



CITY OF RAPID CITY

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MEMORANDUM

TO: Planning Commission

FROM: Joel P. Landeen, Assistant City Attorney

DATE: 3-20-06

RE: Variance to Distance Requirement in Proposed On-sale Ordinance Amendment.

At the last meeting it was asked if an applicant for an on-sale liquor establishment would be able to seek a variance to lower the distance requirement between on-sale liquor establishments and residential areas contained in the proposed ordinance amendment. The answer to this question depends on whether or not the distance requirement is a “use” regulation or a “area” regulation. “Use” zoning regulates how property may be used within a district. A “use” variance is typically one that permits a use within a zoning district that would not otherwise be allowed under the zoning ordinance. Essentially, a “use” variance is an alternate means to rezone property. “Area” zoning regulates density, setbacks, frontage, height and other dimensional attributes in order to promote uniformity of development and spacing. In South Dakota you can get a variance for an “area” regulation but not for a “use” regulation. {FN 1}.

There is no clear cut answer to the question of whether or not the proposed spacing requirement is a “use” or “area” regulation. In my opinion it is a “use” regulation. The basis for my opinion is that “area” regulations control how parcels within a district are physically developed and not what uses can occur on them. The proposed distance requirement regulates the use of property not its physical development. However, on-sale liquor establishments are permitted within certain zoning districts; an applicant could argue that because they are not seeking a variance to allow a use not otherwise permitted within the district that the proposed distance requirement is not a “use” regulation and is instead an “area” regulation. {FN 2} If an applicant were to successfully challenge my determination that the proposed distance requirement is a “use” regulation, then they would be allowed to request a variance.

Even if an applicant is allowed to request a variance to the proposed distance requirement and the variance is granted, the result would be that an application for a conditional use permit that would have otherwise been rejected for being in violation of the ordinance could be considered by the Planning Commission. For example:

EXAMPLE #1

An applicant requests a conditional use permit for an on-sale liquor establishment that is 250 feet from a residentially zoned property. Staff rejects the application because it is in violation of the distance requirement.

EXAMPLE #2

Once rejected the applicant requests a variance to allow them to locate the on-sale liquor establishment 250 feet from a residential area. The ZBoA grants the variance. The applicant reapplies for the conditional use permit. Based on the variance, staff now accepts the application and the Planning Commission can consider the conditional use permit request. The Planning Commission is not obligated to grant the requested conditional use permit and may still consider all of the factors listed in Sec 17.54.030(E) of the City Code.

{FN 1} – Graves v. Johnson, 63 NW2d 341 (1954); However, the South Dakota Supreme Court allowed a use variance in Cole v. Board of Adjustment, 592 NW2d 175 (1999). It is unclear from the Court’s opinion whether or not the issue of “use” vs. “area” variance was raised by the parties. It was not specifically discussed nor directly decided by the Court. The only mention of “use” variance occurs at the end of Justice Sabers’ dissent.

{FN 2} – A court in New York held in a very similar situation that the distance requirement was an “area” regulation and that the applicant could request a variance. Real Holding Corp. v. Lehigh, 788 NYS 438 (2004). I question the rationale used by the Court in this case and believe that it is likely that another court considering the issue may reach a different conclusion.