

# MINUTES OF THE SHAWNEE COUNTY BOARD OF ZONING APPEALS

Monday, May 11, 2015  
Shawnee County Annex  
6:00 PM

**Roll Call and Announcement of Hearing Procedure:** Mr. Macfee, Chairman, called the meeting to order. He said the Board of Zoning Appeals would convene first and after conclusion of business, would adjourn and reconvene as the Planning Commission. He then read the hearing procedure and asked for roll call to be taken.

**Members Present:** Dave Macfee, Matt Appelhanz, Lynn Marolf and Patrick Tryon. With four members present a quorum was established and the meeting was called to order. Christi McKenzie arrived after roll call was completed.

**Members Absent:** Brian Jacques, Nancy Johnson.

**Staff Present:** Barry T. Beagle, Planning Director; Joelee Charles, Administrative Assistant; and, Ashley Biegert, Assistant County Counselor.

**Approval of the October 13, 2014 Public Meeting Minutes:** Mr. Tryon moved for Approval of the October 13, 2014 Board of Zoning Appeals minutes, second by Mr. Appelhanz and with a unanimous voice vote the minutes were Approved.

**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 and did not have any conversation with any of the parties. He didn't consider himself in 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 was seeking a variance to reduce the side yard setback requirement in conjunction with a completed home addition at 4600 SW Shenandoah Road in 2014. The new addition encroaches into the 7-foot side yard setback by 3.3-feet. The home also encroached into a platted utility easement along the south property line. He said the first request was considered by the Board of Zoning Appeals on October 13, 2014. The applicant nor their representative was present. The Board reviewed the facts and denied the requested variance. Following that determination, the Planning Department contacted the County Counselor's office to discuss the best way to proceed to resolve the issues regarding the encroachment and with no valid building permit having been issued. The County Counselor advised since the applicant was not present at the October meeting, they should have been given the right to at least express their side. So in order not to have a due process challenge, it was suggested the applicant be contacted to see if they wanted to complete a new variance application. Contact was made and the applicant chose to reapply. Mr. Beagle said the facts and circumstances relative to the construction of the addition had not changed as they were originally presented on October 13, 2014. Staff had not found any condition associated with the property which was unique that warranted reducing the 7-foot side yard setback to 3.7-feet as requested. Staff recommended disapproval.

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Mr. Macfee asked if the applicant wanted to make a statement.

Mr. Mike Manns, 4600 SW Shenandoah Road, Topeka, Kansas 66610.

- He and his wife built the house and have lived there for about 30 years.
- Until recently, he didn't know anything about setbacks, encroachments or variances.
- They hired Kent Fruits to construct a family addition to his home several years ago.
- Unfortunately, Mr. Fruits didn't follow the rules for building permits or setback issues.
- The addition had a corner that was 39" into the 7-foot setback.
- Mr. Fruits notified them he had made a mistake after construction was completed. He said it happened all the time and he would take care of it. They trusted him to take care of the issue. They found out later Mr. Fruits did not get a building permit in a timely fashion, had ignored a stop work order and then compounded the problem by not attending a zoning violation hearing.
- After they learned Mr. Fruits did not attend the meeting, Mr. Manns contacted Mr. Beagle and Mr. Eckert on how to proceed.
- Mr. Manns said letters had been sent to all the utilities concerned. Kansas Gas Service and Cox Communications responded that they had no issue vacating the utility easement.
- In an effort to settle the issue, Mr. Manns made two different attempts to purchase land and then the house/land from the neighbor to the south but neither were successful.
- Mr. Manns was appealing to the Board as he had no knowledge at the time of the mistakes Mr. Fruits made or their magnitude.
- He was told by several people there was something called adverse possession in Kansas. It was a law that said if you lived on some property long enough and you thought your property line was from one place to another, it was.
- Mr. Fruits had asked Mr. Manns where the property line was before he built the addition. Mr. Manns told him it was from one light pole to another light pole to another light pole in a dog leg fashion. The original owner, Dave Tinsley, built a berm house south of the Manns' home and also believed that the property line was the same.
- Mr. Manns said he could have certified letters sent to the Board stating he too thought the line was pole to pole which to his understanding would bring them into compliance. He had a GPS track that looked to him like pole to pole to pole.
- Mr. Manns questioned if their property had been surveyed by the County. A surveyor had told him the front pins to his property on the south and north side in front of the home couldn't be found. The other two pins were found at the corner of the house and back lot. Jim Stickler, CP Land Surveyors, completed the original 1985 plat of the land before they purchased it. Mr. Stickler said he couldn't find the pins in the front. The surveyor had told him those front pins were out so pins had been used from other property.
- Woodland Heights, the subdivision where they lived, had some property line problems before. His neighbor across the street, Pete Humbarger, had to file for a variance but was given property by his neighbor to settle an issue. He was told that some other property lines were disputed.
- He asked if there was a compliance officer who could have forced Mr. Fruits to stop work before he finished when the County issued the stop order.
- He said they also received a warning about a stop work order another time. Mr. Fruits had left a load of sand near the street and heavy rains had flooded the sand into the street. A potential stop work order was placed on their front door. They immediately responded and demanded Mr. Fruits take care of the problem which he did.
- He said he understood that a mistake was made but he knew that this was unique.
- They were not able to find the pins.
- He knew that there was an exception to every rule and asked that they grant him and his wife a 39" variance on his setback.

