

MINUTES  
BOARD OF ZONING APPEALS  
15 W KELLOGG BLVD, ROOM 330  
ST PAUL, MINNESOTA, DECEMBER 4, 2017

PRESENT: Mmes. Bogen, Maddox, Trout-Oertel and Younkin Viswanathan; Messrs. Miller and Saylor of the Board of Zoning Appeals; Mr. Warner, City Attorney; Mr. Benner II, Mr. Diatta and Ms. Crippen of the Department of Safety and Inspections.

ABSENT: Luis Rangel Morales\*

\*Excused

The meeting was chaired by Gloria Bogen, Chair.

**JOHN RUPP - Commonwealth Properties (#17-214989) 79 Western Avenue North:** The applicant is appealing the decision by the Zoning Administrator stating that the west dining room in the Commodore Restaurant was never legally established as a dining room.

Mr. Benner showed slides of the site and reviewed the staff report.

Four letters were received in support and one in opposing the variance request.

No correspondence was received from District 8 regarding the variance request.

Ms. Bogen asked if the squash building at that time included both of those buildings that are located toward Arundel Street? Mr. Benner replied yes, that is correct.

Ms. Bogen and Mr. Benner discussed the site plan on page 27 of the packet and the overhead photo of the block showing the building from an bird's eye view, the dining room shown on the site plan that is starred in red, matches up on the handout of the overhead view of the property, with the lower section of the building that shows a darker rectangular area located on the roof of the lower section of the building. She asked Mr. Benner if that is the area that is being called the squash club? Mr. Benner replied correct. Staff went back to the photos showing the addition with the stair case. This is the south side of the building where the west dining room is located. This is the location where the HPC (Heritage Preservation Commission) approved a building permit in 1987 to install the windows shown in the photo.

Mr. Miller asked if that section is where there was a parking lot. Mr. Benner stated that it was never a parking lot. He stated that the appellant purchased this space sometime in 2001, it was in conjunction with the squash club some time prior to the appellant's purchase of the space. The previous owner of the squash club had intended to make this space a future dining room. But it never came to fruition nor was it ever approved by the City to be a dining room.

Ms. Bogen asked what Mr. Rupp owns right now. Mr. Benner replied that Mr. Rupp owns the bar and restaurant. Ms. Bogen stated that is in the middle of the "c" section of the building. Mr. Benner replied correct. Ms. Bogen asked if he owns a piece of the building? Or does he rent it. Mr. Benner replied that Mr. Rupp owns that portion of the building. Ms. Bogen asked if there is a different pin (property identification number) for that as opposed to the rest of the building. Mr. Warner stated without going into too much detail, it is his understanding that Mr. Rupp obtained that piece of the building in a court proceeding.

Ms. Trout-Oertel restated for clarity, Mr. Rupp owns all the physical property but the squash club operation is owned by different entities. Mr. Benner replied correct. Ms. Trout-Oertel stated that Mr.

Rupp owns all the physical property. Mr. Benner replied but not the condos. Ms. Trout-Oertel stated the bar and restaurant and the spaces of the squash club. Mr. Benner replied correct.

Ms. Younkin Viswanathan asked if the space is currently being used for a dining room. Mr. Benner stated that when he visited the space it was set up with white table cloths and chairs, it is being used as a dining room. Ms. Trout-Oertel asked if when this room was turned into a dining room was it permitted and inspected? Mr. Benner stated that it was never legally established as a dining room. Mr. Warner stated that there are two things going on here. There are building permit issues and there are zoning issues. The issue before the Board is the zoning administrator's determination with respect to the zoning use. Ms. Trout-Oertel stated because there is a change of use. Ms. Bogen interjected from the exercise room to a dining room. Mr. Warner stated that in the packet on pages 20-21 is the letter of determination from Wendy Lane that the appellant is challenging today.

Ms. Trout-Oertel stated this is a change of occupancy of a room, as opposed to the restaurant/bar facility, she thinks that it requires a change of occupancy when a major space is repurposed for a different use. Is that true? Mr. Warner replied yes. Ms. Bogen asked if there are options here for the Board to either allow it or for the appellant to go the Planning Commission to get a non-conforming use permit, because that space went unused for over a year. Does it now need to be reestablished to some use? Mr. Warner stated yes that is true but before we get to that we should hear the appellants version of the facts and the zoning administrator's determination, that is ultimately what this Board is going to decide. At that time, he will be happy to lay out those options for the Board.

