

BIRMINGHAM BOARD OF ZONING APPEALS PROCEEDINGS
TUESDAY, JANUARY 8, 2018
City Commission Room
151 Martin Street, Birmingham, Michigan

1. CALL TO ORDER

Minutes of the regular meeting of the City of Birmingham Board of Zoning Appeals (“BZA”) held on Tuesday, January 8, 2019. Vice-Chairman Randolph Judd convened the meeting at 7:30 p.m.

2. ROLL CALL

Present: Vice-Chairman Randolph Judd; Board Members Jason Canvasser, Kevin Hart, John Miller, Erik Morganroth, Francis Rodriguez; Alternate Board Member Richard Lilley

Absent: Chairman Charles Lillie

Administration:

Matthew Baka, Sr. Planner
Bruce Johnson, Building Official
Mike Morad, Asst. Building Official
Carole Salutes, Recording Secretary
Jeff Zielke, Building Inspector

Vice-Chairman Judd used the prerogative of the Chair to appoint a Temporary Chairman, Mr. Canvasser, who then took over the gavel and assumed the role as Temporary Chairman.

The Temporary Chairman welcomed everyone. He explained the BZA procedure to the audience. Additionally, he noted that the members of the Zoning Board are appointed by the City Commission and are volunteers who serve staggered three-year terms. They are a quazi-judicial board and sit at the pleasure of the City Commission to hear appeals from petitioners who are seeking variances from the City’s Zoning Ordinance. Under Michigan law, a dimensional variance requires four affirmative votes from this board, and the petitioner must show a practical difficulty. A land use variance requires five affirmative votes and the petitioner has to show a hardship. He pointed out that this board does not make up the criteria for practical difficulty or hardship. That has been established by statute and case law. There are no land use variances called for this evening. Also, appeals are heard by the board as far as interpretations or rulings. In that type of appeal the appellant must show that the official or board demonstrated an abuse of discretion or acted in an arbitrary or capricious manner. Four affirmative votes

are required to reverse an interpretation or ruling. There is one interpretation on this evening's agenda.

T# 01-01-19

3. APPROVAL OF THE MINUTES OF THE BZA MEETING OF DECEMBER 11, 2018

Motion by Mr. Lilley

Seconded by Mr. Morganroth to accept the Minutes of the BZA meeting of December 11, 2018 as presented.

Motion carried, 7-0.

VOICE VOTE

Yeas: Lilley, Morganroth, Canvasser, Hart, Judd, Miller, Rodriguez

Nays: None

Absent: Lillie

T# 01-02-19

4. APPEALS

**1) 211 VALLEY VIEW LANE
Appeal 19-01**

The owner(s) of the property known as 211 Valley View Lane have requested to have their hearing postponed until February 12, 2019.

T# 01-03-19

**2) 555 S. OLD WOODWARD AVE.
Appeal 19-02**

The owner(s) of the property known as 555 S. Old Woodward Ave. request the following variances to allow the installation of additional signage on the building:

A. Chapter 86, Article 01, section 1.04 (B) permits 1.00 sq. ft. (1.50 sq. ft. for addresses on Woodward Ave.) of sign area per linear foot of principal building frontage. The property owner is requesting a variance to be allowed 1.50 sq. ft. of signage per linear foot of principal building frontage.

B. Chapter 86, Article 01, section 1.05 (K) 2 of the Sign Ordinance permits non-illuminated signs identifying the entire structure by a building name above the first floor.

The property owner is proposing an illuminated building identification sign. Therefore, a variance to add illumination to the building identification sign is requested.

This property is zoned B3.

Mr. Baka recalled that as is the policy with sign variances the applicant appeared before the Design Review Board ("DRB") on January 2, 2019 to request a recommendation from the Board. The DRB recommended approval of both variance requests. They felt that granting the variances would not compromise the design review standards of section 7.09 of the Zoning Ordinance which outlines practical and aesthetic guidelines by which applications are evaluated.

