

BOARD OF ZONING APPEALS
MINUTES
October 28, 2008

The regular meeting of the Board of Zoning Appeals of the City of Wichita, Kansas was held at 1:30 p.m., on October 28, 2008 in the Planning Department Director's Conference Room, Tenth Floor of City Hall, 455 N. Main, Wichita, and Kansas.

The following board members were in attendance:
BICKLEY FOSTER, DWIGHT GREENLEE, STEVE ANTHIMIDES and JOSHUA BLICK

Board members absent:
CHARLES YOUNG
BENJAMIN STIFF
JERRY HOGGATT

City of Wichita staff present:
SHARON DICKGRAFE- Law Department

City of Wichita staff absent:
HERB SHANER – Office of Central Inspection

The following Planning Department staff members were present:
JESS MCNEELY, Secretary.
YOLANDA ANDERSON, Recording Secretary

FOSTER We will call the start the BZA hearing at 1:55PM on October 28, 2008. We received the draft of the 2009 BZA Calendar; we will take care of this matter at the end of the hearing. The first thing on our agenda is to approve the minutes of 9/30/2008.

GREENLEE I move that the minutes be approved.

BLICK Seconded

FOSTER All in favor say Aye?

Motion carries 4-0 unanimously

FOSTER We will now hear case BZA2008-51. This is a variance regarding a side yard setback reduction to 1.5 feet.

McNEELY Good afternoon Ladies and Gentlemen, I am Jess McNeely here to present BZA2008-51. **BACKGROUND:** The applicant requests a variance to reduce the Zoning Code required side building setback from 3 feet to 1.5 feet for an existing accessory structure. The zoning code requires a 3-foot building setback for structures on the rear half of a lot in SF-5 Single-family Residential ("SF-5") zoning.

The application area is developed with a home and a detached accessory storage building, which is in question. According to the applicant, the site had a metal building on a concrete slab built in 1974 at 1.5 feet from the north property line. The applicant removed the damaged metal building, and rebuilt a wood shed on the same concrete slab at 1.5 feet from the north property line (see the attached applicant's site plan). The applicant now requests a variance of the 3-foot setback requirement in order to maintain the shed in the current location. Building and fire code require a minimum 6-foot separation between buildings, unless the buildings have increased fire-rated walls and roofs. The only legal assurance of this building separation would be to record a joint setback agreement with the property owner to the north, ensuring that any future improvements on either property would maintain a minimum of 6 feet between buildings. The property north of the application area has a swimming pool immediately adjacent to the accessory structure, reducing the probability of a structure less than 6 feet from the shed in question.

All surrounding properties are also zoned SF-5 and developed with single-family residences. Analysis of aerial photographs would demonstrate that other detached accessory structures in the surrounding area may also violate the 3-foot setback requirement.

ADJACENT ZONING AND LAND USE:

NORTH	SF-5	Single-family residences
SOUTH	SF-5	Single-family residences
EAST	SF-5	Single-family residences
WEST	SF-5	Single-family residences

The five criteria necessary for approval as they apply to variances requested.

UNIQUENESS: It is staff's opinion that this property is unique, as a detached shed existed 1.5 feet from the property line for over thirty years with no apparent negative effect.

ADJACENT PROPERTY: It is staff's opinion that granting the requested variance for a side setback reduction from 3 to 1.5 feet may not adversely affect the rights of adjacent property owners, provided that the property owner north of the site does not desire to build at the normally required 3-foot building setback. The property to the north is developed with a pool adjacent to the shed in question, reducing the possibility of a future building adjacent to the shed.

HARDSHIP: It is staff's opinion that the strict application of the provisions of the code would constitute a hardship upon the applicant, as the site had a shed 1.5 feet from the property line for over thirty years. To now apply the 3-foot building setback would constitute a hardship on the applicant by changing how the property has been used for thirty years, and by requiring the applicant to demolish some portion of the existing building in order to conform to the 3-foot setback requirement.

