

**FLATHEAD COUNTY BOARD OF ADJUSTMENT
MINUTES OF THE MEETING
JULY 7, 2009**

CALL TO ORDER A meeting of the Flathead County Board of Adjustment was called to order at approximately 6:00 p.m. Board members present were Gina Klempel, Mark Hash, Scott Hollinger and Craig Wagner. Alex Hogle, Andrew Hagemeyer, George Smith and Jeff Harris represented the Flathead County Planning & Zoning Office.

There were 18 people in the audience.

APPROVAL OF MINUTES Klempel moved and Hash seconded to approve the June 2, 2009 minutes.

The motion carried by quorum.

PUBLIC COMMENT
(not related to agenda items) Bruce Tutvedt, 2335 West Valley Drive, spoke of having a trust issue with the planning office because landowners were treated differently on the same night. He gave examples of what he felt was bias by the planning office. He feels staff reports need to be fair. He spoke of regulatory standards and said everyone should have an equal process.

BIGFORK FIRE DISTRICT (FPAE 09-01) A request by Bigfork Fire District to construct a fire training facility on property owned by the district, located at 735 Echo Lake Road. The Board of Trustees of the Bigfork Fire District gave notice to the Board of Adjustment of Flathead County that it intends to construct a training facility that may be contrary to zoning regulations adopted by Flathead County as the property is zoned SAG-5, (Suburban Agricultural). Pursuant to 76-2-402, MCA the board shall have no power to deny the proposed use but shall act only to allow a public forum for comment on the proposed use.

STAFF REPORT Alex Hogle reviewed Staff Report FPAE 09-01 for the Board.

APPLICANT PRESENTATION Wayne Loeffler, Bigfork Fire Chief, stated they will comply with all conditions, it would be a great asset to the department, and they would invite other departments to train with them such as Creston and Ferndale.

BOARD QUESTIONS Klempel asked where the tower would be located on the property.

Loeffler said it would be pretty close to the northwest corner of the property. It would be 150 feet east of the fire station.

Wagner asked if the height of the tower would be around 34 feet. Loeffler said yes it would be.

PUBLIC COMMENT

None.

STAFF REBUTTAL

Harris stated under the statutes for agencies, 76-2-402, the BOA was required to hold a public hearing to solicit comment. Since there was no comment, staff will write the fire department they have complied with the statute.

Hollinger asked if there was a difference between the West Valley Conditional Use Permit (CUP) and this application.

Harris stated there was. When staff suggested a CUP for West Valley, they were not looking at this particular statute. The Bigfork Fire Department brought this statute to the attention of the Planning Office through the county attorney's office.

HUGH YATES (FCU 09-05)

A request by Edward Grzesik for a Conditional Use Permit to operate a wine bar, alcoholic beverage catering service for group events and an all beverage retail bar in the future, within the Bigfork, B-2 (General Business), Zoning District. The property is located at 7935 Highway 35, units 104 and 105.

STAFF REPORT

Andrew Hagemeyer reviewed staff report FCU 09-05 for the Board.

BOARD QUESTIONS

Klempel asked if the parking lot was paved.

Hagemeyer said yes it was and spoke of the access to the property.

Klempel asked about the occupancy of the building.

Wagner said he thought there were two empty suites.

APPLICANT PRESENTATION

Hugh Yates, owner of the Coffee Cellar (d.b.a. Uncorked, LLC), stated they were applying for a full beverage alcohol license and a catering endorsement as well. He gave a brief history of the store, why they were applying for an alcohol license, and the future goals of the business. He spoke of acquiring a full beverage license and stated it was not their intention to operate similarly to a normal bar but to cater more to the "art" of wine and beer.

BOARD QUESTIONS

Hollinger asked if the conditions the Bigfork Land Use Advisory Committee (BLUAC) proposed were acceptable.

Yates said he was at the BLUAC meeting and had the opportunity to discuss the conditions with them and felt they came to a "happy-medium".

