

**BOARD OF ZONING APPEALS
MINUTES**

The Winchester Board of Zoning Appeals held its regular monthly meeting on, March 12, 2008, at 4:00 p.m. in the Council Chambers, Rouss City Hall, 15 North Cameron Street, Winchester, Virginia.

PRESENT: **Koneczny, Wiley, Roberson, Hurt, and Phillips**

ABSENT: None

VISITORS: **Kevin Wolford, Lilly Triplett, Mark Williams, Claus Bader, Nancy Pomeroy, Richie Pifer Jr, Mark McKee, Deborah Borsi, Rita Burbough, Susan Howard**

On motion by Mr. Koneczny, seconded by Mr. Phillips, the minutes of the January 9, 2008 meeting were unanimously approved as presented.

CORRESPONDENCE

None

PUBLIC HEARINGS

BZA-08-01 Request of Kevin T. Wolford, on behalf of the subject property, for a variance pertaining to required side yard setback on a nonconforming lot of record, as required within Section 17-6-1 of the Winchester Zoning Ordinance, at 505 Highland Avenue (*Section 174, Double Circle 1, Block M, Lot 17*), which is zoned Limited High Density Residential (HR-1) District.

Mr. Diem presented the request for relief of the side yard setback requirements stating that the Board had previously granted a variance on this property on April 11, 2007. The applicant, during the April 2007 public hearing indicated that there would be at least six inches (6") on the north side and south side between the proposed dwelling and the side property lines. Among the conditions imposed with the variance that was granted, the Board required that a house location survey be performed to ensure no further encroachment into adjoining or adjacent properties.

A House Location Survey Plat, as prepared by Foltz Land Surveying, Inc. on October 29, 2007, revealed that the constructed dwelling was 0.05' from the north property line and 0.32' from the south property line. The drawing also depicts that the structure was not built parallel to the existing property lines and the majority of the north and south walls of the residence are further away from the side property lines.

With no questions or comments Chairman Hurt opened the public hearing.

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Kevin Wolford addressed the Board. He explained that there was no previous survey of the property on record since the 1800's. The house is crooked on the lot but it is parallel to the sidewalk. He hired a surveyor, Foltz Land Surveying and they set the brick points but they didn't record them on paper. Mr. Wolford stated that the blame comes back on him. The house is back in the exact same spot and is not encroaching on anyone else but feels everyone is encroaching on him.

Chairman Hurt asked if a plat was recorded and when.

Mr. Wolford stated that when he applied for his occupancy permit, zoning required a second set of setbacks and that's when the plat was provided.

Mr. Koneczny asked Mr. Wolford to explain what he meant by "he's the one being encroached upon".

Mr. Wolford provided some pictures to help explain that the neighbors have fences and accessory buildings on his property line.

Chairman Hurt stated that the property had to be recorded when the land was subdivided.

Mr. Wolford stated that there was no record in the courthouse.

Mr. Koneczny asked if the surveyor is certified.

Mr. Wolford said he is. He stated that the surveyor put the points in the ground and assured him that he was in the property line with 6" all around.

Chairman Hurt asked if there was a plat done before the house was built.

Mr. Wolford said there was but it doesn't show any of the existing homes.

Mr. Koneczny asked how wide the house and lot are.

Mr. Wolford stated the house is 18 feet and the lot is 19 ½.

Mr. Koneczny asked why there isn't 6" inches on either side then.

Mr. Wolford stated that he paid a surveyor to do that for him. The house doesn't sit on the lot the way it was supposed to. It has been brought up square with the existing houses.

Mr. Wiley asked why the surveyor was not present.

Mr. Wolford stated that he was told that the Board would have put him through the ringer if he was present due to the surveyor's past history with the Board. He continued to say that the surveyor is not even speaking to him at this point.

Mr. Koneczny explained that he made the motion to get the first variance approved. Due to the fact that the measurements given at that time were so specific, he cannot understand how it was not followed.

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Mr. Wolford stated that he paid a professional to do that.

Mr. Koneczny asked if the house could be moved.

Mr. Wolford explained that it would be more feasible to tear the house down then it would be to move it and that would cause him to go bankrupt.

