

**CITY OF KENT
BOARD OF ZONING APPEALS
PUBLIC HEARING & BUSINESS MEETING
April 17, 2023**

MEMBERS PRESENT:

Jona Burton
Steven Protzman
Michelle Sahr
Laura Scarnecchia

STAFF PRESENT:

Bridget Susel, Community Development Director
Eric Fink, Assistant Law Director
Kailyn Cyrus, Development Planner

I. CALL TO ORDER

Mr. Burton called the meeting to order at 7:00 p.m.

II. ROLL CALL

Jona Burton, Steven Protzman, Michelle Sahr, and Laura Scarnecchia were present.

III. PREAMBLE

The Board of Zoning Appeals, Kent citizens serving without pay, hear evidence at public meetings both in support of and in opposition to an applicant's request before rendering a decision. Generally, the Board will decide to approve or deny each requested application at the meeting that it hears the testimony. Some decisions may be continued for further review. Once a decision has been made, the case is closed for the Board, as there is no provision in the code for the Board to reopen a case. If the petitioner disagrees with the findings of the Board, there are only two proper procedures. One is to resubmit a revision of the request that is more compatible with the code and the second is to file an appeal in the Common Pleas Court. Anyone interested in appealing a decision of the Board is advised to seek private legal counsel.

IV. ADMINISTRATION OF OATH

Mr. Fink instructed members of the audience wishing to be heard on any of the cases presented at this meeting to raise their right hand. He administered the oath. The participants responded affirmatively.

V. OLD BUSINESS

**A. BZ23-002 JOHN, RITA, AND BRANDY KUHAR
518 North Mantua Street**

The applicant is requesting an appeal of the Community Development Department's decision to deny a Certificate of Nonconforming Use to allow the property to be recognized as a two-family dwelling.

Atty. Scott Flynn, representing the Kuhar family, 220 Francis Dr., stated that they have presented many records for this residence at the corner of N. Mantua and Fairchild Ave., which is across the street from Sheetz and the Crain Ave. bridge. He stated that currently it is zoned as single-family, but he can't imagine a single family wanting to live in a house that is at a busy intersection such as this one. He stated that the clear history of the house is that it has always been a 2 unit building. He stated that they have letters dating back to the 1950's stating how the property was utilized. He stated that there are kitchens and bedrooms on both the first and second floors. He stated that as far as they can go back it has been a 2-family residence, except for a couple years where the property owners appealed to the Board of Zoning Appeals to have the property approved as a commercial Nonconforming use. He stated that they believe that it was still being used as a residence because there was still a bedroom and a kitchen in the back, but they do not have any record of it while it was a commercial use for a few years. He stated that the two floors are completely separate and you cannot access one from the other; entrances to each unit are both from the outside of the building. He stated that they believe that the structure has been a 2 family structure since the 1950's. He stated that the City staff report states that it was a commercial use and single family at one point, but they have not seen anything to document that it was single family. Mr. Flynn reviewed the exhibits that were presented to the Board. He stated that Exhibit B shows that the approved Nonconforming commercial use has a stipulation that when the property is owned by a new owner, the Nonconforming use is void. He stated that Mr. Kuhar has been a long time councilman for the City of Kent. He stated that Mr. & Mrs. Kuhar purchased the property in 1994 and it has been a 2 family residence ever since then. He stated that they have letters from multiple parties, and photos showing the separation and documentation of the 2 units. He stated that the City pushed for Sheetz to be constructed and also did the construction on the Crain Ave bridge to locate it in its current location. He stated that there are 4-5 other properties in this immediate area that are 2 family residences. He questioned the ability of finding a single family who would want to live in a house that is separated into two separate units. He stated that they believe that it was a nonconforming use under Section 1110.06 that talks about a substitution of nonconforming use and they are asking for it to be recognized as a multi-family nonconforming use. He stated that they have not been able to find any evidence that there was ever 1 family living on the whole property at any time. He stated that Mr. Kuhar did not make any changes to the property to make it a 2 family structure.

