

MINUTES
BOARD OF ZONING APPEALS
15 W KELLOGG BLVD, ROOM 330
ST PAUL, MINNESOTA, AUGUST 27, 2018

PRESENT: Mmes. Bogen and Trout-Oertel; Messrs. Rangel Morales, 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: None

The meeting was chaired by Gloria Bogen, Chair.

Little Grocery (#18-092702) 1724 University Avenue West: The applicant is requesting a variance of the separation requirement between tobacco products shops in order to operate a new tobacco products shop. The zoning code requires a tobacco products shop to be located at least one-half mile (2,640 feet) from another one. The proposed tobacco product shop would be 2,600' from an existing shop for a variance request of 40'.

Mr. Benner showed slides of the site and reviewed the staff report with a recommendation for approval.

No correspondence was received opposing the variance request.

No correspondence was received from District 1724 University Avenue West regarding the variance request.

Mr. Saylor stated that if the businesses were reversed in their locations this argument could not be made, but because they are in their locations this argument works. Mr. Benner stated that if they were reversed they would not need a variance. Ms. Bogen stated that they still would, because it is from property line to property line. Mr. Benner replied correct.

Mr. Warner questioned that the applicant is not currently a tobacco products shop? Mr. Benner replied currently not. Mr. Warner questioned if he is proposing to become a tobacco products shop? Mr. Benner replied that is correct. He currently sells cigarettes as a convince store. But he does not meet the tobacco products shop as defined in the code. Mr. Warner stated he is not clear as to why the Board would be granting him a variance. He is not a tobacco products shop the zoning code does not apply to him. Mr. Benner stated that he is proposing to become one. Mr. Warner asked how does that happen? Doesn't he need a license to do that? Mr. Benner stated that the license is pending based on this decision, much like the last variance we had for a tobacco products shop, where the applicant was not a tobacco products shop, but he wanted to become one. If he was a tobacco products shop he would not need a variance. Mr. Miller asked if the applicant would have to stop selling grocery's because 90% of his business income has to come from tobacco. Mr. Rangel Morales stated that was his question as well, the staff report says that 75% of his revenue comes from tobacco products, does that mean that he will become exclusively a tobacco products shop? Mr. Benner stated that he could sell other things and sell tobacco as well. He will be able to continue to sell chips, candy, and whatever else a grocery store sells in addition to tobacco. Mr. Rangel Morales asked what if that grosses more than 10% of his revenue? Mr. Benner stated that would be something that the licensing department would handle at that point.

Mr. Warner stated that he is a little confused, the applicant is not a tobacco products shop, he wants to become a tobacco products shop, he is presently a convenience store, we do not know if his sales will make him fall above or below the line that delineates a convenience store verses a tobacco products shop,

why is this application not premature? Mr. Benner stated that it is his understanding that the applicant intends to make this into a tobacco products shop. He may add more tobacco products to the store. Ms. Bogen asked what if he never does? Mr. Diatta stated that the intent is to become a tobacco products shop. The applicant is trying to establish a use that does not meet the distance requirement. If we wait until after it becomes a tobacco products shop, then it becomes an after the fact variance. It would be like he establishes the use and then comes to the Board for a variance, for forgiveness later. In order to avoid that he is saying 90% of his revenue will be from selling tobacco products, but he does not meet the separation requirement and wants a variance for that.

Ms. Bogen asked if the Board has anything from the licensing department that says that license is on hold pending the outcome of this hearing? Mr. Benner stated that he has spoken with the licensing manager and there is a pending application. Ms. Bogen questioned pending this hearing? Mr. Benner replied yes, pending this decision. Ms. Bogen asked how fast does he have to get to that percentage of tobacco products? Mr. Benner stated that the applicant could change his business model and just sell tobacco products. The last application we had for a tobacco products shop, the applicant was already selling tobacco products and the Board granted his variance. Ms. Bogen stated that the applicant was creating a separate store for that. Mr. Benner stated that theoretically this applicant could do the same thing. He could change his business model from being a convenience store to be a tobacco products shop. Ms. Bogen asked if the cigarettes have to be behind the counter? The site plan shows a cooler and lots of shelving. Mr. Benner stated that is the existing floor plan. Ms. Bogen asked if by doing this is the Board changing the policy of the zoning staff? If we do not measure from property line to property line? Ms. Bogen continued that Mr. Benner has stated that the long-standing way to measure is from property line to property line, and Mr. Benner has stated that if it is measured from front door to front door it is 2700 feet. She does not want to get into potentially changing the policy. Mr. Benner stated that he does not think that it would be a change of policy. It is a unique circumstance that we have an applicant that is located in a multi-tenant building. This methodology of measuring has worked several times and it has made sense. Now that we have two properties within multi-tenant buildings, we are measuring from two points, neither of which touch the actual products shops. Ms. Bogen commented that it never touches the actual shops the way it is measured. Mr. Benner replied right, but it is usually located on that side of the property. In previous cases the shop has been to the closest point of the property from which to measure, in this case that is not happening.

