

Present: Chairperson Verdi-Hus; Vice-Chairperson Kamp; Members: Clark, Dery, Freedman, Pagnucco, Parks and Pfeifer

Absent: Fahlen

Also Present: Building Official, Byrwa
Village Manager, Hanlin
Council Liaison, Downey
Council Members, Craig and Walsh

Chairperson Verdi-Hus presided and called the meeting to order at 6:30 p.m. in the Village municipal building at 18500 W. Thirteen Mile Road.

APPROVE MINUTES OF A REGULAR ZONING BOARD OF APPEALS MEETING HELD ON MONDAY, AUGUST 9, 1999

The correction was made under Case No. 975 on page 6 to add the following sentence to the bottom of the page to reflect a statement made by the petitioner in his presentation: "The occasion of people turning around in his driveway was three times in the last year".

MOTION by Kamp, supported by Freedman, that the minutes of a Regular Zoning Board of Appeals meeting held on Monday, August 9, 1999 be approved as amended.

Motion passes unanimously.

Rehear Case No. 973

Petitioner: Paul Weisenbach
Frank Rewold and Son
333 East Second Street
Rochester 48308

Property: 31535 Southfield (former Halo building)
Part of Lot 17 of Crystal Springs Subdivision
TH24-02-427-009, 010, 011

Petition: Petitioner requests a variance from the parking requirement of 239 spaces to 173 parking spaces **or** 166 parking spaces with more landscaping.

The petitioner Paul Weisenbach was present. John Boyd with Signature Associates presented the request for variance to the Board. Boyd recognized others in the audience who are present on behalf of this case including Linden Nelson, owner of the building at 31535 Southfield Road, two people from Frank Rewold, and Fran Garity representing Bed Bath & Beyond. Boyd thanked the Zoning Board of Appeals members for calling a special meeting to rehear this case.

Boyd respectfully requested a variance from the parking requirements of the Ordinance for the following reasons. The applicant believes that there is an exceptional undue hardship and a practical difficulty in accommodating the plans for a Bed Bath & Beyond store. It is requested that the ZBA grant the variance as it has granted variances in the past, specifically the McDonald's variance of October 22, 1990 and the Medical Village variance of October 26, 1996. Reasons that were put forward in the motions passed by the ZBA were that there was not land available to accommodate the parking as requested to have the use occupy the premises. Boyd believes that the variance that is being requested tonight reflects a similar situation with an undue hardship and practical difficulty in accommodating the requirements.

Fran Garity contends that the property in question has adequate parking for the needs of the Bed Bath & Beyond facility. This property has more than the 4.5-5 spaces per 1,000 SF ratio required by the operation throughout the country. The parking should be adequate based on the volume of the store.

Boyd recognizes that there are parking issues along Southfield Road. The revised site plan for Bed Bath & Beyond will improve the building and the community by adding over 100 parking spaces to the existing site. Building owner Linden Nelson has agreed to demolish 14,000 SF of the 54,000 SF building in order to accommodate the Village's requirements.

Parks asked if the petitioner has changed the number of parking spaces on the site since the last hearing. Boyd responded that the applicant is still requesting 173 spaces in lieu of the required 230 spaces.

Kamp commented that it was mentioned at the last meeting that there is a lack of experience in terms of traffic flow to this type of free-standing building.

Fran Garity stated that there are no free-standing stores in this district, but there is a store in Troy with the projection and square footage of this store. The Troy store is located at the end of a group of stores. People who work at that store have made the observation which has been confirmed by him that their store does not use as many spaces as will be provided on the Southfield Road site even at the busiest time of the year.

Kamp noted that Board members have received copies of a letter dated August 12, 1999 addressed to Village Manager Hanlin from Village Attorney Ryan in which he reviews and comments on the proceedings of the August 9 Zoning Board of Appeals meeting relative to Case No. 973. Ryan provided the Board with good, pragmatic advice that the ZBA should provide the opportunity to clarify the record if there was any confusion. While the consideration of this case was not finished at the last hearing, Kamp does not find it inconsistent as suggested by the applicant. Kamp agrees that the Board should provide an opportunity to have a clear record in a case like this.

