

MINUTES OF THE SHAWNEE COUNTY BOARD OF ZONING APPEALS

Monday, October 13, 2014
Shawnee County Annex
6:00 PM

Roll Call and Announcement of Hearing Procedure: Mr. Jacques, Chairman, called the meeting to order and announced the Board of Zoning Appeals would convene first and after conclusion of business, would adjourn and reconvene as the Planning Commission. Mr. Jacques asked for roll call to be taken.

Members Present: Brian Jacques, Lynn Marolf, Nancy Johnson, Matt Appelhanz, Dave Macfee and Patrick Tryon. With six members present a quorum was established and the meeting was called to order. Christi McKenzie arrived after roll call was taken.

Members Absent: None.

Staff Present: Barry T. Beagle, Planning Director; Anna Ortega, Zoning and Floodplain Administrator and Joelee Charles, Administrative Assistant.

Communications: There were no communications from staff.

Ex Parte Communication by Members of the Commission: There were no Ex Parte communications expressed by members of the Commission.

Declaration of Conflict of Interest by Members of the Commission or Staff: Mr. Tryon stated he lived in the subdivision on the subject property but didn't consider his participation a conflict of interest.

Public Hearing:

1. **VR14/01 by Mike & Vickie Manns** requesting a variance to decrease a side yard setback from 7-feet to 3.7-feet on property located at 4600 SW Shenandoah Road in Mission Township.

Mr. Beagle stated the applicant (landowner) owned a 1.46 acre parcel platted as Lot 4, Block B in Woodland Heights Subdivision #2. The lot was subject to a 50 foot building setback along both 46th Street and Shenandoah Drive as well as a 6 foot utility easement on the south property line. In 2013/2014, the applicant constructed a home addition that encroached into the required 7 foot side yard setback by 3.3 foot and did not obtain the required building permit. The applicant was now requesting to reduce the side yard setback from 7 foot to 3.7 foot.

Mr. Beagle reviewed the functions/criteria they would consider for the variance request. He said state law stipulated any county who adopted zoning regulations must also establish a Board of Zoning Appeals. Their job was to review the situations where there was a demonstrated hardship associated with a property. He said the zoning regulations established rules governing the use and development of land which were to be applied uniformly. At times, the strict application of the regulations may cause an unnecessary hardship due to some unique physical condition of the property. The applicant would then need to demonstrate what the unique condition was in order for a variance to be granted.

Mr. Beagle said the criteria were rigid for approving a variance because all the same zoning standards had to be met. The standards should not be relaxed as a matter of convenience or financial gain but as a result of a unique condition that prevented all beneficial use of a property.

Mr. Beagle said there were five tests set forth in the state statute that would need to be met in order for the Board to grant a variance such as:

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1. There was a condition unique and not ordinarily found in the same zoning classification and created by the zoning regulations and not by the property owner or applicant's actions.
2. It would not adversely affect the rights of the adjacent property owners or residents.
3. Strict application of the provisions of the regulations would constitute an unnecessary hardship upon the property owner or applicant.
4. It would not adversely affect the public's health, safety, morals, order, convenience, prosperity or general welfare.
5. It would not be opposed to the general spirit of the zoning regulations.

Mr. Beagle made the following points:

- Mr. Kent Fruits, the applicant's builder, met with staff on January 6, 2013, to discuss the building addition requirements including the 7 foot side yard setback on the south property line.
- Staff was not contacted until April 2, 2014, when the builder advised Ms. Anna Ortega, the Zoning Administrator, the addition was being constructed and framed in.
- The builder said a building permit was not applied for due to miscommunication.
- The builder told Ms. Ortega a site survey had confirmed the addition encroached 3 foot into the required side yard setback and a vacation was needed to vacate a portion of a platted utility easement along the same property line.
- Ms. Ortega instructed him to stop work on the addition and apply for the building permits and to seek a variance for the side yard setback requirement.
- Despite being told to stop work, it was staffs' understanding that construction continued and was finally completed without a building permit.
- An application for a building permit was not filed until May 16.
- Since April 2, the applicant has been attempting to acquire the residential property immediately to the south or at least a portion of the property to eliminate the side yard setback violation.
- A violation notice was sent via certified mail to the applicant on June 18 which went unclaimed and a second notice was sent by regular mail on July 7.
- On August 14, the builder met with staff to go over again what needed to be completed and was given a September 2 deadline to submit an application for a variance and a vacation or legal action would be sought against the applicant.
- On September 2, the builder applied for the variance but not the vacation.
- When the builder applied for the vacation, he did not include the letters from the public entities and utility companies with their approval of the easement vacation. Staff decided to put that request on hold pending the outcome of the variance request.
- The 3.3 foot encroachment could have been avoided if the applicant had applied for a building permit prior to construction as all dimensional requirements would have been reviewed. It was the builder's responsibility to take the appropriate measurements to confirm compliance with the dimensional requirements.

Mr. Beagle provided his comments regarding the five tests as follows:

- There didn't appear to be any condition unique to the property that would have prevented compliance with the side yard setback. No condition warranted the addition to be built closer to the side lot line.
- It didn't appear that the resulting setback reduction was going to have an adverse effect on the adjoining property to the south which would have been most impacted. He said the zoning regulations were to be applied uniformly to all properties.

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- There would be occasions where the strict application of regulations as applied to a specific property possibly would result in an unnecessary hardship. It was incumbent upon the property owner to demonstrate that a condition unique to the property prevented compliance with a particular provision of the regulations and, unless a variance was granted, the property owner would be denied all reasonable use of the property. The hardship was self imposed and was created at the time of construction. If a permit had been secured prior to construction, it was the builder's responsibility to confirm the proposed improvement was being built in compliance and properly establish the location of property lines and platted easements. It had not been demonstrated, in Staff's opinion, that the applicant had a condition unique to the property itself that would have prevented compliance with the setback requirement. As such, there was no unnecessary hardship created as a result of the setback requirement itself. Building setbacks were one of a number of community standards established through zoning regulations intended to provide uniformity and predictability. With no demonstrated hardship, granting the variance would set a precedent that would encourage additional variance requests based on little or no substantive grounds other than personal hardship or convenience.
- In time, it would be difficult if not impossible to maintain community standards which were intended to promote the public's health, safety, morals, order, convenience, prosperity or general welfare.
- The side yard setback requirement was applicable to all property in the county with the same classification. It was the responsibility of the applicant to demonstrate a variance was needed to deviate from the requirement based on a unique site condition and not as a result of a self-imposed hardship based on the actions of the applicant. In the absence of the demonstrated condition unique to the property that justified the deviation to the side yard setback requirements, the requested variance was arbitrary to counter the general spirit of the regulations.

In summary, Mr. Beagle said it was important to realize the encroachment into the required side yard was, in Staff's opinion, entirely avoidable. The hardship was entirely self imposed and not as a result of a physical condition unique to the property. There was nothing associated with the property that would have prevented compliance with the side yard requirement and platted utility easement at the time of construction. Not having secured the necessary permit prior to construction, the applicant did not have the best interest in the addition as constructed. After conferring with the County Counselor's office, the County may pursue legal action to remove the offending portion of the addition from the easement and required setback should the request be denied.

Mr. Jacques asked Mr. Beagle if the builder and the applicant were related. Mr. Beagle said they were not. The applicant/owner was the Manns and the builder was Mr. Fruits. Mr. Jacques asked if the appeal from the Zoning Board would go to the District Court and bypass the County Commission. Mr. Beagle agreed. Mr. Macfee asked for clarification. Mr. Jacques said the Board of Zoning Appeals decision would be final and any further review would be handled by the District Court.

Mr. Jacques asked if the applicant was present. The applicant was not present. Mr. Beagle said the applicant was sent the staff report along with the notification of the hearing.

Ms. Johnson asked Mr. Beagle if the addition was completely finished. Mr. Beagle said it was.

