

BIRMINGHAM BOARD OF ZONING APPEALS PROCEEDINGS
TUESDAY, JUNE 14, 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, June 14, 2016. Chairman Charles Lillie convened the meeting at 7:30 p.m.

Present: Chairman Charles Lillie; Board Members Jeffery Jones, Randolph Judd, Vice-Chairman Peter Lyon, Erik Morganroth; Alternate Board Member Jason Canvasser

Absent: Board Members Kevin Hart, John Miller; Alternate Board Member Cynthia Grove

Administration: Matthew Baka, Senior Planner
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 are no interpretations on this evening's agenda.

T# 06-39-16

APPROVAL OF THE MINUTES OF THE BZA MEETING OF MAY 10, 2016

Motion by Mr. Judd

Seconded by Mr. Morganroth to approve the Minutes of the BZA meeting of May 10, 2016 as presented.

Motion carried, 6-0.

VOICE VOTE

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

T# 06-40-16

**1547 WASHINGTON
(Appeal 16-11)**

The owners of the property known as 1547 Washington request the following variance to allow the construction of a detached garage closer to an adjacent principal structure.

A. **Chapter 126, Article 4, section 403 B** of the Zoning Ordinance requires a minimum 14 ft. from the adjacent principal structure. The applicant is proposing 11.3 ft. between the detached garage and the neighbor's house, which would result in a 2.7 ft. variance.

This property is zoned R-2.

Answering the chairman, Mr. Worthington noted the neighbor to the south is over the allowable lot coverage. Thirty percent is what is allowed and they are at 34% coverage. The house was built prior to the change in lot coverage. In response to Mr. Lyon Mr. Worthington explained the garage cannot go further back on the lot because there is a 6 ft. utility easement that DTE wants for clearance with the wires.

Granting of the variance would not affect any of the neighbors.

Mr. Greg Franco, Project Manager for Great Lakes Custom Builder, said they are requesting a variance of 2.7 ft. on the south side of their property for a detached garage. Their hardship is that the south neighbor, 1567 Washington, has a deeper house because the home was built before the current 30% lot coverage ordinance. Due to the neighboring house being over the lot coverage and set back further, they are unable to accommodate the 14 ft. required distance between residences. At the 14 ft. distance, usage of the garage would be extremely difficult. The 6.86 sq. ft. that encroaches on the 14 ft. dimension comprises about 2% of the overall garage structure. Therefore, 98% of it would be conforming. He agreed that DTE wants a 6 ft. utility easement at the rear of the property.

The chairman took comments from the audience at 7:40 p.m.

Mr. Jim Wrobel, 1567 Washington, noted his garage is 3 ft. from the back property line. He cited an example to the north of a house that would have needed the exact same variance for a similar situation. However they did not petition for a variance; they just built the garage as it needed to be to accommodate the 14 ft. distance. The result is

they have full and easy access to their garage and use it for both of their cars. Therefore, he does not think there is a hardship to move the garage to the middle of the lot. Since non-conforming houses exist all over Birmingham, this property is not unique.

Ms. Lindsey White, 1535 Washington, stated this is the second project by Great Lakes Custom Builder that she has lived next to. With the first project the hole that they dug created erosion under her driveway. When she bought the home across the street the same thing happened while Great Lakes was constructing a house next door. Her fence fell down into the hole and the gate that she had installed can't really be used now. She is not willing to forfeit her property rights because of someone's business venture. Further, she doesn't like the precedent that this sets if the variance is approved. The fence falling down seems to be a common thread.

Ms. Rose Murphy, 1521 Washington, said if the applicant can move the garage over and accommodate the surrounding area, she feels that should be enforced.

In response to Mr. Lyon, Mr. Johnson explained that DTE has certain requirements for easements so they are a safe distance from the lines. He is not familiar with DTE's reasoning that requires a 6 ft. easement at this site. Mr. Jones followed up by saying it is not uncommon for DTE to have a blanket easement that is not recorded. Mr. Johnson said the Building Dept. is charged with making sure that a project complies with all the rules and regulations that are out there. That is why in the rear yards they request a letter from DTE to check the clearances. The Building Dept. goes by the results of their determination.

