

**BIRMINGHAM BOARD OF ZONING APPEALS PROCEEDINGS
TUESDAY, FEBRUARY 11, 2020
City Commission Room
151 Martin Street, Birmingham, Michigan**

1. CALL TO ORDER

Minutes of the regular meeting of the City of Birmingham Board of Zoning Appeals ("BZA") held on Tuesday, February 11, 2020. Vice-Chairman Jason Canvasser convened the meeting at 7:30 p.m.

2. ROLL CALL

Present: Board Members Jason Canvasser, Kevin Hart, John Miller, Erik Morganroth, Francis Rodriguez; Alternate Board Member Ron Reddy

Absent: Chairman Charles Lillie; Board Member Richard Lilley; Alternate Board Member Jerry Attia

Administration:

Bruce Johnson, Building Official
Mike Morad, Asst. Building Official
Jeff Zielke, Asst. Building Official
Brooks Cowan, City Planner
Laura Eichenhorn, Transcriptionist

Vice-Chairman Canvasser explained BZA procedure to the audience. He noted that the members of the Board of Zoning Appeals are appointed by the City Commission and are volunteers who serve staggered three-year terms. They are a quasi-judicial board and 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. He pointed out that this board does not make up the criteria for practical difficulty or hardship. That has been established by statute and case law. Appeals are heard by the board as far as interpretations or rulings. In that type of appeal the appellant must show that the official or board demonstrated an abuse of discretion or acted in an arbitrary or capricious manner. Four affirmative votes are required to reverse an interpretation or ruling.

Vice-Chairman Canvasser took rollcall of the petitioners. All petitioners were present.

T# 02-07-20

3. APPROVAL OF THE MINUTES OF THE BZA MEETING OF JANUARY 14, 2020

Motion by Mr. Morganroth

Seconded by Mr. Reddy to accept the Minutes of the BZA meeting of January 14, 2020 as submitted.

Motion carried, 6-0.

VOICE VOTE

Yeas: Morganroth, Reddy, Canvasser, Hart, Miller, Rodriguez

Nays: None

T# 02-08-20

4. APPEALS

**1) 1616 Croft
Appeal 20-09**

Assistant Building Official Morad presented the item, explaining the owner of the property known as 1616 Croft was requesting the following variance to construct a second floor addition on top of an existing non-conforming home along with an addition to the first floor at the rear of the home:

A. Chapter 126, Article 4, Section 4.61(A)(1) of the Zoning Ordinance requires that a corner lot which has on its side street an abutting interior residential lot shall have a minimum setback from the side street equal to the minimum front setback of the average of the homes within 200.00 feet in each direction. The required front yard setback is 35.90 feet. The proposed is 15.10 feet. Therefore a variance of 20.80 feet is being requested.

Assistant Building Official Morad noted the home was constructed in 1949. This property is zoned R2 – Single Family Residential.

Robin Ballew, architect, was present on behalf of the appeal.

Mr. Ballew explained that he did not limit the overhangs only to the portion of the home that would not have increased the non-conformity because to do so would have prevented the home from being aesthetically pleasant and from having a cohesive feel. He explained that limiting the house to only having an overhang in the area of conformity would not likely have been the original intention of the ordinance, and that this home presents an exception to an ordinance that otherwise works for most homes in the neighborhood.

No members of the public wished to comment.

Motion by Mr. Rodriguez

Seconded by Mr. Morganroth with regard to Appeal 20-09, A. Chapter 126, Article 4, Section 4.61(A)(1) of the Zoning Ordinance requires that a corner lot which has on its side street an abutting interior residential lot shall have a minimum setback from the

side street equal to the minimum front setback of the average of the homes within 200.00 feet in each direction. The required front yard setback is 35.90 feet. The proposed is 15.10 feet. Therefore a variance of 20.80 feet is being requested.

Mr. Rodriguez moved to approve the variance because practical difficulty had been established, and to tie approval to the plans as submitted. He said the existing non-conforming home is a unique circumstance of the property, that the need for the variance is not self-created, granting the variance would not adversely affect the adjacent properties, and that the variance requested is the minimum necessary since it does not expand the existing footprint of the home.

