

Birmingham Board Of Zoning Appeals Proceedings
Tuesday, September 13, 2022
City Commission Room
151 Martin Street, Birmingham, Michigan

1. Call To Order

Minutes of the special meeting of the City of Birmingham Board of Zoning Appeals ("BZA") held on Tuesday, September 13, 2022. Chair Erik Morganroth convened the meeting at 7:30 p.m.

2. Rollcall

Present: Chair Erik Morganroth, Vice-Chair Jason Canvasser; Board Members Kevin Hart, Charles Lillie, John Miller, Ron Reddy, Pierre Yaldo

Absent: Alternate Board Member Carl Kona

Staff: Senior Planner Cowan, City Transcriptionist Eichenhorn, Assistant Building Official Morad, Assistant Building Official Zielke

Chair Morganroth welcomed those present and reviewed the meeting's procedures.

Chair Morganroth described BZA procedure to the audience. He noted that the members of the Board of Zoning Appeals are appointed by the City Commission and are volunteers who serve staggered three-year terms. They are a quasi-judicial board and sit at the pleasure of the City Commission to hear appeals from petitioners who are seeking variances from the City's Zoning Ordinance. Under Michigan law, a dimensional variance requires four affirmative votes from this board, and the petitioner must show a practical difficulty. A land use variance requires five affirmative votes and the petitioner has to show a hardship. He pointed out that this board does not make up the criteria for practical difficulty or hardship. That has been established by statute and case law. Appeals are heard by the board as far as interpretations or rulings. In that type of appeal the appellant must show that the official or board demonstrated an abuse of discretion or acted in an arbitrary or capricious manner. Four affirmative votes are required to reverse an interpretation or ruling.

Chair Morganroth took rollcall of the petitioners. All petitioners were present.

3. Announcements

The City continues to recommend the public wear masks while attending City meetings per CDC guidelines. The cases of COVID-19 are increasing in the area. All City employees, commissioners, and board members must wear a mask while indoors when 6-feet of social distancing cannot be maintained. This is to ensure the continuity of government is not affected by an exposure to COVID-19 that can be prevented by wearing a mask. The City continues to provide KN-95 respirators and triple-layered masks for all in-person meeting attendees.

4. Approval Of The Minutes Of The BZA Meetings Of July 26, 2022 and August 9, 2022

T# 09-58-22

Motion by Mr. Lillie

Seconded by VC Canvasser to accept the Minutes of the BZA meeting of July 26, 2022 as amended.

Motion carried, 7-0.

VOICE VOTE

Yeas: Morganroth, Canvasser, Hart, Miller, Reddy, Yaldo, Lillie

Nays: None

T# 09-59-22

Motion by VC Canvasser

Seconded by Mr. Lillie to accept the Minutes of the BZA meeting of August 9, 2022 as submitted.

Motion carried, 7-0.

VOICE VOTE

Yeas: Morganroth, Canvasser, Hart, Miller, Reddy, Yaldo, Lillie

Nays: None

5. Appeals

T# 09-60-22

**1) 600 Aten Ct
Appeal 22-40**

ABO Zielke presented the item, explaining that the owner of the property known as 600 Aten Ct was requesting the following variances to construct a new single family home with an attached garage:

A. Chapter 126, Article 2, Section 2.06.2 of the Zoning Ordinance requires that the minimum front yard setback is the average of homes within 200.00 feet in each direction. The required is 32.40 feet. The proposed is 27.83 feet, therefore, a variance of 4.57 feet is being requested.

B. Chapter 126, Article 4, Section 4.75(A)(1) of the Zoning Ordinance requires that private, attached, single-family residential garages must be setback a minimum of 5.00 feet from the portion of the front façade on the first floor of the principal building that is

furthest setback from the front property line. The proposed is the garage is 0.23 feet in behind the furthest façade. Therefore, a variance of 4.77 feet is being requested.

Staff answered informational questions from the Board.

Gregory Aerts, architect, reviewed the letter describing why the variances were being sought. The letter was included in the evening's agenda packet.