Ms. Younkin Viswanathan questioned that Mr. Benner's determination is that he agrees with the letter written by Wendy Lane. Mr. Benner replied that is correct.

The applicant **JOHN RUPP - Commonwealth Properties**, 366 Summit Avenue, was present. Mr. Rupp asked for copies of the handouts presented to the Board so that he can answer questions about them, stating that he has not seen the handouts provided to the Board. Particularly the overhead photo of the block. A set of handouts was given to Mr. Rupp. Mr. Rupp stated that it should be no surprise that he has a different take on this entire situation including the facts as they have been presented. The Commodore hotel building was built in 1920. It was opened about the same time that prohibition was established. In 1934 prohibition ended and the Art Deco bar in the Commodore was constructed. At that time, the Bar/restaurant was located in what is now the six-story condominium building and had a dining room that had been built in 1920, as a single-story building immediately to the west of the six-story building. In the overhead photo, it is the building that shows some mechanicals on the top. A section of the "u" shaped building and the building with the mechanicals on it opened in 1934, with a liquor license. It stayed in operation, when in 1976, the parking lot that had been approved in 1972, had a new building constructed on it by the late previous owner Thomond O'Brien. Ms. Lane found that when that building was built in 1976 it included a dining room for expanding the restaurant complex. There was also a determination made in 1976 that the license that had been granted in 1934 would be expanded to cover the dining room. In 1976 before the construction was completed the building exploded in 1978. In 1980 there was a large effort to reconstruct the Commodore building after the explosion. Which included rebuilding the sections to the west of the dining room with the mechanical equipment on it, in the overhead photo. At that time one part of the expansion was to add a bar and a lounge in the area that is to the north of the west dining room. At the same time Zoning and Licensing expanded the 1934 liquor licensing for the second time. The liquor license first expanded in 1976 to include the west dining room, which was intended not to be part of the squash club but part of the restaurant. Ms. Lane in her recent letter agreed with that. Then there was another expansion in 1980. For a while Mr. O'Brien attempted to operate the Bar/restaurant, there were a number of meetings between him and Mr. O'Brien, who admitted to Mr. Rupp that it wasn't



a particularly successful experience for him. At which time Mr. O'Brien decided to sell to one of Mr. Rupp's corporate/business entities, that he controls. In 1984 Mr. Rupp purchased the original bar/restaurant and the dining room, which is the single-story building in the photos and Mr. O'Brien retained ownership of the west dining room. At this point Mr. O'Brien was concerned that he would lose the ability to use the west dining room as a restaurant. Mr. O'Brien and Mr. Rupp entered into an agreement. Mr. Rupp passed out a copy of the agreement (he did not provide staff with a copy). He stated that the agreement says that Mr. Rupp is purchasing the original bar and restaurant that was built in 1920 and reopened in 1934. He was buying the liquor license that covered the bar/restaurant and the entire squash rackets club, including the restaurant and bar in the lounge area in the club and the west dining room. This agreement said that he would maintain the license, meaning he pays all the fees beginning in 1984, and that the license would cover not only his own property that he purchased from Mr. O'Brien, but Mr. O'Brien's property as well.