Mr. Wiley asked why the case was being heard if Mr. Wolford has already gotten a Certificate of Occupancy.

Mr. Diem explained that Mr. Wolford can't get a CO without this variance being approved.

Mr. Wiley asked if the surveyor's payments have been finalized.

Mr. Wolford said they have.

Mr. Phillips asked if the original house was up against the concrete walk shown in the photograph.

Mr. Wolford stated that he hasn't done anything with the concrete.

Chairman Hurt asked if there was anyone else that would like to be heard.

Lilly Triplett, partner with Mr. Wolford on this house, stated that she hired the surveyor. He told her that the only thing he had to go by was the survey done in the 1800's. She called him numerous times to get the plat but he said that he hadn't had time to put it on paper. When he did bring it in she paid him without having it looked at. She asked that the Board please approve this variance. They tore down a dilapidated building and built a nice home.

Mr. Koneczny explained that he has a lot of sympathy for the applicant in this situation but the Board has already made one exception so he is hard-pressed to approve this one.

Chairman Hurt explained that there was a plat done before construction and they should have gone by that.

Mr. Phillips stated that he has looked at the house and it's a big improvement. He is questioning if the survey is correct. He stated that the plat was done in October and asked when the house was completed.

Mr. Wolford stated it was completed in August.

Chairman Hurt stated that the not all the information being requested is on the survey.

Mr. Phillips stated that with that information he would rather not deny it but table it and have another survey done if that would do any good.

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Mr. Wolford stated that there is a chance that the surveyor could be wrong. The only option he could suggest is to survey the entire block since there wasn't a survey done to begin with.

Chairman Hurt explained that the Board is only addressing this lot. He asked if a survey plat was done before building began.

Mr. Wolford said that yes there was.

Mr. Wiley stated that there has to be a rule of thumb.

Mr. Roberson, seconded by Mr. Koneczny motioned to deny BZA -08-01 for the request of additional side yard setback variances; because,

- a. The hardship identified on the property was created by the applicant or other party involved in the construction of the single-family dwelling; and,*
- b. Said construction resulted in further encroachment to adjacent residential properties, which could adversely impact the public health, safety, and welfare of residents and property owners at either of those addresses; and,*
- c. Granting any additional variances to side yard setback would not represent good planning practices or uphold the intended spirit of the Ordinance.*

The motion carried 3-2-0 (Wiley and Phillips against the motion)

BZA-08-03 Request of Mark Williams, on behalf of the subject property, for a variance pertaining to minimum lot width, as required within Section 8-4 of the Winchester Zoning Ordinance, at 426 Weems Lane, (*Section 270, Double Circle 5, Lot B*), which is zoned Highway Commercial (B-2) District with Corridor Enhancement (CE) Overlay.

Mr. Diem presented the request for relief of the minimum required lot width for a commercial nonconforming lot of record. The approximate lot width of the subject property is 80'. The required lot width in the B-2 district is 100'.

Mr. Diem explained that on July 14, 2004, the Board granted a variance to the minimum required lot width for the subject property, as requested within BZA 04-12. The applicant, during the July 2004 public hearing indicated that the proposed use of the parcel was for used automobile sales. The conditions that were imposed with the variance that was granted included that the variance was only for the proposed use and existing structure. Additionally the Board required that a rear parking area buffer be created.

Dominion Management Services, Inc. Dba Cashpoint (DMS) is the new tenant at the subject property. The commercial office use and occupancy that is associated with Cashpoint does not include used automobile sales; therefore, a subsequent variance would be required to recognize the lot width deficiency and allow the change of use and occupancy.

Chairman Hurt opened the public hearing.

Mark Williams, owner and applicant, explained that he applied for his Certificate of Occupancy on 10/19/07 and it was approved. A couple of weeks ago he received a letter stating that he was given the CO by mistake and would need to come in front of the Board to ask for a variance. He stated he wants the Board to understand that he wasn't operating the business without a CO and he wasn't aware of the previous variance until he received the letter.

Chairman Hurt closed the public hearing.

