

**BIRMINGHAM BOARD OF ZONING APPEALS PROCEEDINGS**  
**TUESDAY, NOVEMBER 11, 2014**  
City Commission Room  
151 Martin Street, Birmingham, Michigan

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Minutes of the regular meeting of the City of Birmingham Board of Zoning Appeals ("BZA") held on Tuesday, November 11, 2014. Chairman Charles Lillie convened the meeting at 7:30 p.m.

**Present:** Chairman Charles Lillie; Board Members Jeffery Jones, Kevin Hart, Thomas Hughes, Randolph Judd, John Miller

**Absent:** Alternate Board Member Cynthia Grove

**Administration:** Ken Cooper, Asst. Building Official  
Jana Ecker, Planning Director  
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. There are no land use variances called for this evening. Also, appeals are heard by the board as far as interpretations or rulings. Four affirmative votes are required to reverse an interpretation or ruling. There is one interpretation on this evening's agenda.

**T# 11-57-14**

**APPROVAL OF THE MINUTES OF THE BZA MEETING OF OCTOBER 14, 2014**

Chairman Lillie: Remove Peter Lyon from the BZA roster.

**Motion by Mr. Jones**

**Seconded by Mr. Miller to approve the Minutes of the BZA meeting of October 14, 2014 as corrected.**

**Motion carried, 6-0.**

VOICE VOTE

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

Nays: None

Absent: None

**T# 10-58-14**

**1588 STANLEY  
(Appeal 14-27)**

The owners of the property known as 1588 Stanley request the following variances to renovate an existing detached garage.

- A. Article 4, Section 4.03 AS-02 (B). The Zoning Ordinance requires the setback distance to the south property line to be 3.00 ft., with 2.70 ft. existing and 2.70 ft. proposed; therefore, a variance of .30 ft. is requested.
- B. Article 4, Section 4.03 (B) of the Zoning Ordinance requires the accessory structure to be a minimum of the sum of the required side setbacks as determined in Section 4.67 (C) from a principal structure on an adjoining lot. The required setback for the proposed accessory structure on this lot is 14.00 ft. from a principal structure on the adjoining lot. The applicant is proposing 9.08 ft. Therefore, a variance of 4.92 ft. is requested.

This property is zoned R-2.

Mr. Cooper advised the existing garage was constructed in 1950 with a setback of 2.70 ft. from the south property line. The adjoining residential structure to the south was constructed in 2006 with a 33.0 ft. rear yard setback. The owner is proposing to enlarge and construct a loft area to the existing garage. The wall will be left up but the new code requires footing installation under the wall and new roof construction within the existing garage footprint. The proposed addition to the garage meets all setback and lot coverage requirements.

Mr. Miller received confirmation that the adjoining house built in 2006 met all required setbacks. A house can be constructed close to a garage, but a garage can't be built close to a house. Replying to the chairman, Mr. Cooper noted if the petitioner moved the garage to the other end of the lot, more concrete would be needed for the driveway and that would create a problem maintaining the 40 % required open space on the lot.

Mr. Frank Carnovale, Carnovale Associates Architects, spoke to represent Mr. Morisi, the property owner. The proposed addition to the garage is a second floor to the north. It is within the 3 ft. required setback and in compliance. What remains is the wall on the south side of the garage which is required to have an improved foundation below grade.

Two hardships exist that are out of the applicant's control and not self-imposed:

- An existing non-conforming south elevation of 4 in.; and
- The required 14 ft. setback from a principal structure on an adjoining lot. The Zoning Ordinance changed after the house next door was built and now they are out of conformity.

If the garage were moved to the north the required open space would become out of compliance and a car would not be able to turn into the second bay of the garage because of the existing house.

No one in the audience wished to comment on this appeal at 7:43 p.m.

**Motion by Mr. Miller**

**Seconded by Mr. Jones to support the requested variances A and B for Appeal 14-27, 1588 Stanley. He believes the problem is not self-created. The unique circumstance is the positioning of the existing houses; the one in question and the house that is located to the south. The addition to the garage is pulled to the north so it is not increasing any situation where an existing condition is made worse.**

**Mr. Miller believes that not allowing this variance would certainly render this conformity unnecessarily burdensome and would prevent the petitioner from using the property for the permitted purpose.**

**For those reasons it seems this is a very reasonable request and it certainly does substantial justice to allow this garage to be slightly modified all within the other zoning constraints, other than the ones created by the existing condition. The motion is tied to the plans as submitted.**

**Motion carried, 6-0.**

VOICE VOTE

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

Nays: None

Absent: None

**T# 11-59-14**

**1155 EMMONS  
(Appeal 14-28)**

The owners of the property known as 1155 Emmons request the following variance to allow the construction of a new house and detached garage:

- A. Article 4, Section 4.69 (C) of the Zoning Ordinance requires the distance between principal residential buildings to be 14.00 ft. for this lot, with 11.70 ft. proposed. Therefore, a variance of 2.30 ft. is requested.