**AGENCY
COMMENTS**

None.

**PUBLIC
COMMENT**

Tammi Fisher, 502 2nd Ave East, said this project made a lot of sense and asked if approval of the conditional use permit (CUP) would be for the term of the lease, term of occupancy, or term in perpetuity, or wondered if there was a term set for the CUP. She said it sounded like the planning office is doing traffic studies and wondered if they were now doing traffic studies for all applicants for CUPs. Otherwise, she was in favor.

**APPLICANT
REBUTTAL**

None.

**STAFF
REBUTTAL**

None.

**BOARD
DISCUSSION**

Klempel stated the CUP ran with the property and wondered what would happen if the property sold.

Hollinger said a liquor license is personal property, not real property, so that's the difference.

Hash said the use would stay with the property.

Hollinger said if the applicant left and was replaced by someone else with a liquor license, the CUP would continue as permitted.

Harris said they were not suggesting any term with this CUP. Any CUP is valid unless it's no longer active which takes 180 days of vacancy.

Hollinger asked about an onsite full beverage bar and said the state has a law for certain hours of operation. The business needed to be open in order for that license to be considered active.

Yates said he knew of some restrictions as far as the times of sales for the liquor.

Hollinger said if he were to not be in business, inactivity would affect the issuing of the license. He said if a liquor license isn't put to use after a certain time, it's no longer valid.

Yates said he would have to check on that information.

The board, Yates, and Hagemeyer discussed the level of necessary activity to keep the license active, BLUAC's concern regarding taverns,

and the applicant's intentions of the liquor license.

Hollinger asked for clarification on the BLUAC requests.

Hagemeier spoke of their justification for hours of operation and noise reduction. The attempt with the conditions was not to impact the current business. It was more for restrictions on future tavern owners who may move into the space if Yates moved to another venue.

Hash asked the applicant if he was still comfortable with the conditions in light of previous discussion.

Yates said they would like to have longer hours of operation year-round. Originally, he wanted to be open until midnight if possible, but they tried to come to an agreement with BLUAC to make everyone happy.

Hollinger said state law would dictate their hours of operation.

Yates asked if condition #4 would restrict them from serving hard alcohol.

Hollinger said yes because the way it's worded.

Yates said the intent was for a full beverage bar.

Fisher said if their ability was limited to beer and wine that would be a cabaret license. She spoke of the different licenses and their limitations.

Wagner said all of the conditions would be dictated by the state.

Hash stated the community was concerned and were trying to work out a situation which was okay with both sides and the board could be more restrictive than the state. This was something the community put together with conditions and the board had the power to adopt those conditions.

MAIN MOTION

Wagner made a motion to adopt staff report FCU 09-05 with the following conditions; 1-4 and the BLUAC conditions adding a sentence to #4 pending clarification from the state.

Motion died due to lack of a second.

**BOARD
DISCUSSION**

Hash said the community worked very hard to come to an agreement but then some facts came before the board tonight that either the community or the applicant weren't aware of.

MAIN MOTION

Hash made a motion seconded by Wagner to adopt FCU 09-05 with findings of fact #4 as proposed by staff, and conditions including 5 and 6 from BLUAC.

BOARD DISCUSSION

Hagemeier said if someone wanted to change conditions they would have to go back through the Board of Adjustment.

ROLL CALL

On a roll call vote the motion passed unanimously.

BOARD DISCUSSION

Klempel disclosed she has no financial interest in the next application.

KRUEGER (FCU 09-04)

A request by Gary Krueger, for a Conditional Use Permit to operate a concrete batch plant on property within the West Valley Zoning District. The property is located west of West Spring Creek Road.

STAFF REPORT

George Smith reviewed Staff Report FCU 09-04 for the Board.

BOARD QUESTIONS

Hollinger asked for a definition of extractive industries.

Smith said the regulations do not contain an actual definition for gravel extraction or extractive industries. This board determined they were not the same thing, but there wasn't a definition for either.