Mr. Kuhar, 5751 Glad Blvd., owner, provided a small piece of porcelain that came from the cracked upstairs sink that has the date of March 1933 on it. He assumed that 1933 is probably when the house was converted into a 2 family residence. He stated that many people, including himself, do not understand the terminology of the City. He stated that a previous tenant considered their unit as a single family with another single family home on the second floor. Mr. Kuhar assumed that the first floor unit probably started out as a home occupation and grew into a commercial space from there. He stated that the first floor unit was provided residential utility services. He stated that the tenant on the first

floor moved when the commercial use of the garage was denied. He stated that the next owner of the property was cited for an illegal rooming house. He stated that when his daughter bought the house, his daughter was notified that there could not be any more than 2 people in each unit unless they are all related and they have complied with this rule. He stated in 2003 or 2004, he received a letter from the Community Development Department stating that they couldn't have a 2 family home. He then communicated with Mr. Charley Bowman, who was the Community Development Director at that time, about the issue and Mr. Kuhar thought that everything was taken care of.

Mr. Fink, Assistant Law Director for the City of Kent, 930, Overholt Rd., stated that today's hearing is to appeal a decision that was made by City staff to not grant a Certificate of Nonconforming Use. He stated that the goal is to recognize nonconforming uses where they exist, but at the same time eliminate them. He stated that if a particular use type was wanted in a particular district, then it would be a permitted or conditionally permitted use and authorized by Council. He explained that the existing Nonconforming uses are permitted to continue but when the use is terminated and two years have gone by, that use is not allowed to continue. He stated that the application for this property was to recognize this property as a 2-family unit. He explained that in order for staff to approve this, the applicant needs to show a time when the use was legal or existed prior to 1971 when the Zoning Code was adopted, and that it has continued without any interruption lasting longer than two years. He stated that this property is in an R-2 District, where uses are limited and does not include duplexes. He stated that previously the district was C-5: Commercial Zoning District and it also did not include duplexes.

Ms. Sahr questioned if the C-5: Commercial Zoning District included residential and commercial such as a mixed use.

Mr. Fink stated that he is only aware that it did not include duplexes. He stated that the C-5 Zoning District was eliminated in 1983. He stated that in order for City staff to make the conclusion, they need to find clear and convincing evidence that the property was a legal use for a period of time without interruption. He explained that there are 3 types of proof for this type of case. He stated that preponderance of evidence means that it is more likely than not, which is the burden of proof that the Board is operating under, but not the burden of proof that the City staff has to hold. He stated that City staff must operate under clear and convincing evidence, which is more than a preponderance of evidence. The third level of proof is proof beyond a reasonable doubt, which is more than clear and convincing evidence and not what the City staff follows; clear and convincing evidence is between preponderance of evidence and proof beyond a reasonable doubt. He stated that based on the level of evidence required by City staff, approval of the request could not be granted. He stated that staff did find substantial evidence to support that the legal use is a single family dwelling. He stated that the property is listed as a single family dwelling on the Portage County Auditor's website.

Ms. Sahr asked for clarification that Portage County's zoning not matching the City's zoning isn't convincing proof in itself.

Mr. Fink stated that it is not determinative, but it is one of the many clues they looked at. He stated that there is also an electric permit application from 10/29/2008 that states that it is a single family dwelling. He stated that on 12/28/1994 there is another electrical permit application with a homeowner's affidavit signed with Mr. Kuhar's name stating that only the owner and his family live in the single family structure; the affidavit was not notarized. He stated that Zoning Use Certificates were issued on 1/31/1994 and 9/2/1993

and identified the structure as a single family home, which was given to the previous owner of the property and a realtor. He stated that another Zoning Use Certificate was issued by the Zoning Inspector at that time to Rita Kuhar and Wilbur Realty on 1/7/2004, which lists the property as a single family home. He stated that the property was used as commercial property for an undetermined length of time and had a lawsuit filed over it. He explained that these are some of the reasons that the staff could not find clear and convincing evidence that there had never been a greater than two year gap of the property being used as a duplex and had to deny the applicant's request for a Certificate of Nonconforming Use. He stated that the Board must determine that there has never been an interruption greater than two years of being used as a duplex. He stated that Atty. Flynn's comment about who would want to live in the structure at that location is an irrelevant factor in the determination. He reminded the Board that this is also not a variance, but rather an appeal of whether a Certificate of Nonconforming Use should be granted.