Mr. Macfee asked if there were any questions for the applicant.

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Mr. Marolf asked Mr. Manns if he knew the location of his property pins. Mr. Manns said there was a pin on the corner and a pin on the back lot that were located. On the front of the house on the south side at the front of the house and the north side at the front of the house, neither of those pins were located. In 1985, when the property was purchased, the pins were not found.

Mr. Beagle asked Mr. Manns if he was referring to those on Shenandoah. Mr. Manns agreed.

Mr. Marolf asked Mr. Manns if he knew where the property lines were when they purchased the property. Mr. Manns said they had located two when they purchased the property "as is" in 1985 and built the house. They were led to believe when they built the addition they were pole to pole to pole in a dog leg fashion. Mr. Manns had asked him about that. Mr. Manns told him that was what he understood. He always believed that was what it was and it would put them in compliance.

Mr. Marolf asked Mr. Manns if Mr. Manns ever explained to him why he did not cease working when he was notified. Mr. Manns said Mr. Manns was one of those guys who thought it was better to beg forgiveness than ask permission. He said when they received the warning regarding the sand in the street, it took them two times and two weeks to get Mr. Manns to do something. Finally Mr. Manns threatened to use his pickup truck to remove the sand and bill Mr. Manns for it. He said their relationship with Mr. Manns was not good and he was no longer involved in anything they did.

Mr. Marolf asked if Mr. Manns finished the work. Mr. Manns said he had already put the footing in, the concrete and the stick structure when the Planning Department found out about it. Mr. Manns said Mr. Manns self reported the problem. The Manns paid for the original survey. Mr. Manns said it was an honest mistake.

Mr. Macfee said he hated the situation they were in. He said the Board of Zoning Appeals had five criteria they had to meet in order to grant a variance. One of them was the issue had to be unique to the property, not of the owner's making. He said their case was exactly what that was. He asked Mr. Manns if he understood. Mr. Manns asked if the land had been surveyed by the County. Mr. Beagle said no.

Mrs. Vickie Manns, 4600 SW Shenandoah Road, Topeka, Kansas 66610.

- Being a science teacher, the angle of where that pin was and whether that little corner that was 39" over and if you moved that pin to the pole it would change the whole angle and they were several feet from encroachment.
- That pin was crucial to how that angle from that pole since it was a dog leg.
- They had several people come look at it.
- To go across the street which was the pin that the surveyor they paid for and who self reported it. Had he not turned it in, the County would have no idea they were encroaching in any way. Because it was never surveyed.
- The pin was truly the crucial piece that was determining. They can't find them.
- The gentleman they bought the property from 30 years ago was the one they contacted and he couldn't find those front two pins. This was what they were basing all of this on was the fact that angle was crucial as to where they found the one close to the middle telephone pole but that other one could change it several feet as to where that pin was truly located.
- She was concerned they were basing it on not knowing where that pin was as to whether they were encroaching.