The board, staff, and Deputy County Attorney Peter Steele discussed, at length, the definition of gravel extraction and extractive industries, the history of the Supreme Court having directed the task of defining gravel extraction to the Board of Adjustment (BOA), its relationship to the conditional use permit for the Tutvedt Family Partnership, whether the definition needed to be redefined every time it came before the board, and if the definition of gravel extraction industries was specific to West Valley because it was the only zoning district that identifies gravel extraction exclusively.

Klempel expressed her frustration with the West Valley Neighborhood Plan. The framers of the plan used gravel operations, gravel extraction, and extractive industries. She feels the wording is very confusing to the board as well as the neighborhood.

Harris said gravel extraction is a conditional use. The state's, definition of gravel extraction is removal only whereas the county's definition includes crushing, screening, and washing.

The staff and board briefly discussed when a process falls under manufacturing and when it does not.

**APPLICANT
PRESENTATION**

Gary Krueger, 805 Church Drive, said there is no definition of gravel extraction. The definition has to be made through the county commissioners through resolution. He read several statements from the staff report where the commissioners made changes to the Flathead County Zoning Regulations and language had been adopted regarding the application of zoning regulations to sand and gravel extraction, operations, and associated asphalt and concrete batch plants. He said the duty of the board and staff was not to interpret, nullify, or ignore duly adopted zoning ordinances. He was upset and wanted to let his attorney talk to the board and then he'd come back to talk after she was finished.

Tammi Fisher, applicant's attorney, talked about definitions, the Tutvedt case, board authority, the zoning regulations, the application process, appeals and due process.

Krueger passed out packets to the board and said he spent hours going through the West Valley Neighborhood Plan and compared it to the staff report. He found several errors and misrepresentations. The first one said the West Valley Neighborhood Plan was primarily residential. He said the land use character, as stated in the plan, is primarily a mixture of residential, agricultural, and forest. He said there were more but if he went through all the examples it would take until midnight. In the zoning portion of the staff report, he found sixteen errors he believed were incorrect. He wrote an 8-page rebuttal. When he did his rebuttals, he didn't attempt to interpret; he just cut and pasted. He took the actual language out of the relevant zoning regulations, neighborhood plan, or Supreme Court decision. He asked for a five-minute recess.

Hollinger said they would take a 5 minute recess.

The meeting resumed at 7:30 p.m.

Krueger referred to the packets again and said the front page was reference material which mostly talked about the Supreme Court decision in regard to the Bruce Tutvedt decision as well as board duties and the importance of reading the plain language of the zoning regulations and law. The next pages were portions of the Flathead County Zoning Regulations and the last part was the first two pages of his current application and the reason for the application. He further talked about what he was applying for and his plan to mitigate anticipated impacts. He asked if the board had seen the mitigation plan he put together.

Hollinger said they had it in front of them.

Krueger talked about his plan to mitigate the issues of concern.

**BOARD
QUESTIONS**

None.

**PUBLIC
COMMENT**

Bruce Tutvedt, 2335 West Valley Drive, neighbor to the west of the Krueger pit and the farm. He also farms ground to the south of the Krueger farm. He strongly protested the fact he was not given a staff report. He handed out M.C.A. information to the board. He gave a brief history on past gravel pit approvals in the area. He said the definitions of gravel extraction and extractive industries were the same. He talked about Krueger's staff report and thought there was a travesty of justice. He briefly recapped what he said before.

Tom Clark, 307 Farm to Market Road, mentioned the feeling of déjà-vu. This issue had been gone over by several entities and still keeps coming back. He said a fragile truce was formed in West Valley as far as gravel goes; things would change if a concrete plant went in. If they left West Valley where it was with the definition of gravel extraction, then it would be the end of it. If not, then things will get nasty quick.

