

**BIRMINGHAM BOARD OF ZONING APPEALS PROCEEDINGS
TUESDAY, JULY 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, July 9, 2013. Chairman Charles Lillie convened the meeting at 8 p.m.

Present: Chairman Charles Lillie; Board Members David Conlin, Jeffery Jones, Randolph Judd, Peter Lyon, John Miller; Alternate Board Member Cynthia Grove

Absent: Board Member Thomas Hughes; Alternate Board Member Kevin Hart

Administration: Ken Cooper, Asst. Building Official
Bruce Johnson, Building Official
Carole Salutes, Recording Secretary

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 is one interpretation and/or use variance called for this evening. Four affirmative votes are required to reverse an interpretation or ruling.

T# 07-37-13

APPROVAL OF THE MINUTES OF THE BZA MEETING OF JUNE 11, 2013

Motion by Mr. Judd

Seconded by Mr. Conlin to approve the Minutes of the BZA meeting of June 11, 2013 as presented.

Motion carried, 7-0.

VOICE VOTE

Yeas: Judd, Conlin, Grove, Jones, Lillie, Lyon, Miller

Nays: None

Absent: Hughes

T# 07-38-13

**1999 HAZEL
(Appeal 13-16)**

The owner of the property known as 1999 Hazel requests the following variance:

- A. Chapter 26, Article 4, Section 4.69 C. The owner of 1999 Hazel is requesting a variance to construct a new residential structure. The Zoning Ordinance requires the distance between principal residential structures to be 14 ft. for the width of this lot. A distance of 11.01 ft. is being proposed; therefore, a variance of 2.99 ft. is being requested.

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

Mr. Cooper explained there is a home under construction on the adjacent lot to the west which is 5.5 ft. from the property line, and the owner of both of these properties is requesting this home be 5.51 ft. from the property line. The applicant has kept the house as narrow as possible on this 40 ft. lot. He pointed out the plans show a turret that is slightly taller than the main roofline; however it needs to be no higher than the roof line.

Mr. Miller commented the critical facade for this meeting is very plain and minimally drawn out on the plans. It would have been nice to have it rendered similar to the elevation facing the other direction.

Mr. Dan Lynch, the owner of 1999 and 1973 Hazel, was present. He stated it is his intention to request the least amount of variance possible for this 24.5 ft. wide house. This leaves 11 ft. between his houses and appeases the neighbor further to the west. It was noted there is a 10 ft. wide easement on the Eton side which the City has set aside for the future widening of Eton.

Mr. Judd wondered why a variance is necessary since the applicant started out with two clear lots. He was bothered by whether the applicant's problem is self-created. Mr. Lynch thought this is the best plan to make the two lots work together.

Mr. Lyon noted the applicant eased the burden on the neighbor to the west of 1973 Hazel by putting the 10 ft. driveway toward the west, thereby imposing the requirement for a variance on the lot at 1999.

No one in the audience wished to comment on this appeal at 8:25 p.m.

Motion by Mr. Miller

Seconded by Mr. Lyon with respect to Appeal 13-16, 1999 Hazel that the board should grant this variance due to the fact he believes that strict conformity to

zoning would be unnecessarily burdensome to this lot because of the cadence of Hazel, as the driveways are to the east, houses to the west. When you get down to this last lot, the 10 ft. setback has to be maintained along Eton which throws the narrower setback up to 5 ft. to the west side which is exactly how it was addressed in the plan. So, he believes the solution shown is reasonable and relieves the burden that was put on this lot by the fact of the cadence of the placement of the existing houses down the street and the new house at 1973 Hazel.

Therefore, Mr. Miller believes this would do substantial justice to the petitioner as well as the other property owners. Certainly the intent is to complete a house on this corner, which this does.

He believes it is a unique circumstance to this particular corner lot and the board has addressed issues like this certainly before. Because of the situation of the existing houses to the west, the problem is not self-created. The motion is tied to the plans that will be amended with respect to the turret.

Chairman Lillie indicated he would vote against the motion because he would prefer to see more space between the two houses.

Mr. Lyon said he will support the motion because the applicant has minimized the effect on everyone who is not an owner of the two lots. Mr. Conlin stated he will also support because someone will have to lose at the end of the 5-9, 5-9, 9-5 driveways. Also, there have been the same problems with other 40 ft. lots, so it is consistent to support this motion.

Mr. Jones stated he will support the motion. His concern is the relationship to the traffic flow and access on and off of Hazel. For that reason he would prefer to see the variance to the west rather than the east. The petitioner has ameliorated his problems in the best way he can with minimal effect on the existing homeowners other than himself.

Mr. Judd explained he will not support the motion because he doesn't like the order in which the homes were worked on and constructed. He is concerned the entire problem was self-created.

