

BIRMINGHAM BOARD OF ZONING APPEALS PROCEEDINGS
TUESDAY, JULY 14, 2020
Held Remotely Via Zoom And Telephone Access

1. CALL TO ORDER

Minutes of the regular meeting of the City of Birmingham Board of Zoning Appeals (“BZA”) held on Tuesday, July 14 2020. Vice-Chairman Canvasser convened the meeting at 7:30 p.m.

2. ROLLCALL

Present: Board Members Jason Canvasser, Richard Lilley, John Miller, Erik Morganroth, Francis Rodriguez; Alternate Board Member Ron Reddy

Absent: Chairman Charles Lillie; Board Member Kevin Hart; Alternate Board Member Jerry Attia

Administration:

Bruce Johnson, Building Official
Eric Brunk, I.T. Manager
Laura Eichenhorn, Transcriptionist
Mike Morad, Asst. Building Official
Jeff Zielke, Asst. Building Official

Vice-Chairman Canvasser explained 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.

Vice-Chairman Canvasser took rollcall of the petitioners. All petitioners were present. Vice-Chairman Canvasser explained the meeting was being held virtually due to the Covid-19 pandemic. He explained the procedures that would be followed for the virtual meeting.

T# 07-37-20

3. APPROVAL OF THE MINUTES OF THE BZA MEETING OF JUNE 9, 2020

**Motion by Mr. Lilley
Seconded by Mr. Morganroth to accept the Minutes of the BZA meeting of June 9,
2020 as submitted.**

Motion carried, 6-0.

ROLL CALL VOTE

Yeas: Lilley, Morganroth, Canvasser, Miller, Rodriguez, Reddy

Nays: None

T# 07-38-20

4. APPEALS

**1) 1165 Hillside
Appeal 20-28**

Assistant Building Official Zielke presented the item, explaining that the owner of the property known as 1165 Hillside was requesting the following variances to construct a new single family home with a detached garage:

A. Chapter 126, Article 2, Section 2.08 of the Zoning Ordinance requires that the minimum front yard setback be the average of the homes within 200.00 feet in each direction. The required front yard setback is 53.20 feet. The proposed is 41.20 feet. Therefore a 12.00 foot variance is being requested.

B. Chapter 126, Article 4, Section 4.75(A)(1) of the Zoning Ordinance requires that a private, attached, single-family residential garages must be setback a minimum 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 2.33 feet in front of the furthest façade. Therefore a variance of 7.33 feet is being requested.

Assistant Building Official Zielke noted the applicant proposed to construct a new home with an attached and detached garage on this irregular shaped corner lot. This appeal was before the BZA in June 2020 and was tabled until July 2020 with additional clarifications provided with the site plan. This property is zoned R1 – Single Family Residential.

Brain Neeper, architect, reviewed his letter to the BZA outlining his request for the variances. The letter was included in the evening's agenda packet.

In reply to Mr. Morganroth, Mr. Neeper explained he brought the laundry room forward in the front in an attempt to draw attention away from the garage's placement.

Mr. Morganroth said that while the home was well-designed, he saw a number of opportunities to minimize the extension of the home into the front yard setback.

Motion by Mr. Miller

Seconded by Mr. Morganroth with regard to Appeal 20-28, A. Chapter 126, Article 2, Section 2.08 of the Zoning Ordinance requires that the minimum front yard setback be the average of the homes within 200.00 feet in each direction. The required front yard setback is 53.20 feet. The proposed is 41.20 feet. Therefore a 12.00 foot variance is being requested.

Mr. Miller moved to approve variance request A and tied it to the plans as submitted. He said he thought there might be disagreement among the board members in terms of granting both variances so he wanted to begin with just variance request A. He said the need for this variance was caused by the unusual alignment of the adjacent homes and the unusual shape of the lot. Mr. Miller noted that the BZA often accommodates homes on corner lots since that can cause difficulties with ordinance compliance, and said an irregular lot compounds those issues.

Mr. Miller noted that the proposed home would not be out of character for the neighborhood, with the exception of the adjacent house which is itself outside of the zoning envelope and two other homes which are unusually far back on their lots.

Mr. Morganroth said he would second the motion with the caveat that a disapproval of variance request B could lead to a change in the encroachment for variance request A. Mr. Morganroth asked Vice-Chairman Canvasser how the Board could best approach that issue.

Vice-Chairman Canvasser recommended that the Board discuss and vote on the present motion with variance request B to be addressed subsequent to the vote.

Mr. Rodriguez said he would also support the motion, agreeing with Mr. Miller's stated reasons.

Vice-Chairman Canvasser said he would also support the motion for the reasons previously stated.