PUBLIC INTEREST: It is staff's opinion that the requested variance for a side setback reduction from 3 to 1.5 feet will not adversely affect the public interest, as no public right-of-way is affected by the proposed setback reduction, and provided that building and fire

codes are followed. It is in the public interest to permit upgrades and improvements to properties.

SPIRIT AND INTENT: It is staff's opinion that granting the requested variance for a side setback reduction from 3 to 1.5 feet does not oppose the general spirit and intent of the Zoning Code, provided that the required 6-foot separation between buildings is still maintained through a joint building setback agreement.

RECOMMENDATION: It is staff's opinion that the requested variance meets the five criteria necessary to grant a variance, and recommends that the variance be APPROVED. Should the Board determine that the conditions necessary for the granting of a variance exist, and then the Secretary recommends that the variance to reduce the 3 foot side setback to 1.5 feet be GRANTED, subject to the following conditions:

1. The site shall be developed in conformance with the approved site plan.
2. The setback reduction shall apply only to the "13x26.6" structure as illustrated on the approved site plan. All other structures or additions on the subject property shall conform to the setbacks permitted by the Unified Zoning Code unless a separate Zoning Adjustment or Variance is granted.
3. The applicant shall obtain all permits necessary to construct the improvements, and the improvements shall be constructed within one year of the granting of the variance.
4. The applicant shall file a joint building setback agreement, ensuring a minimum six foot separation between buildings on adjoining lots, prior to receiving a building permit or certificate of occupancy for the proposed structure.
5. The accessory structure on the site shall conform to all other codes, to include but not limited to building and fire codes.
6. The above conditions are subject to enforcement by any legal means available to the City of Wichita.

Are there any questions of staff?

FOSTER Jess; let's go back to the site drawing by applicant. See that note there of 3 feet minimum?

MCNEELY Yes, I think it is just a note they put there, they were calling out the 18 inch separation between the buildings.

FOSTER It is not angled or anything like that right?

MCNEELY No, I do not believe so; from my observation it did not appear angled.

FOSTER Will it be checked for height at the time of permitting?

MCNEELY Yes

FOSTER It looks like there are two fences running through there.

MCNEELY That would be the fence running between the two fences right there.

FOSTER I was thinking that was the garage.

MCNEELY From what I can tell, this is a regularly hinge door and not an overhead door.

BLICK Hey, Jess can you put the aerial photo up?

MCNEELY Okay

BLICK Is it by the drive on 16th street?

MCNEELY The one I was showing a photo of is right here. It is hard to see, but you can see that roofline goes right up to the property line.

FOSTER That's the garage?

MCNEELY I would call it a shed. It is not a typical detached garage.

FOSTER It has a driveway.

MCNEELY It does have a driveway leading up to it. It is not large enough to be a garage. Let me show you the photos that were sent to me by the neighbors to the west. This neighbor lives northwest from the applicant. So this would be the building in question.

FOSTER Is the shed as tall as the house?

MCNEELY It is not my belief that this accessory structure is as tall as the houses in that area. However this structure is allowed to be 60% of the maximum height in this zoning district which is, in this case, 21 feet. Under the code 21 feet is the maximum height.

FOSTER That is not in relationship to the principal building on the site?

MCNEELY Those of the three photos that the neighbor from the northwest wanted you to see.

FOSTER Are there any more questions? Thank you Jess, we will call on the applicant to come to the podium and give your name and address.

Joe Silva, I live at 1709 Kessler.

FOSTER Is there something you can add to this case?

SILVA The shed is 15 feet high. It is within what's allowed. It is nowhere near the 21 feet. McNeely presented everything well. There was an existing structure that had been there over 30 years and had rotted. There is a

neighbor or maybe two neighbors that are not happy with the height of it but it is within the legal requirements.

FOSTER Is there anything with the shape of this?

SILVA I tell him to build me a shed like the neighbors. He built it cheaper than the pre-fab shed sold by Lowes. There are several barn like sheds in the area. He said he could build it cheaper.