In response to Temporary Chairman Canvasser, Mr. Baka advised the applicant has requested approval to install some new directional signage as well as additional signage for new tenants. Currently they have several vacancies and tenants without signage in the sign band. The allowable amount of signage has been maxed out. One large reason for this is because the building has two levels of retail. Further, if the building address was on Woodward Ave. rather than S. Old Woodward Ave., then a variance would not be needed. Granting this variance as though the building was on Woodward Ave. would increase the allowable signage on the building by 50% or 150 sq. ft. and would allow staff to continue to administratively approve signage.

Mr. Robert Ziegelman, Lukenbach, Ziegelman, Gardner Architects, presented some boards that showed the sign as it would be illuminated and not illuminated. The current 555 sign is behind trees and unlit. With the existing uplighting the sign becomes a blob. So their proposal is to raise the sign and backlight it in order to get rid of the shadows.

Temporary Chairman Canvasser inquired if there are any other possibilities to illuminate the building. Mr. Ziegelman said floodlighting did not work and the least intrusive was backlighting and keeping the letters opaque. The black letters glow from behind and take out the shadows.

There were no comments from members of the public at 7:52 p.m.

Motion by Mr. Morganroth

Seconded by Mr. Rodriguez with regard to Appeal 19-02, A. Chapter 86, Article 01, section 1.04 (B), with regard to the allowance of 1.00 sq. ft. for addresses on Old Woodward Ave., the applicant is requesting 1.50 sq. ft. of linear footage of the principal building; and for B. Chapter 86, Article 01, section 1.05 (K) 2 the request to illuminate the building sign, Mr. Morganroth moves to approve both variances as requested.

He thinks the applicant has provided enough information to explain the need to be able to see the sign that is currently not visible due to the up lighting. He

thinks that with the DRB supporting the changes and suggesting that they don't conflict with the intent, it is another reason why he supports this variance request.

With regard to the 1.50 ft., he thinks this is a unique structure in a unique location where, although the building does abut Woodward Ave., it does not have an address of Woodward Ave. So he feels this is unique and due to the additional tenants and the additional need for signage, he thinks that the request is reasonable.

For those reasons Mr. Morganroth moves to approve the variances and tie the motion to the plans as submitted and to acknowledge that any additional square footage they are currently not asking for will be reviewed to make sure that it meets all of the other requirements.

Motion carried, 7-0.

ROLLCALL VOTE

Yeas: Morganroth, Rodriguez, Canvasser, Hart, Judd, Lilley, Miller

Nays: None

Absent: Lillie

T# 01-04-19

**280 N. OLD WOODWARD AVE.
Appeal 19-03**

The owner(s) of the property known as 280 N. Old Woodward Ave., Suite 100 request an administrative appeal of the interpretation of the proposed use for the property:

A. **Chapter 126, Article 08, section 8.01 (F) 1 (a)** of the Zoning Ordinance authorizes the Board of Zoning appeals to hear and decide appeals from and review any determination made by an administrative official charged with the enforcement of the Zoning Ordinance. The Building Official has determined that the proposed use of the ground floor space located at the property does not meet the requirements of the Redline Retail District as outlined in the Zoning Ordinance. Therefore, the applicant is requesting a reversal of that decision.

This property is zoned B-4.

Mr. Baka advised that the Redline Retail District is an area of Downtown that requires that the first 20.00 ft. of depth along any street designated as retail frontage on the Zoning Map must provide retail uses within that district as defined in the Zoning Ordinance. The proposed use by the applicant is a flexible office space that is available

for temporary short-term rental without a lease. The 20.00 ft. retail zone required by Ordinance is proposed to be used for accessory uses to the principal office use. A recent zoning compliance letter outlining the definitions that dictate the standards for the Redline Retail District has been included for reference.

Late last year there was a change to the Ordinance that created for the first time a definition for Personal Services that is considered compliant with the Redline Retail District. Since that time Personal Service based uses have to be more customer related. There are several quasi-office uses that currently exist in Downtown, all of which are considered legal non-conforming. If they vacate for a period longer than six months, then anyone coming in would have to comply with the new definition.

