

**BIRMINGHAM BOARD OF ZONING APPEALS PROCEEDINGS
TUESDAY, OCTOBER 17, 2017
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, October 17, 2017. Chairman Charles Lillie convened the meeting at 7:30 p.m.

Present: Chairman Charles Lillie; Board Members Kevin Hart, Randolph Judd, Vice-Chairman Peter Lyon, John Miller, Alternate Board Members Kristen Biardi, Jason Canvasser

Absent: Jeffery Jones, Erik Morganroth

Administration: Matthew Baka, Sr. Planner
Bruce Johnson, Building Official
Mike Morad, Asst. Building Official
Carole Salutes, Recording Secretary
Jeff Zielke, Building Inspector

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 who serve staggered three-year terms. 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# 11-68-17

APPROVAL OF THE MINUTES OF THE BZA MEETING OF SEPTEMBER 12, 2017

Motion by Mr. Judd

Seconded by Mr. Lyon to postpone approval of the Minutes of the BZA meeting of September 12, 2017 to the November meeting as there was an ambiguity in the wording with regard to Mr. Jones' motion on Page 6.

Motion carried, 7-0.

VOICE VOTE

Yeas: Judd, Lyon, Biardi, Canvasser, Hart, Lillie, Miller

Nays: None

Absent: Jones, Morganroth

T# 11-69-17

539 S. BATES ST.

Appeal 17-29

The owners of the property known as 539 S. Bates St. request the following variance to construct an addition to their existing home.

A. Chapter 126, Article 4, section 4.74 (C) of the Zoning Ordinance requires a minimum distance between principal residential buildings to this lot to be 17.50 ft. with 7.76 ft. proposed; therefore, a variance of 9.74 ft. is requested.

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

Mr. Johnson advised that the dimensions stated above are as advertised. However, the appellant has verified the actual dimension between the proposed addition and the existing attached garage to the south at its closest point is 7.82 ft., requiring a lesser variance amount of 9.68 ft.

The existing home was built in 1880 and is a designated historical structure. The property owner received approval on November 2, 2016 from the Historic District Commission ("HDC") to construct an addition to the existing home. A Building Permit was issued on April 24, 2017 to construct the addition after the plans were reviewed and approved by the Building Dept. After the permit was issued they were notified by DTE on June 29, 2017 that the location of the addition would be in violation of the National Electrical Code and DTE minimum clearances between the addition and the high voltage power lines. Therefore the Building Dept. issued a stop work order on June 30, 2017, due to the clearance violation.

The property owner redesigned the addition to meet the clearance requirements from the power lines and submitted an Administrative Approval Application to the Planning Dept. for the changes. They shifted the house to the south to comply with all of the setback requirements on their property (redesign of the interior and exterior from what was initially proposed). The house is now proposed to be 5.22 ft. from the south property line. They meet their combined total side yard setbacks of 17.5 ft.; however they are also required to have 17.5 ft. between principal structures.

The attached garage on the neighboring lot to the south (551 S. Bates St.) did receive a variance to be 3 ft. off the lot line prior to being constructed in 1986. That is where the distance between structures is non-conforming to today's Ordinance. The revised plan has been administratively approved with the condition that the applicant seeks approval from the BZA for the minimum distance between principal structures.

Responding to the Chairman, Mr. Johnson said the neighbor's garage to the south is 2.62 ft. off the side property line. The petitioner's lot is 70 ft. wide and the property directly to the south is 50 ft. wide. There are also power lines that run along the rear (easterly) property line. The applicant is working with DTE on the vertical clearance requirements there.

Mr. Lyon inquired how far DTE pushed the building envelope from the north lot line. Mr. Johnson replied the applicant went 14 ft. from the side property line.

Chairman Lillie summarized that assuming there was no house built on the lot to the south, no variances would be required by the petitioner because they meet all of their required setbacks except minimum distance between principal structures.

Mr. H. Adam Cohen, Steinhardt Pesnick & Cohen, spoke on behalf of Michael and Barbara Horowitz, the petitioners, regarding practical difficulty. Mr. Cohen provided the general background after the Horowitzes agreed to buy the home at 539 S. Bates St. contingent on their ability to resurrect a prior approval from the HDC on the historic home. The HDC reinstated the expired approval. The Horowitzes then advised the HDC that they would return with minor modifications to the property. Approximately one year ago the Horowitzes returned to the HDC with some minor modifications and the HDC unanimously approved the modifications with very positive comments.

In reliance of that approval, the Horowitzes closed on the purchase of the home. The City then issued a Building Permit to build the addition along with the minor modifications. Construction began. During the permit and approval process, DTE asserted some concerns about creating clearance with the power lines on the east. Resolution was worked out and construction continued. While work was going on, DTE for the first time claimed that it was concerned about the clearance between its poles and wires on the north and the Horowitzes' proposed addition. The City then issued a stop work order. The stop work order was issued four months ago. That order led to a lengthy series of meetings and communications over many weeks among representatives for the City, DTE, and the Horowitzes, including attorneys, building officials, engineers, and others.

