

**BIRMINGHAM BOARD OF ZONING APPEALS PROCEEDINGS
TUESDAY, APRIL 9, 2013**

Commission Room of the Municipal Building
151 Martin, Birmingham, Michigan

Minutes of the regular meeting of the City of Birmingham Board of Zoning Appeals (“BZA”) held on Tuesday, April 9, 2013. Chairman Charles Lillie convened the meeting at 8 p.m.

Present: Chairman Charles Lillie; Board Members Thomas Hughes, Jeffery Jones, Randolph Judd, Peter Lyon, John Miller; Alternate Board Member Kevin Hart

Absent: Board Member David Conlin; Alternate Board Member Cynthia Grove

Administration: Matthew Baka, Sr. Planner
Bruce Johnson, Building Official
Carole Salutes, Recording Secretary
Scott Worthington, Building Inspector

The chairman welcomed everyone and explained the BZA procedure to the audience. Additionally, he noted that the members of the Zoning Board are appointed by the City Commission and are volunteers. They 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. Also, appeals are heard by the board as far as interpretations or rulings. There are no interpretations and/or use variances called for this evening. Four affirmative votes are required to reverse an interpretation or ruling.

04-11-13

APPROVAL OF THE MINUTES OF THE BZA MEETING OF MARCH 12, 2013

Mr. Jones:

Page 6 - Third paragraph, replace “besiege” with “beseech.”

Motion by Mr. Jones

Seconded by Mr. Miller to approve the Minutes of the BZA meeting of March 12, 2013 with the change.

Motion carried, 7-0.

VOICE VOTE

Yeas: Jones, Miller, Hart, Hughes, Judd, Lillie, Lyon

Nays: None

Absent: Conlin

04-12-13

**2329 FAIRWAY Dr.
(Appeal 13-05)**

Vice-Chairman Judd took over as chairman for this appeal only, as Chairman Lillie recused himself.

The owners of the property known as 2329 Fairway request the following variances to construct an addition:

- A. Chapter 26, Article 2, Section 2.06 requires a front setback of 36 ft., with 36.1 ft. existing and 30.2 ft. proposed; therefore, a variance of 5.8 ft. is requested.
- B. Chapter 26, Article 2, Section 2.06 requires a total side yard setback of 20 ft., with 19.2 ft. existing and proposed; therefore, a variance of .8 ft. is requested.

This property is zoned R-1 Single-Family Residential.

Five letters have been received expressing no objection to the variance requests.

Mr. Worthington pointed out they measured the width of the lot on the angle because the house is not parallel to the front property line.

It was determined that only three addresses were counted in the average for front setback.

Ms. Jane Bowman, the property owner, said this is a two-bedroom, two-bath ranch. They wish to remodel/expand the existing front bedroom by increasing the closet space and adding a private bath. This will allow the current hall bath to be utilized as a powder room for guests. Additionally, they would like to upgrade the curb appeal to reflect the quality and detail of the recent sunroom addition at the rear that was added in 2012. She further noted that the existing house is non-conforming because the garage projects 18 ft. 4 in. in front of the principal building. The proposed addition will reduce this non-conformance by 10 ft. to 8 ft. 4 in.

The combination of the uniqueness and the shape of the property, the angle of the street, and orientation of the house in relation to the property and street result in their hardship in meeting the Zoning Ordinance. The five home owners closest to them have signed written consent for the variances. They feel the improvements will enhance

both the house and the neighborhood and result in substantial justice to the property owner, the neighbors, and the general public.

Vice-Chairman Judd inquired why projecting into the front open space this isn't a self-created condition.

Mr. Mark Rozek, Mrozek Architecture, said that with this proposal they are decreasing the nonconformity of the garage to the house by bringing the front of the house closer to the projected garage. Vice-Chairman Judd observed they are creating a further massing in the front yard. Mr. Rozek noted they looked at other alternatives to expanding into the front setback. In response to Mr. Lyon, Mr. Rozek explained they cannot build in the back because the rear of the property has recently been remodeled. He further noted their hardship is that the front of the house is not parallel to the street and the setback line forces a step back. Mr. Lyon did not think there is any right to have a third bathroom.

