



Yellowstone County Board of Adjustment

Minutes

October 29, 2015

The County Board of Adjustment met on Thursday, October 29, 2015 in the 1st Floor Conference Room, of the Miller Building located at 2925 3rd Avenue North. Chairperson Hecker called the meeting to order at 4:00 p.m.

Name	Title	02/12/2015	04/09/2015	07/16/2015	09/10/2015	10/01/2015	10/29/2015	12/10/2015						
Bruce Reiersen	Board member	E	1	1	1	E	E							
Carlotta Hecker	Chairperson	1	E	E	1	1	1							
Delores Terpstra	Board member	1	1	1	E	E	1							
Robert Bailey	Vice Chairperson	1	1	1	E	E	1							
Blaine Poppler	Board member	-	-	E	1	1	1							

Chairperson Hecker introduced the County BOA Commission members and staff in attendance: Nicole Cromwell, Zoning Coordinator; Tammy Deines, Planning Clerk Board member Reiersen is not in attendance as he has recused himself as he is acquainted with the applicant for County Variance #277.

Attending: John Miner, Glenn McGaha, Todd Carlson, Travis Williams, Tom Stusek, Jason Frank, Tom Nickel, Judy Nickel, Ron Kaurin

Public Comments

Chairperson Hecker opened the public comment portion of the meeting and asked if anyone wished to speak on an item not on today's agenda. There was none. Chairperson Hecker closed the public comment portion of the meeting.

Approval of Minutes: September 10, 2015

Motion

Board member Terpstra made a motion and it was seconded by Board member Poppler to approve the September 10, 2015 meeting minutes. The motion carried with a unanimous voice vote.

PUBLIC HEARINGS:

Chairperson Hecker read the determinations for granting a variance and Zoning Coordinator Nicole Cromwell reviewed the rules for the procedure for conducting public hearings

Nicole Cromwell read the legal description and reviewed the staff report with a PowerPoint presentation for the audience.

REQUEST

Item #1 -Motion. County Variance #277– 321 Calypso, Nicole Cromwell, Zoning

Coordinator– A variance from Section 27-310(j) requiring a minimum side and rear setback of 8 feet for a detached garage over 18 feet in height to allow a 3.5 foot side and rear setback, and from Section 27-310(j) requiring a maximum foot print of 1,500 for any detached garage to allow a 2,100 square foot detached garage in a Residential 15,000 (R-150) zone, on Lot 1, Block 7 of Wells Garden Estates, 4th Filing. The property is a 26,441 square foot parcel of land.

BACKGROUND

Mr. Carlson started construction in the spring of 2015 on a 2,140 square foot detached garage in the north east corner of his property at 321 Calypso Street. Mr. Carlson was not aware of the requirement to apply for a Zoning Compliance Permit or of the required setbacks and maximum building area at the time construction started. A complaint was filed with the County Code Enforcement office and Mr. Carlson subsequently submitted a permit for approval with the Planning Division on April 22, 2015. The permit was reviewed and the noncompliance with size and setbacks was sent by letter to Mr. Carlson on May 11, 2015. He was informed of his option to apply for a variance and he submitted the application on August 3, 2015.

The garage under construction is intended to store Mr. Carlson's collectible and antique cars. The structure has been framed and mostly enclosed but siding, roofing, and interior finishing is not yet complete. The structure is over 18 feet in height and according to the zoning regulations must be setback at least 8 feet from the side and rear property lines.

The structure is about 3.5 feet from the rear and side property lines. The structure site plan shows a 2,140 square foot building with a drive approach from Hazelnut Street. The maximum square footage allowed in the R-150 zone is based on the lot size. Lots of less than 1 acre must calculate the maximum foot print based on its acreage increment. This size lot, 26,441 square feet, would allow a 1,238 square foot detached garage. The maximum foot print calculation does not apply in the AS or A-1 zoning districts but does apply in all other residential zones in the County up to a maximum of 1,500 per detached structure.