One of the requirements of the Ordinance that the Board must consider is whether or not allowance of the variance would be substantially detrimental to the public interest. Kamp asked the petitioner to address why the traffic flow in and out of this particular site would not exacerbate the traffic conditions at this location on Southfield Road.

Boyd stated that the traffic situation on Southfield Road has existed for a long period of time. The previous use accommodated more employees at this location than customers who will ever come to Bed Bath & Beyond at one time. The majority of the employees arrived in the morning and left in the afternoon at the same time. Most of the Bed Bath & Beyond customers come and go on a fairly regular basis during the day. Boyd believes that there will be less public safety concern with a Bed Bath & Beyond locating in the facility than with the previous use because of traffic flow and the way people frequent the facility.

Parks asked where customers would park in the event that they are unable to park in the existing parking spaces.

Linden Nelson believes that customers would leave and come back if they pull into the site and are unable to find a parking space.

Parks observed that there are parking spaces in the front of the site near Southfield Road, yet the entrance to Bed Bath & Beyond is at the rear of the building. He thinks that there would be a concern that Racquet Club customers would park in front of the Bed Bath & Beyond property to use the club.

Nelson believes that moving the entrance from the front to the rear helped with the parking situation at the Racquet Club and at Beverly Hills Grill. He stated that Bed Bath & Beyond management has no problem with people frequenting the abutting businesses using parking on their site. The Bed Bath & Beyond organization likes the location next to the Racquet Club and Beverly Hills Grill. It is their type of customer. Nelson stated that he has been contacted about other uses for the site that would burden the parking situation such as Dave & Busters and an Office Max home accessory store.

Kamp questioned the basis for the variance. He asked if the petitioner is saying that the lot size is too small for the proposed use.

Boyd stated that the basis for the variance is that there is not enough land on this site to accommodate the use which is permitted under the Village Zoning Ordinance. The building exists and the owner has agreed to remove 14,000 SF of the building. It is an undue hardship and practical difficulty to require additional parking that the site does not accommodate and which the tenant does not need for the proposed operation.

Kamp asked if the applicant is carrying forward the assertion from the previous meetings which was that the requirements and the ratio between square footage and parking spaces for retail space should not apply to Bed Bath & Beyond because of the nature of the retail proposed for the site.

Boyd believes that the Village's requirements do not consider this use in its parking calculations. However, the Zoning Board of Appeals has granted similar variances in the past without consideration of that point.

Kamp questioned if the parking ratio in effect at the time the McDonald's and Medical Village variances were granted is the same as the ratio being considering at this time.

Nelson thinks the parking statute was the same in 1990 as it is presently. There followed discussion about the percentage of deviation in the cases approved by the Board involving Southfield Road property.

Boyd stated that the Medical Village variance was granted on the basis that the deviation from the Ordinance was not unrealistic percentage-wise considering other areas of the Village where more substantial deviations were granted for the number of parking places.

Attorney Miles Hoffert was present representing the owner of the Steve Petix building which is two buildings to the south of the property in question. Hoffert stated that he has reviewed the parking variances granted to businesses along Southfield Road and maintains that those variances are not as significant as the deviation requested by Bed Bath & Beyond. Use of the property must be considered.

Hoffert distributed material and quoted parking requirements from ordinances of neighboring communities to make the point that the Village's code is not out of proportion compared to the parking requirements of other municipalities in the area. Hoffert clarified that the number of parking spaces required is 239 which includes required barrier free parking spaces.

Hoffert stated that his client's problem is that people park in his lot and walk over to neighboring businesses. The cross over parking that will occur when the Bed Bath & Beyond store is busy will create a problem for the surrounding business owners.

Hoffert stated that he has not seen a traffic study that addresses the question of whether the parking deficiency on this site will create additional problems for the area. There is no other store in the area that will sit similarly. A statement was made by the Bed Bath & Beyond representative that only a certain number of parking spaces are needed based on the store's volume. Hoffert stated that the concern is with the number of customers and not with volume. He does not think the Zoning Board of Appeals has enough information to approve this variance without a traffic study.