Motion carried, 6-0.

ROLL CALL VOTE

Yeas: Lilley, Morganroth, Canvasser, Miller, Rodriguez, Reddy

Nays: None

Motion by Mr. Miller

Seconded by Mr. Rodriguez with regard to Appeal 20-28, B. Chapter 126, Article 4, Section 4.75(A)(1) of the Zoning Ordinance requires that a private, attached, single-family residential garages must be setback a minimum 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 2.33 feet in front of the furthest façade. Therefore a variance of 7.33 feet is being requested.

Mr. Miller said he was more conflicted on variance request B. He said he was moving to approve the variance request and to tie it to the plans as submitted. He said the unique lot affected this motion as well, and noted that having the garage door facing the side was better than having the garage door facing the front. Mr. Miller explained that the garage door did not protrude as far forward as other elements of the proposed home, which he said demonstrated an attempt at mitigation of the request. He explained that the site narrows at that point and that the garage was placed in the most appropriate location. He said the location and orientation of the garage would do substantial justice to the neighborhood.

Mr. Morganroth said that while he respected Mr. Miller's perspectives he would not be able to support an approval of variance request B. He said there was opportunity for getting more ordinance-compliant garage space on the lot relative to what was being proposed, and said there was even opportunity for ordinance-compliant connected garage space. He said the garage was too far forward and noted that either an oversized, connected single garage or an unconnected double garage would be possible.

Mr. Reddy said he agreed with Mr. Morganroth. Mr. Reddy said it might be more appropriate to grant a variance for five feet into the rear setback instead of the variance for the front setback.

Motion carried, 4-2.

ROLL CALL VOTE

Yeas: Lilley, Canvasser, Miller, Rodriguez

Nays: Morganroth, Reddy

**2) 280 Millrace
Appeal 20-31**

Assistant Building Official Zielke presented the item, explaining that the owner of the property known as 280 Millrace was requesting the following variance to renovate an existing non-conforming home:

A. Chapter 126, Article 4, Section 4.61(A)(2) of the Zoning Ordinance requires that a corner lot shall have a minimum setback from the side street of 15.00 feet for permitted attached garages with vehicle entry doors facing the side street. The proposed is 8.20 feet, therefore a variance is 6.80 feet is being requested.

Assistant Building Official Zielke noted the applicant proposed to renovate the existing non-conforming house on this irregular shaped corner lot. This property is zoned R1 – Single Family Residential.

Michael and Lisabeth Coakley, owners, Glenda Meads, architect, and David Ganz, builder, were present on behalf of the petition. Mr. Coakley reviewed the letter, which was included in the evening's agenda packet, explaining their reasons for the variance request.

Akhil Gulati said he lived four houses down from the petitioner and said he wanted to voice his support for the petitioner's variance request. Dr. Gulati said that the home is located adjacent to a highly visible intersection and said the part of the lot visible from the street seemed to have a surplus of asphalt and concrete. He said the excess of hardscaping on the lot made the lot seem inappropriate for the neighborhood. Dr. Gulati said it would be beneficial for the neighborhood for this lot to have increased green space and said he was optimistic about what it could do for the neighborhood.

Brian Hock, owner of 251 Baldwin, said he concurred with Dr. Gulati that allowing this variance request would result in a significant improvement to the lot and the neighborhood. He explained that someone driving west on Randall Court right now would be able to see directly into the petitioners' garage, and explained that moving the garage to the north would make the lot substantially more visually appealing. He explained that if one were driving southeast on Lakeside they would not be able to see the garage given the setbacks of the lot.

Motion by Mr. Rodriguez

Seconded by Mr. Morganroth with regard to Appeal 20-31, A. Chapter 126, Article 4, Section 4.61(A)(2) of the Zoning Ordinance requires that a corner lot shall have a minimum setback from the side street of 15.00 feet for permitted attached garages with vehicle entry doors facing the side street. The proposed is 8.20 feet, therefore a variance is 6.80 feet is being requested.

Mr. Rodriguez moved to approve the variance request and tied it to the plans as submitted. He said that a practical difficulty was established due to the unique circumstances of an irregular, pie-shaped corner lot. He said the variance requested was the minimum necessary as it did not seek to increase the garage size, and that granting the variance would not adversely affect the adjacent properties.

Mr. Morganroth commended the petitioners on a useful presentation. He said that the reduction of impermeable surface on the lot would do substantial justice both to the petitioners and the neighborhood. He concurred with Mr. Rodriguez that it was also positive that the variance did not seek to increase the non-conformity.

