

**BIRMINGHAM BOARD OF ZONING APPEALS PROCEEDINGS**  
**TUESDAY, DECEMBER 8, 2015**  
City Commission Room  
151 Martin Street, Birmingham, Michigan

---

Minutes of the regular meeting of the City of Birmingham Board of Zoning Appeals ("BZA") held on Tuesday, December 8, 2015. Chairman Charles Lillie convened the meeting at 7:30 p.m.

**Present:** Chairman Charles Lillie; Board Members Kevin Hart, Jeffrey Jones, Randolph Judd, Peter Lyon, John Miller, Erik Morganroth

**Absent:** Board Member; Alternate Board Members Jason Canvasser, Cynthia Grove

**Administration:** Bruce Johnson, Building Official  
Scott Lenhart, Asst. 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# 12-73-15**

**APPROVAL OF THE MINUTES OF THE BZA MEETING OF NOVEMBER 10, 2015**

**Motion by Mr. Jones**

**Seconded by Mr. Miller to approve the Minutes of the BZA meeting of November 10, 2015 as presented.**

**Motion carried, 7-0.**

VOICE VOTE

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

Nays: None

Absent: None

**T# 12-74-15**

**1139 EMMONS  
(Appeal 15-31)**

The owners of the property known as 1139 Emmons request the following appeal from the Building Official's interpretation of the Zoning Ordinance:

A. **Chapter 126, Article 8, Section 8.01 (D)** of the Zoning Ordinance allows for an appeal of a decision of the Building Official. The Building Official has determined that an eave is not required by the Zoning Ordinance to be continuous under a dormer on the west elevation of a new home built at 1155 Emmons.

This property is zoned R-3.

Six letters have been received in support of tonight's appeal, along with one letter in opposition.

Mr. Johnson explained that in 2013 the Building Dept. started receiving complaints from the public that some recently constructed homes appear to be three stories in height. The Zoning Ordinance limits single-family homes to a maximum of two stories. A habitable attic is allowed, which is limited to one-third of the area of the floor below. Staff determined the complaints stemmed from attic dormers that project from the roof of the home that encloses a portion of the habitable attic. The design did not call for a continuous eave to be installed underneath the bottom of the dormer and that created a three-story image. To correct that three-story condition, he directed planning review staff in February 2014 to require the eave to be continuous underneath the dormer.

In late August of this year the appellants expressed their concern to the Building Dept. that the house being constructed next to them appeared to be three stories tall and it did not have the required eave underneath the dormer. However, it was two stories with a habitable attic per the Building Code. It was determined the plans had been approved without the eave.

The builder was sent a Violation Notice to require that the eave be added. The builder responded that he could not find specifically in the Zoning Ordinance where the eave is required.

Therefore, Mr. Johnson requested a legal opinion from the City Attorney. The City Attorney responded that a definition of a dormer was added to the Ordinance in 2005. During the amendment process to add the definition of dormer, the City Commission asked for sketches of dormer types for reference. The examples include four types of

dormers that project from the main roof out flush with the exterior wall that are very similar to the design in question. Upon further review of the Ordinance it appears that an eave is not required to be continuous under a dormer. It seems that staff can encourage builders to install an eave under a dormer, but cannot require it. That opinion has been passed along to Building Dept. staff.

In response to Mr. Lyon, Mr. Johnson said the Ordinance does not regulate the eave height for dormers. The Ordinance regulates the maximum eave height at 24 ft. for the main building but it does not regulate the eave height for dormers. However if a dormer is allowed, the eave has to be higher than 24 ft. in order to be above the main roof. The Ordinance is not clear on that, but it has been consistently enforced that way since 1997. The Planning Board will be talking about dormers on single-family homes and it can be clarified at that time.

In response to Mr. Jones, Mr. Johnson indicated it is his standard procedure to seek the city attorney's opinion when issues of this nature come up.

Mark Demorest, Attorney, 322 W. Lincoln Ave. Royal Oak, represented the petitioners, Khalil and Mary Mogassabi. Mr. Demorest thought the fundamental question is whether this is a dormer as defined by the Ordinance. What they have is a three-story house, which is not permitted. The Ordinance says that a dormer must have its own walls. This dormer doesn't have its own wall along the exterior of the house. It shares the same wall as the facade. The City Attorney never addressed the issue of what is a dormer. Mr. Demorest believes this latest turn as a result of the opinion from the City Attorney is, in fact, not consistent with the Ordinance.

Chairman Lillie emphasized this is not a three-story house as such because it complies with the Ordinance. The part that sticks out is a sub-set because it is smaller than the main structure of the house below. Mr. Demorest agreed there is nothing in the Ordinance that mandates a continuous eave all the way across.

Mr. Lyon noted that if the siding is stripped off, the wall stops at a floor and doesn't go continuously up. and then picks up again for the next floor. So there is a break, and not a continuous wall. Mr. Demorest said it has the appearance of a three-story home and they are requiring the eave as a way to deal with that problem. Therefore they are asking that the Violation Notice that was originally issued by the Building Official be affirmed and that the builder be informed that he is required to inset the dormer or construct a continuous eave across.