Philip Vestevich was present representing the Cleaver, Ketko office building and the McDonald's site. He commented on the expansion of the McDonald's site to provide a playroom. That addition is a place for children to play and is not an area where merchandise is sold or eaten. The commercial floor space area remained the same and parking requirements did not increase.

With respect to Medical Village, it is a multi-tenant property consisting of many small users who are doctors that do business by appointment. The variance percentage for that use does not apply to a situation like Bed Bath & Beyond.

Vestevich agrees with the comment that this is a great site for an operation like Bed Bath & Beyond. A high traffic count on Southfield Road is a big attraction for commercial tenants and the demographics are great. He maintains that referring to averages does not apply at this location which is at the high end with respect to volume, sales, traffic, and customers. The national figures do not apply, particularly since they are found in shopping centers, not in isolated free-standing sites.

Vestevich stated that there are parking problems even though most of the properties on Southfield Road comply with the Village's parking formula. To exacerbate the situation would be poor judgment, particularly since the basis for a ZBA decision would be assurances from the corporate user that there is adequate parking spaces without an independent traffic study. It is Vestevich's view that no traffic consultant is going to be able to talk around the unavoidable problem that would result here. He asks that the Zoning Board of Appeals deny the variance.

Larry Sherman, city attorney for Madison Heights, stated that he is present to represent the interests of the Beverly Hills Health Club in this situation. He thinks it is important that the Zoning Board of Appeals give consideration to the legal standard that has to be applied in order to determine whether or not a variance should be granted. In this type of situation involving a parking variance, the Board is being asked to grant a variance to an extent which is not permitted by the Zoning Ordinance. The burden is on the proponent of a variance to prove to the ZBA that they have established that which needs to be established to meet the threshold of the legal standard in order to grant a variance.

Sherman stated that there are two sides to the equation. It is a balancing test. If the applicant meets the first prong of the test and it is determined that the strict application of the regulations enacted would result in a peculiar or exceptional practical difficulty or an undue hardship to the owner of the property, the second half of the equation has to be considered. The variance requested must be without substantial detriment or impairment to the intent and purpose of the ordinance.

Sherman maintains that this variance request would not be without substantial detriment to the public good nor without substantial impairment to the intent and purposes of the zoning ordinances. He described this consideration as the equilibrium of fairness regarding the surrounding properties. A problem exists with traffic congestion on Southfield Road. It is known that a parking problem exists with the current occupants on Southfield Road. The question before the Zoning Board of Appeals is whether to risk exacerbating the problem that already exists without sufficient facts on the table to make a determination.

The representative from Bed Bath & Beyond has indicated that there are no free-standing stores in this area. There have been no statistics brought forward by the Bed Bath & Beyond representatives or individuals acting in their behalf that tells this Board whether or not a stand-alone facility will have sufficient parking. There has been no documentation that supports the assertion by the Bed Bath & Beyond corporation that five parking spaces per 1,000 SF is sufficient to meet their needs.

Sherman agrees with Vestevich and Hoffert that a traffic safety study is necessary. There are very serious safety issues that should be addressed in terms of left-turn traffic in and out of the site, cross over parking, and the barrier at the rear property line. Another issue that may be a possibility is a mutual drive between the Beverly Hills Grill property and the Bed Bath & Beyond site which may create additional parking for both sites.

Sherman stated that there are things the Board should be cognizant of before making a decision on this issue. The Beverly Hills Club has the same concerns about people parking in their lot and going to Bed Bath & Beyond. The Board should be aware that the zoning variances once granted are generally thought to run with the land and are not limited to a particular land owner. In addition, characteristics which ordinarily justify a variance for a particular parcel must be unique to that property and not shared equally by others in the immediate area. That is not the case here. All the business owners have the same concerns. A comprehensive traffic safety study would address the issue of parking and truck movements in the area. There are fire safety issues. All the issues should be brought forward so that the ZBA can make an informed decision on whether or not a variance of this nature would be appropriate.

Sherman cited case law which says that a hardship cannot be self-created.