In reply to the Chair, Mr. Aerts confirmed that variance B was necessary because the garage would not function because of the angles of the garage doors and the depth of the garage.

Mr. Miller asked for further clarification regarding the necessity of variance B since the home would be entirely new construction.

Mr. Aerts said the odd-shaped lot and the curved setback would cause difficulty for vehicles backing out of the garage if variance B were not granted. He explained that the garage doors would not be squared to the curb without the variance.

Mr. Miller said it seemed the garage could maintain its angle and be pulled straight back by 4.77 feet to remedy that issue.

Mr. Aerts said that would result in one part of the garage meeting the five foot setback requirement but the middle part of the house would be ten feet from the setback requirement. He said he thought variance B met the spirit of the ordinance for the offset of the garage doors and the house.

Mr. Miller said it was still not clear to him why Mr. Aerts believed that the garage could not maintain its angle and be pulled straight back by 4.77 feet.

Public Comment

Ronald Houseman and Samuel Alsawah, neighbors, both said they wanted to better understand how the proposed home would sit on the lot versus the present home.

The Chair said the proposed home would be a similar distance from the street as Mr. Alsawah's home at 626 Aten.

Phyllis Clark, neighbor, said she would like the plans to be reconfigured.

Seeing no further public comment, the Chair returned discussion to the Board.

Mr. Hart said that the home at 626 Aten was before the Board in November or December 1999 for a similar issue and was granted a variance at that time.

The Chair noted that information showed that there was a previous variance granted for a similar issue.

Mr. Miller said it would have been helpful to see how the proposed home would sit in relation to the other homes in the circle. He said it also would have been helpful to see where the proposed home would sit in relation to the existing home. He said that information likely would have helped Mr. Houseman and Dr. Alsawah better understand the proposal as well.

The Chair noted for Mr. Houseman and Dr. Alsawah that the proposed home would meet the rear setback requirement, unlike the present home on the lot. He noted that the proposed home would also be further from the street than the present home.

Mr. Hart said the plan did not show where the southeast corner of the home was in relation to the property line. He said the dimensions of the existing survey would have been helpful for review.

In reply to the Chair, Mr. Aerts said that, at the corner of the garage, the proposed home would be four feet further from the street than the present home.

The Chair offered Mr. Aerts the opportunity to table this appeal to the next month's hearing, given a number of comments from Board members about the desire for more information on the plans.

The Chair asked the Board members whether they felt they had sufficient information to vote on the appeal.

Mr. Miller noted that granting encroachments into front yard setbacks is uncommon. He also noted that there were concerns from the neighbors. He said that the appellant's submittal was minimal and that the dimensions described by the appellant could not be entirely substantiated by the plans provided. Mr. Miller reiterated his preferred information from his prior comment.

Mr. Aerts replied that he would accept the Chair's offer to table the appeal.

Motion by Mr. Lillie

Seconded by Mr. Reddy to table Appeal 22-40 to the next regularly scheduled Board of Zoning Appeals meeting and that the present additional information as requested by Board members.

Motion carried, 7-0.

VOICE VOTE

Yeas: Morganroth, Canvasser, Hart, Miller, Reddy, Yaldo, Lillie

Nays: None

The Chair said it would be helpful to see all the homes within 200 feet and the home that is 60 feet back so the neighbors see that the proposed home at 600 Aten would align with the other homes.

The Chair also advised Ms. Clark to have her daughter resubmit her letter in regards to 600 Aten since the letter was not yet received by the Board.

T# 09-61-22

**2) 588 S Old Woodward
Appeal 22-41**

SP Cowan presented the item, explaining that the owner of the property known as 588 S Old Woodward was requesting the following variance:

A. Chapter 126, Article 4, Section 4.46(A) Table A of the Zoning Ordinance requires that eating establishments provide 1 parking space for each 75 square feet of floor area. The applicant, Phoenicia, is proposing a 1,381 square foot addition to their restaurant, which will total 4,081 square feet; therefore, 54 parking spaces will be required. The applicant is proposing 34 parking spaces on-site; therefore, a variance of 20 parking spaces is being requested.