This property is zoned R-3.

A letter has been received from the property owner to the west who is in favor of the variance.

Mr. Cooper explained the owner is proposing to construct a new house with a detached garage on this lot. The proposed new house and garage will meet all setbacks, height and lot coverage requirements except the distance between principal structures requirement. The existing house to the west of this lot (the side where the variance is being requested) was built in 1925 and was constructed 6.7 ft. from the property line. Normally under today's Ordinance it would be 9 ft. from the property line.

With this variance and assuming the house to the west is removed in the future, a new home is constructed and they comply with the 9 ft. setback, then there would be 14 ft. between structures. The side-by-side driveway issue could be corrected and that would correct the entire block with all the driveways on the same side.

Mr. Jones received confirmation that there has been no objection from the property owner to the east.

Mr. Fareed Mojaradi, the architect, owner, and developer of the property, noted his neighbor to the west encouraged him to request this variance. Mr. Mojaradi understands the property owner to the east has plans to develop but not occupy his property. The site to the east will not have to seek a variance if Mr. Mojaradi's, request is granted.

There were no comments from members of the audience at 7:54 p.m.

**Motion by Mr. Miller**

**Seconded by Mr. Judd to support the variance requested for Appeal 14-28, 1155 Emmons. The problem certainly is not self created. It is due to the existing misalignment of driveways down the block, which is a unique circumstance that seems like a real win-win situation for both neighbors and the property being considered here.**

**It certainly does substantial justice to both neighbors and the entire block. Conformity with the Ordinance would prevent the block from all conformity in terms of the driveway/house situation running down the block.**

**Therefore, he would support this petition and tie the motion to the plans as submitted.**

**Motion carried, 6-0.**

VOICE VOTE

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

Nays: None

Absent: None

**T# 11-60-14**

**261 E. MAPLE RD.  
(Appeal 14-29)**

Postponed.

**T# 11-61-14**

**2159 E. Lincoln  
Lincoln Birmingham Properties  
(Appeal 14-30)**

The owners of the property known as 2159 E. Lincoln request the following variance(s) from the Zoning Ordinance to allow parking contained within the first story of the building to be closer than 10 ft. of the front facade of the building.

- A. Chapter 126, Article 08, Section 8.10 (D), Appeals, allows for an appeal of the building official. The applicant is requesting an appeal of an interpretation made by the building official that when a building is allowed to be placed a distance from the frontage line in the MX Zoning District, the parking standards in Article 04, Section 4.52 (A) 1 of the Zoning Ordinance remain applicable.
- B. Chapter 126, Article 04, Section 4.52 (A) 1, Off-Street Parking Facilities, requires off-street parking contained in the first story shall not be permitted within 10.00 ft. of any building facade on a frontage line. With 10.00 ft. required and 0.00 ft. proposed, a 10.00 ft. variance is requested.

This property is zoned MX.

Mr. Johnson explained the applicant has received Preliminary Site Plan Approval for a four-story building on this property. The front facade was moved 4 ft. back from the frontage line. The first floor would contain enclosed parking spaces and the stories above would be live/work residential units. The Zoning Ordinance parking standards for the MX District require parking contained in the first story of a building not be located closer than 10 ft. to the front facade if that facade is on a frontage line. The proposed building has parking wholly in this area.

A condition of the Site Plan Approval was that the applicant obtain either a favorable interpretation from the building official for the parking standards, or a variance from the BZA. The applicant is appealing the interpretation (variance A), and in the event that the board upholds the building official's determination, a request is made for a variance from the parking standards (variance B).

Regarding variance A, Mr. Johnson's interpretation is that the context of the parking standards is not related to the distance from something such as a lot line or a frontage line. Rather, it is regarding proximity to something. The context of "on" in this section means a building facade facing a frontage line regardless of whether or not it is set back a distance from the frontage line.

A building approved to be placed a distance from the frontage line, 4 ft. in this case, would still have front building facades on the frontage line and the requirements of Article 4.52 would be applicable. Mr. Johnson added that his interpretation has been reviewed with staff, the city attorney, and the city manager and they are supportive.

It was discussed that the intent of the Ordinance is to encourage interaction with the building and the public on the sidewalk and on the street rather as opposed to having a blank wall that conceals parking. Also it was noted the ability of the Planning Board to move the location of the front facade of a building is without any limitations. The Planning Board granted Preliminary Site Plan Approval for this project because they felt it would be an asset to the neighborhood.

Ms. Ecker noted the intent of the Eton Rd. Corridor Plan ("ERCP") was to encourage an eclectic mix of uses and get more activity on the street. As a planner, she guessed the intent of this provision of the Ordinance might have been:

- To activate the street; and
- To follow the urban design standard and walkability sense that the building would be up at the street and the parking hidden in the back so that pedestrians would not feel like they were walking through a sea of parking.