Ms. Sahr questioned the expiration period for the certificates issued in the 1980's.

Mr. Fink stated that the terms of the BZA in place back at that time, state that the certificates expire when that owner no longer owns the building. He stated that if City Council wishes to change the Zoning Code and the specified legal uses in its districts, it can certainly do so, but at this point in time, this is the Zoning Code that the staff enforces and if a use is not exercised for two years, then that use is abandoned. He stated that clearly in the 1980's, that use was abandoned. He stated that there are questions as to whether the use was abandoned later on based on all the references to single-family use as well. He stated that the evidence also shows that there is not a preponderance of evidence that the building has been used as uninterrupted as a duplex going back to 1971.

Ms. Susel added that the standard for clear and convincing evidence is in the Kent Codified Ordinances and is the City's requirement to use.

Mr. Protzman questioned the mechanisms that were in place to ensure that the Zoning Use Certificates were enforced.

Ms. Susel stated that the 1994 and 2004 certificates were prior to Mr. Fink and her time at the City but explained that this came to light because of the rental licensing program. She stated that all single family rentals are now inspected and registered so when this rental was inspected, it was identified as a two family. She stated that previously, not all of the Zoning Use Certificates were returned with the buyer's signature. She assured the Board that staff keeps all records that are in the files but not all property files are complete; this is a copy of what was in the address file.

PUBLIC COMMENT

Michael DeLeone, 530 Fairchild Ave., stated that he was the paperboy in the neighborhood from 1971-1972 and grew up in the area. He stated that he remembers the property as a 2 family home. He stated that he has noticed many of the duplexes with exterior stairways have now become single family homes. He supports the subject property being a 2 family structure as there isn't a very big yard for a single family.

Charley Bowman, 915 Catlin Ct., stated that he was the former Community Development Director from approximately 2000 – 2006. He stated that in 2004 – 2005 he had some health issues so he was out of the office half the time. He stated that there had also been

a change in staffing for the Development Planner/Zoning personnel. He stated that under the purpose of the nonconforming code it states that the purpose is to permit such non-conformities to continue under certain conditions but to discourage expansion, enlargement, or extension. He explained that this is not the case with this application. He stated that it also states that it may be continued; the ordinance is more positive than negative in that it should be reviewed as something going forward rather than being stopped. He stated that he recalls he and Mr. Kuhar having many conversations regarding the property being a two family after the Development Planner at that time sent the realtor the certificate. He stated that Mr. Kuhar gave him evidence showing that it had been multifamily for quite a while. He noted that the Bicentennial Plan had a much different plan for that area, which did not include a Sheetz. He stated that he feels that the Sheetz was constructed in violation of the Bicentennial Plan by the City administration as they did not care what the plan said. He stated that this impacted residential areas negatively or anybody rehabbing any house in that area especially taking it from multi-family to single-family; an unfair burden. He stated that he is unaware of what the allowed uses were of the C-5: Commercial Zoning District. Mr. Bowman stated that Section 1110.06 refers to a substitution of Nonconforming uses and it uses the term preponderance of the evidence; not clear and convincing. He stated that keeping the structure in its present status does nothing to intrude upon the neighborhood or detract from the neighborhood. Mr. Bowman suggested that the Board could grant Mr. Kuhar a Certificate of Nonconforming Use tonight.

