

City of Columbus
Public Hearing – Chapter 7A-800, Property Access – Zoning Code Amendment
(PC-15-117)
December 16, 2015

The December 16, 2015 Public Hearing to receive testimony regarding amending Chapter 7A–800, Property Access, in the Columbus City Code was called to order at 7:17 p.m. by Chair Garth Sternberg at the City Hall. Present were Commission members Jim Watson, Pam Wolowski, Jesse Preiner, and Jody Krebs; City Administrator Elizabeth Mursko, Planner Dean Johnson, and Recording Secretary Karen Boland.

Also in attendance were City Council members Denny Peterson and Bill Krebs; Jon Wycislak, and Pat Preiner.

Sternberg: So now we have a Public Hearing and discussion, Chapter 7A-800, Property Access, Zoning Code Amendment, pages 12 -15. And, at this time, I would like to ask the recording secretary to read the notice as published.

Notice was read at this time by the recording secretary.

Sternberg: Thank you. And, Dean, are you going to walk us through this one?

Johnson: I, I'll start. Um, as some of you may know, as a matter of practice for the last 20 years– probably preceding me and, certainly, preceding Elizabeth–um, the decisions regarding building permits on private streets were always accepted as, 'You get two.' There's never been anything in the ordinance, and I think it built to a point where the clarification was necessary–the concern over maintenance of private drives, and things of that magnitude. And the City Attorney has been reviewing this for quite some time, uh, to give the Council an opportunity to make this, actually, not just a policy, but an ordinance. And, in essence, there are two amendments that are required. One regards the second ordinance, which is actually amending the subdivision regulations. And it simply makes a provision or exception that, as allowed in the zoning ordinance, they might, lots may not have to have direct access to public roads. So, this first one, that section 7A-800 of Chapter 7A, specifically amends the general provisions of the zoning ordinance now, and includes, within the rural residential district, a formal provision for the first time, that a maximum of two lots may gain access off of a private road. And, in this, is the description of what separates this from a non-public street, if you will, or a private street. And, in part of this, the discussions in staff meetings for the last couple of months regarded liability for permitting legal access, like this, on private drives that may otherwise not meet certain standards. And, in an effort to avoid any kind of liability for allowing access by fire vehicles or other public emergency vehicles, some other standards were included in here as a part of that. So, driveways have to be at least 16 feet wide. Class five material. Uh, makes preference to paving, but that's not required in here. Also, makes a requirement to dedicate formal easements to the City. It also has provisions in here for a development agreement that could enforce maintenance agreements or, in lieu of that, a simple maintenance agreement between the properties that would benefit others. And, again, lastly, it simply identifies this or, it will continue to be classified as a private street rather than a public street. So, we're not maintaining these, but we're trying to step up the

fact, again, that there've got to be some minimum standards for this, unlike a private drive. Uh, we don't have similar requirements for dedicated easements. I don't think we have any specification on the minimum driveway. In this case, it's calling for a 16-foot drive. I know we started out 20 feet, and that had been some sort of a reference to fire vehicles, and then we determined that that really wasn't the case, that 16 feet was adequate, so that's where we ended up. And I'm guessing most private drives are 12-16 feet as they are. But, in this case, there are some determinations that can be made administratively, and that is to verify there aren't more than two lots that would gain access. And, uh, we have some situations where there may be or could be more than two permitted and it's gonna kind of be a first come, first served, after this is done. So, I don't know what, Elizabeth, you might want to add or clarify.

Mursko: This ordinance is the result of two situations that we find ourselves in – one of which is an existing condition, and one is a potential condition. The first one is, uh, it was a result of a minor subdivision where it was indicated that we would allow two lots off an unimproved road and the third lot decided not to take their access off of 189th and that, and then the third one in, then the road would have to be improved. And we had found out at that time it was going to be \$50,000 a lot to improve the road. And that's the Anson Street situation. And, the property owner came in. They had a sale pending, but because we didn't, we wouldn't allow a building permit to be issued, because there was the third house off an unimproved road, the sale did fall through, and the direction from the Council was to apply for a variance. Well, when Dean and I and Jake looked at the, at the Code, there wasn't a clause to take a variance from. So, this creates the clause that allows them to apply for a variance for an existing condition. In the meantime, Mrs. Nelson, on the north side of 189th has come before you with a similar situation, except, in this particular case, the lot on the corner of 189th and what would be—I'm not sure what the new name of the road would be—maybe Evers, she claims that she put a condition on the sale of that lot, that they could not take their driveway off of Evers, but off of 189th, but, unfortunately, with that situation, our code doesn't dictate where driveways go. So if someone came in and said they wanted to take their driveway off of that road or potential road, there wasn't a clause to not allow it. Now there's criteria for it. You know what I mean? There's a maintenance agreement, there's criteria. And that's what this creates, some criteria for that to happen. Whether or not you issue two variances, one for existing condition, and one in a plat, is up to the Planning Commission and Council, but this ordinance being put in place will allow those applications to go forward. Right now, it's considered incomplete.

