

BIRMINGHAM BOARD OF ZONING APPEALS PROCEEDINGS
TUESDAY, APRIL 12, 2016
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, April 12, 2016. Chairman Charles Lillie convened the meeting at 8 p.m.

Present: Chairman Charles Lillie; Board Members Kevin Hart, Jeffery Jones, Vice-Chairman Peter Lyon, Erik Morganroth; Alternate Board Members Jason Canvasser, Cynthia Grove

Absent: Board Members Randolph Judd, John Miller

Administration: Matthew Baka, Senior Planner
Brooks Cowan, Community Development Dept.
Bruce Johnson, Building Official
Carole Salutes, Recording Secretary
Scott Worthington, Assistant Building Official

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# 04-26-16

APPROVAL OF THE MINUTES OF THE BZA MEETING OF MARCH 8, 2016

Motion by Mr. Jones

Seconded by Mr. Lyon to approve the Minutes of the BZA meeting of March 8, 2016 as presented.

Motion carried, 7-0.

VOICE VOTE

Yeas: Jones, Lyon, Canvasser, Grove, Hart, Lillie, Morganrot
Nays: None
Absent: Judd, Miller

T# 04-27-16

**1375 WEBSTER
(Appeal 16-07)**

The owners of the property known as 1375 Webster request the following variance to allow for the construction of a new house less than the required minimum distance between principal residential buildings.

- A. **Chapter 126, Article 4, Section 4.69 (C)** of the Zoning Ordinance requires a minimum of 14.00 ft. between principal buildings for this lot. The applicant is proposing 12.70 ft. Therefore, a variance of 1.30 ft. is requested.

This property is zoned R-3.

Mr. Worthington explained the applicant is proposing to demolish the existing home and build a new home on a 40 ft. wide interior lot. The existing non-conforming house to the west was built with a 2.70 ft. side setback. The applicant has moved the house over from the minimum 9 ft. to a 10 ft. side setback. All other setbacks and distance requirements are conforming. In the notice, "Section 4.69" should be changed to "Section 4.74." The language of the updated Ordinance has not changed.

Chairman Lillie observed that it looks like the owner of the house to the west has added on because part of the rear of the house is set back from the lot line.

Mr. Fareed Mojaradi, the homeowner, noted the house will be moved 1 ft. away from the west property line in comparison to the present structure. The neighbors are delighted that the house will be coming down.

At 8:10 p.m. no one in the audience wanted to comment on this appeal.

Motion by Mr. Lyon

Seconded by Mr. Jones in regards to Appeal 16-07, 1375 Webster, to grant the variance as advertised. The appellant seeks a variance for the minimum distance between principal buildings. He believes that strict compliance would be unduly burdensome. He does not believe this is self-created primarily because and only because the adjacent house is existing non-conforming. He would note that the appellant has done some mitigation by reducing the width of the house by about a foot to decrease the size of the requested variance. He would tie the motion to the plans submitted.

Motion carried, 7-0.

ROLLCALL VOTE

Yeas: Lyon, Jones, Canvasser, Grove, Hart, Lillie, Morganroth

Nays: None

Absent: Judd, Miller

T# 04-28-16

**369 N. OLD WOODWARD AVE.
(Appeal 16-10)**

The owners of the property known as 369 N. Old Woodward Ave. request the following variance to allow the construction of a five-story mixed-use building in the R-6/D-4 Zone that exceeds the minimum lot area per unit.

- A. **Chapter 126, Article 02, section 2.16**, of the Zoning Ordinance requires that buildings with residential units provide a minimum lot area of 1,375 sq. ft. per one (1) bedroom unit and 1,750 sq. ft. per two (2) bedroom unit. The applicant is proposing twenty-six (26) two bedroom units and three (3) one bedroom units requiring 49,625 sq. ft. of land area with 39,204 sq. ft. provided. Therefore, a variance of 10,421 sq. ft. of lot area is requested.

Or in the Alternative:

- B. **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 the proposed project located in the R-6/D-4 Zone is required to comply with the minimum lot area per unit requirement of the R-6 Zone.

This property is zoned R-6/D-4.

A.