Mr. Franko stated they could move the proposed garage north at the 6.6 ft. mark; however, it would impact the turning radius. He had difficulty making the turn while driving a Ford Explorer. There is a box out and stairs on the back of the house. Mr. Judd observed the features the applicant has placed on the back of the house are self-created.

Motion by Mr. Judd

Seconded by Mr. Lyon in the matter of Appeal 16-11, 1547 Washington, the petitioner seeks a variance to Chapter 126, Article 4, section 4.03 B of the Zoning Ordinance as to the minimum distance between adjacent principal structures. The petitioner claims a practical difficulty and upon questioning of the builder, Mr. Judd does not feel that strict compliance with the ordinances as set forth would unreasonably prevent the owner from using the property for a permitted purpose, namely a home. Nor would it be unnecessarily burdensome.

The second requirement is whether a variance would do substantial justice to the applicant as well as to other property owners in the district, and whether a lesser relaxation should be applied for substantial relief to the owner. In essence, this is a board of equity. We have heard from owners of adjacent properties. Mr. Wrobel

who is directly south is conversant with the requirements of a practical difficulty and has pointed out certain delinquencies on the part of the petitioner.

Another requirement is that there be unique circumstances that govern this. There is nothing special about this particular piece of property.

The fourth requirement is the real stake in the heart, which is whether the problem is self-created. The petitioner has admitted that they are well aware of adjacent properties and the requirements that will be placed upon them as to distance between those structures and they have admitted that certain design features in the rear of the subject property are causing a problem. There is no requirement that the City of Birmingham in its ordinances accommodate any certain type of vehicle.

For those reasons, Mr. Judd moved to deny the petitioner's variance.

Mr. Lyon added that the appellant's case hinges on the house to the south, which is non-conforming in lot coverage, not in lot location. He noted there are many accessory buildings built 3 ft. off the lot line, right under power lines. Therefore, in his personal opinion DTE needs to be re-approached on this in search of a compromise. Secondly, there are lots of alternatives, but after the foundation is in it is tougher to do them. Putting in the foundation before seeking a variance is a self-created issue. For those reasons Mr. Lyon will support the motion to deny.

Motion to deny carried, 6-0.

ROLLCALL VOTE

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

Nays: None

Absent: Hart, Miller

06-41-16

**856 N. OLD WOODWARD AVE.
(Appeal 16-12)**

The owners of the property known as 856 N. Old Woodward request the following variances to allow the construction of a four-story mixed-use building in the O-2/D-2.

A. **Chapter 126, Article 3 section 3.04 A (1) (d)** of the Zoning Ordinance permits a third story in the D-2 zone if the use is residential. The applicant is proposing four stories with the third and fourth floor being residential; therefore, a dimensional variance of one additional story of residential is requested.

B. **Chapter 126, Article 3 section 3.04 A (1) (f)** of the Zoning Ordinance requires that a third story shall continue in a different plane, beginning at the eave line, not greater than 45 degrees measured to the horizontal or set back 10 ft. from any building façade. The applicant is proposing a canopy that extends forward from the third and fourth floors and connects to the eave line of the first and second floors; therefore, a variance of 20 ft. is requested for one section of the building.

This property is zoned O-2/D-2.

Mr. Baka advised the proposed overall height of the building does not exceed the maximum height requirement. In this zone, they are permitted 56 ft. including all mechanical equipment. A well for all of the mechanical units has been created on the fourth floor. They meet the parking requirement on-site for the O-2 Zone.

Mr. Richard Rattner, Attorney, 380 N. Old Woodward Ave., spoke on behalf of the petitioner. He noted this site has been a hole in the ground since 1989. It is an extremely unusual piece of property and very difficult to develop. There is a 12 ft. drop at the rear down to the Rouge River. Mr. Rattner went on to describe the unique specific hardships of the property: seven sided shape; topography; front location that is moved back 10.8 ft. to line up with the building to the north; and to the rear severe natural conditions that hinder the use of the property. Therefore, the applicant has lost a total of 65 percent of one total floor due to unnecessary hardship caused by the physical character of the land. They plan to add a little more than a thousand feet to recoup slightly more than the amount of surrounding lots.