FOSTER Did the builder know he was to get a building permit?

SILVA I paid him to do the job and I went out of town afterwards. He built the shed to replace the rustic old metal shed that was there before this shed was build. I was not aware what was needed. I believe the complaints made was made by a disgruntle neighbor whose dog was in a fight with my dog. I did get rid of the rustic frame shed that was rotted and falling apart. I simply rebuild in the exactly location of the previous constructed shed.

FOSTER This person is not a local builder?

SILVA No, he is not a local builder. He is a handyman from out of town.

FOSTER Do you understand the conditions that Jess has proposed?

SILVA Yes and I do not have a problem with the conditions.

FOSTER Any more questions?

BLICK Jess, if you would go back to the slide show. I see new concrete. Is that a sidewalk?

SILVA Yes, I put in the sidewalk.

BLICK This is not a living quarter is it?

SILVA No, this is not a residence. It is a shed for a riding lawn mower.

BLICK We see this type of structures pop up sometimes.

FOSTER Any other questions? If approved you are agreeable to the conditions?

SILVA Yes, the neighbor with the swimming pool has no room to put a shed so we are not concerned about that much. The rear of the shed is 14 feet from the property line so it is well within code.

FOSTER Well I do not see anything to screen the neighbors from this shed.

SILVA I have already planted a tree so the neighbor will not see the shed in years to come.

FOSTER Thank you, Mr. Silva.

FOSTER Jess, can we put in a condition with the language that if this structure is ever remove, it would make certain that a shed can not be set that close in the future?

MCNEELY Anything ever constructed in the future would require a closer look at the side set backs. I think your asking about if this building would ever come down, can a language required that the future structure require conformance to the side-yard setback code?

FOSTER Yes.

MCNEELY I believe anyway to tie this to the property the building variance would have to place on the property that any future structure built would have to conform to the setbacks requirements.

DICKGRAFE I don't think by nature of the variance that the board could do that because the variance is suppose to run with the land not necessarily the building. The variance is tie to the land not to the structure. By using the language that they can only replace whatever building we are approving with a building of the same size same dimensions. I think that is about the best you are going to do because the variance is tied to the land and not the structure.

MCNEELY The logic of the variance is if it meets the 5 criteria's then this property meets the five criterion period.

ANTHIMIDES As long as that foundation is there, like the applicant did, he rebuilt on that same foundation.

DICKGRAFE Right, with the blueprint of the building unless he comes in or the new structure complies with that three feet variance and the six feet variance from the rear.

ANTHIMIDES So, twenty years from now the next owner will have to conform to the code.

DICKGRAFE Unless he replaces that structure exactly as it is unless he takes the building up 20 feet high because that is what the code allows. The structure will have to comply with the blueprints of the permitted variance.

FOSTER Are you saying Ms Dickgrafe that the next person can not do this unless they follow that plan. Do I understand you correctly?

DICKGRAFE That would be my opinion. The condition of the variance that they are approving the structure that is 20 by 30 feet if someone came back in and wanted to do something other than 20 x 30 feet structure, they would need get a new variance or comply with that setback.

FOSTER This is an after the fact type matter, we are not doing a normal zoning variance. Jess can you think of anyway that this will not be repeated?

MCNEELY No, the concept of the variance is if it meets the five criteria then it meets the five criteria. If anyone wants to replace with an expanded structure they will have to meet the variance requirements. Under our typical conditions, if they replace on the exact footprints as what has been approved in this site plan then they can maintain it.

FOSTER Last question, when we talk about the neighbor about a joint agreement, I presume they are talking about the area in the back and not a strip all along the property line.

MCNEELY That would be a joint setback agreement from this building.

FOSTER It would be related only to that area not all along the property line right?

MCNEELY Right

FOSTER Any more questions?

GREENLEE I know there are such things as deed restrictions. How does that get applied from owner to owner?