Mr. Rupp continued in 1991 he contacted Mr. Bob Kessler, Licensing and Permit Manager for the City. He requested a confirmation from Mr. Kessler, that the liquor service area in the Commodore Squash Racket Club, including the west dining room and the lounge and bar within the club, were still covered under his license. Mr. Rupp submitted a letter from Mr. Bob Kessler who stated that Mr. Rupp was covered. This was important because in 1991 he thought he was going to expand the restaurant and use the west dining room for the purpose that it was intended for and had been originally licensed in 1976. By 2001 Mr. Rupp had not heard anything counter to the 1991 letter from Mr. Kessler, stating that his liquor license covers the west dining room. He stated that he received ownership of the west dining room in 2001. He continued that in 2001 he incorporated the dining room into the operation of the bar restaurant complex. It was covered by the license uninterrupted since 1976. For fifteen years he used it as part of the bar and restaurant. It was inspected by license and building inspectors. Nobody had a problem with him using it as part of the restaurant. In 2012, he thought it was time to make some improvements to the bar and restaurant complex, that he had expanded in 2001. Mr. Rupp filed plans to the Department of Safety and Inspections for review. In August of 2015 concluded from a licensing and zoning standpoint he could use the west dining room, that there was no expansion or change of use. Mr. Rupp submitted site plans to the Board. The second plan in the stack is dated February 2012. He stated that when he has a project that is going to take multiple approvals he submits the plans and asks for comments. It took until May to receive the plan that is on the top of the packet he just submitted. The plan has multi colored dots on it and a series of directives in the lower right-hand corner. Those comments all came from the city and they were consolidated comments from the building department, the licensing department and from zoning. After his meeting in February he revised his drawings and submitted the top plan on May 7, 2012. Three months after his original conversation about the project with Planning and Zoning. During those three months, the original February plans were reviewed by the zoning department and by licensing. He submitted the May plan and it is stamped re-submitted May 15. It is highly detailed and says that he incorporated the suggestions from the City into a set of revised plans. He waited from May 17 until August 30. On August 30, 2012, he finally gets a building permit. In order to get a building permit, it has to be determined by licensing and zoning, that what is being applied for a building permit is in an appropriately zoned property and is licenses for the use in which it was intended. Mr. Rupp stated that the City had documents from Mr. Rupp from the first week in February until the last week in August, at the end of this time they all concluded that there was no change or expansion of use. Shown in the upper right-hand corner of the site plan. He pointed out the symbol key on the lower left-hand side of the plans. That reads scope of alteration work. On the plans with the colored dots it shows the lower left hand enclosed area of the plan it reads "west dining room" and it has a detail number saying that a new bar is going to be built in the room. That area is what was covered in the August 2012 permit. Mr. Rupp contended on the strength of that permit he has a building permit, he has appropriate zoning, he has a licensing letter from the previous Licensing Examiner. He owns the property, he has a liquor



license, the zoning is an approved use, and the building department gave him a building permit. He started construction which went on for almost three years. Because he was short of money, he worked on it when he had available funds. During that time, the building department inspected the property five times. The City also issued three electrical permits during that time for the west dining room. The electrical permits cannot be issued unless there is a building permit. He understands that is how the building department works.

Mr. Rupp asked why the zoning department would issue an opinion in advance of construction in which nobody in the zoning department, the licensing department or the building department says there is any problem with this permit, until two days after the opening, three years later. The Building Official, Mr. Ubl says that that Mr. Rupp did not have a building permit for this space. Mr. Rupp showed Mr. Ubl the building permit he has. He stated that it turns out that the City misplaced his permit. Mr. Rupp submitted a print-out of the City records showing permits pulled for the 79 Western Avenue North address. On the second page, it shows that Mr. Rupp filed a building permit application. That is inaccurate, because in 2012 he came in with a preliminary plan, which did not include the west dining room at that time. To talk about what the City was going to require for not only the area he discussed but the west dining room, and the permit he was granted was done on August 30, 2012. Conspicuously what is absent is the building permit, or any indication that he obtained a building permit. He was not surprised when he found this a couple of months ago, because he was told by John Skradski, a Plan Examiner, in DSI (Department of Safety & Inspections), that the City had lost all these permits. The City gave him a permit and they were inspecting it, but they had lost it. In trying to come up with an explanation of why he would have constructed this without a permit in the fall of 2014 when he was trying to open the bar/restaurant expansion.