Mr. Miller explained several devices that would add additional square footage without expanding the footprint of the house. Mr. Rozek said their decision was made partially on the aesthetics of the house and to provide curb appeal.

No one from the audience wished to comment at 8:23 p.m.

Motion by Mr. Miller

Seconded by Mr. Lyon with respect to 2329 Fairway Dr. to deny the request for the variances due to the fact he believes this is a self-imposed difficulty. He doesn't think it would unreasonably prevent the petitioner from still using the property as it is intended and as he would prefer to use it. He doesn't think it would do substantial justice to the neighborhood, and he doesn't believe that conformity is really causing an unnecessary burden in this case.

Mr. Jones indicated he will support the motion because he has not heard enough about the uniqueness of the property that would permit any type of structure not in conformity with the ordinances. He believes the applicant could have built in the back and it is a question of their personal desires. The board cannot grant a variance if it doesn't meet the four criteria for variances.

Mr. Lyon agreed it is not unduly burdensome for the applicant to comply. This goes way far into the front setback with too many alternatives possible that were rejected by the appellant. Therefore, he will support the motion.

Motion to deny carried, 6-0.

ROLLCALL VOTE

Yeas: Miller, Lyon, Hughes, Jones, Judd, Hart

Nays: None

Recused: Lillie

Absent: Conlin

04-13-13

**1164 CHAPIN
(Appeal 13-06)**

The owner of the property known as 1164 Chapin is requesting the following variances to construct a new principal structure:

- A. Chapter 26, Article 4, Section 4.69 requires a minimum of 14 ft. between principal structures, with 10.3 ft. proposed (west side); therefore, a variance of 3.7 ft. is requested.
- B. Chapter 26, Article 4, Section 4.69 requires a minimum of 14 ft. between principal structures, with 13.87 ft. proposed (east side); therefore, a variance of .13 ft. is requested.

This property is zoned R-3 Single-Family Residential.

One letter from a neighbor has been received in opposition to the variances.

Mr. Worthington advised that the neighboring house to the east is 3.4 ft. off the property line and the neighboring house to the west is 5.1 ft. off the property line. The applicant meets all their requirements on the property itself, but they have problems on both sides with the distance between houses.

Mr. Judd noted the same problems keep recurring in these neighborhoods.

Mr. Jones stated this is the 9-5, 9-5, 5-9 problem with driveways. It was discussed that the applicant would be non-conforming whether they flip the house or keep it the same. Mr. Worthington felt their thought process was to keep the driveway on the side where it is closest to the property line in order to get more space. That was the consensus between the appellant and the City.

Mr. Jim Vervisch, the homeowner, said placement of the driveway allows one to back out of the driveway and into the driveway across the street rather than having them staggered. Flipping the house would put hindrance on the house to the east. He addressed correspondence from a neighbor that stated she gets more and more water in her backyard with every new home that is built. He proposes to add a catch basin in the corner of his lot on her side which should alleviate any water problems. The current home is 1.7 ft. closer to the western property line than his proposed home, which effectively improves the circumstance.

No one in the audience wished to comment on this appeal at 8:38 p.m.

Motion by Mr. Lyon

Seconded by Mr. Jones in regard to Appeal 13-06, 1164 Chapin, to approve the variances as advertised. The appellant has shown that strict compliance would be unduly burdensome in this case. This is our proverbial 9-5, 9-5, 5-9 setup where somebody's driveway is the odd man out. He also notes that the appellant has done some to reduce the required variance by locating the driveway appropriately. He further notes that the properties adjacent appear to be certainly non-conforming on one side and probably non-conforming on the other side, further increasing the need for a variance. Additionally, the house is a little over 24 ft. wide. With a 14 ft. setback that would make 26 ft. The appellant has only asked for 24.5 ft. Therefore, he has done something to minimize the variance.