Mr. Carlson has not stated a hardship with the land that prevents him from constructing the garage at the correct setback or within the maximum size allowed for this size property. An example of a hardship with the land would be the location of poor soils, slopes, septic drain fields, domestic water wells and similar physical constraints for construction. Similarly, the need for the size of the garage, 2,140 square feet, is explained as a need to house a car collection. The existing attached garage area is 876 square feet. Similar variances in nearby subdivisions were for smaller detached garages (1,300 and 1,500square feet) that met the required rear and side setbacks. Staff reviewed photographs submitted by Mr. Carlson and aerial surveys of the Wells Garden subdivision. There are no similar sized detached garages in the subdivision. There have been no similar variances submitted in the subdivision. One variance in 1990 to reduce the side adjacent to street setback from 10 feet to 5.5 feet was denied for the construction of a small detached shed at 5017 Sweet William.

RECOMMENDATION

The Planning Division is recommending denial of the requested variances based on the findings of the 7 criteria for Variance #277.

Discussion

Chairperson Hecker asked the Board for questions and discussion.

Board member Poppler asked if Mr. Stusek is the agent and Ms. Cromwell confirmed this and stated any person may appear on behalf of the owner. Per the Board's request for clarification on how this happened, Ms. Cromwell explained the circumstances and said Mr. Carlson contacted Yellowstone County Code Enforcement Officer Mike Schieno due to a complaint.

Tom Stusek, (no address provided)

Mr. Stusek represents Todd Carlson and Travis Williams. He stated he has exhaustively reviewed Supreme Court case law and has detailed this information in his memo. He submitted photographs of buildings of this nature located in the general area labeled with the addresses.

Mr. Stusek explained that his client, Mr. Carlson, discussed this project with the neighbors and they indicated they had no issue with this project. Mr. Stusek recounted the submittal process and said the concrete was set before Mr. Carlson realized a permit was needed. He said there was some confusion with the concrete contractor who didn't make the need for a permit clear to his client.

Mr. Stusek said this building will be used strictly to store some valuable cars that had to be out of the weather. He referred to the *Lowe v. City of Missoula*, 165 Mont. 38 (1974). This structure will mirror the house and will be lower in height than the home.

Mr. Williams is the contractor. He said the proposed building will have a 6/12 pitch shingled roof. He offered to install snow stops on the roof to prevent snow slippage. He said this is not a pole building and commented he is not aware of a building as nice as this in this neighborhood. He was not involved with pouring the concrete slab. He explained to Chairperson Hecker the plans are for 14 foot side walls and no second story. The applicant interjected and said the height is needed to install car lifts.

Mr. Stusek asked Mr. Williams about the general character of the building. Mr. Williams said it will have aluminum soffits and vinyl siding to match the house. Mr. Stusek said the structure will be valued at \$120,000-\$125,000 when it is completed. He stated the applicant does not wish to build something that will detract from his property or the adjacent properties. He said denial of this variance will create a severe hardship for his client. He said it seems this request falls within several Supreme Court cases, and he referenced *Freeman v. Board of Adjustment of City of Great Falls*. 342 (1934).

Board member Bailey asked Mr. Stusek for his definition of a severe hardship. Mr. Stusek replied that tearing down \$40,000-\$50,000 work and effort put into the structure is "economic waste" just for the sake of noncompliance. He asked the Board to remediate this issue with a reasonable solution as this is a "no harm, no foul situation". Nicole Cromwell, who said the building is at least 4 feet into the required setback, gave board member Bailey asked for clarification on the setbacks and lot coverage and it.

Public Hearing

Chairperson Hecker opened the Public Hearing and asked if anyone would like to speak in favor or against Yellowstone County Variance #277.