Krebs: Mr. Chair, I have a question for Elizabeth. Who holds the accountability on the maintenance agreement if these families go into an agreement together?

Mursko: It operates just as a developer agreement or that's what our attorney explained. It's just a developer agreement, and the agreement is amongst themselves. And it's binding, because we've recorded it.

Krebs: Okay. So if someone defaults on it, then what happens?

Mursko: It's a civil matter, and I think they have to litigate it.

Krebs: And so that's what they would be told when they come to the counter—because they're going to come to you—is that it would be a civil matter and they'd have to file with the County?

Mursko: And they'd have to, yeah, and they'd have to negotiate it out—which is why it would be recorded.

Krebs: Okay.

Mursko: Because, according to our attorney, it doesn't become a public right-of-way until it's improved.

Krebs: And we're doing this because we'll save the taxpayers dollars on putting an improved road in? Is that the bottom line?

Mursko: You know, I think it's rather costly, um, to improve a road if you only have two houses on it. And I think the idea was that if you only have two houses, is it cost effective from a maintenance perspective and from the dollar figure that would have to be laid on the two houses, whether or not improving the road would be cost effective? And, the bottom line is, it really isn't, you know with five-acre lots. That would be very expensive.

Sternberg: But, the way I see it, that's why you have a two-house limit, because you don't want to—the two-house limit is to avoid the road improvement. When you have the, if you want roads and you want to pay for them, then, why do this? Why not just change the code that you can put more houses on – er, you can have private roads? You know, to me, this seems like the guy that—the third party that went in on the private street, you know, basically, not compliant, went in off the street—had created an existing condition for himself to not have to do the road improvements. You know what I mean? It's like, this code is going to allow the third house. What will stop the fourth house, the fifth house, all these houses from going in down a dirt road, and not having to pave it? Because they can all just come in and apply for a variance now. And if we give one and two, we may as well give the rest. I mean, am I wrong here?

Krebs: Well, exactly right. Because if the lot sizes, in the future, should maybe change, that is a variable that could be very real.

Sternberg: Right. And I just—I don't really care if we do it or not, but then let's just make that across-the-board code, so we don't have to variance every time. 'Cause, to me, this is going to lead to a variance every time. 'Cause we've seen it; the track record in Columbus is to avoid paving roads. It's too costly. So let's just let 'em put private roads in or something then. I mean, we talked about this and I thought we were against private roads.

Mursko: You know, we talked about this at a staff level, um, whether or not there should be three tiers. Private driveway you have only two houses. A private roadway could have three or four, but you bring it up to another standard. I mean like the driveway, you might have a 16-foot driveway. The second tier, if it's a private road, then you bring it up to limestone or you do something in between. And if you have more than that, then, you, you know, go to paving—some

sort of tiered process that you're going in the right direction, but you're not going to have five houses on a driveway.

Krebs: Right.

Mursko: So this is written for a driveway, not a road.

Krebs: But it would be applied at this time, if somebody came in, essentially for a road, if they were going to be that third home.

Mursko: Well, we have an existing condition, and then we have a plat. And, since I've been here, we've only had two houses off an unimproved roadway for—I mean, that's what we've used, always. And now, all of the sudden, we have this situation.

Sternberg: Well, when we were talking about the, the one guy that had the 40 acres or whatever, and he had an easement in there, and it was limited to two homes. And now the other guy with the 20, and the guy with whatever it was, wants to part out his 20 and sell it off. And he can't, because there's only two people allowed in there. So why is it that guy gets the shaft and then somebody else goes in and puts a third house down a driveway and we've got a variance? That was part of the reason why we were against this stuff, was because we didn't want any more land pigeonholed into, you know, a guy that wants to put four or five homes back in there now can't, because of this two-house limit on his driveway. And now we've created something where . . . You know what I'm getting at? How did the third house get put in on that road, when this other guy that we talked about in the past, wanted to put some in and he was told no? Because he did the legal thing and the right thing, and he came in, and he was told no, that he couldn't do it?