Mr. Phillips, seconded by Mr. Wiley motioned to conditionally approve BZA-08-03 to allow continued use and occupancy of the subject property at 426 Weems Lane by granting a variance to the required minimum lot width, with the following conditions imposed:

1. *The applicant shall submit a revised site plan to the Director of Planning; and,*
2. *None of the previously designated automobile display spaces will be utilized for required off-street parking, unless they meet the current ordinance requirements; because,*
 - a. *The variance is in harmony with the intended spirit of the Ordinance; and,*
 - b. *That the strict application of the Ordinance would produce a clearly demonstrable hardship to the property; and,*
 - c. *That the authorization of the variance will not be of substantial detriment to the adjacent properties and that the character of the district will not be changed by the granting of the variance.*

BZA-08-04 Request of German Engineering, on behalf of the subject property, for variances pertaining to required rear yard and side yard, as required within Section 10-6-1 and Section 10-6-2 of the Winchester Zoning Ordinance, at 220 East Pall Mall Street, (Section 213, Double Circle 1, Block N, Lot 7), which is zoned Commercial Industrial (CM-1) District.

Mr. Diem presented the request for variances of the Zoning Ordinance, pertaining to rear and side yard setback requirements. A proposal to develop the property for commercial use is contingent upon the granting of any variances.

Mr. Diem indicated that due to the current flood plain boundaries depicted on the site, a considerable hardship exists with regards to any future development proposals. Without a variance for side and rear yard setbacks, full utilization of this property may be impacted or prevented.

The preliminary site plan, along with the attached letter of intent, indicates that the proposed structure would be erected in the northeast corner of the property. This portion of the property represents the least impact on any adjacent properties, while recognizing the limitations associated with the flood plain.

Chairman Hurt opened the public hearing.

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Claus Bader, German Engineering, presented a plan showing the flood plain and the intended use of the property.

Mr. Koneczny asked what the use was going to be.

Mr. Bader explained that upstairs will be an office for personal use and downstairs would be leased office space.

Mr. Phillips asked if they planned to dig into the hill.

Mr. Bader stated that they were because that is the only way to stay out of the flood plain.

Rita Burbough, 217 E. Pall Mall St, wanted to know what was going to be done with the old Amerigas property. She was concerned with someone putting in outdoor storage that would take away from her property that they've spent a lot of time on. She stated that she was interested in hearing more about the building that's being proposed.

Several other neighbors that were present for the hearing came forward to get a good look at the plan provided by Mr. Bader.

Mr. Bader took time to go back over the plan for the neighbors, explaining that it would be used as office space. He assured them that there would be no outdoor storage.

Ms. Burbough asked if there would be equipment stored outside.

Mr. Bader said that there wouldn't be any.

Mr. Diem explained that within the CM-1 district that outdoor storage is permitted by right. He explained that if there is going to be outdoor storage, they are required to have a site plan prior to development which is subject to staff and Planning Commission review. Mr. Diem suggested that if the Board did decide to approve this variance that a condition could be imposed that there would be no outdoor storage of equipment or property.

Mr. Koneczny stated that currently a construction company could rent the office building and store their equipment outside.

Mr. Diem stated that he was correct.

Chairman Hurt closed public hearing.

Mr. Wiley, seconded by Mr. Koneczny motioned to conditionally approve BZA-08-04 to allow development of the subject property located at 220 East Pall Mall Street by granting a variance to the required side yard and rear yard dimensions, with the following conditions imposed:

- 1. Only commercial office use is allowed with no outdoor storage; and,*
- 2. A variance to the required side yard, of no more than five (5') feet shall be granted; and,*

3. *A variance to the required rear yard, of no more than ten (10') feet shall be granted; and,*
4. *The applicant, developer, contractor, or property owner shall prepare and present a footing survey at the time of construction to the Building Official's Office and the Zoning Administrator, verifying that no further encroachment than that provided through the granting of these variance requests has occurred during development; because,*
 - a. *The variances are in harmony with the intended spirit of the Ordinance; and,*
 - b. *That the strict application of the Ordinance would produce a clearly demonstrable hardship to the property; and,*
 - c. *That the authorization of the variance will not be of substantial detriment to the adjacent properties and that the character of the district will not be changed by the granting of the variance.*

Motion carried 5-0-0.