We have shown that about a 24 to 25 ft. house on these lots is about the smallest for a livable, modern house. He also notes that it does substantial justice to the surrounding areas and it does not appear to be self-created at all. The motion is tied to the plans as presented.

Mr. Miller added that both minimum setbacks have been exceeded and that shows restraint and good faith by the owner.

Mr. Jones said he relies on City staff to ensure this construction will not flood the neighbor's property.

Motion carried, 7-0.

ROLLCALL VOTE

Yeas: Lyon, Jones, Hart, Hughes, Judd, Lillie, Miller

Nays: None

Absent: Conlin

04-14-13

**1400 SMITH
(Appeal 13-07)**

The owners of the property known as 1400 Smith request the following variances to construct a new principal structure:

- A. Chapter 27, Article 4, Section 4.69 requires a minimum of 14 ft. between principal structures with 13.5 ft. proposed (west side); therefore, a variance of .5 ft. is requested.
- B. Chapter 26, Article 4, Section 4.69 requires a minimum of 14 between principal structures, with 8.9 ft. proposed (east side); therefore, a variance of 5.1 ft. is requested.

This property is zoned R-3 Single-Family Residential.

Mr. Worthington observed this appeal is very similar to the case that was just heard. The petitioner has met the setbacks on their lot, but doesn't meet the distance from the neighboring properties. The houses on each side are both non-conforming.

Mr. Rick Merlini, the owner of the property, explained he is not able to comply with the requirement of 14 ft. between homes on either side because of existing non-conforming homes on each side. He believes that this condition creates a hardship on his property. He has tried to minimize the variances by reducing the footprint of the house to 24 ft. 10 in. Also, he increased the side yard to 5 ft. 6 in. by decreasing the driveway side down to 9 ft. 6 in. Normally a 10 ft. driveway is standard.

There was no one in the audience who wished to comment on this appeal at 8:45 p.m.

Motion by Mr. Miller

Seconded by Mr. Lyon to approve Appeal 13-07 at 1400 Smith. It appears that the proposed house is kind of squeezed from both sides in this case, with less than a 4 ft. setback from the existing house on either side. He believes that would render conformity unnecessarily burdensome. It is due to the unique circumstances of the adjacent properties. This problem, he believes, is not self-created and the house itself and the way it is positioned would do substantial justice to the property owners in the area. The motion is tied to the plans presented.

Motion carried, 7-0.

ROLLCALL VOTE

Yeas: Miller, Lyon, Hart, Hughes, Jones, Judd, Lillie

Nays: None

Absent: Conlin

04-15-13

**1930 HAZEL
(Appeal 13-08)**

The owners of the property known as 1930 Hazel request the following variance to construct a second-floor addition:

- A. Chapter 26, Article 2, Section 2.10 requires a minimum side yard setback of 5 ft., with 4.48 ft. existing and proposed; therefore, a variance of .52 ft. is requested.**

This property is zoned R-3 Single-Family Residential.

Mr. Worthington advised that the project is to demolish the existing second level (attic) and existing roof and to construct a new second level. The proposed addition does not add any footprint to the existing structure.

Mr. Imad Potres of Scope Data, LLC spoke to represent the homeowner who wants to build a nice house to match all of the existing homes in the neighborhood.

There was no one in the audience who wanted to comment on this appeal at 8:50 p.m.

Motion by Mr. Judd

Seconded by Mr. Jones in regard to 1930 Hazel, Appeal 13-08, to approve the variance requested from the requirement of Chapter 26, Article 2, Section 2.10 dealing with the minimum side yard setback. He thinks this is a wonderful solution to a problem. Unfortunately, he understands the reality that not everyone has a basement they want to keep or a house they want to keep; but to him this was absolutely wonderful.