Mursko: Um, in the past they were minor subdivisions. In minor subdivisions you had to bring it up to limestone standard, which is why you have—half the roads that you have in Columbus are limestone, because it was the result of a minor subdivision, which was three or four lots, because that was the standard for roads. You didn't get to do a driveway; you didn't get to do that. You had to bring it up to limestone standards. When we removed the minor subdivision, we said 'Okay, you can have two houses off an unimproved driveway.' There wasn't an in-between, because I'm platting new blacktop roads. Well then we got into the, 'Well, what if the land was only half a road?' And that's when we went, took 50% of the money and put it in escrow for future development. The first situation is the result of a minor subdivision. And, at the time, it was only one house off of the road and, or one, you know, it was one house, and then there was the possibility of the two lots. And Mr. Carey, at the time it was Mr. Bishop, convinced the Council at that time that that first house was going to take its driveway off of 189th, um, and, until it was granted. But, I've got to tell you, Leon and I argued with that gentleman at the counter, and he was not putting his driveway off of 189th. He was adamant that he was going to put it off of that driveway. He went to Mr. Carey and came to an agreement, and then that left, um—I'm drawing a blank—the Schwartzes with me telling them that they had to improve the roadway. And then Larry did an estimate and it was \$50,000 apiece.

Sternberg: And this is going to help that situation?

Mursko: Well, the only thing that this does, is it gives them an opportunity to apply for a variance to allow their house. But that's an existing condition, whereas Mrs. Nelson is not an existing condition. She created that, because she, a year ago, did the subdivision.

Krebs: And so they'd still have to go through the State variance process with the Planning Commission, is that correct?

Mursko: They, in a plat they'd bring the variance with the plat, and then you grant the variance for the plat. And, I don't know, Dean, can you put a, can you put a condition on the plat that the driveway must go off of 189th or it can't be built on, as a condition of the plat? I don't even know if you can do that.

Johnson: Uh, it remains to be seen who's signing the plat. If there's either a buyer or a second owner then you've got to have the Nelsons and the others signing the new plat. Or, if the plat that's gonna be submitted is a re-plat of one lot and not the entire property, so . . .

Mursko: Oh, that's right. I forgot about that. And it's not. They exempted it out. So, yeah. So, it's gone. That opportunity's gone.

Johnson: My, my only comment to you is, Elizabeth's clarified: There previously was nothing that even had an opportunity to consider a variance, because there were no standards. And yet, the real purpose of this is to have in an ordinance, rather than a long standing policy, that creates this limit to two lots on a common driveway, and then adds some standards. The issue that the Chairman referenced about, 'Well, we've already told people this, and now . . .' My comment to you is, there's nothing that suggests that you are compelled to grant a variance. You've got to go through the same findings you always do, and while the two situations might be across the street, they're dramatically different in my mind, and you may not be able to make positive findings for either property or, you could very easily find totally different findings on the two. So, I'm, I'm not suggesting you're going to get locked into being saddled with establishing precedent after precedent because this ordinance is adopted.

Sternberg: No. I understand that, but we have, a third house already went in on a driveway, right?

Mursko: Nope, only two.

Sternberg: Only – there's two on – so the guy on one eight—that's supposed to be going off 189th wants to come in and get . . .

Mursko: Right. It was a matter of, they want to sell the lot. And in order to sell the lot and make it buildable, that's the third one in.

Sternberg: Okay. So that person would come in for the variance process if this went through and everything. And we'd have to go through the variance, and they'd have to prove a hardship before it would be granted.

Preiner: Mr. Chair, what hardship can they prove? The ordinance is already in place. Everybody knows about it. It's two homes per unimproved driveway or whatever you call it. So, then, what's the hardship?

Johnson: If you have a party that is owner of one of those parcels that was not involved in prior decisions, that's critical. They didn't bring this condition on themselves. That might be the case in the one . . .

Preiner: In the Schwartz one. Right.

Johnson: . . . but it isn't the case where you have an applicant that's proposing to do a subdivision, that is requesting a variance. Those are two totally dramatic situations, and I don't know that you could make a finding that . . . They're creating the situation. As you may recall from that plat, this was a potential five-lot development from day one, but nobody wanted to pay for a road. And, I'm like you, I can't sit and say, 'Well, gee, let's manipulate the system and change a couple of ordinances to grant a variance so they can have three lots and avoid building a road.' I'm not suggesting you consider that at all.

Preiner: So, people on one side, they're hardship is because it was done to them by somebody else? And this other . . .

Johnson: The sequence of events are different from . . .

Preiner: From the other.

Johnson: . . . from the new development.