On August 16, 2017, two proposals were made to the Horowitz Family:

- One was that they could apply to the HDC for a permit to demolish the historically designated structure. The process would consume many months and such approval is unlikely according to the City.

- The second proposal was that DTE could elevate the power poles and power lines on the eastern side of the property and relocate them on the northerly side. There was no certainty that the relocation was feasible from an engineering standpoint and the process would also take months at an estimated cost of approximately \$345,000.

Concerned that both alternatives would yield substantial construction delays, uncertainty, significant cost, and potential litigation, the Horowitzes went back to their architect, William Finnicum, and redesigned their proposed addition. The new design has received favorable responses from the various City and DTE attorneys, and other representatives and officials. While the new design meets the City's setback requirements, its construction requires a dimensional variance from the City's Ordinance regulating distance between principal residential buildings on the property's southerly side.

Mr. Cohen said there are several sources of practical difficulty to support their variance request:

- The Horowitzes already obtained approval from the HDC twice under their ownership.
- By now they had obtained a Building Permit and started work on the property.
- It was DTE, not the Horowitz Family, who belatedly objected to the construction and caused the issuance of a stop work order.
- The cost and the time associated with the other two proposals that are extraordinarily risky, not necessarily feasible from an engineering standpoint, and extremely time consuming to a family who is trying to move into a house.
- In 1986 the adjacent property owner to the south obtained a variance to construct a garage addition to the home's northerly side. Therefore that neighbor's garage is nonconforming as to its side yard setback requirement. Moreover, the neighbor's lot is only 50 ft. wide, meaning that lot's distance between buildings is only 14 ft.; not the 17.5 ft. applicable to the Horowitz property which is 70 ft. in width.
- It would be inequitable to reward a neighbor who was first in time to get a variance, and to punish a subsequent neighbor who was second in time and received all approvals to design and build a project which has now been stopped.
- The proximity of the neighbor's garage is the only thing that compels a variance.

These practical difficulties were not self-created and the Horowitz Family has incurred considerable expense and extraordinary hardship through all of this. They have worked to collaborate with the City, with DTE, and with everyone involved to create a solution to this problem.

Finally, in no sense would issuance of the requested variance impair the health, safety, and welfare of the greater community. One of the virtues of this plan is that it has the

effect of relocating the driveway to the north so it is consistent with the northerly driveways adjoining other homes along the street.

Mr. Horowitz showed pictures of the historic house and its relationship to the garage next door and to the DTE pole.

Chairman Lillie pointed out that neither history nor cost are criteria for establishing practical difficulty.

Mr. Lyon summarized the discussion to this point: The house to the south has a 2.6 ft. setback. It originally received a variance in 1986 of 3.3 ft. The larger setback is on the north side.

Mr. Johnson clarified that the DTE horizontal distance requirement is identical to that in the National Electrical Code. The City's position does not support DTE's required clearance, but that of the National Electrical Code. They are both the same. Mr. Cohen pointed out that DTE caused the City to issue the stop work order.

Responding to Mr. Lyon regarding alternatives that were pursued to reduce the required variance, Mr. Cohen stated that Mr. William Finnicum, the Horowitzes' architect, worked very diligently to avoid many possible variance requirements. This was as tight as he could possibly get it. Mr. Lyon went on to inquire why the Horowitzes want such a large house, and Mr. Cohen replied their family has certain bulk needs. They are not building a larger house than the one that was already approved by the HDC three times and for which a Building Permit was granted.

The Chairman took comments from members of the audience at 8:15 p.m.

Mr. Eric A. Parzianello, Hubbard Snitchler & Parzianello, PLC, spoke to represent both Ms. Jane Synnestvedt, and Ms. Barda. He said there was no notice delivered to them nor was there a notice at the property. He noted his clients do not feel that any of the circumstances described amount to practical hardship for the variance to be granted. There was some suggestion that the DTE issue was a surprise, but in November 2016 the HDC meeting notes from the Building Dept. said the applicant must provide a clearance letter from DTE indicating that the setbacks were approved by DTE. That apparently didn't happen.

There are no provisions of the Ordinance that will prevent the Horowitzes from using the property for a permitted purpose; there is no unnecessary hardship, it is all cost and size requirements; the narrowing of the distance between buildings constitutes some safety issues preventing emergency ability to access the homes.

Regarding whether the variance would result in substantial justice to the property owner and the general public, the public would all weigh in favor of denying the variance.

Mr. Cohen stated that in November 2016 DTE raised an issue about the lines on the east . The Horowitzes and DTE reached a resolution which is why DTE never said another word until after the Building Permit was issued. It was not until after construction started that DTE voiced concern about the lines on the north. Secondly, not a single safety professional has indicated there is any problem with the narrow area between the proposed addition and the neighbor's garage to the south. Further, the distance between the proposed addition to the home and the home to the south is very large.

Mr. Johnson clarified for the record that the revised plan was not approved by the HDC; it was administratively approved in the Planning Dept.

