

**SEDGWICK COUNTY  
BOARD OF ZONING APPEALS  
MINUTES  
February 20, 2007**

The Sedgwick County Board of Zoning Appeals meeting was held at 3:30 p.m. on Tuesday, February 20, 2007, in the Planning Department Conference Room, Tenth Floor of City Hall, 455 N Main, Wichita, Kansas.

The following members were in attendance:

GRANT TIDEMANN, KATHLEEN GIDEON, DENNIS GRUENBACHER and TOM LINDSAY.

The following members were absent:

JANA MULLEN

The following Planning Department staff members were in attendance: JESS McNEELY, Secretary, and YOLANDA ARBERTHA, Recording Secretary.

Other members present:

BOB PARNACOTT and GLEN WILTSE.

Tidemann      We will call the County BZA meeting to order. Do we need to go over the minutes of the last meeting?

Gruenbacher    I move to approve the minutes for Nov 7, 2006 and February 6, 2007 minutes.

Lindsay        Seconded.

Tidemann      All in favor say aye?

**Motion carried unanimously 4-0**

Tidemann      We would like to here from the applicant's agent?

Hill            I think the first issue is whether or not this Board has jurisdiction to hear this case. We suggest that you do, by virtue of the fact that the sign code specifically granted authority to the Board of Zoning Appeals to grant variances from the provisions of the sign code. Now the county position is that because there is a permissive provision contained in the sign code, which states that on application for conditional use the board of county commissioners may adopt provisions relating to signage or conditional uses. The county takes that permissive provision from the sign code and says that makes it mandatory that your conditional use permit either have sign provisions in it, or if it does not you are required to go get an amendment to your conditional use permit. The sign code uses the word "may"; it does not use the word "shall." If you look in the Sedgwick County Zoning code, it will tell you by definition for the purposes of zoning zone, (this is not a zoning code case) but by the use of the word "shall" is always mandatory and by the use of the word "may" it is always permissible. So, we believe first that you have explicit jurisdiction because the board of county commissioners when they adopted the sign code gave you that authority. Now the other argument that the County makes is based on zoning statues and zoning code and court decisions on zoning cases, I think we have to understand that this is not a zoning case. The sign code adopted by the county is a part of the building and mechanical code of the County Code book. It is in article VI. It is not in

the Zoning Code. It is not adopted by referencing the county zoning code. It is a Sign Code not a Zoning Code. The county takes the position that you cannot hear this case because you cannot grant, what is referred to in the case law as a use variance. I am sure you are familiar in your zoning work that the Kansas Statutes says you cannot do anything that contradicts the express terms of the zoning code. There is no such statute that applies in your work hearing variance applications from the county Sign Code. The way I look at it is essentially the Board of County Commissioners did not want to handle sign code cases all the time and they said we have this Board of Zoning Appeals and we will let them hear variance cases from the sign code. They gave you a part-time job that has nothing to do with the statutory requirements, that for you to hear zoning cases or the statutory limitations for you to hear zoning cases. This is a separate deal. All you are to do is decide if a variance from the sign code provision is a reasonable thing to do. We submit that you clearly have the jurisdiction to hear this case. There is another reason, why I think you have jurisdiction. If you look at the packet today, the last page before you get to the aerial photograph. That is a letter from Code Enforcement to another sand supply company that has a conditional use to operate a sand extraction operation on property zoned SF-20. I think Mr. Parnacott will agree that there is no difference in the sign code provisions from SF-20 to Rural Residential, which is the zoning on our property. This letter was issued December 27<sup>th</sup>; it states that your property is zoned SF-20 Single-family district that allows for only one on-site ground sign and one building sign limited to 8 square feet. If that is true in SF-20, it is also true in Rural Residential. If that is true, which the county says it is, then all we are asking for is what would be a traditional area variance. I submit to you that you have jurisdiction under one case or another. I think you have the jurisdiction to do anything in regards to a variance from the sign code that is not inconsistent with the overall spirit sign code. If they are right on the use variance argument, it appears clear that the county position is that everyone that does business with a conditional use permit gets at least an 8 square foot sign so we are then here on just a area variance. That is our position the jurisdictional issue. I would like to get that issue resolved before we move on to the merits of whether you should give us a variance.