Mr. Rupp stated that now we get to the use of the building and the zoning. The comment was made that at some point this room was used as an exercise room. That is true, he knows something about this, he owns the University Club of St. Paul and the St. Paul Athletic Club. Both of those clubs are covered by liquor licenses that cover the entire facility. If he uses part of that facility and fills it with exercise equipment or he wants to serve liquor at the swimming pool either the outside or inside of the pool his license covers it. The fact that a licensed building that was built for a restaurant, that continuously held a license in which there was no City action to revoke the license. No zoning or Planning Commission changes to its use and that the O'Brien family never requested that the liquor service area be reduced. The fact that exercise equipment showed up in there is no more important than the fact that little kids are sitting next to their toys around their parents along the swimming pool in summer time while their parents have a bottle of beer, or the same thing downtown. He asked his architect to also look into this based on whether from a zoning stand point if you can take a licensed facility without changing its use, and use it for a temporary period of time as an exercise room without changing its use and without needing any approval. Mr. Rupp submitted a letter from his architect, stating that the Board could read his conclusion, which is no. Ms. Bogen stated that the Board has already read it, it was in the packet. No action was taken throughout the life of this, 40 years now that would suggest that the room was not intended to be used as a dining room. Mr. Rupp contended that he has been using the room for 15 years continuously and there has been no gap in which it has not been used. The only possible explanation that he can see looking at this situation from the outside is that there was a massive screw up on the City's part in having lost its records. Not knowing what is going on with this space and then deciding that the safest thing to do, because they do have at least one neighbor that is trying to get the City figure out what to do about this situation. Is to now make it his problem. Mr. Rupp continued that the City was trying to make him defend the fact that he was granted a permit with the Zoning and Licensing Departments approval to use this as a restaurant and spent a fortune doing it. Three years later and two days after he opened he is told he did something wrong. He contended that he did not do anything wrong. What is at stake here, if he



goes back and says he is going to ask for a change of use because this is from one legal non-conforming use to another. He does not need to do that because as the architect argued if it changes to a lower hazard. If you change a restaurant and temporarily put exercise equipment in it, you can do that, without changing the zoning. You cannot do that if you have an exercise room and want to convert it to a restaurant. That would require a change of use. Mr. Rupp continued, let's say he is forced into a change of use what Mr. Ubl, (the Building Inspector) has already threatened him, saying that Mr. Rupp does not have a building permit. If Mr. Ubl wins it will cost Mr. Rupp \$200,000 and will probably bankrupt the bar/restaurant.

Mr. Rupp explains that by changing the use of the space for building code purposes, he will have to tear the whole place apart, which is beautifully finished, Mr. Rupp added, and install a sprinkler system. Mr. Rupp told Mr. Ubl that he is not required to do that even under his building codes and he is certainly not required to do it if there has not been a change of use. The flood gates open if Mr. Ubl gets away with winning on the point that Mr. Rupp has changed the use when he has not. Because now all of a sudden, the place gets bankrupt by this guy. Mr. Rupp stated that he is trying to defend that this business has been around for 40 years, in fact the business has been around since 1934.

Ms. Younkin Viswanathan stated, she is trying to get the time line down, in 1921 the building opened up and it was a private club or was it. Mr. Rupp replied let's start again, in 1920 the six-story building opens and adjacent to it, on the aerial photo shown with the mechanical equipment on the top of the building, that was the dining room for the hotel, there was no squash club. The buildings to the west were some garages which wasn't relevant to the zoning. Sometime before 1976, he thinks, Thomond O'Brien, John O'Brien's father, remodeled the garages west of the dining room as a classroom for 3M. He believes that the change occurred in 1972, counter to what has been stated, some houses had been tore down along Holly Street and a parking lot was put in, because 1975 the Zoning Code was changed. Then in 1976 Mr. O'Brien decided to build the first phase of what was to ultimately become the squash club. Which was a dining room for the club/hotel with a squash club below it.

Mr. Rupp stated that this is an air rights parcel, the west dining room, below it are squash courts. The dining room was built precisely within 1/100<sup>th</sup> of a foot of elevation and lines up with the floor of the dining room, because it was going to be part of the dining room. There is one tax id parcel because when he received title of this parcel in a court action the examiners of title in Ramsey County decided that rather than having another tax id parcel that is just the west dining room, they added it to the original dining room that was built in 1920. That is why there is not a separate tax id for the property.

