

## REPORT OF BOARD OF ZONING APPEALS

Tuesday, October 18, 2011 – 1:00 PM

PRESENT: Alderperson Jerry Moore, Bob Woehr, and John Gardner (Edward Bancker Jr. and Henry Kroeger absent).

ALSO PRESENT: Community Development Director Michael Ostrowski, Zoning Administrator Brent Curless, City Attorney Louie Molepske, Mayor Halverson, Barb Jacob, Reid Rocheleau, and Deanna Woelfel.

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1. **Public Hearing** - Request from Barb Jacob, for an administrative appeal regarding the necessity of a conditional use permit for the purposes of expanding the premises of Big Hunchies Roadhouse, 2408 Division Street (Parcel ID 2408-32-4020-09), for a one day event.
  2. Discussion and possible action on the above.
  3. Adjourn.
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1. **Public Hearing** - Request from Barb Jacob, for an administrative appeal regarding the necessity of a conditional use permit for the purposes of expanding the premises of Big Hunchies Roadhouse, 2408 Division Street (Parcel ID 2408-32-4020-09), for a one day event.

Ms. Jacob, 2408 Division Street, does not feel she should have to pay for a conditional use permit for a one day event for a fundraiser, when she never had to do this before. To the best of her knowledge and looking through prior case report files, she is the first person to have to do this. She indicated that the ordinance was written in 1979 and the basis of the ordinance has not changed. The way that Community Development Director is interpreting is what has changed. For the last 10 years, the only people who had to get a conditional use permit are the people who already are considered a conditional use. Archies, Guu's, Partners, Final Score have all held one day events outside without having to get a conditional use, they just had to go to the Public Protection Committee. Ms. Jacob stated she held an event 7 years ago and did not have to get a conditional use permit, all she had to do was go to the Public Protection Committee. She does not feel that people should have to pay \$90.00 for a conditional use when they can't even find out before hand what conditions are going to be put on them. Her premises is nonconforming . Ms. Jacob does not feel that a one day event should have to get a conditional use permit.

Chairperson Moore asked Director Ostrowski what has changed in the interpretation of the ordinance. Director Ostrowski stated he can't speak for what has been done in the past. However, for the events that have occurred since he has been here, we have required any extension of premise for a tavern to go before the Public Protection Committee, and the Plan Commission/Common Council for a conditional use permit. One of the things that is different about this request, is that this location is nonconforming use, as it does not currently have a conditional use permit. Our zoning ordinance requires that any expansions to a nonconforming use would need to be brought back into compliance. In order to do that, Ms. Jacob would have to get a conditional use permit.

2. Discussion and possible action on the above.

Mr. Gardner asked what where the sequence of events. Director Ostrowski stated that Ms. Jacob did go through the Public Protection Committee on August 8, 2011, and they approved the event. At that meeting, she was informed that she would need a conditional use permit for this event.

Mr. Gardner clarified with Ms. Jacob that on the second Monday in August, August 8, 2011, that she was made aware that she would need a conditional use permit for this event. Ms. Jacob stated that it was brought up at the meeting, but according to the minutes it does not say in the minutes that I have to have a conditional use permit.

Mr. Gardner indicated that she knew at the time. Ms. Jacob stated yes, and that she had been talking to Director Ostrowski all along, and it wasn't like she was waiting until now to do this. Ms. Jacob stated that Director Ostrowski and she had been in discussion since before she had gone to the Public Protection Committee. She found out when Director Ostrowski sent her the letter telling her she could go to the Board of Zoning and Appeals, and that was the first time that she knew she could appeal it.

Director Ostrowski stated that on August 12, 2011 he spoke with Ms. Jacob and informed her that she did need a conditional use permit, and an email was sent stating that she would need a conditional use permit for this event. He also stated that he also sent her a letter on August 25, 2011 stating that she would need a conditional use permit and if she didn't believe that she needed a conditional use permit that she could appeal this decision through the Board of Zoning and Appeals.