Mr. Kingsley Cotton, Attorney, introduced Mr. Ron Hughes, Lincoln Birmingham Properties; Mr. Sean T. Havera, Sr., Project Manager; and Mr. Thom Phillips, Hobbs and Black Architects.

Mr. Cotton noted this is a rare case where the developer wants to provide more parking than the City requires. However, the City has objected to too much indoor parking. Mr. Cotton went on to address the interpretation issue first. He thought the way to change an Ordinance is not with an interpretation. He suggested the common and plain meaning of "on" most always means having contact with. What they have is a building that is set back 4 ft. from on the frontage line and therefore they are not required to abide by the 10 ft. buffer rule as stated in Chapter 126, Article 04, Section 4.52 (A) 1, Off-Street Parking Facilities. Mr. Cotton could not understand why they are being

penalized 1,700 sq. ft. of interior space that could keep ten cars out of sight, hidden by a closed facade, when "on" means on.

In response to the chairman, Mr. Cotton explained they are trying to provide one interior parking space for each of the 36 apartments. Further, they hope to allow two interior spaces for the three, three bedroom apartments which adds up to 39 interior spaces, and they have 36.

Mr. Judd noted his concern is what he would consider an absurd result, which in a sense perverts what the clear intent of the Ordinance is. Mr. Cotton countered by saying he knows they are entitled to use the plain meaning of a word. To suggest otherwise in this interpretation is not good legislation.

In discussion with Mr. Jones, Mr. Cotton indicated they made no attempt to change their plans when they were before the Planning Board in August and in September. Rather, they made the decision to appeal to the BZA.

There were no members of the audience who wanted to speak to this appeal at 8:48 p.m.

#### **Motion by Mr. Judd**

**Seconded by Mr. Jones in regards to Appeal 14-30, 2159 E. Lincoln, Lincoln Birmingham Properties. Variance A, Chapter 126, Article 08, Section 8.10 (D), Appeals, allows for an appeal of an opinion by the building official where a building may be placed on the frontage line in the MX District. Mr. Judd moved to affirm the opinion of the building official.**

**This case is certainly one of first impression for him dealing with a newly created zoning district, the MX District. Much has been said of the perhaps unfortunate wording of the Ordinance and its use of one term, the word "on," which when he first approached this issue seemed to be an extremely important term, but the more he has read it, the more he has discussed it and heard the opinions of the building official and very competent counsel representing the appellant petitioner, he has come to believe that is not really what is important in this particular case.**

**He feels that in looking at the history of this case the petitioner argued this matter before the Planning Board two times, once in August and once in September and during those appearances did not argue the indefiniteness of the statute or the Ordinance at that time. This has since become the focal point of the thrust of the petitioner. He feels what the board is really dealing with here is to adopt the argument of the petitioner that places them in danger of accepting an exploitation of a single term as the deciding element which would lead to what has been termed by others, and also by him, an absurd result in this case which he thinks would be extremely harsh.**



**Mr. Judd does not feel that the intent of the Ordinance is really in question. He does feel that it has been well discussed. There was a paradigm involved with the MX District which is interaction between buildings and the public and he will stick with that. He thinks that is the paradigm. To ignore that or do violence to that intent based upon an interpretation of one word, he thinks would be an absurd result.**

**For those reasons, Mr. Judd would once again moves to affirm the decision of the building official.**

Mr. Jones clarified why he seconded the motion. The lynchpin for him has always been the ability of the Planning Board to change where the building is located; its application then to the Ordinance. To adopt something other than the building official's position results in the apparent inability for other provisions of the Ordinance to apply.

Mr. Hart stated he feels "on" is on. However he knows the spirit of the Ordinance was to encourage cross connection between the streetscape and the building itself; not to create a wall that has no connectivity to the street. This was never brought up by the appellant early on and it is almost like it is a crafted argument that is in his mind a strategy to allow for the additional parking.

Mr. Judd said the intent or reasoning of the Planning Board may not be examined by the BZA. They are a discretionary board. Mr. Cotton explained the Planning Board required a 4 ft. setback from the frontage line, and as he reads the Ordinance they do not need to have a 10 ft. buffer. The 4 ft. requirement was to allow for doors to open on their property and not on the sidewalk.

Chairman Lillie indicated he will support the motion for the reasons stated by Mr. Judd.