Parnacott        Would you like for me to respond to that?

Tidemann        Yes, please.

Parnacott        Bob Parnacott, Assistant County Counselor, this is a difficult issue. Attorneys have different takes on this. Mr. Hill started by reciting from the County zoning code from the proposition that may means may and shall means shall, then he goes on to say this is not a zoning case. The discretion is placed with the governing body to grant alternative or additional restrictions. So the discretion the may part of it goes to the authority of the Board of County Commissioners, it does not go to the ability of an applicant to choose the way he goes about getting his sign approved. We think that the intent of the County Commissioners when they adopted the sign code was to create a specific procedure for addressing sign code issues in connection with conditional uses. That is to address it as part of the conditional use and have it heard as part of the conditional use proceedings. If you want to do something after the conditional use has been approved, you go back to through the process and get it amended. Again, I admitted this to Mr. Hill; there is not a clear answer here. This board is not chosen to hear these kinds of matters. It is better resolved in the conditional use process for a variety of reasons. Also, we think that the jurisdictional question is not as clear as we would like it to be. If you want to exercise jurisdiction in this case, we will not tell you that you cannot. I think what happens is that

you have to consider the issue in the context of the 5 criteria of the zoning variance. I think, when you look at the last criteria you will have to make certain that you do not do anything that is not in line with the spirit and intent of the sign code. I think when you read that provision and contemplate that the county commissioners have created this process that should be addressed through the conditional use process, for you to avoid that process, is to in-effect override the legislative intent of the commissioners and do something that is not in the spirit and intent of the sign code. You will have to consider it on its merit. You need to go through your five criteria set out in your staff report and determine if it meets the five criteria in order to grant the variance. If you fail to grant the variance or deny the variance request, they will have to go back to the conditional use process. Typically, you can appeal a BZA decision to the District Court. However, there is a legal doctrine call exhaustion of legal remedy. Where you still have an administrative remedy available you cannot go to District Court. In this case, even if you had jurisdiction to the extent that you deny the request. They are going to be required to go before their other administrative remedies, which is the conditional use process. I will be willing to answer any questions. There is always the opportunity to go into closed executive session to discuss this matter.

Hill                   What is the change since the first hearing?

Parnacott           I do not think the facts have changed. We have had a broader understanding of the sign code since the change. The more we get into it. The more we understand that is it not reading like it should be and there are a few things that need be cleared up. After this case, we will probably pursue some amendments to the sign code. When this case was first filed, no one knew that this provision was buried in back of the sign code that allowed for this to address the conditional use process. I will give Mr. Hill credit because he found that section and pointed it out. Then we disagreed about what that section meant and then we examined it from a jurisdictional standpoint. We felt that meant BZA was not the proper forum. That was a legal provision that came to our attention and we had to decide how to address it.

Lindsay             Who hears the conditional use?

Parnacott           The MAPC would have to have a public hearing on it and make a recommendation. If there is no protest or appeal of the MAPC decision then it is approved at that point. If someone protests or appeals it, then it comes to the governing body. In this case, it will be the county commissioners and they ultimately decide whether to grant the conditional use amendment or their requested sign condition.

Hill                   May I respond? When Mr. Parnacott talks about having your cake and eating it to, I think I got to point out that 346 G, which is the portion of the sign code that talks about the conditional use of possibilities, says that this article shall apply to conditional uses. If you go to the first article of the sign code 6-341, it says this sign code may be referred to as this article. It's the entire sign code. So, the fact of the matter is the entire sign code applies to a business on property that is subject to a conditional use. One of those provisions is that you can come to the board of zoning appeals for a variance. Now that provision has to apply equally just as the conditional use has to apply, Mr. Parnacott has not addressed that argument which is the county position that everyone gets at least an eight square foot sign. If that is correct then all we are talking is an area variance. They have not disputed that you have jurisdiction to grant a variance from the provisions relating to the size of the sign or the setback or any of those things. In fact, that's what

they claim in their staff report; you have the authority to do. They have not disputed that today at all. So, we believe you clearly have the jurisdiction under either the sign code or variance.