Mr. Gardner clarified that it was 2 months ago that she knew she needed a conditional use permit, and the event is to occur this weekend. Ms. Jacob stated yes, this Saturday.

Ms. Jacob stated that she received a letter from Director Ostrowski on September 10, 2011, and then she ended up going to the hospital due to her brother being there. She stated that she was there for a couple of weeks and she was going to drop stuff off to Director Ostrowski prior to that time. However, Director Ostrowski never received her letter and payment for the appeal prior to her leaving for Madison where she spent a week and a half with her brother in intensive care. When she got back she called Director Ostrowski because she did not see it on the Plan Commission agenda. She believes that she came down just after that and gave him another check and the request.

Chairperson Moore asked Director Ostrowski for clarification between this property and the other establishments that she is referring to. Director Ostrowski stated there are two issues with this request, the first being is that this property is a nonconforming conditional use. She has been grandfathered in, and she can continue to operate as a tavern, however a nonconforming use cannot be expanded. Once you expand the use, you need to come back into conformity. Secondly, if she was a legal use, she would be required to obtain a conditional use permit for the event.

Chairperson Moore stated, so she would need a conditional use either way. Director Ostrowski stated that we had recently amended the zoning ordinance to allow for temporary expansions of a conditional uses, not exceeding 2 days, without having to amend their conditional use permit. It would just need to be approved by the Zoning Administrator. However, the business must have a conditional use permit prior.

Ms. Jacob stated that her point is that she never had to do this before. The ordinance was not rewritten and nothing was changed. Now all of a sudden this year, it is being reinterpreted that we have to do this. We have never had to do it before.

Mr. Gardner asked Director Ostrowski when you amended the ordinance recently to allow for the two day events with staff approval, was it considered at that time to allow just those that have conditional use permits, or was it conditional uses plus nonconforming. Director Ostrowski stated just conditional uses, because the Zoning Administrator would need something to refer to regarding conditions. Mr. Gardner stated so you would say that it was not an omission by accident, but you intended to limit the amendment to just the properties who had conditional use permits. Director Ostrowski indicated that this was correct.

Mr. Woehr stated that he is aware of numerous alcohol events that have been authorized without applying for a conditional use permits. An example of this would be North Side Bar a couple of years ago. In that instance the new owners of the North Side Bar were also grandfathered in. They applied for a 2 day extension of premise because of wanting to support the hockey teams at the university. It was denied, however, that was a grandfathered nonconforming conditional use that never went to the Plan Commission. Even if the Public Protection Committee approved it, there was not sufficient time to go back to the Plan Commission and the Common Council for approval. The event would have been the weekend prior to the Common Council meeting. Mr. Woehr stated that Chapter 12 allows city employees to sell alcohol in the parks with approval from the Public Protection Committee. In this case, there is not Plan Commission approval required, nor are the parks zoned appropriately for taverns or beer gardens. Mr. Woehr said it appears to be a new interpretation of the requirements for a conditional use. Maybe in past it was interpreted as temporary, not permanent extensions. Mr. Woehr asked if anyone was aware of events that have been held for a temporary premise extension not requiring a conditional use permit.

Attorney Molepske said he believes that this is a classic case where the petitioner does not want to spend the \$90.00 for a conditional use permit for the tavern, which would make it a conforming situation. When you look at the record, Director Ostrowski indicated to Ms. Jacob on August 15, 2011 that a conditional use permit was needed. If the information would have been in for the August meeting, we wouldn't be here today. In addition, if it would have been in for the September meeting, we still wouldn't be here today. Director Ostrowski also wrote to Ms. Jacob on August 25, 2011 as a follow up, again explaining what is needed. Then, Ms. Jacob indicates that she felt we were incorrect in our decision for requiring a conditional use permit for the event. The only issue here is really the interpretation of the ordinance and what does it say. The problem is that we don't have a flexible type of zoning. There is a lot of case law on this, where an extension of a nonconforming use involves a physical extension of the use to land not used for the prohibited purpose prior to the enactment of the restrictive ordinance. The courts have held that the extension violates the ordinance, which in general language, prohibits the extension of nonconforming accessory uses. Our ordinance is a very restrictive ordinance relating to nonconformities. Our ordinance says that no structure or use shall be enlarged, increased, extended, reconstructed, resumed, substituted, or altered unless the nonconformity is changed to conforming. There is a progressive theory of a tavern starting small beginning to enlarge the bar to a 10 foot bar, then people keep coming so I enlarge it to a 20 foot bar, the people keep coming, so I enlarge it to a 30 foot bar, and keep extending. That is referred to as the progression and some zoning ordinances omit that and don't have this carte blanche extension for expanding. Being the devil's advocate, our ordinance says the use is a use that we're expanding that is not in the area at the present time. I don't know what is in back of Ms. Jacob's tavern; I assume it is parking or asphalt.