Mr. Miller said he would support the motion because while a 20 foot variance is unusual in a front yard, this is a corner lot with unique conditions that merit the granting of the variance and does not set any precedent.

Motion carried, 6-0.

ROLL CALL VOTE

Yeas: Rodriguez, Morganroth, Reddy, Canvasser, Hart, Miller

Nays: None

**2) 770 S. Adams
Appeal 20-10**

City Planner Cowan presented the item, explaining the owner of the property known as 770 S. Adams was requesting the following interpretation OR variance regarding side yard setback in the Triangle District:

A. Chapter 126, Article 3, Section 3.08(B) of the Zoning Ordinance Triangle District Overlay requires a minimum side yard setback of 10 feet for walls that contain windows. Meanwhile, **Chapter 126, Article 3, Section 3.16(C)(1)** of the Zoning Ordinance Via Activation Overlay states that side setbacks shall not be required where side lot lines adjoin a via. The subject property resides within the Triangle Overlay District and is adjacent to a public alley, therefore the property is subject to both the Triangle District Overlay standards and the Via Activation Overlay standards.

Chapter 126, Article 3, Section 3.06(C) states that the provisions of the Triangle Overlay District, when in conflict with other articles of the Zoning Ordinance, shall take precedence. However, **Chapter 126, Article 3, Section 3.15(C)** states the provisions of the Via Activation Overlay District, when in conflict with other articles of the Zoning Ordinance, shall take precedence. The applicant has requested an interpretation as to which overlay standard takes precedence in regards to side setbacks along an alley within the Triangle Overlay District and Via Overlay District.

B. Chapter 126, Article 3, Section 3.08(B) of the Triangle District Overlay standards in the Zoning Ordinance requires a minimum side yard setback of 10 feet for walls that

contain windows. The applicant has proposed a windowed side wall on the southern elevation that is setback 3'4" from the property line on the first floor, and a windowed side wall that is 2 feet from the property line on floors two through six. Therefore, a dimensional variance of 6'8" for the first floor on the southern elevation and 8 feet for floors two through six on the southern elevation has been requested.

City Planner Cowan noted the subject property is zoned B2 General Business, as well as MU-3 and MU-5 in the Triangle District Overlay. The proposed project was brought before the Planning Board on January 8th, 2020. The report presented by the Planning Division called out the side setback requirement on the southern elevation of 10 feet for walls with windows as per the Triangle Overlay District standards. The Preliminary Site Plan report considered the subject property to be adjacent to an alley and subject to the Via Activation Overlay standards as it recommends that the Planning Board consider design enhancements along the alley. It is of note that the report did not mention the setback requirements for the Via Activation Overlay District standards at the time. The Triangle Overlay District standards were approved in 2007 while the Via Activation Overlay District standards were approved in 2012.

In reply to Vice-Chairman Canvasser, City Planner Cowan said he was unsure whether the City intended the Via Activation Overlay District standards to prevail over the Triangle Overlay District standards or vice-versa.

Vice-Chairman Canvasser asked if there was any intent on the part of the City to clarify which set of standards should take precedence.

City Planner Cowan stated it would be beneficial if the City did so.

In reply to Mr. Reddy, Building Official Johnson said that conflicts in the zoning ordinance may be resolved by the Board of Zoning Appeals.

Vice-Chairman Canvasser said there were two requests before the Board in this appeal:

1. Which set of standards should take precedence in this appeal; and,
2. If the Board concurs that the Triangle Overlay District standards supercede the Via Activation Overlay District standards in this appeal, whether the requested dimensional variance should be granted.

In reply to Mr. Miller, City Planner Cowan explained the question of standard precedence was not resolved by the Planning Board in this case because the Planning Department only discussed the ten-foot setback requirement of the Triangle Overlay District standards during preliminary site plan review, and did not note that this property is also subject to Via Activation District overlay standards, which do not require a side setback.

In reply to Mr. Miller, Vice-Chairman Canvasser said that a BZA decision on would not set a binding precedent for future appeals. He said the Board could pass an interpretation specific to this circumstance. He also said it would be wise for the BZA to invite the Planning Board and the City to review this issue and to resolve the attendant ambiguity present in the zoning at this time.

Building Official Johnson agreed, saying City staff need to work with the Planning Board to resolve the ambiguity present in the zoning ordinance regarding the standard precedence question.