Staff answered informational questions from the Board.

Mr. Lillie said he would not have a problem approving a variance for the increase in parking spaces resulting from the increase in the kitchen area. He said he had more concerns about granting a variance for the parking space requirements stemming from the dining areas since those will increase traffic to the establishment and parking is already being lost from the street due to the S. Old Woodward project.

The Chair noted that there tends to be much less demand for parking in the area around Phoenicia during the establishment's hours of operation.

Mr. Hart noted that, per the City's data, the 555 Building offers sufficient public parking during Phoenicia's hours of operation to accommodate Phoenicia's increased parking requirements, even if a parking lease agreement was not reached between Phoenicia and the 555 Building.

Richard Russell, attorney, reviewed the letter describing why this variance was being sought. The letter was included in the evening's agenda packet. Mr. Russell introduced Sameer (Samy) Eid, owner of Phoenicia, Victor and Alex Saroki, architects for the project, and John Kelly, general contractor for the project.

Mr. Russell stated that earlier in the day on September 13, 2022, Mr. Eid had been able to reach a parking agreement with Birmingham Place's management for ten parking spaces for Phoenicia employees. Mr. Russell noted that Birmingham Place was approximately 400 feet away from Phoenicia, and offered to distribute to the Board a letter from Birmingham Place confirming the agreement.

Given the newness of the shared parking proposal with Birmingham Place, SP Cowan noted that Staff had not conducted a formal analysis to determine whether Birmingham Place had an available ten parking spaces to offer Phoenicia's employees.

The Chair noted that the ten parking spaces being offered by Birmingham Place would usually be used by a real estate office, which would have different peak hours than Phoenicia.

Mr. Russell said the appellant team would work with City Staff to show that the ten parking spaces would be and remain available for Phoenicia's employees' use.

The Chair observed that since the ordinance does not specify whether the parking requirements are for patrons or employees, the ten parking spaces assigned to employees could be considered to offset the 20 parking space variance being requested.

In reply to an inquiry from the Chair, Mr. Russell said the need for the variance was not self-created by the addition of the private dining room. He explained that the need for the variance was driven entirely by the addition of the non-patron-seating areas. He noted that if only the private dining room were being added, Phoenicia's present 34 parking spots would be more than sufficient to meet the establishment's parking requirements.

In reply to Mr. Russell's statement that many of Phoenicia's patrons walk to the establishment, the Chair noted that the Board's review of a variance request from the Whistle Stop Diner was a similar case.

In reply to a question from VC Canvasser, Mr. Eid stated that prior to the S. Old Woodward project all employees were parked on-site.

The Chair noted if the parking agreement with Birmingham Place were allowed to be a factor in the present appeal, the Board would also likely have to consider a future variance for the distance of the parking location since it exceeds the 100 feet allowed by the ordinance.

SP Cowan said that if the appellant wanted the parking agreement with Birmingham Place to be considered, that proposal would first have to be reviewed by the Planning Board and the City Commission because it would represent a change to Phoenicia's Special Land Use Permit (SLUP) agreement.

VC Canvasser recommended that the parking agreement with Birmingham Place not be considered as part of the present appeal unless the appellant wanted to go through another review with the Planning Board and City Commission first.

The Chair concurred, saying that the Board would vote on the variance request without reference to the parking agreement with Birmingham Place. He noted that, in the case of a denial, an appellant is allowed to submit a new appeal so long as the new appeal is substantially different from the prior, denied appeal. He observed that a proposal for a shared parking agreement could likely meet the requirement of being substantially different from the present appeal.

In reply to Mr. Lillie, Mr. V. Saroki stated that the addition to the kitchen would be 724 sq. ft.

Mr. Russell noted the kitchen addition accounted for nine of the additional required parking spaces. He said the parking agreement with Birmingham Place should be understood not as an alternative to the variance request but rather as a sign of Mr. Eid's good-faith efforts to mitigate any potential parking concerns.