He feels that strict compliance with the ordinance dealing with setbacks would unnecessarily prevent the property owner from using the property for a permitted use. He thinks to grant this variance is to do substantial justice to the property owner and to adjacent property owners. He feels the plight of the owner is a unique way of solving and mitigating the problem, and mitigation is always big with this board. He does not feel this problem is self-created. For that reason he would move to approve the appeal and tie the motion to the plans submitted.

Mr. Jones observed the requested variance is about as minimal as one variance could be.

Motion carried, 7-0.

ROLLCALL VOTE

Yeas: Judd, Jones, Hart, Hughes, Lillie, Lyon, Miller

Nays: None

Absent: Conlin

04-16-13

**1051-1077 N. Old Woodward Ave.
Birmingham Ct. Condominiums
(Appeal 13-09)**

The owner of the property known as 1051-1077 N. Old Woodward Ave. is requesting the following dimensional variance to permit a 6 ft. fence in the front open space:

The maximum height allowed for a fence in the front yard open space is 3 ft.; therefore, a variance of 3 ft. is requested.

This property is zoned R-6 Multi-Family Residential.

One letter has been received expressing opposition to the variance.

Mr. Baka explained the applicant is an R-6 multi-family development on N. Old Woodward Ave. They have a 3 ft. fence on the N. Old Woodward Ave. property line. The rear of some of the buildings faces N. Old Woodward Ave. and they are requesting to build a 6 ft. fence in place of the existing 3 ft. fence in order to preserve their privacy and safety. In response to Mr. Jones, Mr. Baka indicated there is substantial existing landscaping. He perceives the practical difficulty to be that the back of the units along with their decks face N. Old Woodward Ave. They currently meet the required setback to the fence.

Ms. Sherry Gershenson, one of the condominium association board members, spoke. She related that some arborvitae were planted about a year ago; however they didn't survive because they are in shade. The decks that back up of N. Old Woodward Ave. are open for viewing from the sidewalk. The Mobil Gas Station is open 24 hours and it has increased traffic and parking along N. Old Woodward Ave. Further, the Birmingham Farmers Market and its expanded season has created more foot traffic along N. Old Woodward Ave. Also, there is a bus stop right outside on the sidewalk. They believe the aesthetics of the area and the safety of the residents would be much improved by the addition of a 6 ft. privacy fence.

Mr. Jones received confirmation from Ms. Gershenson that there are three board members and all were present. The board feels it has the authority under the Master Deed to act on this proposal regarding general common elements. Chairman Lillie was interested in seeing the Master Deed to determine what are general common elements and what are limited common elements.

Mr. Lyon suggested they could address the privacy issue by putting a fence on the decks. Ms. Gershenson said one of the benefits of having a higher fence constructed on the same line is that they can keep the yard.

Chairman Lillie opened discussion to the public at 9:16 p.m.

Mr. Anthony Cook, a condominium association board member, said he owns one of the four units affected. Since the demise of some of the foliage, there has been an increase in police reports about automobile break-ins and suspicious persons looking into windows. A 6 ft. fence would reduce access to the condo units and eliminate the site lines into windows.

Ms. Patty Patche said she lives in one of the four affected units. She is a single mom with a daughter. As people are lined up at the bus stop they look into her windows. When she moved in there were arborvitae but they are no longer there. The salt from the street gets into their root system and kills them.

Ms. Ida Rea said the arborvitae do not survive because they need sun. Canadian hemlocks do well in the shade, but they are costly. The right trees would have provided a lot of privacy. Birmingham is a walkable city and the Farmers Market is not harming their property, and neither is Tim Horton's. Any litter that is around comes from all of the other condos, including theirs, but not from Tim Horton's or the Farmers' Market.

It was concluded there is some disagreement among the condo association members as to whether they want the 6 ft. wall or not. Mr. Jones noted the Master Deed may give the Board of Directors the authority to control the common elements. If the condo owners disagree, their recourse is to vote for different board members at the annual meeting.