Temporary Chairman Canvasser established that the board is dealing with Mr. Johnson's interpretation letter and whether or not there was an abuse of discretion or if he acted in an arbitrary or capricious manner in the legal sense when making his decision.

Mr. Emil Jakupovic, Managing Member of the applicant, The Work Company, LLC, tenant of 280 N. Old Woodward Ave., Suite 100, clarified the services they will provide. The idea is to provide workspace that can be used for a variety of different people for a variety of different reasons. Unlike a traditional office space, they do not lease space to tenants. They offer memberships to those wanting to utilize their services on a daily, weekly, or monthly basis. It is a networking hub and also a great start-up incubator. Event space and conference rooms are available to rent. They are open to the general public and anyone may stop by. Their location has approximately 6,000 sq. ft. and was formally occupied by Fidelity Investments. They plan to invest approximately one half to three quarters of a million dollars for construction, furnishings and equipment to outfit the space.

Retail purchases of snacks, small meals and beverages are available through their self-service kiosks. They also provide other retail services, such as package/letter mailing, copying, faxing and other general concierge services.

They feel that their proposal falls under the Personal Services Commercial Use due to them being open to the general public. The Ordinance states Personal Services is an "establishment open to the general public and engaged primarily in providing services directly to individual consumers. . .but not including business to business services, medical, dental, and/or mental health services."

Mr. Judd thought the applicant's presentation was very well done and very thorough. However he pointed out that it goes well beyond the purview that this board deals with, which is abuse of discretion.

Mr. Jakupovic said he cannot provide an example of abuse of power. They are present to dispute the interpretation that they received from Mr. Johnson. Temporary Chairman Canvasser pointed out they are really just talking about the first 20 ft. of their space that lines N. Old Woodward Ave. The remaining portion of the space can be used as proposed.

Mr. Jakupovic established that anyone from the street is encouraged to come in and utilize first 20 ft. of the space. Refreshments are available for purchase by the general public. He provided a floor plan illustrating how the first 20 ft. of the space would look.

Mr. Morganroth asked if the kiosk that dispenses coffee and snacks would be the primary source of income for the business. Mr. Jakupovic replied the primary source of income would be the memberships.

Mr. Judd brought the discussion back to contemplation of the term “abuse of discretion.” It doesn’t deal with a misunderstanding; it deals with whether Mr. Johnson abused the duties that come with the job of being the Building Official. In Mr. Judd’s mind the applicant would have to prove some rather serious prejudices against him by Mr. Johnson in his opinion letter dated December 13, 2018.

Mr. Judd did not believe Mr. Jakupovic has presented any proof of abuse of discretion. Mr. Jakupovic indicated he is there to present the facts and he believes it is up to this Board to decide whether or not Mr. Johnson’s discretion is valid.

There were no comments from members of the public at 8:25 p.m.

Motion by Mr. Judd

Seconded by Mr. Morganroth in the matter of Appeal 19-03, 280 N. Old Woodward Ave., Suite 100, the petitioner has asked for a hearing to determine whether or not the Building Official abused his discretion in reaching the conclusion in his letter dated December 13, 2018 that states: “A review of your letter and floor plan resulted in a determination that the proposed use of this area would not be considered retail per the City’s Zoning Ordinance definitions. The area described and shown appears to primarily serve the office workers rather than the general public.”

Mr. Judd would first off say that the presentation by the appellant in this case is one of the better written presentations he has reviewed in the years that he has been on this board. However, the BZA is dealing with a responsibility on its part which it doesn’t really deal with that often and it deals with terms, as he said, that abuse of discretion is a term of art and indeed it is.

Where the other variances before the Board have set elements that they can address, in this case it is a bit more amorphous. It requires the board to in some

instances look into the heart of Mr. Johnson, the Building Official. That is why he was persistent when he was questioning Mr. Jakupovic on whether or not there was any proof to bolster his claim that Mr. Johnson had abused his discretion in reaching the determination that he has just read.

