

BIRMINGHAM BOARD OF ZONING APPEALS PROCEEDINGS
TUESDAY, SEPTEMBER 8, 2020
Held Remotely Via Zoom And Telephone Access

1. CALL TO ORDER

Minutes of the regular meeting of the City of Birmingham Board of Zoning Appeals ("BZA") held on Tuesday, September 8, 2020. Chairman Lillie convened the meeting at 7:31 p.m.

2. ROLLCALL

Present: Chairman Charles Lillie; Board Members Richard Lilley, John Miller, Erik Morganroth, Francis Rodriguez; Alternate Board Member Ron Reddy

Absent: Board Members Jason Canvasser, Kevin Hart; Alternate Board Member Jerry Attia

Administration:

Bruce Johnson, Building Official
Brooks Cowan, City Planner
Laura Eichenhorn, Transcriptionist
Mike Morad, Asst. Building Official
Jeff Zielke, Asst. Building Official

Chairman Lillie explained the meeting was being held virtually due to the Covid-19 pandemic. He explained the procedures that would be followed for the virtual meeting. He then welcomed Vice-Chairman Morganroth to assume leadership of the meeting.

Vice-Chairman Morganroth explained BZA procedure to the audience. He noted that the members of the Board of Zoning Appeals are appointed by the City Commission and are volunteers who serve staggered three-year terms. They are a quasi-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. 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.

Vice-Chairman took rollcall of the petitioners. All petitioners were present.

T# 09-49-20

3. APPROVAL OF THE MINUTES OF THE BZA MEETING OF AUGUST 11, 2020

Motion by Mr. Lilley

Seconded by Mr. Lillie to accept the Minutes of the BZA meeting of August 11, 2020 as submitted.

Motion carried, 6-0.

ROLL CALL VOTE

Yeas: Lilley, Morganroth, Lillie, Miller, Reddy, Rodriguez

Nays: None

T# 09-50-20

4. APPEALS

**1) 1120 E. Lincoln
Appeal 20-38**

City Planner (CP) Cowan explained that the owner of a business applying to occupy a tenant space located at 1120 E. Lincoln Avenue was requesting an administrative appeal 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 Community Development Department has determined that the proposed use of alcoholic beverage sales for off-premise consumption does not meet the requirements of permitted uses as outlined in the Zoning Ordinance. Therefore, the applicant is requesting a reversal of that decision.

CP Cowan then reviewed the staff notes included in the agenda related to the item.

According to Building Official Johnson the City determined that permits granted to Birmingham Wine by the City in 2014 allowing the sales of takeaway alcoholic beverages in the O2 were granted incorrectly. Since then, Birmingham Wine moved its location a bit northward of its previous one and applied for an initial merchant's license to operate in that space. At that point the City discovered Birmingham Wine had applied neither for their business permits nor occupancy permits to operate in that space, which the City is currently working through with the business. Building Official Johnson stated that Birmingham Wine will be receiving a violation notice. He explained that their new application to operate and sell alcoholic beverages in that location will not be granted because the sale of alcoholic beverages is not a permitted use in the O2 zone.

In reply to Vice-Chairman Morganroth, CP Cowan explained that 'incidental' in the zoning ordinance is usually determined on a case-by-case basis by Planning Staff. He said if reasonable minds could infer that a use is incidental that finding usually stands. CP Cowan continued that

since alcohol is such a highly-regulated use and its use is specified in nine other zones in the zoning ordinance it is difficult to define alcohol sales as incidental.

Stephon Bagne, lawyer for the applicant, was present on behalf of the application. Mr. Bagne reviewed the letter and letter addendum submitted to the BZA by William Werner, co-owner of Mongers' Provisions (Mongers'), both of which are included in the meeting's agenda packet.