Ms. Susel clarified for the record that substitution of nonconforming use regulations in the Zoning Code does have a preponderance of evidence, but that it also assumes that the property has a nonconforming use designation. She stated that this property does not have an existing nonconforming use designation. She stated that Section 1111.03 (D) Appeal to the BZA states that City staff has to meet the higher and more stringent "clear and convincing evidence" requirement in this current case.

BOARD OF ZONING OF APPEALS DISCUSSION

Mr. Flynn stated that there isn't any evidence that this was a single family structure. He stated that the permit fees documentation does not confirm that this was a single family. He explained that the electrical permit was obtained so that Mr. Kuhar could install separate electrical services for the structure. He stated that the affidavit that Mr. Kuhar signed but didn't notarize was true at the time as Miss Kuhar lived there and the other unit was vacant; it didn't mean that it was single family but rather that there was only Mr. Kuhar's family living at the property. He stated that the property hasn't changed in the last 50 years. He added that no one has said that there was a family that lived on both floors. He stated that the Code states that there can be a substitution of Nonconforming use; the property is a nonconforming use and should be allowed a substitution of use from the commercial use to a multi-family.

Mr. Fink stated that while he is not trying to rebut Atty. Flynn's statements, he reminded the Board that today's hearing is an appeal of the City staff's decision and not an application for a substitution of a nonconforming use; it is an appeal of the City staff's decision to not grant a Nonconforming Use Certificate.

Ms. Susel added that a substitution of nonconforming use is utilized when there is an existing nonconforming use that is being substituted by a different nonconforming use. She stated that currently there is no nonconforming use on record because the one for a commercial use was terminated at the time the owner of the property moved out based on a decision of the Board at that time.

Ms. Sahr stated that this is very muddy in some ways, but she does feel that the physical separation of the structure and no evidence that it has changed since the 1950's is somewhat of a testimony to how it's been used. She noted that no one has mentioned that the structure has been physically changed or that it has been used as a single-family home, but rather, there are letters that it was used early on as two residential units before the Zoning Code was in effect. She stated that other letters also indicate that the bottom unit was both residential and commercial. She agreed that there isn't necessarily clear and convincing evidence, but she feels that there may be enough for her to vote in favor of this, especially given the physical features of the structure.

Mr. Burton stated that some of these cases are clearer than others and the challenge is looking at the physicality of the building, the record keeping of both the previous owners and the City and making different suppositions of both. He stated that they can split hairs about what should have been done when and by whom and how the code has changed. He stated that there is a process for the application for a Certificate of Nonconforming Use, which is one way the situation could be handled although it may not be the most appropriate method. He questioned what the process is to obtain a certificate of nonconforming use.

Mr. Fink stated that staff would review the property file, other available documentation, and application documents to determine the use of the property.

Ms. Susel added that it would need to be in continuous use all the way back to 1971.

Mr. Burton asked if it would use the clear and convincing threshold.

Mr. Fink and Ms. Susel both agreed that it does.

Ms. Susel stated that staff is beholden to the clear and convincing for determining use. She stated that once a use is determined, then staff evaluates to see if the proposed use is less intrusive, etc. She explained that it always goes back to the 1971 threshold and you cannot request a use in a district that doesn't allow such a use.

Mr. Burton stated that aside from this hearing, there is no other process that the owners of this property can reasonably go through to expect to have a legal nonconforming use of their supposed duplex.

Ms. Susel agreed.

Mr. Protzman agreed that this is messy. He stated that one of the concerns that he had was mentioning the look and location of the Sheetz gas station because to him it is irrelevant to him and doesn't impact the BZA decision. He stated that the bigger issue for him is the Zoning Use Certificates in the property file that were issued by the City stating that it is a single family residence, whether or not it was used that way. He asked the staff to clarify who received the certificates.

Ms. Susel stated that this is why staff couldn't make the determination because there are different delineations in the Zoning Use Certificates and even in the minutes from the request for the commercial use when it referenced a two-family structure. She stated that there isn't any documentation with the certificates as to how the determination was made.