Vice-Chairman Canvasser said he would also support the motion. He said he thought there was some room for disagreement as to whether the issue was self-created or not, but said he understood why the petitioners were seeking the variance and said it would do substantial justice to the neighbors. He said there was no question that the property presented some unique challenges.

Motion carried, 6-0.

ROLL CALL VOTE

Yeas: Lilley, Morganroth, Canvasser, Miller, Rodriguez, Reddy
Nays: None

**3) 545 W. Brown
Appeal 20-32**

Assistant Building Official Zielke presented the item, explaining that the owner of the property known as 545 W. Brown was requesting the following variances to construct a second floor addition on the rear of an existing non-conforming home:

A. Chapter 126, Article 2, Section 2.10 of the Zoning Ordinance requires that the minimum rear yard setback is to be 30.00 feet. The proposed is 13.56 feet. Therefore a variance of 16.44 feet is being requested.

B. Chapter 126, Article 2, Section 2.10 of the Zoning Ordinance requires that the minimum combined front and rear setback is to be 55.00 feet. The proposed is 30.35 feet. Therefore a variance of 24.65 feet is being requested.

Assistant Building Official Zielke noted the appellant proposed to construct a second floor addition to the existing non-conforming home. This home is a single-family residence, which is allowed in the zone, by following the R3 zoning requirements. There was a variance was granted at this location in 1981 (see attached minutes). The appellants approval was granted at the planning board meeting that took place on July 8, 2020. This property is zoned R8 – Attached Single-Family Residential.

Larry and Janine Brycz, owners of 545 W. Brown, reviewed their letter to the BZA which described why they were seeking these two variances. The letter was included in the evening's agenda packet.

Motion by Mr. Lilley

Seconded by Mr. Reddy with regard to Appeal 20-32, A. Chapter 126, Article 2, Section 2.10 of the Zoning Ordinance requires that the minimum rear yard setback is to be 30.00 feet. The proposed is 13.56 feet. Therefore a variance of 16.44 feet is being requested. B. Chapter 126, Article 2, Section 2.10 of the Zoning Ordinance requires that the minimum combined front and rear setback is to be 55.00 feet. The proposed is 30.35 feet. Therefore a variance of 24.65 feet is being requested.

Mr. Lilley moved to approve both variance requests and tied them to the plans as submitted. He noted that the addition would be built well within the roofline of the current garage.

Mr. Reddy said the property had unique circumstances. He explained that the plans remain within the existing non-conformity and do not seek to increase it. He said for those reasons he thought the motion should be approved.

Mr. Miller said he was also supportive of the motion. He said that the house to the south, which was most likely to be impacted by these changes, only had its garage facing the addition. He said this meant there would be minimal impact to the other homes in the neighborhood.

Motion carried, 6-0.

ROLL CALL VOTE

Yeas: Lilley, Morganroth, Canvasser, Miller, Rodriguez, Reddy

Nays: None

**4) 593 S. Glenhurst
Appeal 20-33**

Assistant Building Official Zielke presented the item, explaining that the owner of the property known as 593 S. Glenhurst was requesting the following variance for two basement window wells in the required side yard:

A. Chapter 126, Article 4, Section 4.30 C(4) of the Zoning Ordinance permits that window wells are allowed to project into the required side yard setback a maximum of 3.00 feet measured from the inside of the window opening and shall not exceed 6.00 feet in width. The constructed is 8.33 feet in width. Therefore a variance of 2.33 feet is being requested.

B. Chapter 126, Article 4, Section 4.30 C(4) of the Zoning Ordinance permits that window wells are allowed to project into the required side yard setback a maximum of 3.00 feet measured from the inside of the window opening and shall not exceed 6.00 feet in width. The constructed is 7.02 feet in width. Therefore a variance of 1.02 feet is being requested.

Assistant Building Official Zielke noted the applicant constructed two window wells on the side yard that exceeded the width per the ordinance on a new home that was constructed in 2019. This property is zoned R1 – Single Family Residential.

Rick Wiand, builder, was present on behalf of the petition. He reviewed the letter to the BZA, as included in the evening's agenda packet, outlining the reasons for the variance request.

Building Official Johnson clarified that when the plans were reviewed by the Building Department originally the window wells were in compliance. He said they became non-compliant when the home shifted towards the side street.

Mr. Wiand stated that prior to starting construction his team submitted a revised site plan that showed the window wells in their present location. He emphasized for the BZA that his team genuinely believed they were in compliance with the ordinance. He said that if the issue had been noticed in review his firm would have revised the window well and the number of windows to meet the requirements.

