Township. Trowbridge had questions about how the 16' easement changed to a 24' easement; now he knows how that happened. Stated he does the maintenance on the road and it is hard to keep up with because it is soft and sinks; he can not continue to do the maintenance if this request is granted and the property begins to be used for commercial purposes and the road starts being used for commercial traffic. Each of us (the residents) owns a piece of the easement. If it is going to be 24' through South Haven Township, there is a deep ditch that will have to be reconstructed and drained. Trowbridge has asked South Haven Township and they would not let him drain it. How are you going to make three hundred (300') of the road in the township wider. Trowbridge concluded, "What financial burden will be put on the residents if that road is improved?"

Wittkop asked if the board is ruling on a city or a township issue. Anderson said if this request is granted, the approval would have to be contingent on the applicant working with the township. As far as the city, any use that goes in there has to go to planning commission and be reviewed by emergency services, the police department, city engineering, etc. This is only the first in a number of approvals which would be required.

Lewis said Mr. Trowbridge brings up a very good point to which Ingersoll responded, "No, construction is not part of our pervue here. We are here to rule only on what is written in the ordinance as pertains to this request."

Matt Petter, 508 River Island Drive. Petter lives across the river from the property under discussion; Kal-Haven Bike Company comes before the board all the time, just asking for

little bits from the ZBA or planning commission. Petter said, "Go to the ordinance that says you cannot put commercial access over private land." Petter stated that the applicant probably bought that property for a song because it is landlocked. Now he comes and asks for this and he recommends no.

Motion by Lewis, second by Henry to close the public hearing.

All in favor. Motion carried.

Anderson shared three letters in opposition from Ward Hamlin Jr.; Constance and Matt Petter and Richard Docksteder.

Paull stated that when a variance is granted a precedent is being established; "I realize that somewhere in the ordinance it states that ZBA decision do not set a precedent". Paul continued, "But in this case if you grant the variance, you are setting a precedent." Ingersoll said "every time this board grants something we set a precedent. There is only one set of circumstances that we are considering". Paull said he didn't study the entire city, but there might be some places in the City where similar circumstances exist. Ingersoll stated that the board cannot go on "ifs" but on the facts that we know.

Lewis said Ingersoll is correct and his biggest issue is that he does not see how he can vote against it, unfortunately. As far as can be told from the information provided, this is the only access to the applicant's property. Lewis said, "Shame on the city for creating this situation." The zoning ordinance, according to Ingersoll, sets this up as a commercial property and the drafters probably did not even consider access.

Apotheker has a problem with the question in the standards (Section 2205-1) which states that that this request, if granted, will not be detrimental to adjacent property owners. Apotheker thinks granting this request could cause problems and be detrimental to those along Black River Street.

Wittkop has a problem with the entrance to this area through the township. If the Zoning Board grants this and the township says "Sorry, Charlie," we are putting the cart before the horse. Ingersoll said the applicant does not have any reason to go before the township unless they can get this variance".

Anderson said any decision made by the board, can have contingencies, such as they must get township approval within a certain amount of time.

Attorney Ken Lane: The variance grants the relief from that particular section of the Zoning Ordinance; it does not say anything about the condition of the road, whether it is appropriate for specific uses of the property, the rest remains an issue for the township and the Planning Commission. Ingersoll said if the Zoning Board approves it, the approval is not saying anything about the use of the property.

Henry is comfortable with the ordinance and the way it is written so would have to vote no.

Motion by Henry that the request for a variance from Zoning Ordinance 1716.2 be denied. Second by Wittkop.

Lewis would like to see the reasons for the denial included in the motion.

Wittkop said such a variance will be detrimental to adjacent lands and the surrounding neighborhood, per zoning Section 2205-1.

Motion by Henry that the request for a variance from Zoning Ordinance 1716-2 be denied since such a variance has the potential for detriment to the neighborhood.

Anderson asked that the chair clarify that a yes vote meant to deny the request and a no vote meant to approve the request.

A roll call vote was taken:

Ayes: Henry, Paull, Wittkop, Apotheker

Nays: Lewis, Ingersoll

Motion carried.