Parnacott Probably the only thing I would disagree with is the clearly adjective or adverb. I do not think it is clear. Whenever we have statues or regulations that are unclear, we have to struggle to determine what the intent of the legislative body is that adopted that language. He has some arguments that I cannot fully counter. The ultimate question always in these questions in this argument is what was the intention of the board of county commissioners, and I believe the ultimate intentions was to have this address through the conditional use process. I have one more comment. If you go back to the variance issue or what the authority of this board is, it is not an authority to grant a variance from any provision in the sign code. You are limited to granting a variance from the specific terms of the signs code. What do specific terms mean? It is not defined. We think it means things you would characterize as use variances, the size and height of the sign. He does have a point on the issue of having some signage available. Maybe he is asking for use variance from the 8 square foot sign to the 88 square foot sign.

Hill An area variance.

Parnacott You are right. An Area Variance to go from the 8 square foot that Code Enforcement is allowing them to have without amending their CU to the 88 square foot that he has erected and is now seeking a variance on.

Tidemann So Bob, what you are saying is that you think we have the jurisdiction in regards to looking at a bigger sign?

Parnacott First I do not think the answer is clear. The jurisdictional issue should be resolved by someone other than by your board. We can deal with this in a different forum if necessary. At this point, I would recommend that we entertain jurisdiction and that you address the merit of the case. I am not going to concede that you necessarily have jurisdiction. Since it is sufficiently unclear, you should go ahead and exercise jurisdiction.

Tidemann Okay, any question of the board? May I suggest that we take a short recess? I only want the four of us to convene. If, in fact, we need further input from the county or Mr. Hill, we will come back and ask for it.

Parnacott Are you entering executive session? Can you identify why you are going into executive session? Is it to deliberate on the case?

Tidemann Correct.

Parnacott Okay, do you think you need 15 minutes 30 minutes?

Tidemann 15 minutes.

Miller What we need to do is the board member stay here and the rest of us will leave because right now we have no other place to send you because of the remodel.

Parnacott If you are not done, come back in and ask for another 15 minutes.

Tidemann Since it has been some time since we heard the case, let's go back over it in a short version like five minutes on each side. The applicant goes over his side, the county to review their comments and then the board will take over from there.

Parnacott You just want the fact and the merits of the case?

Tidemann Yes.

## **EXECUTIVE SESSION**

Hill Every sand pit is unique because you can only mine sand where sand is and it is not all over the county, it is adjacent to the river primarily and areas close to the river. Any place that you can find sand and un-appropriated water rights, which are hard to find, that is where you put a sand pit. We take the position that every sand pit location is a unique piece of property because it has the two things that you have to have to mine sand. The second factor is whether there is an adverse impact on adjacent property. We submit to you pictures that we have taken from various locations from the Pine Bay area and from the nearest residential street at Grove Court, from the neighbors house to the north which is the only house to the north of our property. The sign does not have an adverse visual impact. It does not cause any traffic problems. What we hope it does is keep trucks from going south of the entrance, which is something that we agreed to do. It is a 45 miles per hour residential street. An eight square foot sign with truck driver going 45 miles an hour, who may not know where he is going, it will not be seen. Hardship to the applicant, we got 2.5 million dollars invested in that facility. We need a sign so that our customers know where to go when they get there. We put a larger sign than the Planning staff approves of but it is a first class facility, fully landscaped, the sign looks great. It would be a significant hardship to us if we cannot alert our customers where we need to go and it also helps to tell them where not to go which is south of the entrance on Grove street with their trucks. The fourth factor is a public interest factors, the staff originally conceded there no adverse impact upon the public health and safety, morals, order, convenience, prosperity, and general welfare. Then the staff says that it may have negative affect on the harmonious development of the community. First off, I have no clue what that means. The sign is only going to be there as long as we are mining sand, which is a maximum of 12 years. Our CU is ten years but we could get 2 administrative adjustments on top of that time. We will probably be done with that sandpit well in advance of the ten-year period. When the sand mining is done, the sign will come down. That is when that property will get developed. I do not believe there is any way you can say it is going to have a negative affect upon the harmonious development of the community. The fifth factor, does the variance conform to the spirit and intent of the sign code? I will suggest that it does, in that, the spirit and intent of the sign code is to allow reasonable size signs for businesses doing what they do. If you look at property use, this is an industrial use. In an industrial zone property, we clearly have a right to a 300 square foot sign. We do not want a 300 square foot sign. We need a sign that is large enough to be seen by our customers. It is a good-looking sign. It will only be there for a short period of time. It is not lit at night. There is nothing on the backside. We think it is appropriate given that we have the conditional use to operate our business that the county needs.