However, she currently does not sell alcohol in this location. Therefore, I would say you may be able to make an argument in this case that the use under our ordinance shall not be enlarged or increased. However, the use can continue as is. The parking lot is auxiliary to the use and we are not extending that use into the parking lot area. I think the argument of what went on in the past is immaterial. How we have interpreted this ordinance in the past, or how it may have been interpreted, and I really don't know if there were that many nonconforming conditional uses, is immaterial. Ms. Jacob mentioned Guu's and Partner's, which are conditional uses.

Director Ostrowski stated that Partner's just came in and got their conditional use amendment for the homecoming event.

Mr. Woehr stated that Partner's was initially a grandfathered use, and then they put in the volleyball court, which required them to get a conditional use permit. Homecoming has been held at Partner's back when Mr. Molepske was in school, and the volleyball court was not there.

Attorney Molepske stated Ms. Jacob takes exception to what the rule is, and I think the ordinance is pretty clear in this case. In this case, what the event is is really immaterial. Whether it is AMVETS, or whether it is for Red Cross, it is simply the extension of the use of the premise. The applicant could have made the September or October meetings, but elected not to, as she felt she was right on this particular issue. If there were some ambiguity within the ordinance, then I would say ok. However, the ordinance reads, but no use or structure on such premises shall be enlarged, increased, extended, unless the nonconformity is changed to conforming. It would have been so simple to make this conform, but the applicant didn't want to.

Ms. Jacob stated that Attorney Molepske talked about a \$90.00 fee, which was not an issue. When she spoke with Director Ostrowski, she asked him what conditions will be placed upon the conditional use. His response was that we wouldn't know until the Commission acts on the issue. One condition may be to screen the dumpster. Ms. Jacob indicated that she checked out what it would cost to just to screen in the dumpster, and it was over a thousand dollars. Ms. Jacob stated that she is not going to pay a thousand dollars. She stated she also has apartments on her property, which changes the whole procedure of whether she is just has a tavern. Since this is the case, she stated that she could be forced to plant trees and put shrubs in. So there is a lot more to the fact than just it being a \$90.00 fee. This could cost her a fortune just to try and raise money for the city to put playground equipment in a park that has been neglected. Of course Director Ostrowski cannot say for sure that they are going to require her to screen the dumpsters, but she does not want to take that chance. Once she files for a conditional use, then she has a conditional use, and has no choice. Ms. Jacob stated that she does not have that kind of money to do a fundraiser to try to help the city. She thinks that the city is discouraging people from doing these things because it is going to cost us money to do it. Ms. Jacob stated that she has been out there walking the streets selling tickets for this event. It is not benefiting her personally. She stated that she has been asking the Mayor for quite a few years about playground equipment, and she was told that there would be playground equipment this year. Now she has been told that the budget does not allow for it. She spoke to the Mayor in June and was told at that time it would be 2015/2016 before there would be any. Ms. Jacob did not feel this was an acceptable timeframe, so she made an appointment and spoke with the Mayor directly as to what she can do to get playground equipment for the kids. After a conversation with the Mayor she believes they came up with the consensus of having a benefit. The playground equipment does not benefit her, if anything, it hurts her with the little kids that have to use the bathroom facilities. Ms. Jacob stated that she cleans the park with nothing in it for her. She also takes care of the garbage can in the park by placing a garbage bag in there and empties it into