Rick Rattner, attorney for the appeal, reviewed the appellant's request.

In reply to Mr. Hart, Mr. Rattner explained:

- A solid wall along the alley would be more detrimental to the appeal than the proposed windows because a large blank wall go against the precepts of the Triangle Overlay District.
- The issue would be resolved if the Via Activation District standards are found to supercede the Triangle Overlay District standards in this appeal.
- Having the windows along the alley would necessitate glass that addresses any fire concerns and other design elements to make sure the building conforms to safety codes. Adhering to these requirements would present no issue for the appellant.

No members of the public wished to comment.

Motion by Vice-Chairman Canvasser

Seconded by Mr. Rodriguez with regard to Appeal 20-10, A. Chapter 126, Article 3, Section 3.08(B) of the Zoning Ordinance Triangle District Overlay requires a minimum side yard setback of 10 feet for walls that contain windows. Meanwhile, Chapter 126, Article 3, Section 3.16(C)(1) of the Zoning Ordinance Via Activation Overlay states that side setbacks shall not be required where side lot lines adjoin a via. The subject property resides within the Triangle Overlay District and is adjacent to a public alley, therefore the property is subject to both the Triangle District Overlay standards and the Via Activation Overlay standards. Chapter 126, Article 3, Section 3.06(C) states that the provisions of the Triangle Overlay District, when in conflict with other articles of the Zoning Ordinance, shall take precedence. However, Chapter 126, Article 3, Section 3.15(C) states the provisions of the Via Activation Overlay District, when in conflict with other articles of the Zoning Ordinance, shall take precedence. The applicant has requested an interpretation as to which overlay standard takes precedence in regards to side setbacks along an alley within the Triangle Overlay District and Via Overlay District. B. Chapter 126, Article 3, Section 3.08(B) of the Triangle District Overlay standards in the Zoning Ordinance requires a minimum side yard setback of 10 feet for walls that contain windows. The applicant has proposed a windowed side wall on the southern elevation that is setback 3'4" from the property line on the first floor, and a windowed side wall that is 2 feet from the property line on floors two through six. Therefore, a dimensional variance of 6'8" for the first floor on the southern elevation and 8 feet for floors two through six on the southern elevation has been requested.

Vice-Chairman Canvasser moved to approve an interpretation whereby the Via Activation Overlay District controls in this situation, thereby allowing the windows to abut the alley and negating the necessity for the Board to consider any variances. He strongly recommended to City Staff and the Planning Board that the issue of standard

precedence be studied and resolved. Vice-Chairman Canvasser stated that this BZA decision was based on the particular facts and circumstances of this appeal, and shall not be taken as a binding precedent for future BZA appeals. Vice-Chairman Canvasser concluded that an approval of this appeal would be tied to the plans as submitted.

Mr. Morganroth said that he would support this motion because having an alley with no windows contradicts the City's stated goal of activating its alleys.

Motion carried, 6-0.

ROLL CALL VOTE

Yeas: Canvasser, Rodriguez, Reddy, Hart, Miller, Morganroth

Nays: None

**3) 932 Chestnut
Appeal 20-11**

Assistant Building Official Zielke presented the item, explaining the owner of the property known as 932 Chestnut requested was requesting the following variance to construct a window well in the required front open space:

A. Chapter 126, Article 4, Section 4.30(C) 4 of the Zoning Ordinance prohibits window wells to be erected in the required front open space. A window well is proposed to be constructed in the required front open space; therefore a variance to permit the window well is requested.

Assistant Building Official Zielke noted the applicant proposes to construct a window well around an existing basement window on the front of the home. The existing home was constructed in 1976. This property is zoned R2 – Single Family Residential.

Daniel Ionescu, owner, and Lee Traxler of ZLM Services were present on behalf of the appeal. Mr. Traxler reviewed the appeal for the Board.

In reply to Mr. Hart, Building Official Johnson said he could see an argument that a window well already exists on this property and this appeal only proposes to raise the grade and slope the water out to the road. He said in putting in the walls and raising the grade, however, the proposal would actually be creating the window well. Building Official Johnson said the appellant seemed to be attempting mitigation by proposing to disguise the window well as part of the porch.