Mr. Warner stated that it was his opinion that this would be a departure from measuring from property lines. Ms. Bogen stated that she does not think that findings can be made for measuring it from door to door. Mr. Warner stated that he thinks it would be a change of the process precedent. Mr. Benner asked if because the intent of the provision is being met is it reasonable to consider this use? Mr. Warner stated that he supposes that as a matter of policy it would be reasonable to say that we should measure from door to door, but then how do we distinguish between the next applicant. If staff measures from door to door for this applicant then staff will have to do the same for everybody, staff cannot just pick and choose. Mr. Benner stated that the basis to consider it this way is because the applicant provided a survey that shows the distance, although the measurement does not align with the current method of measurement he thinks that it is still appropriate that the intent of the zoning code is still being met and is reasonable.

Mr. Rangel Morales stated that the variance is for 40-feet. The Board is still considering the two closest points between the two property lines. What the applicant provided shows that if measured from door to door there would be no need for a variance. He is not seeing the argument on how the Board is deviating. Ms. Bogen stated that she does not think that can be made into a finding. Mr. Rangel Morales stated that we are not making the finding. Ms. Bogen stated that the finding says that "it would be reasonable to allow the proposed shop to operate because its location meets the intent of the zoning code to discourage

a concentration of tobacco products shops". She thinks that finding opens the Board up to setting precedent to having to follow that from now on. Mr. Rangel Morales stated that he is not arguing precedent, if 200-feet was reasonable, not that that binds the Board, in the previous case, then 40-feet the way staff has proposed that their measurement still requires a variance because the distance still needs to be 40-feet further away from each other. He thinks that the question to the Board is than is it a practical difficulty and reasonable to grant those 40-feet. Ms. Bogen stated that staff is saying that the finding is met because of the certified survey is 2,716 feet and because of that the finding is met. The staff report does not talk about the 40-feet at all. Mr. Miller asked isn't that what the variance is for? Ms. Bogen stated that the variance is for 40-feet, but she reads the staff report in the findings it does not mention the 40-feet needed to meet the requirement. The finding does not say anything about practical difficulties it just mentions the survey and says that the location meets the intent. Mr. Rangel Morales tried to come up with some language for fining three that discusses the 40-feet. Mr. Warner stated that he was focusing on the second paragraph of that section which says that the measurement is from the front door of one shop to the front door of the other shop and the City has never measured that way. We have always measured from the property lines. We have always used the rational that some of the businesses are in large commercial centers and they can move uses within those centers, to alleviate this issue the city has always taken the approach of measuring between the two closest property lines. That was a simple standard that was easy to meet and more importantly property lines rarely move, where businesses move frequently. Mr. Rangel Morales asked if there is a way that the Board can make a correction to the staff report? Mr. Warner stated that the Board could certainly do that but it strikes him as a subject matter that will have to be very thoughtfully worked out. The findings have to be tailored for the particular application, but you have to be cognizant of the underlying policy that is going on here and trying to balance those. To him a deviation of the measurement is a pretty substantial thing. If the zoning administrator is fine with it, his only comment would be that he would like to have the opportunity to sit down with the zoning administrator and find out why and talk about it more in terms of not only the past planning studies but also the other City policies that are in play.

Mr. Rangel Morales stated that after the comments from the City Attorney, he would like to give staff a chance to rephrase the findings and a chance for the zoning administrator to meet with the City Attorney to discuss this measurement interpretation issue to come to a consensus on the interpretation of the measurement and the appropriate findings for this case. Then the Board can address this in two weeks. Mr. Saylor stated that this layover is to clarify how to interpret the measurement then the Board can move on it.

The public portion of the hearing was never opened.

Mr. Rangel Morales moved to lay this case over for 2 weeks.

Mr. Saylor seconded the motion, which passed on a voice vote of 5-0.

Submitted by:



Jerome Benner II

Approved by:



Diane Trout-Oertel, Secretary