her dumpster. She picks up the garbage daily in the park, not because she has to, but because she wants the park to look nice, and she wants people to use the park. If you do go over there to look, the train has rotted wood around the bottom and some little kid could get hurt, and she has given mothers tweezers on several occasions to pull the little wood chips out of their kid's feet. She did look at trying to do this fundraiser in the park, but she was unable to get a beer license to do it in the park because she is not an organization, and the organization that she does have, does not meet the criteria to do it. There is no playground equipment on this side of Division Street for those kids to play at all; they have to cross the highway in order to have playground equipment to play on, other than on a swing that has been there since 1954.

Mayor Halverson stated that there are a couple of things he needed to clarify. First of all, the reasons for the extension are irrelevant. The request in terms of why it is being justified is irrelevant, and should not be taken into account in terms of the quasi-judicial role that this particular board needs to fulfill for this decision. The ordinance is very clear, the language is very very clear, a conditional use would be required to bring a nonconforming property up to compliance to be able to move forward. It does not matter what the use is of the event, the requirements also were made very clear to the applicant. The additional conditions that may or may not be placed on that property will not be known until you are in front of the Plan Commission working through the conditional use process. The protection is geared specifically by personal financial reason because of the exposure inherent with pursuing a conditional use for a property that would require one in order for it to have a premise extension. This is why the language of the ordinance is very clear. It does not matter why the event is supposed to be happening, or what the use is for that park. It is irrelevant, the question is a question on language within the ordinance and the language, whether it is difficult or not for Ms. Jacob to understand is very clear. The decision of the Zoning Board of Appeals is not about whether we want playground equipment on the south side, we do, and we will figure out a way to do that some time, but this is irrelevant in terms of what this body needs to be considering. It needs to be about language, and zoning requirements that specifically require a certain measure. It is also irrelevant how this was handled in the past. The way it's going to be handled is by a complete reading of the zoning code, and we are also recognizing that there are areas that need to be cleaned up, but under the reading of the zoning ordinance today, and the language that is there today, this needs to be denied.

Mr. Gardner asked the City to explain what the scope of the decision was for this board, and what are the criteria is for this board to make a decision. Attorney Molepske stated unlike a variance, this is simply an interpretation of what the ordinance says. In other words, we are deciding whether or not Director Ostrowski's opinion and decision as it relates to saying this is a nonconforming use, and this is an expansion of the use in connection with that nonconforming use, is correct. I would suggest to the board to read the language and make a determination. What is really in front of us is what does the ordinance say.

Ms. Jacob stated that our ordinance hasn't changed, it is the same ordinance that was written in 1979, and it is just that Director Ostrowski interprets it differently than what is was interpreted before.

Mr. Gardner asked what is the vote that needs to happen today, is it a simple majority. Attorney Molepske stated that yes, under the new ordinance it is the simple majority, it used to be 4 out of 5.

Mr. Gardner asked that the question before us is whether the highlighted section in the handout is interpreted correctly or not. On the top of the same page under number 2, it says that minor modifications on nonconforming premises may be approved by the Zoning Administrator. Most of the

things it lists however are physical in nature, and this is a use as opposed to a physical structure. The Public Protection Committee has reviewed this specific request and said that you can consume outside for a temporary period of time. Mr. Gardner asked if this would apply in this particular case. Attorney Molepske stated that, that section would apply to permitting a substitution of a more restricted use, permitting ordinary maintenance repairs, or permitting minor deviations from parking, yard, setback, or density where there are special circumstances caused by the nonconformity which would deprive the subject property of privileges enjoyed by other property within the vicinity under the same zoning classification.

Mr. Gardner pointed out that it does say such as, as opposed to a limiting list.

Chairman Moore stated it is a suggestive list.