Preiner: Well, that makes sense, and that gives you the tool you need, too.

Johnson: You know, by law, you have to make all of the findings—you have five or six, I can't remember how many you have—but, you have to be unanimous in your findings. And I'm not convinced you'll be able to do that on one, but you might on the other. And so I don't think this opens quite the precedent that you're concerned about. This, this ordinance, while it allows that situation to exist for future variances, the primary thing it does is take an old 20-30 year policy and put it into effect, and also create some reasonable standards and requirements for common maintenance. And, I can tell you this, no matter how, how it reads about forcing people to get into a maintenance agreement, I've seen them erode all over the place. And the party that's got a high four-wheeler and doesn't worry about getting through the snow and won't contract for snowplowing with somebody else that's now 15 years older than when this all started - that's how it breaks up. And, as Elizabeth said, that's a civil matter. We're not going to go in and hold hands with people. They're going to have to figure it out. And you, you hope that 90% of the time, people have more good will towards each other, and, if they can't afford to pay, they, they'll help 'em out in some other fashion – they'll watch their dog when they go out of town. But, I just want to warn you, there's always a sourpuss in every community, and these things don't work the way they're intended. But, it's not our problem.

Preiner: It is just a driveway, it's not a street.

Johnson: It's not a public street. When you get into developing other private streets that are catering to lots of people, you start worrying about the liability for vehicles—emergency vehicles. The only way to solve that is, the City's got to take the responsibility for maintenance. And we don't want to do that unless everything is normal – you get the proper right-of-way and the road's built the way it should be in the first place. And, if the original party doesn't want to make that investment, there's nothing we can do, other than sacrifice your standards to allow a few more rooftops in the community and then have problems.

Sternberg: So this would allow more than two homes on a private driveway, by variance?

Johnson: By variance.

Sternberg: Would it allow four?

Johnson: I don't know that we have the landlocked parcels that you may in the one instance. Because, again, when you had the minor subdivisions with different standards to allow access and things of the magnitude, over time, if the property doesn't sell or develop, and then somebody makes a decision, like gaining access from the private road instead of a public road, when that was an option, is that your problem? That's going to have to be what you look at in evaluating the variance request. The one issue that happens on all of these things that have occurred in a prior time, and we may even regret that somehow we assisted or aided in the approval process that created the problem. They never go away. Communities that have got parcels for the last 40 years that I've been involved with them that they can't—as a community—you just can't bury your head in the sand forever and avoid a resolution. And they're hard to come by. And, eventually, they do get solved. And this is one way for those preexisting conditions that, just the way the law is structured, let somebody apply for it; if they meet the standards you can consider it. But when somebody's creating the standards in their original application, I'll tell you what my reaction is: they don't warrant a variance. It's only money.

Krebs: Mr. Chair, I have a question. Can you look at 'd' on the, on page 14, and maybe clarify that for us? Why it would say that this shall be classified, 'shall' be classified as a private street? Because the whole purpose was, we didn't want to have private streets, because it causes this issue then.

Johnson: Um, you know, again, the, the wording or the distinction is to make certain that the private drive is not a public street, so there's no access. Why it is a private street instead of a private drive, I'm not entirely certain.

Krebs: Because, if we say private street, that means no one can access it except for the parties that are a part of it. That way if someone were to have a parcel that could be subdivided in the future, they would then fall into this same issue of not being able to do it, because it's a private street, not a private drive.

Johnson: Well, yeah, and the . . . what I can't answer is the attorney's choice of the words, classified as a private drive rather than private street.

Mursko: I don't remember that one either Dean. I don't remember.

Johnson: I, I mean nobody dwelt on that particular . . .

Krebs: I know.

Johnson: . . . wording. Uh, I'm just trying to see if we even have a definition.

Sternberg: Sounds very legal, doesn't it?

Krebs: Well, it's what's causing this issue to begin with, with that one parcel we were talking about.

Johnson: Oh, I, here's what I think the classification could possibly be, is, we do define a private street as a local street that is not accepted for public use or maintenance which provides vehicle, vehicular and pedestrian access. Uh, and I, I'm guessing, because there was no description of a private drive in the ordinance, that that's the choice of that word, 'private street.' But, I regret I don't, I don't know that any of us debated that.

Sternberg: If you had the, um, if this situation came before us and we granted the third home a variance, and let them come in off the private drive, and let's say there's another 40 acres back in there, I mean, where do you draw the limit? Because if you grant one, doesn't the fourth one come in, you by, almost by rights, have to give it to them? the fifth one? sixth one? seventh one? And pretty soon you have a whole development on a private driveway.