Mr. Traxler told Mr. Miller the top of the drain would remain where it is currently located.

Mr. Miller said he would have liked a clear layout of the existing wall, drain, window and sidewalk, a clear layout of the proposed changes to those elements, and why those proposed changes would be necessary. He said without that documentation the Board could only speculate how high the window well retaining wall should be and if the guard rail is required. While acknowledging that this lot had a unique condition, Mr. Miller emphasized that City zoning

regularly aims to avoid window wells in front yards. Mr. Miller said the appeal seemed well thought out, but that without line drawings of the present and proposed conditions he could not determine the appeal's necessity.

Michael Heilman, resident of Forest Street, said he wanted to do a window well on his property and noted that the most recent revisions to the Building Officials and Code Administrators (BOCA) National Code require a means of egress from basements. Mr. Heilman said he was in support of Mr. Ionescu's appeal, that he could not understand why the Board found window wells in front yards objectionable, and that the City's prohibition on window wells in front yards needs to be revisited.

Vice-Chairman Canvasser explained that it is the ordinance that prohibits window wells in front yards, not the Board.

Mr. Heilman said he understood, and that he was asking the BZA to revisit the matter.

Mr. Morganroth said that if window wells were prohibited on all sides of a home, that would present a practical difficulty. He noted that the ordinance allows window wells on all sides of a home except for the front, however, which makes it much more difficult to explain why putting a window well in the front yard is a necessity.

Mr. Heilman said he could not understand why an eight to ten foot porch into the front yard setback is not a problem, but a hole in the ground would be. He said he understood that to be the case in City ordinance, and asked the BZA again to consider the matter for review.

Assistant Building Official Zielke confirmed for Mr. Hart that the window being requested as part of this appeal is not an egress window.

After discussion, the Board concurred they would like to have more documentation from the applicant regarding the grade, the flow of water, where the drain would be located, whether the drain could be lowered, and whether the same results could be achieved without creating a well prohibit by the ordinance.

Vice-Chairman Canvasser advised the appellant that they could elect to return with the requested documentation, or could ask the Board to presently proceed with a vote on the appeal. Vice-Chairman Canvasser reminded the appellant that he would need four affirmative votes from Board members, that there were only six Board members present, and that a number of Board members had already expressed that they did not feel they had enough information to render a decision.

Mr. Ionescu said he would like consideration of Appeal 20-11 to be adjourned to the March 2020 BZA meeting, saying he would return with more information.

Motion by Mr. Reddy

Seconded by Vice-Chairman Canvasser with regard to Appeal 20-11, A. Chapter 126, Article 4, Section 4.30(C) 4 of the Zoning Ordinance prohibits window wells to be erected in the required front open space. A window well is proposed to be constructed

in the required front open space; therefore a variance to permit the window well is requested.

Mr. Reddy moved to adjourn consideration of Appeal 20-11 to the regularly scheduled March 2020 BZA meeting, at which time the appellant would provide more information with regards to the Board's questions regarding grade, efficacy of the solution proposed, and whether any other solution would equally well without requiring a variance.

Motion carried, 6-0.

Yeas: Reddy, Canvasser, Rodriguez, Hart, Miller, Morganroth
Nays: None

T#02-09-20

5. CORRESPONDENCE (included in agenda)

T# 02-10-20

6. GENERAL BUSINESS

Building Official Johnson asked the Board members to review the draft master plan and to be prepared to give BZA-related comments regarding the draft's contents during the March 2020 BZA meeting. He explained that discussion would be open to public comment as well. He advised the Board members that he was providing them with a hard copy of highlights from the draft, and that a full version of the draft could be found at thebirminghamplan.com.

Building Official Johnson also noted that the Board members were being provided with a hard copy of the new zoning ordinance. He recommended the Board members view the online version of the zoning ordinance as well, saying it had been optimized to provide a much more user-friendly experience than the previous version.

T# 02-11-20

7. OPEN TO THE PUBLIC FOR MATTERS NOT ON THE AGENDA

No members of the public wished to comment.

T# 02-12-20

8. ADJOURNMENT

No further business being evident, the board members passed a motion to adjourn at 8:47 p.m.



Bruce R. Johnson, Building Official