

**CITY BOARD OF ADJUSTMENT**

MINUTES June 1, 2016

Name	Title	01/06/2016	02/03/2016	03/02/2016	04/06/2016	05/04/2016	06/01/2016	07/06/2016	08/03/2016	09/07/2016	10/05/2016	11/02/2016	12/07/2016
Jeff Bollman	Board member	-	-	1	E	1	1						
James Olson	Board member	-	-	1	1	E	1						
Paul Hagen	Board member	-	-	1	1	1	1						
Frank Chesarek	Vice Chairman	-	-	1	1	1	1						
Oscar Heinrich	Board member	-	-	1	1	1	1						
Martin Connell	Board member	-	-	1	1	1	E						
Mark Noennig	Chairman	-	-	1	1	1	1						

TOTAL NUMBER OF APPLICATIONS 2016	01/06/16	02/03/16	03/02/16	04/06/16	05/04/16	06/01/16	07/06/16	08/03/16	09/07/16	10/05/16	11/02/16	12/07/16	TOTAL
Variance	0	0	2	1	3	3							9

Chairman Noennig called the meeting to order at 6:00 p.m. The City Board of Adjustment met in the first floor conference room of the Miller Building located at 2825 3<sup>rd</sup> Avenue North.

Nicole Cromwell introduced the City Board of Adjustment members and Planning Department staff. Attending Staff members are Nicole Cromwell, Zoning Coordinator; Karen Husman, Planner I; and Robbin Bartley, Administrative Support.

**Attending:**

Leslie A. Hergenrider, Kurtis Grow, Bob Bushing, Mike Mitzel

**Public Comment**

Chairman Mark Noennig opened the public comment period and asked if there was anyone wishing to speak during the public comment portion of the meeting. There were none. Chairman Noennig closed the public comment period.

**Approval Meeting Minutes**

Board member Heinrich made a motion for the approval of May 4, 2016 minutes. Board member Olson seconded the motion. Minutes were approved by unanimous voice vote 6-0.

**Disclosure of Conflict of Interest**

Chairman Noennig asked for disclosures of conflict of interest.

Board member	Yes	No	Not Present
Jeff Bollman		x	
James Olson		x	
Paul Hagen		x	
Frank Chesarek		x	
Oscar Heinrich		x	
Martin Connell			x
Mark Noennig		x	

**Disclosure of Outside Communication**

Nicole Cromwell explained there are times applicants communicate directly with Board members or visit the site and this should be communicated to the Board members in a public forum.

**Board member Chesarek made public his affiliation with EEC but stated he did not know the individuals here representing Variance #1231.**

Board member	Yes	No	Site visit?	Not Present
Jeff Bollman		x	none	
James Olson		x	none	
Paul Hagen		x	all	
Frank Chesarek		x	none	
Oscar Heinrich		x	all	
Martin Connell				x
Mark Noennig		x	#1231	

**Public Hearings**

Zoning Coordinator Nicole Cromwell reviewed the procedures for public hearings and stated the Board will open a public hearing and allow public comment this evening. She reviewed the hearing and presentation processes for the meeting for reviewing and acting on each variance. She stated four votes in favor of the Board of Adjustment are required to pass a variance. This evening there are 6 Board members attending. A simple majority will approve requests.

Nicole Cromwell read the legal description and presented **Variance request #1229:**

**Variance 1229 – 1430 Country Manor Blvd – Side adjacent to Street –** A variance from Section 27-309 requiring a side adjacent to street setback of 10 feet to allow a minimum side adjacent to street setback of 5 feet for the construction of an outdoor patio pergola on Lot 3, Block 1, Circle Fifty Subdivision, a 21,505 square foot parcel of land in a Community Commercial (CC) zone. The proposed pergola will provide shade on an existing 464 square foot patio on the east end of the multi-tenant building. Tax ID: A26426

**RECOMMENDATION**

Planning Staff is recommending conditional approval and adoption of the findings of the 7 criteria for Variance #1229.

**Discussion**

Chairman Noennig asked the members of the Board for questions and discussion. Board member asked if alcohol is served on the patio. Board member Heinrich replied in the affirmative.

**Public Hearing**

Chairman Noennig opened the public hearing and asked if there was anyone wishing to speak in favor or against **City Variance #1229**.

No one in favor, no one opposed, no rebuttal and no discussion.

Chairman Noennig called for a motion.

Board member Chesarek made a motion and Board member Hagen seconded the motion to conditionally approve **City Variance #1229** with the conditions and Findings of Fact presented by Staff.

Board member	Yes	No	Abstain	Not Present
Jeff Bollman	x			
James Olson	x			
Paul Hagen	x			
Frank Chesarek	x			
Oscar Heinrich	x			
Martin Connell				x
Mark Noennig	x			

**The motion passed 6-0. City Variance #1229 is conditionally approved.**

**Nicole Cromwell read the legal description into the record.**

**Karen Husman presented:**

**Variance 1230 – 211 Fair Park Drive – Front Setback and Projection in Front Yard – A** variance request from 27-308 requiring a minimum front setback of 20 feet to allow a minimum setback of 19 feet; and from Section 27-310(g) requiring a maximum projection of 4 feet in a front setback to allow a maximum projection of 8 feet for the addition of a new entryway and new front stoop, in a Residential 7,000 (R-70) zone, on Lot 29, Block 3 of Central Heights Subdivision, 1<sup>st</sup> Filing, a 8,360 square foot parcel of land. Tax ID: A04497.