Ms. Younkin Viswanathan stated to continue with the trajectory, the Commodore opened in 2015, as it exists now. Mr. Rupp replied in 2015 they completed the remodel that was started in 2012. Ms. Younkin Viswanathan questioned that Mr. Rupp had stated that before 2012 the space was being used as a dining room. Mr. Rupp replied that the whole thing was part since 2001 the entire area that was remodeled and shown in the site plans was a bar/restaurant complex. Ms. Younkin Viswanathan asked if it was open to the public? Mr. Rupp stated that back then it was periodically open to the public on special occasions. It was a banquet facility and its license is owned by the University Club. They had a restaurant license so that they could open it periodically and close it, it was primarily for private events. Mr. Miller stated that Mr. Rupp is telling the Board that he thinks that this space was established when it was constructed back in 1976. Mr. Rupp replied no, that is what Wendy Lane agreed to in her most recent letter, she said it was built as a dining room in 1976. Before Ms. Lane wrote that letter she had sent some internal memos which he found in discovery, which said that John has not come in and said what the building was built for. Before she wrote her letter, he brought in all the evidence that the structure was built with the squash courts down below to be part of the soon to be expand squash club and a dining room up above because it is stacked. She took that evidence and she reached the conclusion that it was built as a dining room. Mr.



Miller restated that it is not Mr. Rupp's opinion that it was established as a dining room, it was Wendy Lane's opinion. Mr. Rupp replied no, it was built as a dining room. He gave Ms. Lane the evidence, the evidence was a letter from the architect who designed the dining room wrote a statement that Wendy Lane has a copy of that says that it was designed as a dining room and both the 1976 site plans and the 2015 site plans it says dining room. Mr. Rupp continued that these are not matters of opinion this is what it was. Ms. Bogen stated but Ms. Lane's letter does not say that. Mr. Rupp replied yes it does. Ms. Bogen stated that the letter says that Mr. Rupp provided a floor plan from 1976 when the floor plan showed this area as a future dining room. But no evidence that the use was ever established. Mr. Rupp stated that the question was if the space that was intended to be a dining room in 1976 ever established for use as a restaurant. Ms. Lane is saying that he, Mr. Rupp, has not produced evidence that a building that was permitted to be built as a dining room and licensed for use as a dining room could not be used as a dining room. He stated that his presumption that any rational person should make is if the City of St. Paul grants a permit for a building to be used as a restaurant/dining room and then gives a license to use it as a restaurant/dining room, that its use was established. Ms. Bogen asked if Mr. Rupp has a copy of the license that covers that dining room? Mr. Rupp replied that it is in the 1991 letter from Mr. Kessler, who says that the entire squash racket club is covered by his liquor license. He contended that was an important question that he needed the City to have in its records that they would find that this is a licensed restaurant area. Because he has a very large project that depended upon not getting into this kind of a nightmare with the City over the use of that particular piece of property. He thought he had it figured out in 1991, he still thinks he has it figured out.

Mr. Saylor questioned Mr. Rupp about the 1991 letter, the letter reads "We agree that the liquor service area does include the area presently occupied by the squash club" it also mentions an entertainment issue and Mr. Kessler goes on to say "My contention is that an entertainment license is required if liquor is provided by the license holder." Then in the next paragraph goes on "During our discussion you recalled the existence of a letter from the previous license inspector that supposedly gave you permission to provide liquor and allow another private party to provide entertainment without the need for a license, you were to locate a copy of that letter since we cannot find any such letter in our files and we have not heard from you." Mr. Rupp stated that he went to Mr. Kessler on two issues, he has a ridiculous situation on the whole complex. He stated this is how it goes, if one of you comes to him and says that they want to rent the restaurant or use part of it for a private party and want to bring in entertainment, no problem. But if he hires the entertainment and invites, people in to listen to it, he cannot do that. He finds that ridiculous, but that is the position he is in. When he went to Mr. Kessler he had two issues. One to make sure that he had the liquor license in the west dining room. The second issue was about an entertainment license situation. He lost one of the first points on the entertainment license. Now the other problem he has is that he opened this place to have entertainment in it. But he cannot get a neighborhood petition supporting a change in the entertainment license to allow him to hire the entertainment like anyone else can at his business until he gets this zoning issue straightened out. Mr. Rupp contended that he has been tied up for six years come February. Trying to get clarification on the zoning of that business. It is going to be six years since he filed his first building permit to get this resolved.

Ms. Bogen asked Mr. Rupp if the building permit he submitted to the Board is the building permit he received that allowed him to improve and put a bar in. Mr. Rupp stated that he does not say anything, this speaks for itself, this is a legal document. It says that he can build in this area, there are all the conditions listed on it. We have added all the conditions that the City put on the permit, if he complies with those conditions he is fine. The last inspection by the City, the City inspector told him he was going to provide a temporary certificate of occupancy. He never got one but was told that two days before he opened.