Mr. Baka advised the property was recently rezoned to D-4 by the City Commission at the request of the applicant to be included in the Overlay Zone which allows up to five stories if the fifth story is residential. The R-6 Zone allows 40 ft. and three stories. The additional height allows the applicant more density; however, due to the minimum lot area they are not able to take advantage of that unless they are granted a variance. The Downtown Overlay Zone was drafted specifically to encourage more residential in the Downtown. That is why the bonus floor is only permitted if it is residential.

In response to the chairman, Mr. Baka said this is one of two R-6 parcels in D-4. The other lot is very small and could not handle this type of development. Further, if this parcel did not have R-6 zoning, only D-4, then a variance would not be needed. He

clarified for Mr. Jones they are equating lot size to the number of units, but not specifically the size of the units. In answer to a question from Mr. Lyon, Mr. Baka advised if there is a conflict the Overlay overrides the underlying zoning, but because the Overlay doesn't speak directly to minimum lot area in this situation, the underlying zoning prevails.

Mr. Baka clarified for the chairman that the intent of R-6 was to be a buffer to single-family residential property. He went on to note this property is unique because on three sides it is surrounded by City-owned property and not residential.

Mr. Jones said the developer has made a marketing decision that these are the style and number of units that he desires. But under the Condominium Act when the developer owns all of the units, he can amend them. Also upon appropriate votes from condo association members, many things can change. Then the question is whether the City has a legitimate purpose in interfering with what the developer chooses to use under the condominium project. Mr. Johnson said if the variance were granted the petitioner cannot exceed that number of units but they can reduce the number of units and still conform to the requirements of the Ordinance. However, the intent of the Overlay is to encourage more density in the Downtown.

Mr. Richard Rattner, 380 N. Old Woodward Ave., presented a PowerPoint. It showed that the parcel is bordered on three sides by public property and the east side by N. Old Woodward Ave. They are asking a variance from the minimum lot size/unit as set forth in Article 2, section 2.16. The property is in a D-4 Zone of the Overlay District with an underlying zoning of R-6.

The PowerPoint explained for each requirement how they meet the four conditions necessary for the granting of a variance, as follows:

- Article 8.03 (F) (3) (a) (i) - Because of special conditions applicable to the property in question, the provisions of the Zoning Ordinance unreasonably prevent the property owner from using the property for a permitted purpose;
- Article 8.03 (F) (3) (a) (ii) - Literal enforcement of the Chapter will result in unnecessary hardship;
- Article 8.03 (F) (3) (a) (iii) - The granting of the variance will not be contrary to the spirit and purpose of the Zoning Ordinance nor contrary of public health, safety and welfare;
- Article 8.03 (F) (3) (a) (iv) - The granting of the variance will result in substantial justice to the property owners, the owners of the property in the area and the general public.

Mr. Rattner did not feel the intent of the minimum lot area/unit makes sense when you wipe out all the other requirements of R-6. He went on to advise they have an agreement to deed land at the south end of their property to the City to be used as part of a future Bates St. right-of-way, as the City is looking at potentially redeveloping the N.

Old Woodward Parking Structure and/or the surface parking lot behind. In addition they will need an Easement Agreement from the City to get access to and from the underground parking levels from the City property.

He noted the practical difficulty and hardship they experience is not self-created, but exists because the property is isolated at the end of the D-4 Zone, is surrounded by public property, and is an unusual size and shape. The normal R-6 Zoning District borders on single-family residential. The location of this property is not the same as any other R-6 Zoning District in the City. Further, the requirement of the R-6 Zoning District as to the minimum lot area/unit when applied to this property is inconsistent with all of the accepted planning and zoning goals of the City which comply with the purpose and objective of the Downtown Birmingham 2016 Plan that encourages more residential in the Downtown.

Mr. Jones pointed out the survey does not have the same legal description as the application. He does not see the existing Master Deed and inquired how much of the property that the developer owns will be dedicated to the condominium. Mr. Rattner replied the only property they will not use is the portion they are deeding to the City. Chairman Lillie observed the requested variance is based on the size of the lot. If the applicant is going to dedicate some of their property to the City for the road, they will have less land and therefore will need a bigger variance than was advertised.