In reply to Vice-Chairman Morganroth, Mr. Bagne acknowledged that the O2 zone was intended as a buffer between residential neighborhoods and commercial districts in Birmingham. He said that with this understanding it would be appropriate to have a specialty food store that sells alcohol to be part of such a buffer zone because it would be a low-traffic, low-intensity use. He explained that it would have no impact on the surrounding residences whether a customer leaves Mongers' with just charcuterie or leaves with both charcuterie and a bottle of wine. The City's allowance of bistros in the O2 zone also proves that the sale of alcohol is not inherently prohibited in the O2 zone.

In reply to Mr. Rodriguez, Mr. Bagne reported that in general Mongers' alcohol sales comprise about 8% of their revenue at their Detroit and Ferndale locations.

Mr. Lillie said zoning regulations in the City are very specific about where alcohol can be sold, and that he was not persuaded that the City intended to allow off-premises alcohol sales in the O2 zone. He also noted that alcohol available in bistros is consumed on-premises, whereas the alcohol sold in a specialty food store is takeaway, which constitutes an important difference. Mr. Lillie concluded by stating that it is up to the City Commission to determine where alcohol can be sold, and not the BZA.

Mr. Bagne asserted that the City unequivocally meant to allow alcoholic beverages in the O2 when they used the word 'beverage' in the zoning information without any modification. He noted that definitions of the word 'beverage' include beer and wine as possible beverage types. If the Commission had wanted to exclude alcoholic beverages, they either could have written non-alcoholic beverages or could have written a definition of beverages specific to the ordinance that excluded alcoholic beverages. With this understanding, Mr. Bagne opined that ruling against Mongers' in this situation would do exactly what Mr. Lillie stated he wanted to avoid, which was failing to follow the City Commission's previous determinations.

In reply to Mr. Reddy, Mr. Bagne said he had not seen any evidence that allowing Birmingham Wine in 2014 to operate in the O2 zone was actually in error. Mr. Bagne said declaring it such seemed like a retroactive change by City staff, uninvolved in the original decision, in order to justify treating Mongers' differently from how Birmingham Wine had been treated. Using a different definition of 'beverage' now to render moot the singular precedent in this case is an erroneous interpretation, arbitrary and capricious, and an abuse of discretion, Mr. Bagne continued. If allowing Birmingham Wine to operate in the O2 had indeed been an abuse of discretion then the City should have altered the ordinance to specify non-alcoholic beverages in the definition of specialty food store to make that clear. Birmingham Wine would have then become a legal non-conforming use which could not be used to establish precedent for any following businesses. Allowing Birmingham Wine to operate for six years without making it a legal

non-conforming use proves that it can be used to establish precedent for selling alcoholic beverages in the O2 zone.

Mr. Lillie responded to Mr. Bagne's contention that there was no evidence the City made a permitting mistake for Birmingham Wine in 2014. While Mr. Lillie granted that may be true, he explained there was also no evidence contradicting the assertion.

Mr. Bagne disputed that the onus was on him to prove the absence of a permitting mistake. Rather, he suggested, the City should have to convincingly prove that a permitting mistake existed vis-a-vis Birmingham Wine. He reiterated that since the City did not change Birmingham Wine into a legal non-conforming use in the O2 in the course of its six-year operation it could reasonably be used to establish precedent for alcohol sales in the O2 zone. He stated that Birmingham Wine was allowed to engage in selling takeaway alcohol in the O2, that the ability to do so is supported by the ordinance's use of the word 'beverage', and that the zoning ordinance included no special definition of the word 'beverage' in the zoning ordinance to make alcoholic sales prohibited. For these reasons, Mr. Bagne reasserted his client's right to sell takeaway alcohol in the O2.

Vice-Chairman Morganroth said he the assertion that the City should have corrected Birmingham Wine's erroneous licensing in order to avoid potentially establishing a precedent had some merit. Acknowledging that, he said he also saw the following two facts that indicated the City did intend to prohibit the sales of takeaway alcohol in the O2 area:

- That when alcohol sales are permitted in a given zone, the zoning ordinance explicitly states it; and,
- That no other businesses have been permitted in the O2 zone to sell takeaway alcohol.