Literal enforcement of the chapter will result in unnecessary hardship because the unique physical circumstances related to this parcel will result in a design that unfairly limits the applicant from building what is otherwise permissible in the D-2 Zone.

The granting of the variance will not be contrary to the spirit and intent of the Ordinance or contrary to the public health, safety, and welfare. It behooves all of us to do what we can to put a reasonable development on that site and create a pedestrian friendly streetscape.

The first benefit parking-wise is that they are totally self-parked, with parking not only for the residents, but for all of the retail on the main floor. Also, because of moving the building back at the front, they have been able to add four more parking spaces for a total of nine spaces on the street. They propose to re-do the islands out front so there is safe circulation in and out of the building. Therefore, the granting of the variance will result in substantial justice to the property owner, the owners of property in the area and the general public.

The practical difficulty and hardship is not self-created, but exists because of the size, shape, location and natural features of the property. The applicant has worked to

comply with all of the Ordinance requirements and minimized their design so they only need two dimensional variances that will allow them to use the property in a manner that is fair and just. The proposed building will be one of the most attractive designs in the City.

The canopy is a very nice-looking design and Mr. Rattner hoped the board would allow it to go into that space along with the fourth story. The canopy is an accent feature that is only 20 ft. wide over one small area.

Mr. Jones observed that they have lost 11,229 sq. ft. as a result of the physical character of the site. They are adding a top floor measuring 13,378 sq. ft., an increase of 18 to 19%. Mr. Rattner answered that by adding mechanical equipment that upper floor is smaller.

Responding to Mr. Lyon, Mr. Rattner explained they had to pull the building back in the rear due to the instability of soils leading down to the river.

Mr. John Marosich, the architect, explained how the extreme slope makes it challenging if not impossible to build upon. He noted that additional parking will be proposed at Final Site Plan Review, beyond what is currently presented.

Mr. Judd received clarification that the nine parking spaces in front will be City parking that is metered. From an equitable standpoint a difficult hole in the ground will be eliminated by the applicant, public parking will be increased, property will be given up, and in exchange they are looking for another story. Mr. Rattner noted the architectural mass of the proposed structure is identical to what the Ordinance allows.

Chairman Lillie called for comments from members of the audience at 8:50 p.m.

Mr. Carolyn Butcher, who works at 800 N. Old Woodward Ave., said her one concern is that the five existing metered parking spots in front of the site are for permit parking only. For the last year and a half there has been no parking. The proposal has gone from 3,500 sq. ft. to 4,500 sq. ft. of retail. Those nine spaces will be taken up by the retail customers, and the five spaces they have had for permit parking will disappear.

Mr. Baka clarified that the parking provided inside the building includes the required parking for the retail. The nine spaces outside are not counted towards the applicant's parking requirement. So, they are self-contained for parking and have improved the parking situation outside by four spaces.

Motion by Mr. Judd

Seconded by Mr. Jones in regard to Appeal 16-12, 856 N. Old Woodward Ave., the petitioner seeks two variances, the first being Chapter 126, Article 3, section 3.04 (A) (1) (d) of the Zoning Ordinance that permits a third story in the D-2 zoning

area - Variance A. The applicant is proposing four stories, one story above and beyond what is permitted in the Ordinance. This, as Mr. Judd stated when he was questioning Mr. Rattner, has been a hard slog for him to exactly get his arms around. But the important point is that it is an exchange between the builder and the City. What exists there now, no one has argued with the description of it being a funnel-like hole, which is quite extensive and is a complete challenge. Part of it is an angle of repose where the dirt is just sitting there.

What the petitioner proposes is to place a building on this site. He is offering a certain indicia to the City to permit him to do so, such as setting the building back, including parking spaces in the front, and on-site parking. In the first two stories we have seen those, but in the third story there is a 10 ft. setback and then in the contentious fourth story a further 10 ft. setback. The petitioner is offering in exchange filling the hole, putting a building there, providing self-parking on the site, metered nine spaces in the front, and in exchange he requests that we compensate them for the amount of square footage that they have lost in constructing a building which has to meet the very challenging side yard setbacks.