Sherman related that the Court of Appeals articulated four factors that a Zoning Board of Appeals must use in determining whether a land owner has practical difficulty or undue hardship warranting a variance. The first is whether the compliance with the strict letter of the ordinance unreasonably prevents the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. Sherman thinks this situation involves an attempt to create a commercial site out of a retail site which poses a problem for the abutting property owners. For the petitioner to put his problems on the neighboring properties would not be an appropriate basis on which to grant a variance.

The ZBA must consider whether granting of a variance would do substantial justice to the applicant as well as the other property owners in the district. That is the equilibrium of fairness. Sherman contends that, until this Board sees a comprehensive traffic study, it is difficult if not impossible for the Board to accept the Bed Bath & Beyond assertion that there is sufficient parking.

The third factor is whether relief can be granted in such a fashion that the spirit of the ordinance would be observed and the public safety and welfare secured. There has been discussion about traffic safety issues. The last issue is whether or not the problem is self-created. Sherman believes that the McDonald's variance and the Medical Village variance are clearly distinguishable from the variance requested here.

Based on these reasons, Sherman respectfully requests that the Zoning Board of Appeals reject the variance as requested.

Carmen Avantini, planning consultant with the Strader Group, reviewed that there was a concern at the last meeting about the wording in the Village Zoning Ordinance in terms of practical difficulty and undue hardship. The Village Ordinance does read "practical difficulty and undue hardship". Avantini distributed copies of the State law which says, "If there are practical difficulties **or** undue hardship....". He made the point that State law supersedes local law.

Avantini handed out a couple of sheets from a training session sponsored by the Michigan Society of Planning Officials. The material was prepared by land use attorneys and planners. The discussion of use variances clarifies that the standard for granting a use variance is undue hardship. The standard for nonuse variances is practical difficulties. He asserted that the issue of undue hardship does not come into play in this particular case.

Avantini maintains that there is not a lot that differentiates this request from other cases that the ZBA has reviewed in the past. The Board needs to consider the use and the parking requirements for that use and determine whether the Zoning Ordinance is reasonable or whether its requirements are burdensome. At the last meeting, the Board was provided with parking standards that are used throughout the country that clearly show that this particular use has enough parking. The Ordinance categorizes general retail uses. There could be many different uses that fall into that category and not every use is going to fit which is why there are requests for parking variances. The ZBA has reviewed parking variances for the Medical Village and MacDonald's properties. The operation is different, but those applicants proved to the Board that they did not need the parking that was being asked of them. Bed Bath & Beyond is doing the same thing. They are demonstrating with definitive proof that there is enough parking for this use.

As far as some of the other standards that have been mentioned, Avantini stated that the petitioner is not creating this hardship. There are other retail uses that are permitted in this district that will not meet this requirement. The applicant has provided all the information that is necessary. The other users to the north and south of this building have the propensity to spill over onto this property rather than Bed Bath & Beyond parking overflowing onto their property. It is already occurring.

Avantini respectfully asks that the Zoning Board of Appeals approve this variance. He feels that the petitioner has met the criteria of all the tests. There are unique circumstances. The purpose for coming before the ZBA is to look for fairness and justice and to keep the Zoning Ordinance from being unnecessarily burdensome.

Garity commented that there is a store six miles from this location in Farmington Hills and another store six miles in the other direction in the City of Troy. The proposed store will not be drawing off its typical area which is larger.

Ryan stated the four prongs mentioned earlier are the appropriate test to apply when considering a variance. The Board is deliberating this case based on practical difficulty and not undue hardship. Undue hardship is considered for a use variance. The Board has to use a balancing test. It has to first find whether or not the Ordinance is restrictive as to this particular property and use. This property is zoned for a retail use.

Secondly, there has to be substantial justice done to both the neighboring properties and also to the property in question. It has been heard that this store is vacant and there is already a parking problem in the area. Ryan stated that one property cannot be used to alleviate a pre-existing problem.

Ryan is aware of the change in the site plan from a front to a rear entrance. The Board should consider whether that will alleviate any parking issues that may occur.

Ryan stated that the Board can find that the Ordinance is unduly restrictive to this particular use and property, but it must find that the spirit and intent of the Ordinance is still met by the variance.