Trent Krueger, 154 North Riding (born and raised at 805 Church Drive). He has worked hard rock mining/decorative mining for the last three and a half years and is currently back farming. He said there is no definition of gravel extraction. The water tank was used to control dust as well as magnesium chloride. He feels that everything creates noise and said noise created from the plant would not carry far. These will not be issues if controlled properly.

Kristen Krueger, 2440 West Spring Creek Rd, was concerned that jobs wouldn't be created if this application is turned down. Any job created in this economy is a good thing.

Bill Breen, 335 Mountain Meadow Rd, gave a brief history of how many times this issue had been gone over. He said it comes down to common sense. He read an entry involving 'extraction' from Webster's Collegiate Dictionary. He said a batch plant is a manufacturing activity, adding another ingredient that is not present at the site. Oil drilling is not same as oil refining. Coal mining is not the same as iron and steel manufacturing. Logging is not the same as milling two by fours. He asked the board to support the other decisions which had been handed down.

Mark Schwager, West Valley Drive, gave a brief history of the neighborhood plan. It was his understanding neighborhood plans need to be updated about every five years. It has been twelve years since that neighborhood plan was formed. The neighborhood is

residential as stated in the plan. It was upheld by the District Court as residential, by the Supreme Court as residential, and to his knowledge the county commissioners had not said it is not residential. This board has the option of denying this type of application in a residential area. He doesn't believe the things the applicant said would be mitigated would necessarily happen that way. He mentioned his concern for safety and asked the board to deny this application saying the applicant had other land where this might be more appropriate.

Susan Schwager, West Valley Drive, was upset to be back addressing the same thing again. She thought it a little humorous to hear that the board and staff have been prejudice against the gravel pit applicators because in her opinion, the board and staff had been giving them practically everything they have asked for. Some people accepted the guidelines and others continued to push and complain about them continuously.

**STAFF
REBUTTAL**

None.

**BOARD
QUESTIONS**

Wagner read from page 18 of the West Valley Neighborhood Plan concerning commercial industrial uses, what was allowed by the existing regulations, and the fact that new industrial uses are generally not to be encouraged.

Hollinger said they should hear the rebuttals before board discussion.

**APPLICANT
REBUTTAL**

Krueger said previous decisions were made when the West Valley Neighborhood Plan was considered regulatory by the zoning regulations. That was changed by the county commissioners.; neighborhood plans are no longer regulatory. He discussed legislative process and county resolutions that were adopted to clean up some language. He talked about the board's duties to either condition a use or prohibit it. It was now up to the board to do their duty and attempt to clear up the findings-of-fact issue and find so they could grant, deny, condition, or amend his application according to the zoning regulations.

**BOARD
DISCUSSION**

Hash said it was very difficult for this board when they get attacked from both sides. A lot of the arguments they heard today were actually legal arguments and they are not in the position to decide a legal issue. He felt the board needed to look to the county attorney's office for legal guidance. He asked Steele to explain if the definition that the board made, in the previous case was limited to that case only.

Steele said the Supreme Court asked the board to define it for that case but it can be used for subsequent cases. Gravel extraction is one of the conditional uses in the West Valley zone. He reiterated that the board had defined gravel extraction in a previous case. The facts and circumstances are very similar.

Hash and Steele discussed if the board could modify their definition, the steps necessary if they chose to modify, and if they had to redefine gravel extraction each time they are confronted with it. The continued to discuss the meaning of the terms.

Harris read a section of the zoning regulations pertaining to agricultural uses and referenced West Valley zoning. He discussed permitted and conditional uses and talked about defining the term gravel extraction.

Hash was going to ask Fisher a question in regard to grandfathered usage but said Tutvedt may be able to answer his question as well.

Tutvedt said LHC and Old Castle gravel operations were grandfathered in and Hanson's pit came three months later.

Hash asked Fisher her thoughts on how this should be analyzed.