Mr. Lillie noted that the business owner at 670 S. Old Woodward previously submitted a similar request for a parking variance that was not granted.

Mr. V. Saroki stated that there is abundant parking available on S. Old Woodward in the evenings.

Public Comment

Tricia Stanton, resident of Chester, and Wendy Zabriskie, resident of Watkins, said their families and their neighbors regularly patronize Phoenicia and walk to the establishment instead of driving.

In reply to the Chair, Ms. Stanton said walking to Phoenicia and other City businesses was due to preference and not due to parking difficulties.

Ms. Zabriskie also reiterated her comments from the April 27, 2022 Planning Board review of this item where she stated that the City's parking requirements are archaic and should be modified.

Seeing no further public comment, the Chair returned discussion to the Board.

Motion by Mr. Hart

Seconded by Mr. Yaldo with regard to Appeal 22-41, A. Chapter 126, Article 4, Section 4.46(A) Table A of the Zoning Ordinance requires that eating establishments provide 1 parking space for each 75 square feet of floor area. The applicant, Phoenicia, is proposing a 1,381 square foot addition to their restaurant, which will total 4,081 square feet; therefore, 54 parking spaces will be required. The applicant is proposing 34 parking spaces on-site; therefore, a variance of 20 parking spaces is being requested.

Mr. Hart moved to approve the variance request and tied approval to the plans as submitted. He explained that the appellant appropriately outlined the issues arising from the establishment's location and improvements. He said the improvements to the building, which include the kitchen, bathrooms, storage areas, and locker room for employees, would not increase vehicular traffic to the establishment. He said the loss of on-street parking was also impacting the establishment and causing a practical difficulty. He said that granting the variance would do substantial justice to the neighborhood by allowing Phoenicia to continue operation. He said that the improvements would also increase the safety of the building. Mr. Hart said the need for a variance was not a self-created issue.

Mr. Yaldo said he would support the motion in part because of comments made regarding the master plan. He said other arguments were made that demonstrated a

practical difficulty. He said allowing Phoencia to make necessary upgrades was important as well.

Mr. Miller concurred with Mr. Yaldo regarding the alignment between the present request and the draft 2040 Master Plan.

Mr. Miller also lent his support to the motion. He contrasted this request from some other parking variance requests by noting that this request stemmed from a continuing operation and not from a new function on-site. He said the improvements would benefit the operator and patrons. He noted that the proposed upgrades would bring Phoencia into alignment with the City's code requirements, which help protect the health, safety, and welfare of the community. He stated that the Board should generally encourage operators to make these kinds of upgrades. In this case, bringing the building into alignment with the City's codes created the need for the parking variance. He said the addition of the small private dining room was incidental. He said Phoencia's location was unique and that approving the variance would be doing a service to the City.

VC Canvasser noted that the draft 2040 Master Plan was not yet adopted, and stated that neither the present or the draft Master Plan would be the basis for his vote. He said he would also not support the motion on the basis of Phoencia's excellent reputation. VC Canvasser said he would support the motion since the ordinance requires parking for interior spaces with no seating, but does not require parking for exterior spaces with seating. He said that given these incongruities, granting the variance would do substantial justice to the appellant. He said the four factor test for granting the variance had been met.

The Chair said he would also support the motion. He said he lives nearby Phoencia and usually walks, and noted that he regularly sees residents getting carry-out from the establishment and walking more than 100 feet to their vehicles. He concurred with VC Canvasser's comment about the incongruity in the ordinance. He said the proposed improvements to the restaurant were necessary given that presently some of the storage is in the exterior rear of the building, and said the improvements would benefit the City. He said he could not think of a reason to require more parking for interior spaces that will not add more patrons. He said that while the private dining room would generate the need for some additional parking, it would likely be offset by the number of patrons who walk to the establishment.

Mr. Lillie noted that a number of comments were made regarding the present parking ordinance. He explained that resolving potential issues with the present ordinance was a matter for the City Commission, and not for the BZA.