Mr. John Henke, a neighbor and chairman of the HDC, said he is speaking to clarify the record. The HDC has neither been consulted on this plan nor approved it. Secondly, this evening's hearing was never posted in front of the property. Third, immediately adjacent to the south lot line of the second house to the south of the subject property is a driveway on the north side of the property of the third house. Chairman Lillie answered that it was presented that all of the driveways are on the north side, and if the variance request is approved this driveway would also be on the north side. Mr. Henke continued that if the variance is granted there will be a 2 1/2 story structure immediately adjacent to a 1 1/2 story structure. The Chairman indicated that is not something the BZA decides on. Mr. Henke concluded that speaking as a neighbor, he sees this as a self-created problem.

Ms. Jane Synnestvedt, 551 S. Bates St., immediately south of the subject property said she has a passion for older homes and purchased her home because she felt the Bates St. Historic District offered protection for her 1907 home. If the proposed addition goes up it will affect the light that comes into her house on that side. She thought that a solution might be to shrink the size of the Horowitzes' house. There are a number of neighbors that agree with her.

Motion by Mr. Judd

Seconded by Mr. Lyon in regard to Appeal 17-29, 539 S. Bates St. The representative of the petitioner has certainly noted that this is a thorny problem. In fact, Mr. Judd has never seen a confluence of conflicting interests on a piece of property that is quite as complete as this one. We have a historic home; we have DTE with a setback controlling; we have a house to the south that was granted a variance in 1986 (by the way, nothing the past board did or that we do is precedent).

The question is whether any of these or added together is enough to constitute practical difficulty in this particular situation. Mr. Judd feels that they are. He thinks that strict compliance with the setbacks in this case would unreasonably

prevent the owner from using the property for a permitted purpose and would render conformity to the restrictions unnecessarily burdensome.

Further, to grant the variance would do substantial justice to the applicant as well as other property owners in the district.

We are the Board of Zoning Appeals, we are not the Historic Board; we are not the City Commission; we deal with the issue at hand and that does not include worrying about or considering the historic nature of the area. There is a board for that purpose so we will be very circumspect in our decision.

Mr. Judd feels that to allow a lesser relaxation would give substantial relief to the owner of the property and be more consistent with justice to the property owners.

The third point this board deals with is whether or not this is due to unique circumstances. Well, as he noted, there are a lot of unique circumstances here. The historic home has been before the Historic District Commission twice. The plans that have been submitted have been approved, and the main problem suddenly becomes DTE. DTE is certainly not a self-created problem as noted. The setback required by DTE has really thrown this entire project off. Mr. Judd indicated he is an attorney, not an architect, but he looked at the plans and tried to figure out how you could shift that house, but you can't touch the historic home which sits in the middle. That is the fulcrum and it is not going anywhere. So, that is the problem that we have to deal with. Added to that problem is in 1986 members of this board, none of whom were on the board at that time, granted a variance. That variance, once again, is butting up against the subject project from the south.

Mr. Judd feels the solution that has been presented by the petitioner is the one that will work in this case. Therefore he would move to grant this appeal and tie it to the plans as presented.

Mr. Lyon said he supported the variance because the house to the south is not a conforming structure. This is a bit of our 9-5, 9-5, 9-5 rule where Birmingham is a bit unique in the required distance between buildings. The neighbors to the south intruded on the required 5 ft. setback (actually more than they were allowed to). Were it not for that structure this board would not even be meeting tonight. The City has supported the DTE required distance from their lines. Therefore it requires the petitioner to put the large driveway setback on the north side of the structure. That leaves the south side of the structure with the smaller setback which would normally be 5 ft. were it not for the neighbor's garage that is 2.7 ft. from the south lot line of the subject property. So for those reasons, Mr. Lyon thinks that a practical difficulty has been established; it is not self-created; and it is definitely unique to the property.

Mr. Miller commented in support of the appeal. There are many unique circumstances here, but the garage to the south and its variance are an over-riding factor for him.

Chairman Lillie indicated he would support the motion for the reasons stated by Mr. Judd. He also pointed out that the board has run into this situation before where adjoining lots have different widths. It causes a problem for the larger lot owner because the smaller lot owner is able to comply because he doesn't have to be as far away from the lot line. Besides that, the variance that was obtained in 1986 has exacerbated the problem.

Motion carried, 7-0.

ROLLCALL VOTE

Yeas: Judd, Lyon, Biardi, Canvasser, Hart, Lillie, Miller

Nays: None

Absent: Jones, Morganroth

T# 11-70-17

CORRESPONDENCE (none)

T# 11-71-17

GENERAL BUSINESS

Mr. Johnson announced that the December meeting will be on December 5 due to holidays occurring in the second week.

T# 11-72-17

OPEN TO THE PUBLIC FOR MATTERS NOT ON THE AGENDA (no public was left)

T# 11-73-17

ADJOURNMENT

No further business being evident, the board members passed a motion to adjourn at 8:40 p.m.



Bruce R. Johnson, Building Official