Mr. Miller made a motion with respect to 1051-1077 N. Old Woodward Ave., Birmingham Ct. Condominiums, Appeal 13-09, to approve the request with respect to the height of the fence. He believes this is not a self-created problem. His motion did not receive a second.

Motion by Mr. Jones

Seconded by Mr. Judd to deny the variance request for 1051-1077 N. Old Woodward Ave., Birmingham Ct. Condominiums, Appeal 13-09. The petitioner has not shown that strict compliance with the Ordinance would somehow render the property unusable and/or a detriment to the rest of the area. The board has discussed as it always does ameliorative matters as to how one would attempt to do certain things. In fact, the board has had testimony that says when the arborvitae or foliage was there it was sufficient to them for their purposes.

The request is based on understandable reasons, but not within the confines of how the board would grant a variance. Therefore, he thinks that to grant the variance would not do substantial justice to the area. He believes there is little or nothing unique about this property as it relates to a fence along a front yard within a multi-family area. He is sorry that there may be grandfathered in areas adjacent to them that have a higher fence, but he thinks there are other ways to go about it, rather than to come and ask this board for a variance, when there is an Ordinance that says, given these circumstances, there has to be a 3 ft. fence instead of a 6 ft. For those reasons, Mr. Jones would move to deny.

Mr. Lyon indicated his support for the variance. The testimony indicates there are alternative ways to address the concerns of both privacy and/or security. Privacy concerns could be addressed by fencing the deck.

Mr. Judd agreed with the assessment by Ms. Ida Rea that Tim Horton's and the Farmer's Market do not play a role in this. Therefore, without something that is substantive and verifiable, he supports the motion.

Mr. Jones explained he made the motion because the requested variance doesn't meet the standards laid out under the Ordinance.

Mr. Hart said he can't make an intelligent choice because the graphics provided do not indicate where the fence is situated in relation to the property line. If it were 25 ft. back, they could build the 6 ft. fence. Further, he doesn't feel that the condominium association is represented effectively here. Therefore, he is reluctant to approve a variance.

Mr. Jones clarified that he feels the request for a variance is self-created.

Motion to deny carried, 4-3.

ROLLCALL VOTE

Yeas: Jones, Judd, Lillie, Lyon

Nays: Hart, Hughes, Miller

Absent: Conlin

04-17-13

**33779 Woodward Ave.
(Appeal 13-10)**

The owner of 33779 Woodward Ave. is requesting the following dimensional variances to permit a screenwall in the front setback and a parking variance for up to five spaces:

- A. A dimensional variance to construct a screenwall 23 ft. into the front yard setback. When abutting the side line of property zoned residential, a parking lot screenwall is not permitted to extend into the front setback area of the abutting residential district, which in this case is 25 ft.; therefore, a 23 ft. variance is requested.
- B. A dimensional variance for up to five parking spaces. The proposed uses on this site require 45 off-street parking spaces to be provided. If variance A is granted then the site as proposed provides 44 spaces; therefore, a variance of one parking space is requested. If variance A is denied then the existing site provides 40 spaces; therefore, a variance of five spaces is requested.

This property is zoned B-2B General Business.

Mr. Baka explained that at the request of the Planning Board the petitioner moved the screenwall closer to the front setback to provide four extra parking spaces and try to mitigate some of the parking crunch in that area. They are asking to go north/south with their parking rather than extend further into the neighborhood. It was noted that every time a tenant and use changes, the petitioner could be in for a new parking variance if the parking requirements are not met.

Mr. Judd was concerned that the proposed wall goes all the way to the sidewalk.

Mr. Roman Bonislowski, Ron & Roman Architects, spoke for the petitioner and noted two issues:

- Leasing – balancing out the parking formula with the tenants;
- Practical difficulty – the success of the Pancake House presents a parking challenge in the area.