Mr. Burton stated that this speaks to the comments regarding the changing terminology definitions and change in the Zoning Code.

Mr. Protzman stated that just because it was used as a duplex, does not mean that it was legally done so. He stated that with a substitution of nonconforming uses the new use needs to be similar in character to the previous nonconforming use.

Ms. Susel reiterated that the commercial use was the only legal nonconforming use and that one ended when that property owner left; the issue of substitution is moot.

Mr. Protzman stated that if it weren't moot, he would argue that it isn't a similar nonconforming use.

Ms. Scarnecchia stated that she feels that there are compelling arguments on both sides, but it seems that there are many discrepancies and inconsistencies with the paperwork and how things are defined on both sides of this case. She stated that considering the area and the surrounding properties, which seem to be comprised of many rentals, she doesn't feel that using it as a rental is in direct opposition to the surrounding area. She stated that there is some evidence that it has been a two family dwelling for quite some time, even when it was called single family based on the architecture.

Mr. Burton stated that he agrees.

Ms. Sahr stated that the Board members are not trying to make new rules or give exceptions based on their feelings. She stated that she appreciates Mr. Protzman's comment regarding the Sheetz not being an issue because it is beyond the purview of what they are reviewing today. She stated that the law changed in 1971 and if there's a preponderance of evidence to show it was used as a duplex, she feels that it is in their purview to vote for or against.

Mr. Protzman questioned if Ms. Sahr feels that there is a preponderance of evidence that it was used as a duplex.

Ms. Sahr stated that she does because the utility statements showing separate utilities are compelling to her. She stated that she also believes the written statements from people she knows and respects in the community that they received and feels that it is enough for her to be in agreement.

MOTION: *In Case BZ23-002, applicant John, Rita, and Brandy Kuhar, located at 518 North Mantua Street, Ms. Sahr moved that the Board of Zoning Appeals grant the appeal of the Community Development Departments decision to deny a Certificate of Nonconforming Use to allow the property to be recognized as a two-family dwelling.*

Ms. Scarnecchia seconded the motion.

VOTE: The motion carried 3-1.

VI. **NEW BUSINESS**

A. BZ23-003 **GREEN LINE DESIGN – GORDAN COSTLOW**
1337 South Water Street

The applicant is requesting a variance from Section 1103.14(E) to allow a 20-foot variance, where 30 feet is the minimum requirement to allow an addition to be constructed 10 feet from the rear property line.

Atty. Scott Flynn, representing the applicant, stated that in 2008, the owners received a 20-foot variance from the 30 foot minimum rear yard setback to allow the addition to be constructed 10 feet from the rear property line. He stated that his client now would like to build a 10' x 20' addition that goes no further back than the original variance and would still be a 10' setback. He stated that there is an additional issue because the adjacent property owner is opposed to the variance. He stated that there is an access easement that goes both ways: it allows the El Dorado's owners to access S. Water St. through his client property and likewise allows his client to access Bowman St. through the El Dorado property. He stated that he disagrees with Atty. Reitz's statement that any extension of the present use would violate the easements. He explained that this is not true as the easement agreement does not state that the consent of the adjacent property owner is required for any use, but rather, that it is for vehicular and pedestrian access, ingress and egress, on, over, and through the parcels and shared parking. He further explained that this is an access agreement and does not give the adjacent owner the right to say what can or cannot be built on this property as long as there isn't any reasonable access obstruction. He stated that this minor extension of the variance that was granted in 2008 should be allowed as there is a 10' wide access road behind the current addition that will not be blocked. He stated that his client needs the extra room for inventory and it would make sense to construct a 10' x 20' extension off the existing addition.