Mr. Morganroth noted that everyone agrees the massing and the structure size won't be changed by an eave to break up the long wall. He noticed the Ordinance doesn't say that all walls must be separate and independent; it only says that the walls must be separate. How the dormer terminates at the edge or prior to the edge is not really

addressed in the definition of a dormer. The definition only says that a dormer interrupts the slope of the roof with its own walls.

Mr. Judd stated the standard that the Planning Board normally uses is whether or not there has been an abuse of discretion on the part of other boards or staff. He asked Mr. Demorest what abuse of discretion he could offer. Mr. Demorest replied that where the issue comes in is that Mr. Johnson is relying upon the opinion which in his view doesn't really address the issue. Mr. Judd stated that not liking a result or not agreeing with a decision made by either a board or a building official is one thing; but in this case he thinks it is far below the standard required for an abuse of discretion. Mr. Demorest said he is suggesting that the new interpretation is an abuse of discretion because it is contrary to the language of the Ordinance. He went on to note that the eave makes a tremendous difference in the appearance of the house and how it affects his client's property, what they see, and the value of their property.

Mr. Jones did not see how the Building Official has done anything other than what he would almost be mandated to do. Mr. Demorest answered they don't believe this qualifies as a dormer. However, if it is somehow separated from the rest of the structure such as by an eave, it creates the appearance that it has its own walls. The intent is not to have something that appears to be three stories. Everyone except this one builder seems to be satisfied with having an eave or other separation.

No one from the audience wished to speak to this appeal at 8:33 p.m.

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

**Seconded by Mr. Lyon in regard to Appeal 15-31, 1139 Emmons. This is an appeal of an interpretation by the Building Official. The interpretation in question, and we have certainly had a great deal of verbiage as to what the actual issues are in this case, revolves around the height of a home; whether a dormer is a dormer; the definition of a dormer; and whether a section of eave attached to a building at a certain height makes it a two-story building rather than a three-story building. There seem to be a lot of strands to this particular appeal.**

**However, Mr. Judd is approaching this case from the issue which traditionally this board has approached, which is whether or not the Building Official abused his discretion in offering an opinion. In the subject case the Building Dept. had a paradigm if you will which required builders to attach an eave which was either cosmetic improving appearance, or was actually functional. This was initiated in 2005 and in reading all of the materials it would seem that there was some discomfort with this particular paradigm all the way to about 2013 at which time the Building Official began having some questions as to whether or not the Building Code and the Zoning Ordinance permitted the Building Official to require this or even suggest it. It was a decision of the Building Official to seek a legal opinion from the City Attorney and Mr. Currier provided an opinion which**

**reinforced and supported the suspicions of the Building Official that there was no legal standing really in our Ordinance that would permit a Building Official to require this particular paradigm to be enforced.**

**Mr. Judd personally feels that is remarkable first off that the City of Birmingham through its Building Official has publically given us a mia culpa. He also feels Mr. Jones has pointed out quite correctly that once the City had a legal opinion from the attorney supporting the position of the Building Official that the placement of eaves, be they functional or cosmetic, was not supported. He feels that once the Building Official had that mandate from legal counsel he was mandated to act upon it. It would have been, frankly, irresponsible to have ignored it.**

**For that reason, Mr. Judd would move to affirm the decision of the Building Official which has discontinued the paradigm requiring cosmetic or functional eaves on buildings. He would also state that he feels, based on the standard stated above as to whether or not there is some abuse of discretion, the facts he has related amply demonstrate that Mr. Johnson did not abuse his discretion.**

**Therefore, Mr. Judd stated once again that he wishes to affirm Mr. Johnson's final decision.**

Mr. Miller said from what he has heard if the dormer in question was set forward or back it would have been okay. The crux of the concern is that it is in a flush position with the walls below. Because of that it seems the decision of the City Attorney seems appropriate.

Mr. Jones expressed his support for the motion. He thought everyone can agree that if the Planning Board and the City Commission were to give some clarity it would be beneficial. The other reason for his support is he believes that discretion itself is built into the process. He doesn't see any abuse of discretion in this circumstance.

Mr. Lyon indicated he will also support the motion. He thinks it hinges on abuse of discretion. If the Building Official didn't follow the opinion of counsel, maybe that is abuse of discretion. This hinges on what is a dormer. It is a sub-unit that comes out of the roof. Unfortunately in Birmingham there are not always prescriptive design standards.

Chairman Lillie found no abuse of discretion on the part of Mr. Johnson and stated his support for the motion.