Ms. Bogen asked why the building permit has attached to it bathroom plans and bathroom details. The



building permit refers to it as a minor remodel, minor structural work and then at the bottom of the building permit it says "it is an interior remodel permitting with owner was approved by Building Official Jim Bloom, that the new restrooms would have to be constructed according to the 2007 Minnesota Accessible Code Chapter 13.41 requirements even though the restrooms are not on an accessible route and the unisex bathroom is being provided." How do we know that this building permit is not just for the bathroom? Mr. Rupp stated that you really have to look at it. He stated that it is circled on the plans and calls out the fact that he is building a bar inside of the west dining room and he is doing the bathroom upgrades. The meeting in February 2012 one of the comments that was made when upgrading drawings for a formal building permit application purposes, the 2007 code for restrooms has to be analyzed, the architect went back to the drawing board did a bunch of modifications to the plans per the City requirements one of which was to develop the specs for the bathrooms. We then installed those. Mr. Rupp pointed out the dashed line around text on the top of the plans, stating that this was added to the plans between February and May of 2012, this section does the calculation that says that the bathrooms that were required after his first meeting with the City in February, in order to occupy the place, they had to meet the new codes. That is why there is a change from the February 2012 draft to this one there was a change. Ms. Bogen asked where is the building permit that does not have to do with the toilets, because on this plan it specifically says under point #10 in blue, new toilet rooms see detail, electrical and mechanical by separate permit. This is the permit for the toilet rooms. Mr. Rupp replied no, this is a building permit that includes the toilet rooms. He cannot, because he is not licensed, file an electrical permit or a plumbing permit, what he can do is file a building permit which says here are the number of toilet stalls. Here are their sizes, here is how they meet the code and then subsequently what happened is a plumber come in and files a plumbing permit then an electrician comes in and files an electrical permit to put the electrical in. He cannot do that because he is not licensed to do that.

Paul Olson, 431 Portland Avenue, testified that he has known Mr. Rupp for many years, his net effect of real estate and entertainment investments in our neighborhood has been extremely positive. Ms. Bogen asked that Mr. Olson address his comments about the dining room, that is what this Board has to hear about. Mr. Olson continued that Ramsey Hill uses these facilities frequently. Ms. Bogen asked if he is speaking for the Ramsey Hill Association. Mr. Olson state he is a member and his wife is a Boardmember. They use this for various meetings and gatherings. Ms. Bogen asked Mr. Olson to just speak the dining room issue and whether it has been in use as a dining room. Mr. Olson stated that he has had occasion on many occasions to be a member of the Ramsey Hill Association as a guest to enjoy and utilize these facilities. They were very conducive to neighborhood building and safety. What he is saying is that these facilities is a big asset to the community. Ms. Bogen stated that we just have to talk about the Commodore and the dining room.

There was opposition present at the hearing.

Valerie Evje and Gerald Barns, 418 Ashland Avenue, stated she has a zoning question, since this property is zoned a residential area is there a zoning requirement about the parking and its impact on the residents. Mr. Benner stated that if the Board decides that Mr. Rupp is correct in his assessment of what happened then the parking would be a wash, because it would have already been established as a restaurant use and there would be no new parking required. However, if the Board decides that a non-conforming use permit is required, the parking would then be included with that and the parking determination would be made to see how many parking spaces would be required. Essentially there would be a need for a non-conforming use permit and a parking variance if Mr. Rupp decides not to provide the required parking. At this time, we do not know the number of parking spaces that would be required. Ms. Bogen stated that would be a decision of the Planning Commission and if a variance is needed then it would come back to this Board. Ms. Evje asked if she is understanding correctly, the parking required would depend on if the



west dining room was in the original plans or if it now needs an additional approval. Mr. Benner replied that is correct. Ms. Evje further asked if there is any sense of how many parking spaces would be required for that room, or is that for a later event. Mr. Warner stated that there is a formula for calculating parking, but before we get to that point we have to make a determination. There is a parking requirement and there is a formula for it, whether or not it is applied depends on what happens here today. Mr. Barns stated he just wanted to make a quick comment. As of 2015 when the restaurant opened parking became an extreme issue. Since the day of opening anyone who lives on this street is unable to find a parking space from 4 p.m. until around 10-11 p.m. except for Sunday and Monday when the restaurant closes early. Ms. Bogen stated that if this gets to the point of looking at the parking, their testimony on that issue would be very important. Ms. Evje asked if there would be another notification about that. Ms. Bogen replied yes.