Mr. Bonislowski thinks the area needs the parking. They can't even fulfill the City's desire for the types of businesses that they want to see and the presence they want to see along Woodward Ave. because these areas are so challenged. Meanwhile they are just trying to work it out so that everyone can park and enjoy the property.

Mr. Duane Barbat, B-3 Investments, the property owner, noted that Jersey Mike's business is 75 percent carry-out and their peak period is different than that of the Pancake House.

Mr. Bonislowski explained they have thought of a number of parking alternatives and this is the best they can come up with.

Mr. Lyon admitted he is struggling with the wall right up against residential with no front setback on the street. Mr. Bonislowski said it is 2 ft. back.

Motion by Mr. Lyon

Seconded by Mr. Jones in regard to 33779 Woodward Ave., Appeal 13-10, to deny variance A, a dimensional variance to construct a screenwall 23 ft. into the front yard setback. He cannot believe the appellant has proven it would be unduly burdensome to comply with the existing zoning rules and he believes this is self-created in that they are trying to construct a parking lot in a residential area and expand that parking lot into the front setback. Therefore he would deny variance A.

Chairman Lillie indicated his support on the basis that he thinks to grant a variance would be setting a very bad precedent and he doesn't feel the petitioner has really shown a practical difficulty.

Mr. Miller commented that without the guidance of the Planning Dept. it is difficult to determine where they stand on this issue. Therefore he will support the motion to deny.

Mr. Lyon thought personally that the parking lot could be made more accessible by setting back the wall 25 ft. at the west end, and potentially curving or angling that to make the last parking spot more accessible and allow an amount of front yard open space. That would require a much lesser variance.

Motion carried, 7-0.

ROLLCALL VOTE

Yeas: Lyon, Jones, Hart, Hughes, Judd, Lillie, Miller
Nays: None
Absent: Conlin

Motion by Mr. Judd

Seconded by Mr. Lyon with respect to 33779 Woodward Ave., Appeal 13-10, variance B, to grant a dimensional variance for up to five parking spaces.

Mr. Judd feels the petitioner has established a practical difficulty and that strict compliance with the Ordinance would be unduly burdensome. He thinks that substantial justice would be done to the petitioner and the surrounding property owners. He certainly feels that the plight of the owner is due to the unique circumstances of the property (assuming that the Pancake House is a unique circumstance) and that the problem is not self-created. The motion is tied to the plans submitted.

Chairman Lillie indicated his support for the motion on the basis that the information presented indicates the two restaurants in the area have their heavy use at different times. Therefore, he suspects they will be able to share parking.

Mr. Lyon said he supports the motion because if there is an issue with the wrong people parking, enforcement could be utilized. If the neighbors have concerns about overflow parking along the residential street, they could talk to the Police Dept. about obtaining permit parking there.

Mr. Jones supported because the petitioner has stated there will be little or no seating at Jersey Mike's restaurant.

Motion carried, 7-0.

ROLLCALL VOTE

Yeas: Judd, Lyon, Hart, Hughes, Jones, Lillie, Miller
Nays: None
Absent: Conlin

04-18-13

CORRESPONDENCE (none)

04-19-13

GENERAL BUSINESS

Board members determined that election of officers will be placed on the agenda for the next meeting.

Mr. Johnson thought the city attorney should be consulted as to who has the right to appeal in the instance of a condominium association. The board needs to know what the general common element is and then who controls it. He agreed to report back as to how that goes and then the board can talk about it.

Mr. Lyon thought that whoever comes in has to attest that they have the right to represent whoever is appealing. Add to the application that the petitioner may be asked for evidence that they are legally allowed to represent the owner(s). Mr. Jones added the only difference with a condo is there is the extra glitch as to what it is (common element, limited common element) and who controls it.

04-20-13

ADJOURNMENT

No further business being evident, the board members passed a motion to adjourn at 10:33 p.m.

Bruce R. Johnson, Building Official