MCNEELY Deed restrictions tend to be a private legal matter. It is not anything we deal with in Planning. A variance is a publicly approve item that get recorded here in our mist that this property has a variance that runs with this property that's on the zoning map regardless of ownership. Likewise, this requirement for a joint setback agreement with the property to the north has to be recorded with the register of deeds not as a private deed restriction. There are private deed restrictions done between property owners. OCI does not have the authority to enforce private deed restrictions. We do stay within the public grounds and codes as to what OCI can enforce legally.

FOSTER The six foot joint agreement is that filed as a record?

MCNEELY They would have to file a joint building setback agreement that is file with both OCI and the county register.

FOSTER What if we put in here, adding to that joint agreement, if that building is ever removed that the joint agreement is dissolved. In order to give, the future neighbor's a say over it.

DICKGRAFE You are still making conditions on a property owner that is not before the board. I understand that the neighbor does not have a problem with the six foot agreement. I have concern with your ability to deal with property issues that is not before you for the purpose of the variance.

FOSTER This joint agreement does not it act as a covenant?

MCNEELY This acts more like an easement instead of a covenant.

FOSTER The variance request came after the structure and we did not get a chance to review it beforehand.

ANTHIMIDES The foundation was already in place.

GREENLEE The variance has to be passed on base on the 5 criteria.

FOSTER I am not talking about the five criteria as the condition that may be place on it.

ANTHIMIDES I understand you if someone had the forethought.

FOSTER I am just thinking this building may need to be replace another time and do we have to automatically have it replace or not. They have no say in it. I may be possible to dissolve the easement if this building was ever removed.

DICKGRAFE I do not think you can make a variance temporary with the building or the owner and the variance runs with the property. While I appreciate what you are trying to do, I do not think you can do that without the interference of the variance.

FOSTER We can require this to be done but we can not remove it. Are there any other opinions?

GREENLEE I think Sharon Dickgrafe is correct once we grant the variance it stays with the property no matter who owns it. That owner can go back and rebuild it within the variance or the plat. I do not think we have a choice as long as we have met the 5 criteria for the variance.

GREENLEE Mr. Chairman, I move that the board accept the finding of fact as set forth in the secretary's report that all five conditions set out in 2.12.590 B as necessary for the granting of a variance have been found to exist and that the variance be granted subject to the conditions set out in the secretary's report.

ANTHIMIDES Seconded.

FOSTER All in favor say aye?

Motion carries 4-0 unanimously

FOSTER I am under the impression that one of the reason for getting a permit is because it is on concrete. As I recall, if it is not on concrete and it is a smaller building it does not have to get a permit?

MCNEELY That is a building code issue not something that the BZA has jurisdiction over. If you building and enclosed building, you are required to have a building permit.

FOSTER Even if smaller than 60 square feet?

MCNEELY If you are building a deck over a certain height, you will need railing and a building permit. In the case of an enclosed built structure, that does not require a building permit.

FOSTER Herb has no report?

MCNEELY Herb is not here. He has no report.

FOSTER Looking at the 2009 calendar.

GREENLEE I move to approve the 2009 calendar.

ANTHIMIDES Seconded

FOSTER Lastly, we will have election.

ANTHIMIDES I moved that we accept Greenlee as Chairman.

BLICK Seconded.

GREENLEE I move to appoint Mr. Anthimides as Vice Chair.

BLICK Seconded.

FOSTER All in favor say aye?

Motion carries 4-0 unanimously

FOSTER Moves to appoint Jess McNeely as BZA secretary

ANTHIMIDES Seconded

Motion carries 4-0 unanimously

FOSTER In my closing as Chairman, I am please that we have not had conflicts of interest. Previously, we have had applicant's delivering materials to our houses and it is nice not to have conflict of interest.

BLICK I motion to close.

GREENLEE Seconded

FOSTER All in favor say aye?

Motion carries 4-0 unanimously.

Adjourns at 2:55pm