Regarding this, once again we look at the standards for practical difficulty and whether strict compliance with our rules would unreasonably prevent the property owner from using the property for a permitted purpose. Mr. Judd contended that it would be unnecessarily burdensome in this case to hold the petitioner to those requirements.

The second standard would be whether to grant the variance would do substantial justice to the applicant and other property owners. While we have heard some people have concerns about parking, that really doesn't address the issue before us. For that reason Mr. Judd thinks the petitioner successfully meets that one.

The third standard is whether the plight of the owner is due to unique circumstances and he wouldn't spend too much time talking about whether we have unique circumstances there. Just don't stand next to the site too closely or it may give way on you.

The fourth standard is Mr. Judd's favorite, whether the problem is self-created. He thinks the petitioner skirts self creation in this situation. When we are talking about a fourth story, is that self-created? Well, he supposes it is. But, as has been pointed out in presentations before the Planning Board, the height in that Zone District is 56 ft. This building cleverly meets the exact 56 ft. and it does so by taking the mechanical, which normally sticks up higher on the highest story, and placing it in a recessed area where it is invisible and certainly does not add to the height in this case.

Mr. Judd thinks the petitioner has shown a rather imaginative design and he also feels that the fourth story is warranted because, while he is very concerned about height, we have already covered tonight that this is not a precedent setting appeal. And, while he has concerns that all the adjacent land owners will come in with all kinds of creative arguments, probably represented by Mr. Rattner, in this case he is saying quite definitively that this is not a precedential one.

So, for those reasons Mr. Judd moved to grant this particular variance as advertised and tie it to the plans submitted.

Mr. Jones said that this is a situation where compliance with our requirements is more than well met in this regard. As he brought up before, he is not so sure that "compensating" the loss of square footage by an additional 20% is all that equitable. But he does believe this is likely the highest and best use of what we will get on this site. Further, the issue of parking is not the problem of the BZA; it is a function of the Planning Board and/or the City Commission and its desires to create ordinances that affect or otherwise ameliorate the problem. For those reasons Mr. Jones said he will support the motion.

Mr. Lyon indicated he would also support the motion. He believes this particular creative solution fits within the height as stated. His view is they have screened the mechanicals and the variance just seems fair in a lot of respects, which is good.

Chairman Lillie said he too will support the motion. He is not wild about granting a fourth floor, but due to the fact they are staying within the height limits allowed by the Ordinance for this area, and due to the fact this lot is pretty unique as far as shape and contour, he will support.

Motion carried, 6-0.

ROLLCALL VOTE

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

Nays: None

Absent: Hart, Miller

Motion by Mr. Judd

Seconded by Mr. Jones the petitioner also seeks a second variance to Chapter 126, Article 3, Section 3.04 A (1) (f) of the Zoning Ordinance that requires that a third story shall continue in a different plane, beginning at the eave line, not greater than 45 degrees measured to the horizontal or set back 10 ft. from any building facade - Variance B. The applicant is proposing a canopy that extends forward from the third and fourth floors and connects the eave line of the first and second floors. Therefore, a variance of 20 ft. is requested.

Under questioning, the petitioner and the architect have admitted this is an architectural feature and it is really up to this board to determine whether or not it is warranted in this case. Mr. Judd would agree that certainly from the south looking northward toward this building it would give the appearance of a roofline extending out, but it is over air and it is transparent. So Mr. Judd feels that, while denying the petitioner on this would not unreasonably prevent the owner from using the property for a permitted purpose, it is a structural design that adds something from that perspective.

Granting the variance would do substantial justice to the applicant as well as other property owners in the District. From an aesthetic standpoint, he realizes the BZA doesn't do aesthetics, but in this case he thinks it applies.

It is certainly not due to the unique circumstances of the property, but once again it is part of the design which the board has already passed. And while the problem is totally self-created, once again he thinks it is part and parcel to the original design which the board has already passed.

For those reasons, Mr. Judd would approve the Variance B as advertised and tie it to the plans presented.

Mr. Jones said he thinks the design is adequate in this regard. While not reaching the concept of the intent of the Ordinance, in this instance he feels the requested variance is in order.

Chairman Lillie announced he will vote against the motion. This board doesn't just grant variances for architectural design. Therefore, he thinks approving the canopy sets a very bad precedent. The applicant can use the property without the canopy.