BZA-08-05 Request of Guido H. Borsi, on behalf the subject property, for a variance pertaining to an addition to an existing accessory structure within a required front yard, as identified within Section 18-10-1 of the Winchester Zoning Ordinance, at 2633 Blue Ridge Terrace (Section 289, Double Circle 2, Lot 8), which is zoned Low Density Residential (LR) District.

Mr. Diem presented the request for a variance pertaining to accessory structures within required front yards at 2633 Blue Ridge Terrace. The request is the result of an addition having been made to an existing nonconforming structure.

Mr. Diem explained that the accessory structure that is being added onto has existed at the subject property for several years and pre-dates the current ordinance; therefore, constituting a nonconformity. The current ordinance would prohibit an accessory structure from being built in a front yard. The property is considered to be a multi-corner lot with two (2) front yards and one (1) corner side yard.

Chairman Hurt opened the public hearing.

Mrs. Borsi explained that she agrees that it would be inappropriate to erect a building in the front yard however she felt that the area to the rear of their house is as a backyard.

Mr. Phillips asked if we have received any objections from the public.

Mr. Diem stated that there haven't been any.

Mr. Phillips, seconded by Mr. Wiley to conditionally approve BZA-08-05 to allow an addition to an existing and nonconforming accessory structure located in a front yard, by granting a variance to the provisions of Section 18-10-1 of the Winchester Zoning Ordinance, with the following conditions imposed:

1. *Any additional expansion of the nonconforming accessory structure, beyond what is currently proposed shall not further encroach into either the front yard or corner side yard; and,*
2. *The existing, mature landscaping adjacent to Middle Road and Westview Lane shall be maintained, so as to provide a visual barrier and screening, thus minimizing any potential for impact to adjacent properties or change to the character of the district; because:*
 - a. *The variances are in harmony with the intended spirit of the Ordinance; and,*
 - b. *That the strict application of the Ordinance would produce a clearly demonstrable hardship to the property; and,*
 - c. *That the authorization of the variance will not be of substantial detriment to the adjacent properties and that the character of the district will not be changed by the granting of the variance.*

Motion carried 5-0-0.

BZA-08-07 Request of Frederick J. and Nancy Pomeroy, representing the subject property, requesting variance pertaining to permitted fence heights in front and corner-side yards, Section 18-9-2.8 of the Winchester Zoning Ordinance, at 220 Roszel Road (*Section 192, Double Circle 2, Lot 10*), which is zoned Medium Density Residential (MR) District.

Mr. Diem presented the request for a variance to permitted fence heights in front and corner-side yards at 220 Roszel Road. A fence was recently constructed at the property that exceeds the height and openness requirements for a front or corner-side yard.

Mr. Diem explained that the fence that has been recently constructed exceeds the four foot height limitation and 25% minimum required openness for fences erected in front or corner-side yards.

Mr. Diem stated that based on the materials presented by the applicant, specifically regarding the previous landscape screening that existed on-site, there would appear to be a reduction of nonconformity. The landscape screening that had existed provided relatively no openness and was upwards of 12' in average height. If the landscaping were, instead a solid fence, a clear nonconformity would have existed. However, as it is, the newly constructed fence is less obtrusive and is of a much smaller scale.

Chairman Hurt opened the public hearing.

Nancy Pomeroy stated that she had no idea there were rules in regard to building a fence. She tore out all the ivy on the 12 foot yews in order to save the trees. However, after the ivy was removed you could see that $\frac{3}{4}$ of the yews had died. She felt that she had to put a fence up to support the ivy that would regrow. She explained that they started with 4ft posts in the front but due to the change in grade the post in the back came to be almost 6ft in height in order to keep the top of the fence even. She asked that the fence remain to support the ivy.

Mr. Koneczny asked if the fence was put up by a contractor.

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Mrs. Pomeroy stated that it wasn't. She stated that the plan is to paint it gray and let the ivy cover it.

Mr. Koneczny asked if it is 6ft of solid fence.

Mrs. Pomeroy explained that only ¼ of the fence is 6ft but that it is solid.

Mr. Phillips stated that he can see why the fence was built in proportion to the stone wall however the fence should have all been one height. He continued to say that she is getting the benefit from the inside but the public has to look at it from the outside.