Lastly, there must be more than just mere inconvenience for the variance to be granted under practical difficulty. The Board must find that the reason for granting a variance is not self-created but is a result of the Ordinance and the particular use of the property in question.

Freedman asked if there was any parking study done on behalf of the Village for this site concluding that the amount of space would be sufficient for this building.

Avantini stated that a report prepared by Birchler Arroyo mirrored the report the Strader Group prepared which came to the same conclusion that there would be enough parking available for this site.

Byrwa remarked that Birchler Arroyo prepared an analysis of parking demand by land use category dated August 3, 1999 which represents their professional space demand recommendations by use group.

Pfeifer commented that both the Strader Group and the Village's planning consultant have suggested that the parking requested is satisfactory. The Planning Board and Council have not come to a conclusion on the parking issue for this site. Pfeifer does not think the parking requirements should be determined on this site by means of interpretation of the Zoning Board of Appeals. He suggests that the parking issue be referred to the Planning Board for a traffic study and recommendation. Pfeifer will not vote in favor of the variance on the basis that he does not think this Board has the power to grant this variance.

Parks asked Ryan if the Zoning Board of Appeals has the authority to request a traffic study since it has to weigh practical difficulties against the public good.

Ryan questioned the purpose that a traffic study would serve. With all due respect, Ryan stated that Southfield Road is the Village's busiest roadway and a major arterial road in the southeast Michigan area. Whatever use is located in this building will be a small increase or decrease to the existing conditions. Ryan remarked that the Village planning consultant has not suggested that there be a traffic study.

Parks commented that this large building will be occupied at some point with a use that is consistent with the zoning district. Existing traffic will increase which is something that the surrounding neighbors do not want. This is a problem which the community is going to face.

Freedman stated that the Village permitted this building to be constructed. The onus is now being placed on this one site to remain less than fully occupied in order to alleviate the problems on Southfield Road. It is Freedman's opinion that this is not an unreasonable request for this site.

Kamp stated that explicit at times and implicit at times is the petitioner's argument that the standard required by the Ordinance is not appropriate for what they are proposing because of the nature of the use and the assertion that the Ordinance is outdated. He agrees that it behooves the community to have a use there that is consistent with permitted use of the property and that will not be detrimental to public use. Kamp believes that the petitioner's argument leaves the Board without any data to evaluate whether or not their statement is true. He is not sure that this Board is the appropriate forum to entertain that kind of a policy judgment particularly without data.

Kamp stated that the ZBA is asked to address the detriment to the public good. It has been said that the Village will have to deal with the traffic issue on this site. He is concerned that a percentage of vehicles coming into the site will not find parking spaces and possibly back up onto Southfield Road.

As you go further south on Southfield Road, traffic becomes more dense and the potential risk of cars going in and out as well as the potential of exacerbating the traffic problem by cars not being able to get in and out of this facility is unknown.

Kamp agrees with Pfeifer that this proposal requires further study, and this is probably not a consideration that is appropriate for this Board. He does not think the petitioner has carried the burden to demonstrate the requirements in this case.

Decision: MOTION by Freedman, supported by Parks, that the petition be granted due to the practical difficulty of utilizing this building for a business use that is permitted under the Village Zoning Ordinance and considering that the parking requested is within the limits as outlined by the Village planning consultant.

Roll Call Vote:

Dery	- no
Freedman	- yes
Kamp	- no
Pagnucco	- yes
Parks	- yes
Pfeifer	- no
Verdi-Hus	- yes
Clark	- no

Motion fails (4 - 4).

ZONING BOARD COMMENTS

Kamp referred to Mr. Ryan's comments on Case No. 973 in a letter dated August 12, 1999 to the Village Manager. Kamp suggests that the Zoning Board of Appeals consider formally adopting the procedures outlined by Ryan at a future meeting.

MOTION by Pagnucco, supported by Pfeifer, that the meeting be adjourned at 7:40 p.m.

Motion passes unanimously.

MaryAnn Verdi-Hus, Chairperson
Zoning Board of Appeals

Ellen E. Marshall
Village Clerk