Jason Frank, 335 Calypso Street, Billings, Montana

Mr. Frank lives directly north of Mr. Carlson. He said he contacted Mike Schieno to report this case due to the structure's proximity to his property line. This structure is 3.6 feet from his fence and runs 50-feet along his property line. He stated it is his responsibility to make his yard safe for children, and pets and this will not be safe due to potential drop off of the roof of snow load accumulation. Mr. Frank feels this structure is creating a hazard to his property, and said snow guards are not 100 percent reliable. Mr. Frank said he spoke with the contractor during construction and found the building to be too close to the property line. He presented the setback requirements to the applicant in writing, but he was not deterred and construction continued. Construction debris has dropped off the roof into his yard. The applicant has concrete over the 8-ft utility right-of-way. He said the petition in favor of the new garage was unclear and has no bearing on this application. He voiced concern with the floor drain flows.

Board member Terpstra asked how much of the building had been constructed and Mr. Frank said the sides are up along with the first trusses. Mr. Frank reiterated the need to keep his property safe.

Tom Nickel, 647 Calypso, Billings, Montana

Mr. Nickel said this subdivision was built during a time when the City had jurisdiction and houses had to meet inspections. His understanding is the right-of-way was platted for a sewer line along property lines. The gas line goes down the property line but it would not affect the applicant. Mr. Nickel voiced concern with the installation of a future sewer line. He said the applicant is setting a precedent and creating a potential fire hazard with buildings constructed next to the property line. He said taller buildings should be constructed further back from the property line.

Rebuttal

Tom Stusek, (no address provided)

Mr. Stusek noted his memo and said Mr. Franks home is not near this structure. He stated a decision cannot be made on speculations, and this does not constitute an abuse of discretion. He noted photos of structures located 6 inches from property lines in this neighborhood but no one complained.

Travis Williams said Mr. Frank was aware of the size of the building. He said he was setting trusses and he was not going to stop his crew on hearsay that something isn't right. He stated he will clean up any construction debris.

Mr. Stusek said there are speculative concerns but they do not constitute evidence. He said he appreciates Mr. Frank's subjective concerns but does not feel they are reasonable in terms of remediation. This building will be nicer than others in the neighborhood.

Todd Carlson said it will have a small drain to alleviate drainage/drip off that goes to the side of the concrete into the dirt. The applicant is not going to be washing cars that will create runoff, and he has valuable cars that need a good home. He said there doesn't seem to be much concern except for this one individual.

Board member Bailey said the property owner should have done his due diligence and he will not support this variance request today.

Judy Nickel, 647 Calypso Street, Billings, Montana

Ms. Nickel said they purchased their property from Leland Wells. All of the houses have septic lines going to the back of the property to connect to services. She said the issue is not just applicant's financial concern but everyone that goes up and down the street if the sewer cannot be placed where it is supposed to go.

Board member Poppler said he found the memo from Mr. Stusek includes case law intermingled with factoids and matters of opinion, and it is difficult to separate case law and what is specific to this case. He said a variance must not be contrary to public interest, and he contends this is contrary to public interest and is a dangerous precedent for those that live in the neighborhood. He said this is an unnecessary hardship which could have been addressed when the applicant instructed the contractor to obtain the permit. The spirit of the ordinance must be observed. He clarified the language in the Lowe case and said the quote used in the memo is speculation. He said there is ample evidence, including photos, neighbors' testimonies, and the contractor's testimony. He voiced concern that the neighbors who signed did not have all of the information. Mr. Stusek apologized if his facts are not technically clear. Board member Poppler stressed the importance that written testimony is factual. Mr. Stusek explained he tried to lay down general precepts of law. Applying his understanding of the facts, Mr. Stusek believes the application is not unreasonable, and denial of this request will create economic waste.

Glen McGaha, 306 Rhubarb Lane, Billings, Montana

Mr. McGaha said he feels the utility lines will be placed in the middle of the street. Board member Poppler pointed out this is a recorded plat.