Mr. Lyon indicated his support for the motion because he feels this is the least impact on neighbors.

Mr. Jones did not believe the owner is under any obligation to come in with the two lots at the same time; nor does he think the board is in a position to say anything other than what the unique characteristics are for each individual lot.

Motion carried, 5-2.

ROLLCALL VOTE

Yeas: Miller, Lyon, Conlin, Grove, Jones

Nays: Judd, Lillie

Absent: Hughes

T# 07-39-13

**1031 E. FOURTEEN MILE RD.
(Appeal 13-18)**

The owner of the property known as 1031 E. Fourteen Mile Rd. requests the following variance for the construction of a rear addition:

- A. Chapter 26, Article 4, Section 4.69 (C). The Zoning Ordinance requires the distance between principal residential structures to be 14 ft. for the width of this lot. A distance of 10 ft. is being proposed; therefore, a variance of 4 ft. is requested.

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

Several board members were concerned because the drawings presented were lacking in detail, especially on the interior space. Mr. Cooper said the submitted plans are the least that the Building Dept. would accept. Mr. Conlin noted that without some interior detail it is not possible to tell if the applicant is asking for more than he needs.

Mr. David O'Keefe, the property owner, said the plans show a family room in the back and a master bedroom above. He wanted to proceed this evening so construction can get started. He picked the size because it is the most space he could add and still work with the property.

Mr. Cooper related that after meeting with the petitioner he agreed to build a smaller addition so he wouldn't have to ask for a 5 ft. side yard variance and also an overhang variance as in his original proposal.

Mr. O'Keefe explained his practical difficulty is that around ten years ago a variance was granted so the neighbor's house could be extended back. That variance created his distance between buildings problem. Therefore this variance request is not self-created.

Mr. Miller said he is struggling with the need for a 21.3 ft. family room. A lot of family rooms are smaller. Mr. O'Keefe stated his purpose is to maximize his return on investment and get the biggest bang for his buck. Chairman Lillie told him that financial problems are not criteria for granting a variance.

It was discussed that shifting to the east could still maintain the required 10 ft. from the applicant's detached garage and 14 ft. from the neighbor's garage. However because

of the location of a large tree it would close him off from pulling a car through to the back.

Mr. Conlin was bothered by the 21.3 in. He thought a couple of feet could be taken out of the variance request. Adding a bay on the side would not only create some interest in the room but also allow more footage without asking for a variance.

There were no comments from the audience on this appeal at 9:02 p.m.

Motion by Mr. Lyon

Seconded by Mr. Jones in regard to Appeal 13-18, 1031 E. Fourteen Mile Rd., that after serious consideration he would move to grant the appeal as advertised. He believes the appellant is faced with several issues. One is that the house to the west was granted a variance for a 5 ft. setback in spite of the fact that the appellant's house is in existing, non-conformance because it is only 3 ft. 4 in. from the side yard and it should be 5 ft. Even if it was 5 ft. the appellant would have needed a variance because of the minimum distance requirement between buildings.

The situation of the driveways both to the east and to the west (this is our classic 9-5, 9-5, 5-9 issue) someone is going to get a variance for distance between buildings or someone is going to build a very narrow building.

Mr. Lyon believes that while well intended, the ordinance for minimum distance between buildings along with the required minimum setbacks does present a problem at some point in the block. He believes the appellant is also faced with a garage and a large tree to the east that prevent moving the addition significantly to the east from where it is at.

Mr. Lyon further believes it does substantial justice to put the east wall in line with the existing east wall. Also, he believes the appellant has shown some tempering of the required setbacks by not continuing the 3 ft. 4 in. setback, but by stepping in at least 5 ft.

It does not appear to be overly massive compared to the neighborhood. It is the same height or lower than the existing houses. Therefore, he would move to approve and tie the motion to the plans presented tonight as best as possible.

Mr. Conlin said that losing a couple of feet out of the variance would do justice to the entire situation. Mr. Lyon shared those concerns; however the neighbor already got a 5 ft. variance, so why can't this person have 5 ft. as well. Also, he noted there is no parking along Fourteen Mile Rd. so the homes along there need all the driveway space they can get. Mr. Conlin thought those were good points.

Mr. Jones said he believes the petitioner has attempted to ameliorate the amount of variance request. So, despite the lack of detail in the drawings, he will still support the

motion. Mr. Miller added the tree is critical to the applicant's argument but it doesn't even show up on the plans. Also, he cannot find a compelling argument for the 21.3 ft.

Motion carried, 4-3.