Attorney Molepske read that minor modifications are permitted only after the Zoning Administrator finds the modifications are not contrary to the public health, safety, or well being, the modifications are compatible with surrounding uses, and the modifications would not injure the neighborhood. To some extent we have a dilemma because let's say we go under that at this late date, he hasn't made a determination under this, he made a determination that the language that he has doesn't permit this use or extension. The extension of the use is what is before the board. Then we have to go back and he has to make a determination now whether or not it meets the criteria, assuming you come up with an answer that we think that there could be a minor modification based on sub 2 of this, so then it goes back to Director Ostrowski to determine whether or not there should be a modification granted.

Mr. Woehr asked what Attorney Molepske meant by some of the lines in here are problematic. Attorney Molepske clarified that when he said problematic, it was as the devil's advocate to attempt to make this go through, because it is frankly so cluttered.

Mr. Woehr asked was the word permanent implied when this was written. Could we imply just what has transpired in the past that the word permanent might have been left out when they typed up this thing prior to the word interior or exterior extension. Attorney Molepske stated that his statutory interpretation is this is that you take the plain reading of the words.

Mr. Woehr asked if they should apply the principle of the legal term stare decisis, because previous councils, previous committees, and previous mayors have interpreted this as allowing the Public Protection Committee to make the determination. Attorney Molepske stated that you really wouldn't use that; you need to interpret the ordinance the way the administrator interprets the ordinance in a particular way that isn't binding on the city.

Chairperson Moore stated that what we have to remember that part of our code is designed to bring nonconforming properties into conformity. It is not a matter of what this is for. We do need to abide by this because if we make an exception here, it is going to be hard to bring nonconforming properties into conformity in the future. Mr. Woehr stated that he understands that.

Mr. Gardner said that we have heard today that it was an intentional omission on the part of the council and the part of the person drafting the ordinance, to not include nonconforming uses in the recently amended city ordinance. The recently amended ordinance allows conditional uses, taverns who have conditional use permits, to hold outdoor events without going to the Common Council to amend their conditional use permit. This tells me that the Common Council recently dealt with this issue. We

wouldn't be here today if they had expanded that amendment to include nonconforming uses. With that, let's presume that staff intentionally excluded nonconforming uses, and the Common Council intentionally did not include nonconforming uses. We have seen correspondences on August 15<sup>th</sup> and August 25<sup>th</sup> informing Ms. Jacob that she needed a conditional use permit, and on September 12<sup>th</sup>, she writes back and says I don't think I do. Clearly, there was enough time between the first communication and on August 15<sup>th</sup>, in fact it was discussed at the Public Protection Committee that she did need a conditional use permit on August 8<sup>th</sup>. It has been ignored until this late date in October, that is not our fault. So the fact that we are right up against this thing is not our responsibility, it actually is the responsibility of the applicant, who chose to ignore this for whatever reason. I think that we heard that this board has a limited scope of review and our charge is to review the ordinance and see what the plain meaning of the words are, not necessarily to interpret them. I think that's frankly what our role is, we are not here to legislate, that's for the council to do. The council would have had the opportunity to deal with the other issues if they would have had the application, and could have chosen to screen the dumpsters, or not, we won't know the answer to that, as they did not have the application. We are not legislative, they are legislative. I will not substitute my opinion for their opinion, and I have always been under the rule that if it was past practice, it does not necessarily make it right. We are not talking about making law here, we are talking about interpretation of the ordinance. Just because it was interpreted poorly in the past, does not necessarily mean it has to be interpreted poorly in the future. I think again we go back to the issue of what is the plain meaning of the ordinance. I think the plain meaning of the ordinance is that no use or structure on such premises shall be enlarged, increased, extended, reconstructed, resumed, substituted, or altered unless the nonconformity is changed to conforming.

**Motion by Mr. Gardner to support the City's interpretation and deny the application for an interpretation that says this use should be allowed without having a conditional use permit; seconded by Chairperson Moore.**

**ROLL CALL: Ayes: Woehr, Moore, and Gardner. Nays: None. Motion carried.**

3. Adjourn.

**Meeting Adjourned at 1:53 PM.**