The board took a quick break at 9:08 p.m. to allow the applicant to discuss matters.

Mr. Lyon noted the original variance request was for 10,421 sq. ft. of lot area for three one (1) bedroom and 26 two (2) bedroom units. He proposed the petitioner request a variance of 10,421 sq. ft. not to exceed three one (1) bedroom and 26 two (2) bedroom units subject to the area of the new plot once they give up the land. The variance is about the number of units as it relates to the land, and they may have to reduce that number in order to meet the R-6 requirement on the remaining land after part of it has been deeded to the City.

Mr. Lyon explained the formula is the number of one (1) bedroom units x 1,375 + the number of two (2) bedroom units x 1,350. Add those up and it can't exceed the land left over + 10,421 sq. ft. Therefore, the number of units will have to come down in order to meet the requirements for land area of the remaining portion.

There was no one in the audience who wished to comment on this appeal at 9:48 p.m.

Mr. Rattner received clarification that the Ordinance specifies the square footage of land required/unit. The unit size is irrelevant. He expressed the desire to table this appeal to the next BZA meeting.

Motion by Mr. Jones

Seconded by Mr. Morganroth, based on the petitioner's request, to adjourn Appeal 16-10, 369 N. Old Woodward Ave., (A) to the next regularly scheduled BZA meeting on May 10, 2016.

Motion carried, 7-0.

VOICE VOTE

Yeas: Jones, Morganroth, Canvasser, Grove, Hart, Lillie, Lyon

Nays: None

Absent: Judd, Miller

B.

Regarding the building official's decision, Mr. Rattner argued that the minimum floor area/unit should not apply to a new building in the D-4 Zone. There are four different sections of the D-4 Overlay Zone that speak to this. First is Section 3.02 (B) (4) that states "Where a new building is proposed, the use and sites shall be subject to the Downtown Birmingham Overlay District."

Secondly, there are three sections in Section 3.03 (A, C, and D) that speak to the fact that in a D-4 Zone the provisions of the Downtown Birmingham Overlay District, when in conflict with other articles of the Zoning Ordinance, shall take precedence.

Mr. Johnson said there is no question that the Overlay D-4 is intended for the underlying B-4 Zone District. In the Ordinance B-4 only regulates floor area ratio but not minimum lot area/unit. If you go around the other Overlay Zone Districts, in the B-2, O-2 and the other underlying Zone Districts they have both of those requirements, floor area ratio and minimum lot area/unit. Those are typically the Overlay Districts that directly abut single-family residential. Therefore, tonight's case is unique. Maybe it should have been B-4 but it is not; it is R-6 surrounded by public property. If it was exempt from minimum lot area/unit also, then that would be true for all of the other Overlay Zone Districts that directly abut single-family residential. He does not believe that was the intent of the Overlay District

Replying to Mr. Canvasser, Mr. Johnson indicated that the city attorney is verbally in support of the interpretation.

At 9:48 p.m. there was no one in the audience that wanted to discuss this part of the appeal.

Motion by Mr. Lyon

Seconded by Mr. Jones in regard to Appeal 16-10, 369 N. Old Woodward Ave., (B) the appellant seeks to overturn the decision of the building official. He moves to deny. Both parties have made persuasive arguments. He can see the point. He looks at the old regulation, it indicates you would develop under the Overlay. He

looks at the new one and it says "shall be regulated," but it doesn't say exclusively. Overturning the building official requires the board to define an abuse of discretion. On a 50/50 split, it is not an abuse of discretion in his opinion. Therefore, he would uphold the decision of the building official.

Motion carried, 7-0.

VOICE VOTE

Yeas: Lyon, Jones, Canvasser, Grove, Hart, Lillie, Morganroth

Nays: None

Absent: Judd, Miller

T# 04-29-16

CORRESPONDENCE (none)

T# 04-30-16

GENERAL BUSINESS

T# 04-31-16

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

T# 04-32-16

ADJOURNMENT

No further business being evident, the board members passed a motion to adjourn at 10:15 p.m.

Bruce R. Johnson, Building Official