Tidemann Bob or Jess, do you want to respond?

McNeely

Good afternoon board members, Jess McNeely with the Planning department, if you read the staff report you will see that we recommended that you not find jurisdiction on this case. If you would like to hear the planning staff report on this we can give you that. As you can see on the zoning map in front of you, this property is zoned "RR" and is in fact an island of county unincorporated area surrounded by City of Wichita and "SF-5" Single Family Residential zoning, with the exception of the small piece of "LC" zoning for the golf pro shop that is associated with the Pine Bay neighborhood just west of the site. The aerial photograph shows the lot lines of property. You can see where the golf course is located. You can see where the residential development is taking place. The most affected property is immediately west of this sign along with the property immediately north of the site. To the east of the site is the river, and then on the other side of the river is a now developing residential subdivision. This is the site plan submitted by the applicant showing where the sign is intended to go. This would be the sign that was erected. If you read your staff report, we try to make the point. If you are going to discuss the variance criteria, this sign was put up without a permit without checking what the sign requirement in RR zoning. It is an 88-foot square sign and of course it serves the purpose of identifying the business and ensuring that trucks do not head further south than the business. We will point out that this sign has a lot of blank white space. In the previous hearing, the applicant pointed out that most other surrounding sandpits in the Sedgwick County area have more like 28 or 32 square feet, that is the size of one 4x8 sheet of plywood, is a common sign for sandpits. The sign that was put up without a permit was not very narrowly tailored to its needs. There is a lot of blank space. It is along a residential street not an arterial street. It is viewed directly by "SF-5" zoned residences. Looking at the sign from Grove Street, there is a sign that identifies that there are trucks entering from the highway. There is some anticipation, as a truck is heading south off the arterial street that they will be turning following this sign. Of course, you can see the sandpit operation in the background. This is standing from the sign looking north, and you can see the residential there. This is looking northwest of the sign, across the golf course, you see in the foreground the residential there. Some of these are two story residences that views across that golf course, and if the look to their east they will see this sign. This is looking south into the parking lot of the golf club. Southwest of this sign you see the building in the background, the Pro Shop and a restaurant for the golf course. This is looking due west actually at a tee box immediately west of Grove from the sign. We do not see that this variance as necessary, because it could be hear by the Planning Commission without need for a variance of the sign code. We find that the request is not unique. It is along a residential street. If this was along an arterial street with higher traffic volumes at higher speeds, we could see the greater need for increase size and signage. Eighty-eight square feet, we find to be excessive for a residential street. If you look at the back of your packet, you will see a letter from a homeowner that is not happy about this sign. That homeowner seems to feel a negative affect on him. We feel this is not appropriate sized signage in proximity to a single-family residential neighborhood in the City of Wichita. Hardship, we do feel eight feet could be small. What would be more appropriate is more like a 32 square foot sign. We are trying to balance the needs of the community and public interest. First off, we do not see that this is the appropriate venue to hear a variance request that actually should go through the conditional use process without need for a variance. Regarding Spirit and intent, it is preferable for signage within conditional uses to go through the public hearing process in the MAPC and County Commission process. We do not feel that the spirit and intent of the sign code in this case would allow an 88 square foot sign. We feel that the spirit and intent of the sign code would be to work with the surrounding zoning and try to be

respectful to the surrounding zoning. We do not feel that it this is necessary. That is our recommendation, any questions of staff?