Motion carried, 6-1.

ROLL CALL VOTE

Yeas: Morganroth, Canvasser, Hart, Miller, Reddy, Yaldo

Nays: Lillie

T# 09-62-22

**3) 167 N Old Woodward
Appeal 22-42**

SP Cowan presented the item, explaining that the owner of the property known as 167 N Old Woodward was requesting the following variance:

A. Chapter 126, Article 4, Section 4.54(C)(8) of the Zoning Ordinance requires that rooftop mechanical and other equipment be limited, positioned and screened to minimize views from adjacent properties and public rights-of-way. The applicant is proposing two new rooftop mechanical units without a screen wall, therefore a variance of 342 square feet (171 square feet per unit) is being requested.

Mr. Yaldo stated that he had a familial relationship with the principal/owner of the property. He said he had no financial interest, direct or indirect, in the matter and did not believe that the relation would impact his ability to hear the matter or vote on it fairly. He said he was willing to provide further information to the Board and/or step out of the room if necessary.

The Board raised no concerns in reply to Mr. Yaldo. The Chair stated that Mr. Yaldo's disclosure would be noted.

Staff answered informational questions from the Board.

Mike Klingl, of JSD Professional Services, Inc, reviewed the letter describing why this variance was being sought. The letter was included in the evening's agenda packet. Mr. Klingl added his contention that the mechanical units would not be viewable from the street, from the nearby two-story buildings, or from the more-distant, taller buildings, which made screening the mechanical units unnecessary.

The Chair explained that the other non-screened mechanical units on the roof of this and other buildings are pre-existing non-conforming. He noted that the City generally expects pre-existing non-conforming conditions to come into compliance with the ordinance when changes or updates to those conditions are made. Consequently, Mr. Klingl's client was being asked to screen their new mechanical units while other, older units on the same roof were not yet required to be screened.

In reply to Mr. Lillie, Mr. Klingl stated that the drawings with the screened mechanical units were not part of the original submittal. He stated that screens were added to the drawings when he was notified by the City that the screens would be required.

Mr. Miller asked Mr. Klingl if the new mechanical units would have been installed had he been initially aware of the screening requirements.

Mr. Klingl said he was not sure.

Mr. Yaldo asked if the fact that the mechanical units could not be viewed could cause a unique circumstance of the property that lead to a practical difficulty.

Mr. Klingl reiterated his contention that his client's mechanical units were not visible from the street or from other buildings.

The Chair said that basing whether to screen mechanical units on mechanical unit visibility would require a change to the ordinance, which would be a matter for the City Commission.

Motion by Mr. Miller

Seconded by VC Canvasser with regard to Appeal 22-42, A. Chapter 126, Article 4, Section 4.54(C)(8) of the Zoning Ordinance requires that rooftop mechanical and other equipment be limited, positioned and screened to minimize views from adjacent properties and public rights-of-way. The applicant is proposing two new rooftop mechanical units without a screen wall, therefore a variance of 342 square feet (171 square feet per unit) is being requested.

Mr. Miller moved to deny the variance request. He said that screening of mechanical units in the downtown is a positive element in the ordinance, and noted that as mechanical units are updated more screening would occur. He said it was difficult for the Board to determine where sightlines from the street and adjacent buildings could be vis-a-vis the appellant's mechanical units.

Motion carried, 7-0.

ROLL CALL VOTE

Yeas: Morganroth, Canvasser, Hart, Miller, Reddy, Yaldo, Lillie

Nays: None

6. Correspondence

7. Open To The Public For Matters Not On The Agenda

T# 09-63-22

8. Adjournment

Motion by VC Canvasser

Seconded by Mr. Yaldo to adjourn the September 13, 2022 BZA meeting at 9:55 p.m.

Motion carried, 7-0.

VOICE VOTE

Yeas: Morganroth, Canvasser, Hart, Miller, Reddy, Yaldo, Lillie

Nays: None

Bruce R. Johnson, Building Official



Laura Eichenhorn

City Transcriptionist