Mrs. Pomeroy asked if it would help if the fence was painted gray.

Chairman Hurt stated that the color wasn't going to make much of a difference.

Richie Pifer Jr, at 215 Roszel Rd, stated that he is straight across the street and looks out onto the fence everyday. He has no problem with the fence. He felt that it was tastefully done and that it is in keeping with the rest of the neighborhood.

Jim Spangler, 139 Roszel Rd stated that he drives by it everyday. He pointed out that it's a circular street. The only people that drive past it are the people that live there. He felt that it's a large improvement.

Chairman Hurt closed the public hearing.

Mr. Koneczny asked that the objection that was emailed be noted as well.

Mr. Diem asked the objection be read so the applicant has the benefit of hearing what the objection was.

Mr. Diem read the objection stating that a 4 ft fence that can be seen through would be more attractive than a 6ft solid fence that is like a fortress.

Mr. Phillips stated that there was a previous case that was similar that the Board set conditions on that should be taken into account.

Mr. Wiley stated that the conditions were set before the fence was constructed.

Mr. Phillips stated that it still sets a precedence especially considering that the next case is also a fence.

Chairman Hurt asked if there are permit requirements to enforce the rules.

Mr. Diem explained that at this time there is no requirement for a permit to build a fence within the city. However a draft text amendment was presented to the Planning Commission at their worksession yesterday that would require zoning permits for fences but with no charge to the property owner. It would assist the citizens with making sure they understand the requirements.

Mr. Koneczny stated that he lives in the same general neighborhood and fences are important. Had the fence not been 6ft it wouldn't be a problem.

Rick Pomeroy addressed the Board after coming in late. He stated he understands that it's an imposing structure but with the lay of the land the headlights of the oncoming cars even now with the 6ft fence shines directly into their living room. He asked that the fence be allowed on the bases that the yews and the ivy were there when the house was purchased blocking out those headlights; the only answer was to put up the fence.

Mr. Koneczny stated that living in the city you learn to live with headlights.

Mr. Koneczny, seconded by Mr. Wiley motioned to conditionally approve BZA-08-07 to allow the erection of a fence that is not at least 25% open within a front and corner-side yard at 220 Roszel Road, by granting a variance to the provisions of Section 18-9-2.8 of the Winchester Zoning Ordinance, with the following conditions imposed:

1. *No portion of the fence shall meet or exceed a height of four (4') feet above grade; and,*
2. *Landscaping, such as some form of ivy be planted along the fence to re-create the visual effect that previously existed; because:*
 - a. *The variances are in harmony with the intended spirit of the Ordinance; and,*
 - b. *That the strict application of the Ordinance would produce a clearly demonstrable hardship to the property; and,*
 - c. *That the authorization of the variance will not be of substantial detriment to the adjacent properties and that the character of the district will not be changed by the granting of the variance.*

Motion carried 5-0-0.

BZA-08-08 Request of Mark E. McKee, on behalf of the subject property, requesting a variance pertaining to permitted fence heights in front and corner-side yards, Section 18-9-2.8 of the Winchester Zoning Ordinance, at 35 West Whitlock Avenue (*Section 232, Double Circle 3, Block C, Lot 1*), which is zoned Medium Density Residential (MR) District.

Mr. Diem presented the request for a variance to permitted fence heights in front and corner-side yards at 35 West Whitlock Avenue. A fence was recently constructed at the property that exceeds the height and openness requirements for a front or corner-side yard.

Mr. Diem explained that the fence that has been recently constructed exceeds the four foot height limitation and 25% minimum required openness for fences erected in front or corner-side yards. The purpose of the fence, as stated by the applicant within their written request, is similar to what had previously been considered by the Board of Zoning Appeals within BZA07-17 on July 11, 2007. With regards to that particular decision, the Board unanimously approved the fence (3-0-0) with certain conditions imposed. If the Board were to support the applicant's request to maintain the fence at its current location, those conditions may assist in reducing the visual impact that has been created.

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Chairman Hurt opened the public hearing.