PUBLIC COMMENT

Atty. Tom Reitz, 215 W. Garfield Rd., Aurora, representing Jack Elrod who is the trustee for the adjacent property, as well as the owner/operator of El Dorado, stated that it is correct that his client is in opposition to the variance request due to the aforementioned easement as well as the City of Kent Zoning Code. He stated that in 2008 when the initial variance was requested, Mr. Elrod did not object to the variance at that time. He stated that since that time, he has found that the initial variance that was granted has had an adverse effect on his property and on matters covered under the easement. Mr. Reitz read from the same easement pointing out that the easement states that the owners of the parcel CR at 1337 S. Water St. and all subsequent owners shall not place, build, or construct any building, edifice, or other structure in the easement area that unreasonably interferes with the rights of the parcel ARR at 1331 S. Water without the prior written consent of the owner of parcel ARR. He stated that it is a consideration for the Board to determine if the proposed extension interferes with the use of the adjacent property as no consent has been given. Mr. Reitz stated that page 4 of the limited warranty deed that was provided in the Board's packets, lists the rights that were reserved by Mr. Elrod's trust when the property was sold to the prior owner of USA Gas, including language regarding the use of the parking lot for parking, deliveries, and dumpster; it sets forth the restrictions upon the use for the property used by USA Gas. He stated that Section 1111.03(D)(4) states that the BZA has the authority to grant the size or area variance in accordance with standards including whether the adjoining property owners would suffer a substantial detriment as a result of the variance and whether the variance would adversely affect the delivery of government services such as water, sewer, and garbage. He distributed a series of photos labeled Exhibit A-F to the Board and helped the Board get oriented. He stated that there is now a puddle between USA Gas and El Dorado after the building extension was constructed in 2008, which has caused water issues in the basement at El Dorado. He stated that the proposed project to construct a larger building will create more

of an impervious surface and more water runoff. He stated that a footer drain was installed at the corner El Dorado along with a trench drain in the parking lot at the expense of El Dorado to take care of the water in the basement. He stated that the snow piles created from the plowing that is done by USA Gas are placed in an area that directly violates the easement. He stated that a larger building would further complicate the snow issue. He stated that Exhibit D has copies of violation notices for 1337 S. Water St., regarding a commercial vehicle, and a portable storage container that exceeds the maximum length of 15'. He presented a denied container application from 2021 and photos of the portable storage container, which is a step van and a file cabinet that was parked on the property. He stated that the violation of the step van was avoided when the owner purchased a 30 day tag for the unlicensed van. He stated that the pictures that do not have snow were taken on April 13, 2023 at 1pm and show the same van without valid tags. He stated that there isn't enough room on the site for the snow or for the extension of the building. He stated that ingress and egress are permitted under the easement and the only way a large delivery truck will be able to reach the El Dorado building is by crossing the Gas USA property. He stated that one of the photos shows the proximity of the existing addition and he explained that with the new addition, it will be even closer to the access. He presented a statement from one of the delivery drivers stating the treatment that he has received from the Gas USA employees who tell him that he is not allowed to be in the easement area. He stated that the photo that shows an empty parking space shows where the dumpster is supposed to be and the following photos show where the dumpster is actually located and the garbage that is not in the dumpster. He noted that according to the deed, the dumpster costs are supposed to be shared but Gas USA doesn't pay for any costs. He stated that the next photos show what a detriment to the neighborhood Gas USA is with all of the garbage and other items piled up outside. He read the Zoning Code standards that must be met in order for the variance to be granted. He stated that it is his client's position that putting more of a building on the site will cause the already bad conditions to overflow onto his property and the Gas USA property. He stated that a general standard under which the Board should consider granting a variance from Section 1111.03(D)(2)(c) says that there are special conditions to the site that must be demonstrated but do not result from the actions of the applicant. He stated that the applicant's business is successful and has grown but he needs to take care of his business in a way that it doesn't adversely affect El Dorado.