Mr. Morganroth said that in situations where a variance is being requested after the home or feature in question is built he considers whether he would have approved the variance before the work was done. He said that he recognized the cost and challenges that exist to return a building to code, but said that cost is not a factor the BZA members are permitted to consider when making their decisions. He said that granting these oversized window wells in the sideyard setback could create a precedent for future builders and homeowners to expect that variances would be granted for other non-ordinance compliant features after the fact.

In reply to Mr. Reddy, Mr. Wiand confirmed that the error regarding the window wells was strictly done by his firm and that the homeowners did not become aware of the issue until several months after moving into the home.

Mr. Reddy noted a variance could be granted when the need for the variance did not arise from any action performed by the petitioner. He noted that the homeowners were the petitioner in this case, and not Mr. Wiand's firm.

Motion by Mr. Miller

Seconded by Mr. Rodriguez with regard to Appeal 20-33, A. Chapter 126, Article 4, Section 4.30 C(4) of the Zoning Ordinance permits that window wells are allowed to project into the required side yard setback a maximum of 3.00 feet measured from the inside of the window opening and shall not exceed 6.00 feet in width. The constructed is 8.33 feet in width. Therefore a variance of 2.33 feet is being requested. B. Chapter 126, Article 4, Section 4.30 C(4) of the Zoning Ordinance permits that window wells are allowed to project into the required side yard setback a maximum of 3.00 feet measured from the inside of the window opening and shall not exceed 6.00 feet in width. The constructed is 7.02 feet in width. Therefore a variance of 1.02 feet is being requested.

Mr. Miller said this case had very unusual circumstances and because of that should not be interpreted as setting any kind of precedent for future cases. He said that if it were not for the sequence of events between the City and the builder that he would not be moving to approve the variances. He noted that the mistake was unintentional on the builder's part. He said withholding the variance would be unnecessarily burdensome in light of the fact that the builder made a good faith effort to build everything up to code. Mr. Miller said these things almost never happen in Birmingham because the City and builders operating within it are usually very careful. He said that for all these reasons, he would move to approve the variance requests and to tie them to the window wells as built.

Mr. Morganroth recalled a previous case where a petitioner had a fence installed that ended up being taller than City ordinance allowed. Mr. Morganroth explained that in that case the Board found that the issue was not about blaming the contractor who installed it, or the homeowner, but was simply about the fact that the fence was too tall. He noted that the BZA instructed the homeowner in that case to take the fence down. Mr. Morganroth said this matter was somewhat self-created because the error

should have been caught. He said for these reasons he could not support the motion as presented.

Mr. Rodriguez stated that he appreciated Mr. Morganroth's comments and reiterated that in no way should this granting of variances in this case be seen as constituting a precedent for future cases. Mr. Rodriguez said that withholding these variances would punish the homeowner who was not part of the process in which the error was made. He noted that, in addition, the petitioner could even theoretically add more window wells to the home as long as the window wells were in compliance with the ordinance. Mr. Rodriguez said that given this particular combination of facts, and the fact that the owner would be punished for something they had no part in, he thought the variances should be granted.

Vice-Chairman Canvasser said he found this case challenging since for the builders the matter was arguably self-created but for the homeowners the matter was arguably not self-created. He said he was having a hard time finding a reason to punish the homeowner by putting them through the process of having their window wells removed and filled in when they had no part in making the error. He said he was looking for some middle ground solution ideally but was not able to find one. He said he was, as a result, leaning towards begrudging support of the motion with a strong caution to the builder to not let this happen again.

Mr. Morganroth said he wanted to point out that if the error had not been made then the owner could not have had the window wells that are now in place. He noted that the homeowner would ultimately suffer minimal damage because the cost of fixing the error would be borne by the builder. Mr. Morganroth said the Board also did not know why the ordinance only allows window wells to project into the required side yard setback a maximum of 3.00 feet measured from the inside of the window opening and said he did not think he was in a position to second-guess the ordinance's logic.

In reply to Vice-Chairman Canvasser, Building Official Johnson explained that the three foot projection is allowed into a required setback because it is the minimum allowable space for emergency egress. He clarified that if the projection did not go into a required setback, however, the window wells could project four feet from the home and still be in compliance with ordinance.

In reply to Mr. Morganroth, Assistant Building Official Zielke confirmed it would be possible to bring the right window well into compliance with the ordinance with not too much difficulty since it was a double section window. He explained that the window well on the left would be a little more difficult since it was a triple section window.

Vice-Chairman Canvasser asked the petitioner for a limited comment regarding the feasibility of closing in the right window well.

Mr. Wiand confirmed that it would be possible.

Mr. Miller said he understood and would still prefer to proceed with the motion as presented.