Chairperson Hecker asked if there was anyone else wanting to speak in favor or against County Variance #277. There was none. Chairperson Hecker closed the public hearing at 5:27 p.m.

Motion

Board member Terpstra made a motion and it was seconded by Board member Bailey to deny this request and adopt the Findings of the 7 criteria in the staff report.

Discussion

Chairperson Hecker called for discussion on the motion. Board member Poppler said he doesn't want to see a \$40,000 garage torn down, and it is a shame that warnings were not followed. He said he has a hard time granting a variance with a precedence that could be long reaching. The zoning laws were carelessly disregarded in this situation. Board member Bailey said that the applicant should have

done due diligence. Board member Hecker said the applicants property was purchased with Covenants and they realtor should have given the applicant a copy. She noted the concerns voiced with a building constructed within 3-feet of the property line and within the utility easement.

Chairperson Hecker called for a vote.

The motion carried 4-0. Variance #277 has failed. The County Board of Adjustment voted 4-0 to adopt the findings as proposed by the Planning Staff and to deny the variance as requested. The findings of the Board are as follows:

1. That special conditions and circumstances exist which are peculiar to the land, the lot or something inherent in the land which causes the hardship, and which are not applicable to other lands in the same district;

The BOA finds there are no special circumstances that exist which are peculiar to the land. The lot is slightly over ½ acre, is flat, and soils in the area appear to be suitable for construction. The applicant has not stated a hardship with the property other than the need for additional storage for collectible and antique automobiles. The detached garage could be built to meet the minimum setbacks and at the size (1,238 square feet) allowed by the zoning regulations.

2. That a literal interpretation of the provisions of this Chapter would deprive the applicant of rights commonly enjoyed by other tracts in the same district;

The BOA finds the literal interpretation of the provisions of this chapter will not deprive the applicant the ability to construct a detached garage in conformance with the zoning regulations. Similar variances in nearby subdivisions have been granted for garages of 1,300 to 1,500 square feet. Detached garages of 2,100 square feet do not exist within this subdivision or in nearby subdivisions with or without zoning variances. Detached structures over 18 feet in height need to meet the minimum side setback of 8 feet. The BOA was not presented any credible evidence of other detached structures of this height in the subdivision that were setback less than 8 feet from the property line.

3. That granting the variance requested will not confer on the applicant any special privilege that is denied by this Chapter to other land in the same district;

The BOA finds that granting this variance would confer a special privilege to this applicant as all other detached accessory buildings within this subdivision appear to have been constructed according to the zoning regulations with the proper size and setbacks.

4. That the granting of the variance will be in harmony with the general purpose and intent of this Chapter and with the Growth Policy;

The BOA finds the variance is not in harmony with the general purpose and intent of the zoning regulations and the growth policy. The height and bulk of the detached garage is out of character with the surrounding residential properties and has a larger foot print than the existing home on the site.

5. In granting any variance, the Board may prescribe appropriate conditions and safeguards in conformity with this Chapter. Violation of such conditions and safeguards, when made a part of the terms upon which the variance is granted, shall be deemed a violation of this Chapter;

The BOA finds there is insufficient cause to approve the requested variance and has no recommended conditions of approval.

6. The Board shall prescribe a time limit within which the action for which the variance is required shall be begun or completed, or both. Failure to begin or complete such action within the time limit set shall void the variance; and

The BOA finds there is insufficient cause to approve the variance so no time limits are proposed.

7. Under no circumstances shall the Board grant a variance to allow a use not permissible under the terms of this Chapter in the district involved. A variance shall not be a grant of special privilege inconsistent with limitations placed upon other property in the district.

If the board had made findings to approve the variance, the granting of such variance would not allow a use that is prohibited in the zoning district. Detached accessory structures are allowed within the Residential 15,000 zoning district.

Adjournment:

The meeting adjourned at 5:35 p.m.

ATTEST: DRAFT. To be approved on December 10, 2015