Amjad Hamdeh, 1337 S. Water St., owner of Gas USA stated that he purchased the property in 2008. He stated that the water that was shown in the photos was never an issue until Mr. Elrod constructed an addition onto the El Dorado. He stated that he called the Kent Police Department many times to complain that the El Dorado employees and customers had parked illegally blocking access to the USA Gas property. He stated that he feels that these issues are being brought up because he called the police. He stated that the 30 day tags on the van are expired and he was planning on getting rid of the van once the addition was complete. He stated that the new location of the dumpster was Mr. Elrod's idea and has been in that location since he purchased the property. He stated that the boxes are taken outside so that they can be broken down and put in the dumpster. He stated that there are no complaints from the City stating that they have a bad business or a dirty parking lot, etc.

Jamie Burns, 540 S. Water St., is an employee of Gas USA for 2-3 years and a customer. She stated that the gas station has improved and is very clean all the time. She stated that Mr. Hamdeh sweeps the parking lot frequently. She stated that they have cleaned El Dorado's trash from the parking lot. She stated that they have many customers that are college students and they are just trying to grow the business. She stated that the van

doesn't have much stored in it at this time due to the weather. She stated that she has talked to the delivery drivers that they have in common, who stated that they have no issues and can still back in and make their deliveries without any problems. She stated that the addition is not going to be located in a space where it will affect the customers going in or out.

Brian Elkins, 4271 Kent Line Rd., stated that he is a frequent customer and can see that his back room is full and needs additional storage space. He stated that the owner is currently doing the best that he can with what he has. He stated that the parking lot is big enough and the dumpster isn't in the way.

Carmen Rivas, 415 E. School St., stated that she has been going to this store for 5 years. She stated that she had been there when the police were called due to illegal parking. She feels that it is unfair that his project hasn't been approved.

Mr. Burton explained that regardless of the issues the applicant may have had with the neighbors, the applicant still has to come to the BZA for approval.

Ms. Rivas stated that his business is growing and he needs the space and needs to use the van for storage.

Sherri Waller, 4838 Timberview Dr., Rootstown, stated that she is a long time customer, and this is the cleanest she has ever seen the place even when Mr. Elrod owned it. She stated that she doesn't feel that the storage addition will impede anything that is going on there as it is 10' off the property line. She stated that the dumpster is on the side and has a walkway that you can get through.

BOARD OF ZONING OF APPEALS DISCUSSION

Ms. Sahr stated that she feels that there are many issues at play, many of which are not pertinent to what the BZA is concerned with. She stated that she doesn't feel that they need to be concerned with the water issue because the City looks at those details.

Ms. Susel agreed. She stated that this is outside the purview of the BZA and would be a part of the minor site plan technical plan review conducted by the Development Engineer.

Ms. Sahr explained that it isn't that they aren't concerned for them but it isn't what the Board looks at. She asked staff for guidance with regards to the legal easement.

Mr. Fink stated that the easement is not the City's issue. He stated that that is an issue between the two property owners and their attorneys. He stated that the Board is limited to resolving whether they believe the elements have been met to grant a variance. He stated that if the Board feels that somehow the easement does play into whether or not it meets the elements of the variance that is up to them. He stated that he believes the attorneys presented the information about the easement because it supported their positions with respect to whether they meet the elements of the variance. He added that in the end it is not the City's purview to enforce the private easement agreement.

Ms. Sahr stated that it does seem that there could be some clear adverse effects by the addition, but she wonders if there is some shortsightedness as the addition could ease the congestion in the area. She questioned the Board's options.

Ms. Susel stated that the Board is only speaking to the request for the variance and anything outside of that is basically the private restriction agreement or covered under technical plan review process. She stated that they are speaking to the variance request and they consider it within the confines of the Zoning Code for such a variance.

Mr. Fink added that the Board can grant the variance, deny the variance, or table the case and request further information that would help the Board with the decision. He stated that the applicant would then come back for another meeting and may or may not present more information. He stated that it is up to the applicant on whether they provide more information, but it is the Board's right to request it. He stated that they do need to make sure that the decision is granted in a certain amount of time, but it does allow them to reset it one month, if that is what the majority of the Board decides to do.