Mr. Bagne replied that Article 5.09 in the zoning ordinance says that "alcoholic beverage sales for consumption off-premises, in conjunction with grocery stores and drug stores is permitted subject to a special land use permit" because the City desired to limit alcohol sales in the B1 district. He said that the O2 lacked that specification, in contrast, because the City did not wish to limit takeaway alcohol sales in the zone.

Seeing no further discussion at the BZA level, Vice-Chairman Morganroth invited public comment.

Dr. Andrew Rosenberg asserted that across the United States it is understood that a specialty food store includes the sale of specialty alcoholic beverages. He said that since Mongers' is a specialty food shop, they should be permitted to sell specialty alcoholic beverages. Dr. Rosenberg noted that in general one would be more likely to buy alcohol incidentally at Mongers' especially because the alcohol selection is curated to pair with Mongers' other products. He said that while he appreciated the zoning ordinances' intention to prevent nuisance and danger, he could not see how buying a wine to pair with cheese would cause a nuisance to the surrounding residences. Dr. Rosenberg said that the existence of many stores selling alcohol within 500 feet of Mongers' also belies the idea that City intended to provide an alcohol-free 'buffer', via the O2, to the nearby residences. He said it would be a great inconvenience to him to have to make two trips for food and wine when he could just stop at Mongers' to purchase both.

Motion by Mr. Lillie

Seconded by Mr. Reddy with regard to Appeal 20-38, 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 Community Development Department has determined that the proposed use of alcoholic beverage sales for off-premise consumption does not meet the requirements of permitted uses as outlined in the Zoning Ordinance. Therefore, the applicant is requesting a reversal of that decision.

Mr. Lillie moved to deny the applicant's request for a reversal of the Community Development (CD) department's decision to prohibit the sale of alcoholic beverages in the O2 for off-premises consumption. He said he believed CD acted properly and that their decision was supported by the zoning ordinance. He explained that the sale of alcoholic beverages is regulated by the City, that the City designated nine zones in which alcoholic beverages for off-premises consumption could be sold, and that the O2 is not listed among those zones. Mr. Lillie continued that only the City Commission is authorized to permit the sale of takeaway alcoholic beverages in the O2 district.

Mr. Miller said that there were many positive aspects of the project both for the neighborhood and for the City, but to allow the sale of takeaway alcohol in the O2 would cause the BZA to be too far afield of its review scope. He said deciding where liquor can be sold in the City is addressed variously by the City Commission, Master Plan, the Planning Board, and the Planning Department and not by the BZA. Beyond that, Mr. Miller stated that CD made a reasonable determination in this case and that those facts lead to him supporting the motion.

Vice-Chairman Morganroth said he would also be supporting the motion. He said that while he would love to see Mongers' thrive in Birmingham, he did not find that this matter showed any kind of capricious or inappropriate interpretation on the part of CD. He said he was hard pressed to see alcoholic sales as incidental given its regulation by both the State and the City.

Motion carried, 5-1.

ROLL CALL VOTE

Yeas: Morganroth, Lillie, Miller, Reddy, Rodriguez

Nays: Lilley

T# 09-51-20

5. CORRESPONDENCE

Included in the agenda packet.

T# 09-52-20

6. GENERAL BUSINESS

None.

T# 09-53-20

7. OPEN TO THE PUBLIC FOR MATTERS NOT ON THE AGENDA

None.

T# 09-54-20

8. ADJOURNMENT

Motion by Mr. Lillie

Seconded by Mr. Lilley to adjourn the September 8, 2020 BZA meeting at 8:41 p.m.

Motion carried, 6-0.

ROLL CALL VOTE

Yeas: Morganroth, Rodriguez, Lilley, Miller, Lillie, Reddy

Nays: None

Bruce R. Johnson, Building Official