**Motion carried, 7-0.**

ROLLCALL VOTE

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

Nays: None  
Absent: None

**T# 12-75-15**

**1172 E. LINCOLN  
(Appeal 15-32)**

The owners of the property known as 1172 E. Lincoln request the following variances to allow for the construction of a house addition less than the required minimum side yard setback and less than the required minimum distance between principal residential buildings:

- A. **Chapter 126, Article 2, Section 2.10** of the Zoning Ordinance requires a minimum side yard setback of 5.00 ft. for this lot. The applicant is proposing 4.86 ft. Therefore, a variance of 0.14 ft. is requested.
- B. **Chapter 126, Article 4, Section 4.69 (C)** of the Zoning Ordinance requires a minimum distance between buildings of 14.00 ft. for this lot. The applicant is proposing 9.67 ft. Therefore, a variance of 4.33 ft. is requested.

This property is zoned R-3.

Mr. Lenhart advised the applicant is proposing to build an addition to an existing non-conforming house that was built in 1987. Non-conformance is due to the existing side yard and existing distance between buildings being short. All other proposed setbacks and distance requirements for this lot are conforming.

Mr. Miller noticed this variance request is due to the existing position of the house with relation to the property line and the house next door. He received clarification that the condition of the proposed construction would not affect the adjacent lot's need for a variance.

Mr. Mark Grozde, the property owner, explained there will be no change in the distance to his neighbor's house. The original footprint and height of the structure is unchanged. The proposed construction will add a master suite.

There were no comments on this appeal from the audience at 8:50 p.m.

**Motion by Mr. Miller**

**Seconded by Mr. Jones to approve Appeal 1532 for 1172 E. Lincoln. He believes that certainly strict compliance with the Ordinance would make adding this very reasonable addition unnecessarily burdensome. The variance would also do**

**substantial justice to the adjacent property owners. It seems to be a very modest but nice refreshing addition to that home. The problem is due to the unique circumstances of the existing location of this house in relation to the property line and because of that the problem, he believes, is not self-created.**

**He would tie the approval to the plans as submitted.**

**Motion carried, 7-0.**

ROLLCALL VOTE

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

Nays: None

Absent: None

**T# 12-76-15**

**1078 PURITAN  
(Appeal 15-33)**

The owners of the property known as 1078 Puritan request the following variance to allow for the construction of a garage addition less than the required minimum setback distance from the front façade of the principal residential building:

A. **Chapter 126, Article 4, Section 4.70** of the Zoning Ordinance requires a minimum setback distance of 5.00 ft. from the front façade that is furthest setback from the front property line. The applicant is proposing 0.23 ft. past the front facade. Therefore, a variance of 5.23 ft. is requested.

This property is zoned R-1.

Mr. Hart recused himself from this appeal and Mr. Canvasser replaced him.

Mr. Lenhart advised that the applicant is proposing to build a garage addition to an existing non-conforming attached garage. Nonconformance is due to the existing garage being 0.23 ft. in front of the front façade furthest setback from the front property line. All other proposed setbacks and distance requirements for this lot are conforming.

Chairman Lillie noted the proposed addition is extending the existing plane of the house and goes no further out than that.

Mr. Miller received confirmation that the adjacent property would not have to require a variance if this appeal was granted. The need for the variance is not affected by the lot line to the north; it is about the garage setback from the front facade of the building.

Mr. Jason Jarjosa, the property owner, said they are doing some structural and cosmetic changes to improve the usage of the garage. The garage was built in the '50s prior to the current setback Ordinance. They are requesting a moderate 2 ft. accommodation.

The chairman called for comments from the audience at 9 p.m.

Ms. Kathy Pellan, homeowner to the north, did not want the garage 2 ft. closer to her house. Chairman Lillie explained the garage is allowed to go 2 ft. to the north without violating the Ordinance for side setbacks. The variance is only for the front corner of the garage.

**Motion by Mr. Jones**

**Seconded by Mr. Lyon. For Appeal 15-33, 1078 Puritan, the petitioner requests a variance of 5.23 ft., effectively asking that he can maintain the front line of his existing structure, but adding the garage and in that vein not change the front line from the street. However, the Ordinance does require a 5 ft. setback for the garage. He has a non-conforming use there and it is only the addition of 2 ft. that renders this variance an application.**

**Mr. Jones believes that to grant the variance would do substantial justice to the community and that to deny it would unreasonably prevent the owner from using his property for the permitted purpose and, in fact, make it unnecessarily burdensome. He believes it is due to the unique circumstances of the house and the circumstances of the property. He notes that it does comply with all other requirements of setback and does not affect the neighbor's potential use if the grant of this variance was there. He doesn't believe it was self-created and would tie the variance to the plans.**

**Motion carried, 7-0.**

**ROLLCALL VOTE**

Yeas: Jones, Lyon, Canvasser, Judd, Lillie, Miller, Morganroth

Nays: None

Recused: Hart

Absent: None

**CORRESPONDENCE (none)**



**T# 12-77-15**

**GENERAL BUSINESS**

Chairman Lillie passed out information on recusal and the procedure.

**OPEN TO THE PUBLIC FOR MATTERS NOT ON THE AGENDA** (no one spoke)

**T# 12-78-15**

**ADJOURNMENT**

No further business being evident, the board members passed a motion to adjourn at 9:12 p.m.

---

**Bruce R. Johnson, Building Official**