Fisher talked about state law, the zoning regulations, and the neighborhood plan. She said the BOA doesn't have the authority to amend definitions of the zoning regulations. The BOA can come up with conditions to mitigate impacts or if they cannot be mitigated, the board can prohibit the requested use.

Hash, Steele, and Fisher further discussed the zoning regulations in regard to gravel extraction. Steele said the Supreme court tasked the BOA to define gravel extraction in a previous case which should help the board because if they were to define it a different way this time, it would be inconsistent with how the board defined it before.

Klempel reiterated that the board already defined the term gravel extraction. The thorn in the side is the term extractive industries.

Hollinger asked if the board had structured the definition themselves or if it was something that came from staff.

Wagner thought the board had worked on it with guidance from staff.

Harris recalled that staff gave the definition and the board didn't change it, however staff didn't make up the definition it came from the county attorney's in a District Court case that preceded the Supreme

Court case. He said staff has used the same definition consistently. This definition varies from the state's definition which defines gravel extraction as only removing the material. The processing part would include the crushing, washing, and all of the other material, all the other processing activities.

Tutvedt wanted to comment because this all had to do with his court case. He said District Court never had a definition for gravel extraction. The court determined the area was residential, so the board had the choice to condition or deny his application—the choice was to deny. It was then taken to the Supreme Court, who remanded it back to the BOA to come up with a definition, at which point a definition was written by staff. He didn't agree with the definition but said it was only for that particular case so let it go.

Tom Clark called a point-of-order and said the chairman already closed public comment.

Hollinger thanked him for pointing that out.

Klempel said it boils down to the neighborhood plan and that it isn't the boards responsibility to redo the plan. She asked if anybody is going to work on the plan.

Krueger said he's the current chairman of the West Valley Land Use Advisory Committee (WVLUAC). He said every year, for the last 3 years, he's asked Mr. Harris to start working on the plan and is told he doesn't have the staff to do it and can't get it done. He said a neighborhood plan is not regulatory and you can't use it to interpret zoning regulations.

Clark said he was a member of the WVLUAC and said they passed a resolution to work on the neighborhood plan. It was in the works for approximately one year during which time a couple individuals "drug their feet". The committee gave up because decisions weren't being made and everyone became too frustrated.

The board further discussed definitions.

Hollinger asked if there were any questions, comments, further discussion, or if anyone wanted to make a motion.

Klempel said let's take a break.

Hollinger called for a five-minute break.

The meeting resumed at 8:50 p.m.

Hash asked Klempel her thoughts.

Klempel feels the board has defined it before but there is still a lot of confusion. She wondered if gravel extraction and extractive industries are getting singled out.

Hash asked Hollinger his thoughts.

Hollinger guessed that extractive industries, in theory, cover more than just sand and gravel.

Wagner said top soil.

The board continued to discuss definitions at great length.

MAIN MOTION

Hash made a motion seconded by Wagner to adopt staff report FCU 09-04 as findings-of-fact and deny the application.

**BOARD
DISCUSSION**

Hollinger has some questions about the legal process, and wondered if the board was to table it, instead of taking action, if it would have to get resolved with the board before heading to District Court.

Wagner said if the board tabled it, there would be no action either way.

Hollinger understood but wondered if it would just sit as a tabled item and not go on to District Court.

The board and staff further discussed tabling the project.

ROLL CALL

On a roll call vote the motion passed unanimously.

OLD BUSINESS

Harris said Tony Sagami moved out of the county and his position is being advertised and would close on July 15, 2009.

NEW BUSINESS

Harris passed out bylaws, with suggested changes highlighted in yellow, for the board to review and discuss at their next regular meeting. The changes have been reviewed by the county attorney's office.

ADJOURNMENT

The meeting was adjourned at approximately 9:06 pm. on a motion by Wagner. The next meeting will be held at 6:00 p.m. on August 4, 2009.

Scott Hollinger, President

Donna Valade, Recording Secretary

APPROVED AS SUBMITTED/CORRECTED: 9 / 1 / 09