Motion carried, 5-1.

ROLL CALL VOTE

Yeas: Lilley, Canvasser, Miller, Rodriguez, Reddy

Nays: Morganroth

**5) 691 Oak
Appeal 20-34**

Assistant Building Official Zielke presented the item, explaining that the owner of the property known as 691 Oak was requesting the following variance to install a retractable awning:

A. Chapter 126, Article 4, Section 4.30 C(5) of the Zoning Ordinance allows uncovered patios to project for a maximum distance of 15.00 feet into the rear open space. The proposed is to have a retractable awning with a 15.00 feet projection into the rear open space. Therefore a variance of 15.00 feet is being requested.

Assistant Building Official Zielke noted the applicant proposed to install a retractable awning to the rear of the home that would provide shade over the patio. This home was constructed in 2019. This property is zoned R2 – Single Family Residential.

Regina Greer and Hoyt Frericks, owners, were present on behalf of the petitioner. Ms. Greer thanked the Board members for their volunteer service on the Board. Ms. Greer reviewed the letter to the BZA, as included in the evening's agenda packet, outlining the reasons for the variance request.

In reply to Mr. Morganroth, Ms. Greer explained the retractable awning would be bolted onto the house and could be removed by a future resident if they so desired.

In reply to Ms. Greer, Mr. Morganroth explained the City prohibits structure in the allowed setback. He explained the issue is not one of whether shade is permissible in the rear of the home.

Ms. Greer said she did not see her request as being one of structure given the minimal size of the retractable awning proposed. She also said she thought the prohibition was unreasonable.

Vice-Chairman Canvasser said Ms. Greer should absolutely feel welcome to broach her concerns regarding the ordinance with the City Commission because the Commission has the power to act on her concerns should they see fit, while the BZA unfortunately does not.

In reply to Mr. Miller, Building Official Johnson confirmed that if a mechanism for creating shade was not attached to the house and its frame did not protrude into the rear yard setback it would be permissible under the ordinance.

Motion by Mr. Morganroth

Seconded by Mr. Lilley with regard to Appeal 20-34, A. Chapter 126, Article 4, Section 4.30 C(5) of the Zoning Ordinance allows uncovered patios to project for a maximum distance of 15.00 feet into the rear open space. The proposed is to have a retractable awning with a 15.00 feet projection into the rear open space. Therefore a variance of 15.00 feet is being requested.

Mr. Morganroth said he wanted it on the record that he thought the Commission should look at this matter as a separate item. He said that if a structure which is permanent falls within the building envelope it was possible that the temporary opening of the structure into the rear yard setback should be permitted.

Mr. Morganroth then moved to approve the variance as requested. He said the circumstances of this case were unique and that allowing the variance would do substantial justice to the petitioner and the neighbors. He noted that if the petitioner were to put up four umbrellas it would cover the same amount of space in the rear of the home and would be significantly less attractive. Mr. Morganroth observed that when closed the structure does not go into the rear yard setback, and said that since the structure could be removed from the home it was a temporary, not a permanent, structure.

Mr. Lilley said he agreed with Mr. Morganroth, both in that the City Commission should consider modifying the relevant ordinance and in his reasons for moving to grant the variance.

Vice-Chairman Canvasser said he could not vote to support the motion. He said that while he agreed the ordinance should be recommended to the City Commission for review, he did not feel it appropriate to go around the City's current definitions of covered patios and structures. Vice-Chairman Canvasser noted that although they may not be as attractive or functional there are options for patio furniture that would accomplish the petitioner's goals and not run afoul of the ordinance. He said that he felt the issue was self-created and that there was no unique circumstances to the property that would merit the variance.

Mr. Miller said he would support the motion because the ordinance does not address retractable awnings specifically and because the more permanent part of the structure remains within the building envelope when closed.

Motion carried, 5-1.

ROLL CALL VOTE

Yeas: Morganroth, Lilley, Miller, Rodriguez, Reddy

Nays: Canvasser

T# 07-39-20

5. CORRESPONDENCE (included in agenda)

T# 07-40-20

6. GENERAL BUSINESS

T# 07-41-20

7. OPEN TO THE PUBLIC FOR MATTERS NOT ON THE AGENDA

T# 07-42-20

8. ADJOURNMENT

Motion by Mr. Morganroth

Seconded by Mr. Lilley to adjourn the July 14, 2020 BZA meeting at 9:41 p.m.

Motion carried, 6-0.

ROLL CALL VOTE

Yeas: Morganroth, Canvasser, Lilley, Miller, Rodriguez, Reddy

Nays: None



Bruce R. Johnson, Building Official