Ms. Susel stated that any information requested must speak to the variance; not anything to the site plan or the private deed restriction; it must be specific to what is under the Board's purview.

Ms. Sahr stated that the access does play into their decision due to potential adverse effects.

Mr. Burton stated that when the Board looks at the criteria, they are looking to see if there is something unique or unusual about the property, is there some undue burden on the property owner that is different from others in the adjacent areas, and also how will it effect the immediate neighbors and neighborhood. He stated that he believes that they know how people feel about it. He stated that in addition to Atty. Reitz and his client, they also have a letter from another neighbor opposing the variance. He stated that these items are worth considering as far as the impact for the immediate neighbors that are also commercial properties. He stated that they could give consideration because the property is land locked, it is an unusual shape and size, and growing a business is difficult given the space constraints of the lot.

Ms. Susel stated that in addition to the criteria Mr. Burton mentioned, there are more criteria.

Mr. Burton read the seven factors that the Board must consider when determining whether a practical difficulty exists as listed in Section 1111.03(D)(4)(b):

- *Whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance;*
- *Whether the variance is substantial;*
- *Whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance;*
- *Whether the variance will adversely affect the delivery of government services (i.e., water, sewer, garbage);*
- *Whether the property owner purchased the property with knowledge of the zoning restriction;*
- *Whether the property owner's predicament can be solved through some method other than a variance; AND*
- *Whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.*

Ms. Scarnecchia stated that from the aerial view, it doesn't look to her that the addition would be dramatic in nature or that it would substantially change where the snow or trash goes. She stated that the addition could in some ways create an opportunity for cleanliness and organization while mitigating some of the issues the neighbors are having. She stated that she feels that the addition is so small that it doesn't seem to have any direct hinderance for anything. She stated that some of this sounds like neighborly disputes that aren't necessarily related to the 20' x 10' addition. She stated that she feels comfortable with this not being an excessively detrimental addition.

Ms. Sahr questioned if Ms. Scarnecchia viewed the property.

Ms. Scarnecchia stated that she did.

Ms. Sahr stated that it all seems very congested.

Ms. Scarnecchia agreed that it is congested, which goes back to the idea that there is only a finite amount of land at this site to expand upon.

Ms. Sahr questioned if the entrance to the El Dorado is in the middle of the side of the building.

Mr. Burton stated that there are multiple entrances: adjacent to the proposed addition and one along the Bowman St. side.

Ms. Scarnecchia stated that she noticed that El Dorado also has a new parking lot on the other side of Bowman.

Mr. Protzman stated that he agrees with Ms. Scarnecchia in that a variance was granted for the original 20' x 35' addition and this is an additional 10' that he doesn't see impacting traffic patterns, easements, or anything else like that. He stated that there has been a clear demonstrated need that would probably provide an improvement in terms of storage. He stated that he doesn't appreciate being brought into the disagreement between the property owners and noted that neighborly disputes are out of their jurisdiction and will not affect his decision on this.

MOTION: *In Case BZ23-003, applicant Green Line Design, located at 1337 South Water Street, Mr. Protzman moved that the Board of Zoning Appeals grant the applicant's request for a variance from Section 1103.14(E) to allow an 20-foot variance where 30 feet is the minimum requirement to allow an addition to be erected 10 feet from the rear property line.*

Ms. Scarnecchia seconded the motion.

VOTE: The motion carried 3-1.

VII. MEETING MINUTES

MOTION: Mr. Protzman moved to approve the March 20, 2023 meeting minutes as presented. Ms. Sahr seconded the motion. The motion carried 4-0.

VIII. OTHER BUSINESS

None.

IX. ADJOURNMENT

MOTION: Mr. Protzman moved to adjourn the meeting. Mr. Burton seconded the motion. The motion carried 4-0. The meeting adjourned at 9:00 pm.