Mark McKee, applicant, stated that this is a \$2700 fence, and is a great fence. He loves his home and where he lives. He felt that he has great neighbors but he has a lot of foot traffic. He has had people approach him in his yard. He has a small child and doesn't want him subjected to that. He felt that when the ordinance was written the city was a place where you could leave your doors unlocked but this is 2008, that city doesn't exist anymore. He expressed his concern with safety. He installed an alarm system in his home because he is in the army and is deployed a lot. He stated that he would feel better about leaving with his home being as safe as possible.

Mr. Wiley asked what the current height is.

Mr. McKee stated that it is 6ft. He provided pictures showing other things in the neighborhood that are more unsightly such as a motorcycle chained to a front porch.

Susan Howard, neighbor, stated that she has no issue with the fence surrounding his property.

Chairman Hurt closed the public hearing.

Mr. Phillips asked what was stated by the Board on July 11th.

Mr. Diem stated that same as this case the applicant stated the fence was for security due to the number of sex offenders in the area and beverage containers being thrown in their yard. The Board requested that the landscape along the front of the fence be build up giving the appearance of a shorter fence.

Chairman Hurt asked how much grass area is available in front of the fence.

Mr. McKee stated 3-4 feet.

Mr. Koneczny stated that the 6ft fence in previous case was denied so there has to be some consistency.

Mr. Wiley expressed that the security does show a hardship.

Mr. Roberson stated that building up the landscaping was not an option in the last case.

Mr. Koneczny stated that he doesn't have problem with the opening but definitely the height.

Mr. Roberson asked if the landscaping would be required all the way around or just in the front.

Mr. Diem stated that the entire fence would have to be included.

Chairman Hurt asked if the fence was the property line.

Mr. McKee stated that it is.

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Mr. Diem stated that there are no restrictions for landscaping within the public right-of-way. He continued to say that the only issue that could arise would be if the city would have to come in and put a line in. The property owner would have to accept the fact that the landscaping would be ripped out.

Chairman Hurt stated that if that were to happen, then the Board could adjust the ruling at that time.

Mr. Koneczny expressed his concern with giving an applicant permission to put something on city property.

Mr. Wiley stated that per code it's allowed.

Mr. Phillips asked the applicant if he had any plan for what he would do if the Board were to deny his request.

Mr. McKee stated that it was a surprise to even receive the violation letter in the mail. He hired a contractor to put up the fence and in the contract it states that all the codes and ordinances will be followed.

Mr. Koneczny stated that this information makes it more complex.

Chairman Hurt agreed with Mr. Diem that more information has to be made to the public to prevent these issues. He asked the applicant if he had contacted the contractor after he received the letter.

Mr. McKee stated that he had not because the intent was to have a fence that provides security and that's what he got.

Chairman Hurt suggested tabling this until the applicant has time to talk to the city and see if they can provide any other options to soften the height of the fence.

Mr. Koneczny stated that he would not feel comfortable telling the applicant to build something on city property.

Chairman Hurt asked what happens if the Board cant make a decision.

Mr. Diem explained that if the Board moves to deny the request the applicant has 30 days to appeal the decision with circuit court. If the Board tables the request the applicant can do whatever they feel like they can do to mitigate this problem before the next public hearing. If the Board approves the request with conditions, then the applicant has whatever time specified by the Board to meet those conditions.

Mr. Roberson asked Mr, Koneczny if he would still have an issue if the city writes a letter that states they do not oppose the building up of the landscape.

Mr. Koneczny responded by saying that at that point the Board wouldn't have been responsible for making the decision.

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Mr. Diem stated that it could be made part of the tabling motion.

Mr. Roberson seconded by Mr. Phillips motioned to table BZA-08-08 until the applicant has time to pursue options with the Planning Dept or City Engineer or other options with their Contractor.

Motioned carried 5-0-0.

Mr. Wiley stated that if this wasn't a security issue he would deny it in a heartbeat.

Mrs. McKee asked if the fence was cut back to 5 ft would it be approved.

Mr. Koneczny stated that it would be considered but that can't be answered at this time.

Mr. Phillips, seconded by Mr. Koneczny motioned to adjourn.

Motion carried 5-0-0.

OLD BUSINESS

None

Meeting adjourned: 5:50pm