Mr. Macfee asked Mr. Beagle to confirm how they determined it. Mr. Beagle said after Mr. Manns returned to their office in April 2014 and identified the problem associated with the encroachment, a survey was provided at that time which confirmed the addition was encroaching into the side yard setback. It was the survey that Mr. Manns provided and was stamped by the engineer who completed the survey.

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Mrs. Manns said she had talked to Mr. Schmidt. He told her they couldn't find their pins so they went across the street. She said they talked to a couple of other surveyors and he found a pin. Well that pin since that time that was one of the gentleman her husband had addressed as Mr. Humbarger. He now has had his replatted because it didn't fit with the exact angle of his easement. It was all off too. So they used a pin that has already changed. We went clear across the street in the middle of his yard to try and find a pin.

Mr. Macfee asked if they had any evidence that the survey was in error. Mrs. Manns didn't say it was in error but there was no pin. She questioned whether it was correct or incorrect since there was no pin.

Mr. Beagle said it wasn't entirely uncommon where there was a question about a property corner pin that couldn't be located in the field. However, it was incumbent upon the property owner to certify and verify the ownership of the land that they own. The County does not perform that service for them.

Mr. Beagle said if an addition or an improvement was being made to property and it was close to a property line, often they would require a survey before any work was done to ensure it was going to be compliant with the setback or an easement and wouldn't be encroaching.

Mr. Beagle said if they had gone through the building permit process, more than likely, they would have required a survey to confirm it was compliant with the setback requirements. Unfortunately, missing pins were not all that uncommon because this plat went back to the 1960s and sometimes pins just disappear.

Mr. Beagle said there were certain benchmarks by which subdivisions were originally surveyed and designed where you can go back to the quarter section corners and follow the dimensions and hopefully then reconstruct individual lots and establish where individual property corner pins were.

Mrs. Manns said they contacted the neighbors for 3-4 years and tried to buy the house to the south.

Mr. Marolf asked Mr. Beagle if the County had the original dimensions of the subdivisions. Mr. Beagle agreed and said this property was platted as part of Woodland Heights #2 Subdivision. It would determine the legal description for individual parcels. Based upon the legal description and the manner in which all subdivisions had to be created, hopefully you could find this place in the ground by following the original legal descriptions.

Mr. Macfee said they would open the public hearing and asked if there was anyone who wanted to speak in favor. There were none. He asked if there was anyone who wanted to speak in opposition.

Mr. Don Long, 930 NE 43<sup>rd</sup> Street, Topeka, Kansas 66617.

- Owned the property at 4612 SW Shenandoah Road, next door to the applicant.
- Said he wasn't opposed or in favor.
- If the permit process had been followed, it wouldn't have been a problem.
- If 39" was the issue and there was a question as to where the property line was, then get another survey.
- As far as selling the property to the Manns, they would consider it if there was a reasonable offer.

Mr. Manns said that he had a conversation one time with Mr. Long and his daughter about the sale of 5-8 foot of land and they didn't want to sell it. He said they also made a bid on the house and the land together and Mr. Long didn't think it was an adequate bid. He said maybe they could settle that issue. He didn't want to go to court and he really didn't want to have to tear down his addition either.

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Mr. Macfee closed the public hearing and asked for discussion from the commissioners.

Mr. Appelhanz asked Mr. Beagle if a vacation was applied for on the property. Mr. Beagle said an application was initiated and it was the property owner's responsibility to make contact with the utility companies and government agencies to confirm that they had no objection to the vacation. It was being done independent of the variance process.