**Motion carried, 6-0.**

VOICE VOTE

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

Nays: None

Absent: None

Mr. Cotton listed several reasons why he thought the board should support variance B:

- Compliance with the buffer requirement in their view unreasonably prevents the appellant from using the property for a permitted purpose: parking;
- Compliance is burdensome because it eliminates ten interior parking places, wastes 1,735 sq. ft. in a non-heated garage, and increases the number of cars that will be open to public view;



- Granting the variance does substantial justice to the developer because they don't have to figure out a use for the 10 ft. corridor. Additionally it allows inside parking for ten additional cars and viewing parked cars is not ideal;
- Keeping more cars indoors does justice to the developer and the other property owners;
- A unique circumstance is they can make no guess as to the civic purpose or intent of the Ordinance requirement.

Therefore, there is adequate basis for the board to grant variance B which is to allow cars parked up to the rear of the facade.

Mr. Johnson explained variance B. He clarified the aisle width is 22 ft. and the parking spaces are 9 ft. in width and 18 ft. deep

Ms. Ecker said that there is nothing in the Zoning Ordinance that mandates the width of aisles in a parking lot . She advised the applicant needs 42 parking spaces and they are proposing 60 total spaces located on the first floor of the building and in the paved section behind the building, and 9 available on E. Lincoln - 18 extra spaces in all. Therefore, if 10 were deleted they would still be in compliance with the Ordinance.

Mr. Cotton said the fact of the matter is it will be crowded over there. They are doing their civic duty by paying and providing for more parking. He doesn't see the harm in allowing them to park in the buffer space. This meets the standard for practical difficulty.

At 9:20 p.m. there was no one left in the audience that could speak to the appeal.

#### **Motion by Mr. Judd**

**Seconded by Mr. Jones with respect to variance B, Chapter 126, Article 04, Section 4.52 (A) 1, Off-Street Parking Facilities, requiring off-street parking contained in the first story shall not be permitted within 10.00 ft. of any building facade of a frontage line. With 10.00 ft. required and 0.00 ft. proposed, a 10.00 ft. variance is requested.**

**Mr. Judd moved to deny the variance. He would incorporate by reference his comments dealing with the first part of this hearing and the other motion. There seem to be two competing interests or concepts in play: whether granting ten more parking spaces on-site on the first story trumps the paradigm of the interactivity between the public and the buildings within the MX District.**

**He feels that strict compliance with the Ordinance would not unreasonably prevent the owner from using the property for a permitted purpose and would render conformity with such restrictions not unnecessarily burdensome.**

**He feels that the 10 ft. exclusion from the parking has been justified by the comments made by City personnel and also within the Ordinance itself dealing with the MX District.**

**He feels that to grant the variance would not do substantial justice in this case to the other property owners in the District or the general population. Also to grant substantial relief to the owner would certainly not be consistent with justice to other property owners.**

**The one element of practical difficulty which has been touched upon is whether or not this issue was self-created. Since it has been well established that the petitioner knew from the outset what the requirements were with the MX District and not until quite lately brought up the issue that he hangs his hat upon, Mr. Judd feels that based upon that foreknowledge and the clear intent of the Ordinances dealing with the MX District, this is a self-created circumstance.**

**He does not feel the plight is due to unique circumstances of the property. It is a blank sheet of paper. The building certainly can be designed to comply with these requirements. It is also noted that even with the loss of ten parking spaces the petitioner does comply with the parking required on this particular site.**

**Mr. Judd feels that to deny this would be in the spirit of the Ordinance. It also grants substantial justice to the City and to neighboring property owners. Therefore, he would move to deny.**

Mr. Miller thought this is a very nice project that does substantial justice to the entire area. However, he cannot get around the self-created situation, especially when they have 18 extra parking spaces.

Mr. Jones agreed there is no question this is a great looking facility. He suggested the applicant's reliance on the building official's interpretation or obtaining a variance is not something that is this board's responsibility. He feels the board will be accurate in what it determines.

Mr. Hart noted that 9 ft. x 18 ft. does not add up to the required 180 ft. for a parking space. Also, the aisle width is kind of vague. He doesn't see any dimensions on the drawings so it is hard for him to make a determination. However, he thinks there is a way to comply with the Ordinance and still keep ten spaces.

Chairman Lillie commended the petitioner for offering to screen the property so the cars would not be visible. However, he doesn't think that makes this property unique. They are in no different position than anyone else in this district. Therefore, he will support the motion.

Mr. Hughes concurred with Mr. Hart and the chairman on this second question.

Mr. Cotton indicated they tried to re-design the building but could not. The other thing is if they can't guarantee each unit an indoor parking place it cripples their ability to do this project. He doesn't understand why the board would defend an Ordinance that is poorly written.

**Motion carried, 5-1.**

VOICE VOTE

Yeas: Judd, Jones, Hughes, Miller, Lillie

Nays: Hart

Absent: None

**T# 11-62-14**

**CORRESPONDENCE** (none)

**T# 11-63-14**

**GENERAL BUSINESS** (none)

**T# 11-64-14**

**ADJOURNMENT**

No further business being evident, the board members passed a motion to adjourn at 9:32 p.m.

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Bruce R. Johnson, Building Official