Tidemann Does anyone have any questions?

Gruenbacher Do you have any other letters from surrounding residents?

McNeely No, only one letter, we had a couple of phone calls.

Gruenbacher Can you tell us what the phone calls were about?

McNeely When the first notice went out back in November, surrounding residents remembered the conditional use case for the sandpit, they wanted some clarification and they both were opposed to this size of signage in their neighborhood.

Greunbacher Is it because of the sign or is it because of the sandpit business?

McNeely I explained to them the only issue at hand was the size of the sign in regards to zoning and the sign code. People were not supportive of the current size of the sign.

Tidemann Any other questions of the board members? Okay Jess, thank you. What are the Board's wishes?

Greunbacher I move that we hold another executive session.

Lindsay Seconded.

### **EXECUTIVE SESSION**

Gruenbacher I move after reading the 5 criteria for a variance and his response, to grant the applicant a written statement in support of a request for variance for the 88 square foot sign.

Lindsay Seconded

Tidemann There is no vote by Kathleen.

Gruenbacher I would like to add to my statement. I would like to amend that the signage be taken down at the close of the sandpit business.

Parnacott Do we have an abstention? For what reason?

Gideon I know some members of the Cornejo family.

Tidemann We need a vote.

McNeely Having the condition on there that the sign be tied to the business at the site.

Gruenbacher I can make a second motion if you like?

Miller I wrapped it all into one. We know what you mean.

**Motion carried 3-0-1**

- Guenbacher I would like the County Commissioners to address the sign code; so, we do not have these problems down the road.
- Hill Also, we would like you to address it because it will be an issue with our other operation up north. We could be back here again.
- Wiltse I would like for you not to put the sign up until you get an approval.
- Hill We know better now.
- Parnacott We do have another agenda items?
- Mcneely Yes, we do have another item on the agenda. Your Sedgwick County Board of Zoning Appeals Bylaws, I passed out copies at the last meeting. It addresses your meeting date as being the first Monday of every month. When I became the secretary of the BZA, we had traditional meet on the first Tuesday of the month. I recommend that the County BZA request a new set of bylaws that changes the meeting date time to the first Tuesday of every month. We can have it ready for you at the next meeting.
- Greunbacher What is in the by-laws now?
- McNeely The by-laws state that you are to meet the first Monday of the every month.
- Tidemann I think that Tuesday is fine with everyone. I am sorry that I failed to get that on the agenda.
- Parnacott The other alternative is the way MAPC handles it. They set a specific date or as determined by calendar to be approved. Isn't it something like that Dale? If that is preferable we can draft it that way.
- Tidemann That is a better way to do it and it gives flexibility.
- Gruenbacher Do we need to elect new officers for this board? I thought we had to do that at the first meeting of the year when we met.
- McNeely The bylaws say at the first meeting after May first. So, I would assume that we wait until May.
- Miller Technically, you served until you are replaced. Even though your term may be up, we continue to recognize you as a legitimate member of the board of BZA unless you send in a letter resigning then we can go to the governing body requesting them to replace you officially.
- Tidemann I took my oath in January because I was Unruh's appointment and he was elected two or three years ago.
- Gruenbacher Is there a limit on how long you can serve on this County Board?
- McNeely I am showing appointments all the way through 2009.

Greunbacher No, is there a limit on how long someone can serve on this board?

Parnacott No that typically is not something the county does. I know that the City does that for some positions. We can get all that cleared up and address that next time.

Greunbacher I know I have been on the Colwich Planning Commission for the past 30 years.

Parnacott It is up to the governing body to structure it that way.

Tidemann Is there anything else. If not, we are adjourned.

**Adjourn 4:28pm**