Ingersoll stated we denied a request to allow commercial access over residential property in a 4 to 2 vote.

- 7. Michael Roth, 214 Huron Street, requests a variance from zoning ordinance section 402-5 to permit 44 percent lot coverage where 40 percent is the maximum allowed. The parcel number for the applicant's property is 80-53-022-005-00.**

Anderson noted this is regarding a covered roof. Mr. Roth is seeking to construct a wrap-around porch with a roof. This brings the lot coverage to 44 percent, which is 4 percent more than the ordinance maximum of 40 percent. Anderson talked about keeping part of it open, with a pergola to bring that percentage down, but applicant preferred to keep it consistent.

Roth, Michael and Julie, 214 Huron. "Anderson correctly stated our case. The house is the second from the last on Huron and is a single story two-bedroom house with a screened in porch on the west end of the house". Roth explained he and his wife bought the house and due to having four kids, wanted to put another bedroom on the house. After they got into the process they found out that the foundation will not support another story, "so we could not go up over the existing portion of the house. We got an architect to give us a plan to replace the screen porch with a four-season room and go up over that. We want to keep the screen porch atmosphere and the character of the house. We use our screened porch all the time. Our improvements would be right where it is now; not encroaching into the open space. By putting our year-round improvements where the screen porch is, we will try to keep the screen porch atmosphere by screening in part of the new porch. Roth explained that the second floor will be a cantilever over the new family room. Our neighbors wished us well when we talked to them about it. It will maintain the neighborhood character of the area; many of the other houses have similar improvements."

Ingersoll asked for more details. Roth explained that the existing screen porch would turn into a family room and the upstairs above the family room would be bedrooms. We hoped to bring the porch around the house.

Ingersoll asked if Roth really wanted the Huron Street porch and the portion of the porch that faces the garage and the concrete. Ingersoll stated that the 25.5' in the back could be taken off to which Roth responded, "We will be happy for what you will give us." Roth also

noted that this drawing was architecturally designed and it is possible that without the back portion we would not need a variance. Ingersoll stated he hates to shoot down a good idea. The ordinance says 40% but the flip side is this is an improvement to the South Haven area.

Roth responded, "Shame on us that we did not find out in the inspection period that the foundation is not structurally good enough for us to build up over the main structure."

Lewis noted it is good to find as many exceptional circumstances as possible in considering these cases. Apotheker pointed out that the porch itself is not so much the issue as the cantilevered portion of the second floor. The group discussed the cantilever and noted that the cantilever alone does not bring the number above 40 percent. It is the porch roof that is the problem. The board also discussed conditions that could be attached to an approval.

Motion by Henry, second by Apotheker to close the public hearing.

Anderson noted that the board needs to look at the ordinance standards in considering this request.

Ingersoll asked for discussion. Henry has no problem with the variance. Paull said the thing that bothers him is that if we approve this, we will be granting a substantial property right to one person that no one else in the neighborhood has. Ingersoll stated that the porch is not livable area. Wittkop said that does not matter, the porch is still covering property and has a roof. Paull said it still is granting something others do not have. Apotheker pointed out that the overage is a small amount at only 4 percent.

Motion by Henry to approve the variance request at 214 Huron Street to allow for 44 percent lot coverage, a 4 percent increase over the allowed ordinance maximum of 40 percent. A condition shall be attached that the area to be defined shall not be used as habitable space. Reasons for the approval include the unique foundation structural problems which existed and not self-created by the applicant, the fact that requested variance improves the property and the neighborhood and is clearly not detrimental and the variance relates only to property under the control of the applicant. Second by Apotheker.

A roll call vote was taken:

Roll call vote:

Ayes: Lewis, Apotheker, Henry, Ingersoll

Nays: Paull, Wittkop

Motion carried. Variance granted.

8. Member Comments

None at this time.

9. Adjourn

Motion by Lewis, second by Henry to adjourn at 8:17 p.m.

All in favor. Motion carried.

RESPECTFULLY SUBMITTED,

Marsha Ransom
Recording Secretary