ROLLCALL VOTE

Yeas: Lyon, Jones, Conlin, Grove

Nays: Judd, Lillie, Miller

Absent: Hughes

T# 07-40-13

**387 GEORGE ST.
(Appeal 13-19)**

Chapter 26, Article 4, Section AS-02-B. The owner of 387 George St. requests the following two variances to construct a new garage:

- A. The Zoning Ordinance requires the setback distance to the west property line to be 3 ft. A distance of 1.6 ft. is being proposed on the west side; therefore, a variance of 1.4 ft. is requested.
- B. The Zoning Ordinance requires the setback distance to the north property line to be 3 ft. A distance of 1.2 ft. is being proposed on the north side; therefore, a variance of 1.8 ft. is requested.

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

Mr. Cooper advised that a smaller garage was removed from the property because it was in disrepair. The new garage is about 100 sq. ft. larger than the old garage.

Mr. Miller believed it would enhance the petitioner's case if they would show substantial justice to the neighbors by creating a more handsome façade facing that direction.

Ms. Patty Keller from Kevin Hart Associates represented Mr. Nicholas Petcoff, the homeowner. They propose to maintain the existing footprint along three walls of the garage and extend it 4 ft. to 20 ft. in length. This will allow a car to park in one stall and use of the other bay for storage. The lot is 79 ft. deep and this is the only place the garage can go. The depth of the lot is their practical difficulty for requesting a dimensional variance to use the garage successfully. This is the most optimal solution asking for the most minimal variance.

The chairman invited comments from the public at 9:35 p.m.

Mr. Ned LaBelle, 888 Purdy, said his backyard backs up to the subject parcel. He is fine with what the petitioner wants to do. The design is extremely good and the garage is at the point where his lot is the most diminished.

Motion by Mr. Lyon

Seconded by Mr. Jones in regard to 387 George St., Appeal 13-19, the appellant seeks two variances under Chapter 26, Article 4, Section AS-02 B for the side setback and rear setback of an existing structure in order to replace what was an existing, non-conforming garage. He would move to grant the appeal as advertised.

He thinks there are unique circumstances with this lot, particularly the lot depth. Seventy-nine feet is rather shallow for a lot, especially the way the Zoning Ordinance is written for minimum front and rear setbacks. The second unique circumstance is the existing house. This side of it has not been modified, as we understand it, probably since it was built.

Mr. Lyon thinks this does substantial justice to the surrounding area. The design now is much more harmonious with the house. It matches the existing architecture and replaces a rather dilapidated building as we understand from the testimony.

While Mr. Lyon normally is very concerned about side setbacks, it appears the impact on the existing two lots is minimal and it is in the exact same spot where the old garage was before. For those reasons he would move to approve and tie the motion to the plans as presented.

Mr. Conlin said he will vote against the motion because he feels the petitioner can accomplish the task they are seeking to do by meeting the requirements of the Ordinance.

Chairman Lillie indicated he will also oppose the motion. The petitioner indicated that he could reduce both sides of the garage, retain the same style, and meet the side setback requirements and the garage door would be in the same position as if he were granted the variance. Chairman Lillie was concerned about having the garage so close to the lot line.

Mr. Jones said he supported the motion because the variance in his mind has minimal impact on the adjoining property in that area, it does substantial justice to the area, and it is in the same place as it had been before. The chairman answered it is in the same spot, but the massing is substantially greater. Mr. Jones replied the neighbor said he is not affected and the other property owner on one side is a substantial distance away. Therefore his perception is that would overcome whatever the increase in mass would be.

Mr. Miller indicated he will support the motion because this is a substantial improvement over the existing garage.

Mr. Lyon said he is worried that without a variance they could put something up that would not require a variance but would be aesthetically out of place. Therefore, he likes what has been proposed.

Motion failed and variance was denied.

ROLLCALL VOTE

Yeas: Lyon, Jones, Miller

Nays: Conlin, Judd, Grove, Lillie

Absent: Hughes

The board took a brief recess at 9:45 p.m.

T# 07-41-13

**USE INTERPRETATION
(Appeal 13-20)**

Mr. Johnson advised that the owner of Burn Hookah Club, Inc. is requesting an appeal of the building official's interpretation that his proposed Hookah Club is a "Tobacconist Use" and therefore is not permitted in the B-4 Zoning District.

Article 8, Section 8.01 (D) allows for an appeal of a decision of the building official. The applicant is requesting an appeal of an interpretation made by the building official that the applicant's proposed use would be a tobacconist use per the Zoning Ordinance; and therefore would not be permitted within a B-4 Zoned District. To meet the tobacco specialty exemption through the State, 75 percent of their gross annual sales each year must be from tobacco related products. That puts the hookah club into the tobacconist category. In Birmingham, the O-2, the MX and the Triangle District all permit tobacconist uses.