Mr. Macfee asked if that was different from their decision on the variance. If they received permission from the utilities to vacate the easement, it didn't change their ability to make a decision. Mr. Beagle agreed. He said the utility easement was just a right for utility companies to use that portion of private property for the installation and maintenance of utilities.

Mr. Appelhanz said he thought the Manns had an issue with the contractor. He didn't know if the contractor needed to be flagged. He didn't know if it was possible to do some kind of condition where if the vacates were granted. He couldn't see tearing down a new addition. It didn't make any sense. It was a big mess for a contractor. It was his fault. That was his opinion.

Mr. Marolf said he was hesitant for the Board to agree to the deviation of the setback. It would open up the floodgates if they approved it. It was basically saying if you don't have a building permit and you don't have the property surveyed to know where the pins were then you could go ahead and build and get permission later. Beg for forgiveness rather than do it right to begin with.

Mr. Macfee asked Mr. Beagle to reiterate their responsibilities in meeting as a Board of Zoning Appeals since it was different than the Planning Commission. They would have to consider the five criteria and all five would have to be met.

Mr. Beagle said the requirements for a Board of Zoning Appeals were set out by State Planning Enabling Law. For communities that established a planning commission and adopted zoning and subdivision regulations, they also needed to form a Board of Zoning Appeals.

Any zoning regulation couldn't anticipate every circumstance for every property throughout an entire jurisdiction. The underlying principle was that the zoning regulations were to be applied uniformly to all property of a given zoning district. What was not anticipated by the regulations was there may be circumstances because of terrain or other factors that would influence the reasonable development of a tract of land. Therefore the issue was not with a matter of convenience but because of the terrain that was forcing or causing an unnecessary hardship to comply with the requirement of the zoning regulations that said unless we granted relief through the form of a variance it was going to dramatically affect the reasonable use and development of a particular tract of land. On that compelling evidence that was submitted with regard to that unique site condition then the Board of Zoning Appeals would grant a variance.

As a Board of Zoning Appeals, they were sitting in a quasi-judicial capacity which meant essentially they were sitting in judgment of the facts that were presented. As a result, their determination was final unless, within 30 days, a petition was filed with the District Court. Basically they were sitting as a court of appeals in this case rendering a decision whether the five tests set out by state statute were met. Not only just one or a majority but all five must exist for them to grant the variance.

Mr. Tryon said this was a hard case in that they wanted to do the right thing. In some respects it morally points that you should grant it since it was 39". There was some reference that the County might be responsible for establishing where the property line was. He didn't find that a real argument because it was ultimately the homeowners responsibility to determine where their property line was

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regardless of whether they can find the pins or not. It was very difficult for him to vote for something that was very clear and didn't meet the five criteria that they were obligated to meet. He would like to vote in favor but unfortunately was not in the position to do so.

Mr. Macfee said that would be his exact comments as well. He wanted to give discretion. Their decision was the finding of fact. The facts showed it was built over the setback line. He hoped the applicant would find some relief at some point.

Mr. Appelhanz asked Mr. Beagle if they were defining this different from an opinion to facts. Mr. Beagle said they would have to take the information that was provided by the applicant for justification of their claim and did they provide their point. It was incumbent upon the applicant to prove that some unique condition was associated with the property that was as a result of the regulation and not as a result of some other condition which was self imposed. That was their determination on finding of fact.

Mr. Beagle said it didn't satisfy the Manns' situation. He thought the whole thing was unfortunate in how it transpired. The Manns do have an option with regard to the builder to get restitution from creating this situation without coming into compliance with building without a building permit first. He thought there were opportunities for the Manns to pursue. Unfortunately, it would take additional time and expense to do so.

Mr. Macfee moved for disapproval of the variance, seconded by Mr. Tryon and with a vote of **5-0-0**, the variance was Denied.

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

**Adjournment:**

Mr. Tryon moved to adjourn the Board of Zoning Appeals hearing, seconded by Ms. McKenzie and with a unanimous voice vote the meeting was adjourned at 6:41 p.m.