Mr. Jacques said there was a similar issue before the Planning Commission that was continued for one month to allow the applicant to be present. Mr. Jacques said he would like to give the applicant the opportunity to be heard since it would be a final decision. He asked if the applicant could be contacted to inform them that it was continued. Mr. Beagle said the applicant would be contacted if that was the action of the Board of Zoning Appeals.

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Mr. Macfee asked if the notification sent to the applicant was certified. Mr. Beagle said it was sent out by regular mail. He said the applicant was aware as they had talked about getting a variance. They were informed of the schedule and the necessity to attend the meeting.

Mr. Jacques commented on the lack of information that was completed on the application and had indicated there was no unique condition. Ms. Johnson asked if the applicant completed the form. Mr. Beagle said the applicant had completed it.

Mr. Jacques said if they were going to continue the item, he would continue it before comments were made. If they were going to hear it and make a decision, they would proceed. He asked if someone wanted to make a motion.

Mr. Marolf said he felt there were people who came to the meeting to speak to the issue and asked if they could proceed and hear their comments and then decide whether to table it or not.

Mr. Jacques asked if there was a motion. If not, then they would proceed to public comments. There was no motion.

Mr. Jacques opened the public hearing and called for comments in regard to the proposed variance.

Mr. Don Long, 930 NE 43rd Street, Topeka, KS 66617.

- Owns the property at 4612 SW Shenandoah Road, next door to the applicant.
- Talked to someone who indicated the Manns were in the process of buying their property.
- Said the Manns indicated an interest but had not received an offer.
- Said they would entertain an offer if they wanted to buy it.
- Said it was 3 ½ feet of an easement which was not part of their property.
- Has owned rental property in Illinois and Kansas.
- Never occurred to them to just go ahead and do something without getting permits.
- Assumed they had the permits.
- Didn't know if he was strongly opposed to it.
- More interested in how it affects them.

Mr. Jacques said he wasn't sure if it would be negative. It wouldn't change the Long's property. He asked if any other members had any questions for Mr. Long.

Mr. Beagle said Ms. Ortega had received a letter from the builder on May 29. Ms. Ortega read the letter which stated the builder was trying to buy the property at 4612 SW Shenandoah Road to move the property line three foot; the property was vacant; the builder was negotiating with Ms. Peggy Long; and a contract for purchase was sent to Ms. Long but did not have a signed deal when the letter was sent. Mr. Beagle asked the Longs if they received the letter. They indicated they had not.

Ms. Peggy Long, 930 NE 43rd Street, Topeka, KS 66617.

- Talked to two men, one was Mr. Tom Bailey and someone else who said he would do the work.
- Didn't know who the other guy was and didn't get a name.
- Met with them and showed them the property.
- He called her once and gave her a range of what he thought he might want to do as far as price.
- Mr. Bailey called again a few weeks ago and she requested they put something in writing.
- She hadn't received an offer in writing to date.

Ms. Susan Long, 930 NE 43rd Street, Topeka, KS 66617.

- Said she was the daughter and said she had lived at 4612 SW Shenandoah Road with her brother.
- Said they had taken liberties with their yard by driving trucks in and out over their grass.

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Mr. Beagle asked if they had ever received any contract. The Longs indicated they had not.

Mr. Jacques asked if there were any other comments. With no further comments, Mr. Jacques closed the public comments.

Mr. Jacques then called for comments from commission members. There was no discussion on the motion.

Ms. Johnson asked Mr. Beagle if they needed to indicate a reason. Mr. Beagle said it could be something as simple as that they find in concurrence with Staff's comments and it did not conform to the state statutes.

Mr. Macfee asked Mr. Jacques if a yes vote was to disapprove. Mr. Jacques said it was.

Ms. Johnson moved for disapproval of the variance, seconded by Mr. Marolf and with a vote of **7-0-0**, the variance was Denied.

There was no public comment on non-agenda items and no discussion of planning items.

Adjournment:

Mr. Jacques moved to adjourn the Board of Zoning Appeals hearing, seconded by Ms. McKenzie and with a unanimous voice vote the meeting was adjourned at 6:30 p.m.