This case is applicable to all properties located within B-4 Zoned Districts.

Mr. Paul Weisberger spoke on behalf of Burn Hookah Club, Inc. The family behind this operation is also behind the Churchill's operation. He explained that hookah lounges have multiple hoses that people share to smoke shisha tobacco on premises in a relaxed social environment. He noted that "hookah club," "tobacconist," and "social club" are not defined in the Ordinance.

Mr. Weisberger showed a PowerPoint containing examples of different clubs and tobacconist shops and putting forth the concept that his Hookah Club resembles a social club more than a tobacconist. Therefore Burn Hookah Club would be a permitted use in the B-4 Zoning District as a social club but as a tobacconist it would not.

He concluded by saying that a hookah club, operating as a social club with a members only policy and the sale of one and only one tobacco product (shisha), for on-premises

consumption only, should not be considered a “tobacconist,” an undefined term in the Zoning Ordinance, but should rather be considered a “social club.”

Mr. Jones thought the consideration that the applicant is requesting should more properly come before the City Commission as an amendment to the Zoning Ordinance rather than before the BZA. Mr. Weisberger responded they feel there is legitimate reason to come before this board to appeal an interpretation made by the building official. Mr. Jones pointed out his argument falls in line with the lack of definitions.

Mr. Lyon said the fact they are selling tobacco makes him question why it can't be considered a tobacconist. He wonders what the social part of it is when the hookah lounge forces people to buy their product and consume it on-site. Mr. Weisberger maintained hookah lounge does not fit into the Ordinance as a tobacconist, doesn't fit at all, or it should be called a social club. Mr. Conlin pointed out that 95 percent of the income results from the sale of tobacco. Mr. Weisberger replied “social club” is an undefined term but his definition is “a gathering of people with a common interest.”

Motion by Mr. Judd

Seconded by Mr. Jones on Appeal 13-20, pursuant to Article 8, Section 8.01 (D) which allows for an appeal of a decision from the building official, the applicant is requesting an appeal of an interpretation made by the building official that the applicant's proposed use would be a tobacconist use per the Zoning Ordinance and therefore would not be permitted in the B-4 Zoning District.

Mr. Judd would move to affirm and sustain the opinion rendered by the Building Official. He feels the hookah bar that is described is commercial in nature. The service clearly fits into the definitions of retail use, dealer, and tobacconist. He also feels that the attempt to utilize the definition or term of “social club” is not applicable.

Mr. Conlin indicated he will support the motion because 90+ percent of the income from the operation is the sale of tobacco.

Mr. Lyon said he also will support the motion. He is persuaded by the fact that the prime reason to come other than socializing is to buy tobacco and that is an implicit requirement to go there; and therefore, the building official's interpretation is correct.

Mr. Jones added that a tobacconist is not prohibited in three other zoning areas of the City and therefore he will support the motion.

Mr. Miller said he will also support. He doesn't think a hookah lounge is a tobacconist, but he can't slide it over into being a social club. He, also, feels uncomfortable with taking on the responsibility of assigning it.

Motion carried, 7-0.

ROLLCALL VOTE

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

T# 07-42-13

CORRESPONDENCE (none)

T# 07-43-13

GENERAL BUSINESS

- Building Official Report: Exterior repair/improvements at 555 S. Old Woodward Ave.

Mr. Johnson explained the issue is whether the repair/improvements are considered maintenance of the building and not an expansion of a non-conforming use. The building is non-conforming because it does not meet the current height requirement. In order to accomplish the goals of eliminating water leaks, air infiltration, and to improve the building's overall appearance, this is the minimum dimension they would need to come out. The proposal is not an addition to the building; it is a new curtain wall right along side of the one that is there.

He feels this is maintenance and therefore does not require a variance. They are doing the least possible to achieve their maintenance goals and comply with the advanced Code requirements. Floor area will not be increased. Further, if the building was the right height this would be a non-issue. There is no problem with distance to the property line. It was agreed that this determination will be helpful down the road in working with other building owners.

Motion by Mr. Lyon

Seconded by Mr. Jones in regard to the building official's memorandum of July 1, 2013 with respect to the 555 S. Old Woodward Ave. renovation, he would move to confirm the interpretation of the building official that the proposed project to re-skin the exterior of the building falls under maintenance of an existing non-conformance and not expansion of an existing non-conformance. He would tie the motion as far as possible to the prints, pictures, and renderings provided by the building official tonight.

Motion carried, 7-0.

ROLLCALL VOTE

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

T# 07-44-13

ADJOURNMENT

No further business being evident, the board members passed a motion to adjourn at 11:25 p.m.

Bruce R. Johnson, Building Official