John O'Brien, 675 Goodrich Avenue, stated that he is the owner of the Commodore Squash Club and he has a long history with Mr. Rupp. He would like to point out that some of what Mr. Rupp said, he would disagree with. Mr. Rupp's contention that the exercise room has been in use as restaurant space, seems to be what he was implying, is not true. From 2001 when the O'Brien Family lost it as a result of twenty years of bitter lawsuits, until it was reopened as part of an expanded restaurant in 2015, the room was an awful leaky nightmare. With tarps strung around through the ceiling to try and capture some of the rain water and to prevent the water from flowing into his property, which it continued to do for years and years; not only from that mess of a room but also from the adjoining kitchen space into his office flooding his carpets. When Mr. Rupp talks about the room being in use, sure he stored some chairs in there and other stuff, but it was not being used as a restaurant.

Mr. O'Brien stated he would also like to question this business of a liquor license which applies to a space that is not owned by Mr. Rupp. That room he does not believe was ever utilized for liquor service or liquor consumption. It was an exercise room, in fact the record would show that he applied for a 3.2 beer license back in 1995, but it expired because he did not sell a single beer, we just did not think that we wanted to go into that business. Then when he hired a new (??) he encouraged Mr. O'Brien to see if he could get that 3.2 beer license reinstated and he did. Mr. O'Brien stated that he could not understand how a liquor license from 1993 that is part of the University Club's license could apply to a room that Mr. Rupp did not own until 2001. Ms. Bogen stated that she saw that in the letter he submitted to the Board, that is not something that we would be able to have an answer for. But we appreciate the question.

Mr. Rupp stated that yes when he received title to the restaurant, the west room, it was in a deplorable condition. It took a while to get it repaired. But it was always part of the restaurant operations and he thinks that John was correct in that a lot of the time we used it for storage. It wasn't a formal dining room by any means but it was part of the back-house operations as defined by Bob Kessler, the license manager in the 1995 letter. Mr. O'Brien asked about it being the University Club license. The University Club holds three separate different liquor licenses one for the Summit Avenue Clubhouse, one for banquet operations in the St. Paul Athletic Club and one for the Commodore. He thinks one of the larger questions did not get raised in this hearing, was that the Zoning Office reached the conclusion that there was no expansion of use and Wendy Lane reached a different conclusion. He met with Wendy Lane at the suggestion of the City Attorney, and she, Theresa Skarda, asked him to bring in information to Wendy that she could use in her decision. Mr. Rupp stated that he asked her that question and Ms. Lane said that we lost the zoning file. He asked about the person who wrote the conclusion that Mr. Rupp relied upon, when he built the business. That person has retired and cannot be reached. He asked if they had seen the building permit that the City Attorney has. Ms. Lane told him no we have not been given that. He stated that the previous Thursday he stopped in at DSI and asked Mr. Benner if he would like a copy of the site plan so they would have it before they wrote the staff report. The response was no we cannot look at it,



because the City Attorney has said you have to go through her. She has the copy that she won't show them.

Hearing no further testimony, Ms. Bogen closed the public portion of the meeting.

Ms. Bogen stated that the decision would be to uphold Ms. Lane's decision or not uphold it.

Mr. Saylor asked if Mr. Warner has any legal perspective from the City's point of view before the Board makes a determination. Mr. Warner replied no, he thinks that the Board has Ms. Lane's letter to Mr. Rupp and she sets out her reasons for her determination that the restaurant could not be expanded in there because of the zoning code. The burden is on the applicant to establish whether that is correct and it is up to this Board to determine if Mr. Rupp has shown that is correct or incorrect. If the Board has questions concerning the testimony he would be happy to address those. The Board has the basis of Ms. Lane's decision in this letter.