Mr. Lyon was in support. Part of the issue is to reduce massing. His worry is that if they just have a sheer wall that is stepped back and goes the whole length of the property without something to break it up, it becomes visually massing. So in his opinion the small architectural feature helps to reduce that impact.

Mr. Canvasser was not in favor of the motion as proposed. His reason is that this problem was self-created. He has heard nothing from the petitioner as to why a lesser canopy could not be used.

Mr. Morganroth said he also will not support the motion. Although he does believe it is architecturally attractive, he agrees this is a precedent that the board should not allow. It is a large variance and not necessary to complete the structure.

Motion failed, 3-3.

ROLLCALL VOTE

Yeas: Judd, Jones, Lyon

Nays: Canvasser, Lillie, Morganroth

Absent: Hart, Miller

06-42-16

**1290 LAKESIDE
(Appeal 16-13)**

The owners of the property known as 1290 Lakeside request the following variance to allow for the construction of a house addition less than the required minimum front and side yard setbacks, distance between principal residential buildings, allowable overhang projection.

A. **Chapter 126, Article 4, section 4.75 A. 1** of the Zoning Ordinance requires that an attached garage be set back a minimum of 5 ft. from the portion of the front façade that is furthest setback from the property line. The proposed garage addition is 31.1 ft. in front of the furthest front façade; therefore, a variance of 36.1 ft. is requested.

This property is zoned R-1.

Mr. Worthington said the applicants have an existing non-conforming attached garage and they want to expand it flush with the front of the existing garage.

Mr. Sam Moraco, MLC Building Co., spoke on behalf of the petitioners, Jonathan and Evelina Ericsson. He explained the house was built in 1926 and the original footprint was designed to include the third stall which was never put in. The house sits right on the river and floodplain so part of the decking is cantilevered into the floodplain. There is nowhere else on the property that a third stall could be. As an architectural feature the garage is smaller on the interior than a normal garage. The Ordinance has changed since the house was built and it was okay then to have a garage in front of the house.

It was discussed this is a Wallace Frost house. Mr. Moraco said they will follow the same architectural features that are currently there.

There were no comments from the public at 9:15 p.m.

Motion by Mr. Lyon

Seconded by Mr. Jones regarding Appeal 16-13, 1290 Lakeside. The appellant seeks a variance under Chapter 126, Article 4, section 4.75 A. 1 of the Zoning Ordinance requiring the attached garage to be set back a minimum of 5 ft. from

the portion of the front facade that is furthest set back from the property line. Therefore, they are asking for a variance of 36.1 ft.

Mr. Lyon would move to grant the variance as advertised. He believes that strict compliance would be unduly burdensome due to the particular case of this property. It is next to the Rouge River floodplain. The existing house has been in place since 1926. It is angled, leaving no other place to build a second accessory building/garage. Mr. Lyon thinks the appellant is mitigating any required variance by just extending the existing garage which, due to the angle of the street, is further back than the existing garage.

He also believes there are some unusual circumstances about the house itself where the front door is set way in as opposed to more of a single plain front of a house.

He further believes it does substantial justice to the appellant and the community, given that it is considerably set back from the road. Also he believes it is not self-created because of the condition of the lot and the existing house. He would tie the motion to the plans as presented.

Motion carried, 6-0.

ROLLCALL VOTE

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

Nays: None

Absent: Hart, Miller

T# 06-43-16

CORRESPONDENCE (none)

T# 06-44-16

GENERAL BUSINESS

Chairman Lillie thought someone should take a look at the Ordinance with respect to 856 N. Old Woodward Ave. that allows a building to be so high that an extra floor can be squeezed in. Also, it was agreed that the City needs to do something about the parking problem. Mr. Johnson noted the City is well aware of the problem and he explained several ways in which they are working to expand parking availability.

T# 06-45-16

OPEN TO THE PUBLIC FOR MATTERS NOT ON THE AGENDA (no one was left in the audience)

T# 06-46-16

ADJOURNMENT

No further business being evident, the board members passed a motion to adjourn at 9:25 p.m.

Bruce R. Johnson, Building Official