It is Mr. Judd's feeling that Mr. Johnson has interpreted an Ordinance that was enacted on November 13, 2017 by the City Commission. He fails to see that there is an abuse of discretion in this case; he certainly finds no invidious discrimination. He finds no examples that Mr. Johnson went into this with his mind made up, it was not open, and in fact it sounds as though Mr. Jakupovic and Mr. Johnson have maintained a very good relationship throughout and he would certainly hope that would continue in this case.

For those reasons and also the fact that the examples that Mr. Jakupovic presented of other businesses in town that he feels are the same as he proposes failed to take into account that many of them are grandfathered in based upon the fact that the Ordinance was enacted on November 13, 2017. There are also protections in the Ordinance dealing within a six-month period from when a business goes out and another one comes into that location it in effect is grandfathered also.

So for that reason and others Mr. Judd would state that he moves to affirm the decision of the Building Official in this case, and in doing that denies the appeal of the petitioner in this case.

Temporary Chairman Canvasser complimented Mr. Jakupovic on a well put together presentation, both written and oral. However, they are talking about a very high burden, not whether or not Mr. Johnson may or may not have misinterpreted the statute, but whether or not his interpretation was an abuse of discretion or was somehow arbitrary and capricious. The interpretation by Mr. Johnson wasn't arbitrary or capricious. It was based on his reading of the Ordinances, and therefore we cannot say he has abused his discretion in reaching that conclusion. Therefore the Temporary Chairman did not believe he has any choice but to support the motion.

He went on to say that Mr. Jakupovic has laid out a very thorough and hopefully very successful business plan. He urged him to continue to work with the City to figure out how to best utilize the first 20 ft. of his space to accomplish what he is looking to do.

Mr. Morganroth said he will also support the motion. He pointed out that offering coffee and snacks for a 6,000 sq. ft. location in Birmingham to him does not fulfill the requirement for retail space. That is really kind of irrelevant to whether or not he believes there was any kind of capricious or inappropriate interpretation.

Mr. Miller noted that the petitioner in his presentation kept repeating office space, incubator, start-up, home office, etc. That served to confirm the determination of the City. Therefore it seems to him the City has acted in a very relevant and appropriate way, so he will support the motion.

Mr. Hart indicated that he will support the motion as well. He thought that Mr. Jakupovic was disputing the interpretation of the determination that Mr. Johnson made. He didn't agree with Mr. Johnson but that doesn't mean there was an abuse of discretion.

He wanted to understand whether if someone is seeking a variance based on disagreement with the interpretation, whether that in fact automatically toggles over to accusing the Building Official of an abuse of power.

Temporary Chairman Canvasser said there is no appeal before the board and that could be a different analysis. Mr. Hart noted there is a dispute of the interpretation, which could be an honest disagreement.

Mr. Judd said under the Enabling Act for Zoning, MCL 125.3604 (5) talks about if the BZA receives a written request seeking an interpretation of the Zoning Ordinance or an appeal of an administrative decision, the BZA shall conduct a public hearing on the request. This board doesn't generally get requests for interpretations. If someone wants an interpretation of the Zoning Ordinance, the most direct way would be to ask for a variance. An interpretation might be something the board would refer to the City Attorney.

Mr. Judd noted this case was treated as an appeal from a decision by the Building Official and was noticed as such. The proof they use in that case is an abuse of discretion, which is kind of a "glass banana." That is this board's job.

Motion carried, 7-0.

ROLLCALL VOTE

Yeas: Judd, Morganroth, Canvasser, Hart, Miller, Lilley, Rodriguez

Nays: None

Absent: Lillie

T# 01-05-19

5. CORRESPONDENCE (none)

T# 01-06-19

6. GENERAL BUSINESS (not discussed)

T# 01-07-19

7. OPEN TO THE PUBLIC FOR MATTERS NOT ON THE AGENDA (no one from the public wished to comment)

T# 01-08-19

8. ADJOURNMENT

No further business being evident, the board members passed a motion to adjourn at 8:43 p.m.



Bruce R. Johnson, Building Official