Ms. Younkin Viswanathan asked if the City contends that the permit from 2012 is not correct that Mr. Rupp came to the City with these plans to build it and he was granted the permit. Does the City think that is not what happened? Mr. Warner stated that he thinks that the building permit issue is addressed in the first paragraph of Ms. Lane's letter. Stating that the building permit is not really relevant to the zoning issue, it might be relevant to Mr. Rupp's business, but that is between the building and the zoning code. The issue here is that Ms. Lane looked at it and says that the current uses in the building and the current uses that are proposed are non-conforming uses and she has made the determination that the non-conformity cannot be expanded into that portion of the building. She is saying that it was never legally established as a restaurant. The testimony that the Board has heard is that Mr. Rupp has a liquor license and he has these permits, but this is zoning the only people that can make zoning decisions are Zoning Officials. The Building Official cannot modify a zoning requirement, just because a building permit is granted to allow something that is a non-conforming use, that does not legalize it. In fact Minnesota law would say just the opposite, that if a Building Official issues something that is in violation of the zoning code then theoretically that permit is revocable. Ms. Lane has very narrowly for zoning purposes the use that Mr. Rupp is proposing has never been approved as a restaurant. The answer to the original question here would be for Mr. Rupp to apply for some type of a non-conforming use permit, he does not know if it is re-establishment or expansion, there are about 7 different non-conforming use permits, there is a process that could for zoning purposes legally clarify what this space could be used for. To address one of the questions that came from the testimony today, and that would take into analysis how big the space is and would apply the parking formula, it would be run by Plan Review to assure that the building is safe for occupancy, all those things would be taken up in that process. Mr. Warner stated that he looks at this permit, he does not know what it says for zoning purpose, the Board heard that the document speaks for itself, well when he looks at this document it says change of expansion or use no, commercial use c restaurant that is building code descriptions not zoning code descriptions. The building code and the zoning code use different descriptors for what the public would say that's residential, that's commercial use, that's a bar, that's a restaurant, but the zoning code and the building code use different terms. The approvals here might have been building code approvals but Ms. Lane is saying for zoning code purposes, in her opinion, it has never been established.

Ms. Trout-Oertel stated that this space has clearly not been used over the years as a dining room and to find a note on an architect's drawing "future dining room" that is the kind of thing that is thrown on plans and the fact that it does not have a history of being used as a dining room and was turned into one in a process that took years. She looks at the building permit and it is not really clear what is happening with this remodel.



Ms. Trout-Oertel moved to deny the appeal, concluding that Ms. Lane did not err in her determination that the restaurant could not be expanded in there because of the zoning code.

Ms. Younkin Viswanathan asked if this part of the restaurant was always attached to the restaurant, just because it wasn't being used. To her it would be like if a kitchen was not being used to serve food on a table you cannot move your kitchen in your restaurant and make it dining room. If this was always part of the restaurant space it just seems like it was an accessory room at some point that did not feel that it was needed to be used, but it was still part of the space and is still covered under the grandfathered zoning. She stated that she does not understand the timeline of the history of the space. As she remembers the Commodore you walk in and there is the small area with a little bar and the lounge area, then you walk down some steps and there is this west dining room we are having this conversation about. If that was always there and there wasn't ever a closed off wall then it was a room that wasn't being used in the restaurant. You should not be penalized and not allowed to use it, because it was always there but not actively being used. Ms. Bogen stated that it was in a building that was built many years after the original bar and restaurant was built. She does not believe that the buildings were attached or connected, she does not know when the room was attached. From what she sees here it was never meant to be a part of the complex until there was some change of ownership, then this plan was drawn up that maybe we are going to have a future restaurant in there. That is how she would look at it, that this building has not always been a part of the complex. Ms. Younkin Viswanathan restated that it has not always been attached to the dining area of the original 1924 building. Ms. Bogen stated that it was a squash club. She thinks that 2001 is when it became part of the Commodore complex. Ms. Younkin Viswanathan questioned when they opened up the building space. Mr. Warner stated that if you look at the plans submitted by Mr. Rupp, looking at 1A and 1B on the key of the plans, it says remove a portion of the existing masonry wall for new door assembly, that is a recent phenomenon. Ms. Bogen stated that is about 2012. Mr. Warner stated it looks like there might have been a service door there. It was not the wide expansive doors he has on this plan, to open up the space.


Ms. Maddox seconded the motion, which passed on a roll call vote of 5-1 (Younkin Viswanathan).

Submitted by:



Jerome Benner II

Approved by:



Diane Trout-Oertel, Secretary