Johnson: I think the effort has been in every division of property that I've been in, Elizabeth has been in, that we look at those properties that have no other access potential. And, from day one, our recommendations are: 66 feet easement. We don't necessarily require, particularly in the old minor subdivisions, public right-of-way dedication. Uh, we take an easement. But, even on the plats we can take an easement rather than right-of-way, to keep that distinction between public responsibility for maintenance, and so forth. But, in the past, the decisions that didn't get accepted, and, most recently, I can't remember the, what was the name of that? Lone Oak.

Mursko: Oh, the DuFresnes.

Krebs: The DuFresnes.

Johnson: The City Engineer and I both commented, you know, there are parcels that are landlocked in the back, they're owned by the same party, there's an existing drive on the south end of the plat, why don't we require an easement? That didn't happen. And, again, that occurs. And, the problems that you're going to run into or the risk for a variance that might be, 'Well, could we get a fourth one out of this?' Sure. But it's gonna be a preexisting condition. I, I try desperately to avoid creating these, where somebody's requiring a variance to do something.

Which is why I'm not in favor of action on a new plat that requires a variance, because there are other alternatives, even though they might include financial impacts. The law is very clear: you can't base your decision on variances on money alone. So, if the applicant says, 'Gee, it'll cost me 50,000 bucks.' Well, what are you going to sell the lot for? If you want to make 80, why don't you spend 50? If you can split off five lots, why aren't you considering that, instead of forcing us into denying your subdivision because you want a variance? You're gonna find potential situations that have no other remedy than variances, and that's what variances are for. That's why the statute allows them.

Mursko: At this time, maybe you just want to ask for public input and then we'll close the hearing?

Sternberg: Yeah, at this time I'd like to open the hearing to the public. Is there anyone here from the public that wants to speak on this matter?

Bill Krebs: Well, I could say something.

Sternberg: Well, come on up; you're the public.

B. Krebs: Bill Krebs. 172nd Avenue. I'm thinking like Garth is. I mean, two houses to the road. After that . . . Although, I was in a neighborhood two weeks ago, where there's five houses on a road out in Lake Elmo. And I asked the guy how it works. He says, 'Just wonderful. Everybody gets a long good. Everybody helps each other. One guy is a skidster. One guy, you know, we get a load of dirt or gravel and everything is fine.' But, exception to the rule, I think. 'Cause when, when you go throughout Columbus—and, Garth knows this from knocking on doors. Jesse knows this from pounding stakes in—some people's driveways are really exceptional, and some people's driveways are horrid. So, what constitutes? I mean, how do you, so . . . I don't know. I think that, I think that's where you're going, aren't you Dean?

Johnson: I don't know. Where are we going?

B. Krebs: You're neutral or what? That deal up there that happened to that guy on 189th, that should've never happened. That's a bad, bad deal, and Mr.—what's his name?

Mursko: Carey.

B. Krebs: Carey should've come in and talked to the City before he did that. I think that guy must've applied a bunch of pressure, just like he tried in here, and he just folded, probably. So, I just—and then now that poor lady can't sell her piece of property. So there's an example right there where she should have a variance.

Johnson: It establishes different conditions.

B. Krebs: He forced the hardship on her – Mr. Carey and that other guy up there forced the hardship on her, and she should be able to do that. So, in that case maybe we give more than two driveways, if there's a hardship.

Preiner: Well we can, if there's a hardship. Doesn't this just establish the baseline? This gives you something to say, 'Here's this. Go away.' Or . . .

Johnson: Right. Because we never had a standard that said you can have two, how could we vary that and allow three? This now puts the policy into ordinance, and it would create that. Does it say that you couldn't get a variance for five? You might. But you've got to meet what is now practical difficulty instead of hardship. Which, again, you have to make unanimous findings, and . . .

Preiner: But it's easier to meet a practical hardship.

Johnson: Practical difficulty is given . . .

Preiner: Practical difficulty.

Johnson: . . . a little more latitude than the outright hardship of the old statute, but it still requires that you make unanimous findings. And they're going to be different in every case, and the primary one is, 'Was it the fault of the party? Did they create this mess themselves?'

Preiner: Okay. Mr. Chair. So then we say, she comes up and the third house has a . . .

Sternberg: Actually, hold on one second here. Is anybody else from the public? Okay, I'm going to close the hearing with the right to reopen if it becomes necessary.

Hearing closed at 7:50 p.m.

Respectfully Submitted:

Karen Boland, Recording Secretary