**RECOMMENDATION**

Planning Staff is recommending **conditional approval** of **Variance #1230** with 7 criteria for Variance #1230.

**Discussion**

Chairman Noennig asked the members of the Board for questions for Staff.

Chairman Noennig asked for clarification of the # 2 “determination”. Board member Heinrich asked if both garages will be kept. Staff stated there is no information about removing or remodeling the garage. Board member Heinrich confirmed the intent being an extension to the front. Board member Heinrich ask if the property behind is zone approved. Staff has no information regarding said property.

**Public Hearing**

Chairman Noennig opened the public hearing and asked if there was anyone wishing to speak in favor or against **City Variance #1230**.

**Leslie Hergenrider, 211 Fairpark Drive, Billings, MT**

Mr. Hergenrider explained the variance request is due to the utilities in back. The staircase installation would require disturbance of the sewer, water and power lines.

Board member Heinrich confirmed that both garages will be kept.

Chairman Noennig asked for explanation regarding the need for front access.

**Opposed**

None

**Discussion**

None

Chairman Noennig called for a motion.

**Motion**

Board member Chesarek made a motion and Board member Olson seconded the motion to conditionally approve **City Variance #1230** with the conditions and Findings of Fact presented by Staff.

Board member	Yes	No	Abstain	Not Present
Jeff Bollman	<b>x</b>			
James Olson	<b>x</b>			
Paul Hagen	<b>x</b>			
Frank Chesarek	<b>x</b>			
Oscar Heinrich	<b>x</b>			
Martin Connell				<b>x</b>
Mark Noennig	<b>x</b>			

**The motion passed 6-0. City Variance #1230 is conditionally approved.**

**Nicole Cromwell read the legal description into the record.**

Karen Husman presenting:

**Variance 1231 – 316 Miles Avenue – Side and Rear Setbacks** – A variance request from 27-308 requiring a minimum side setback of 8 feet for a 2-story structure to allow a minimum side setback of 5 feet and from 27-308 requiring a minimum rear setback of 15 feet to allow a minimum rear setback of 10 feet, in a Residential Multi-family-Restricted (RMF-R) zone, on Lots 39 & 40, Block 12, Suburban Subdivision, a 7,000 square feet parcel of land. The proposed variance is to allow the owner to finish the construction of a partially completed structure. Tax ID: A15964.

This structure was started in January of 2011. A building permit application was initiated for a 2 story residential structure. After review, corrections from the City Building and Planning departments for structural and setbacks were sent to the applicant for changes needed before a permit could be issued. In April of 2012 the pending building permit expired. A new application was required to go forward with construction. In addition, a couple of Code Enforcement cases have been opened in regards to the property. The case notices spelled out that compliance to building code and zoning requirements and a building permit is required to complete the structure.

### **RECOMMENDATION**

Planning Staff is recommending **denial** of **Variance #1231**.

Board member Bollman asked if construction was started without a building permit. Staff does not have that information and once submitted, corrections were sent out and the building was either started before they applied or started before the building permit was issued. Board member Bollman asked about other adjacent Variances. Staff replied regarding the particulars of the adjacent properties. There were no variances for a two story structure.

Board member Olson asked what is the bases for denial. Staff replied the structure was constructed without a building permit, it was not there preexisting to zoning, it is not considered legally nonconforming because it was not there prior to the zoning was in place.

Chairman Noemig stated that he was at this property and noticed that some adjacent properties had two residences on them. Is it zoned for more than one residence? Staff replied it is a 7000 square foot lot two residences are allowed by current zoning. He then asked staff if the distance from the structure to the alley lot line had been measured by staff. His pace calculation to the fence line is 8 feet. Perhaps the fence is off. Typically the fence is on the lot line. Staff explained that the alley fences are not always accurately put on the property line.

He then inquired, if denied, if the structure were one story, would it meet the setback requirements? Staff stated a single level structure wouldn't meet the setback requirements in the rear.

Board member Olson asked if the variance is denied, where this leaves the applicant. Would the building have to be moved? Staff said the structure would have to be moved to meet the setbacks. However, if the variance were approved, Staff has provided alternate conditions that would apply. Staff went on to explain the conditions relating to the structure being destroyed and the placement of the rebuild. A rebuild would have to meet the correct zoning requirements.

Board member Chesarek asked about the setback requirements and how destroyed would it have to be to be forced to meet conditions and building codes. Staff indicated 50 percent. He then confirmed at that time the foundations and all would have to be redone.

Board member Bollman explained all building code requirements would have to be in compliance regardless.

If the board chooses to approve this Variance, Staff has outlined 8 conditions.

1. The variance request is from 27-308 requiring a minimum side setback of 8 feet for a 2-story structure to allow a minimum side setback of 5 feet and from 27-308 requiring a minimum rear setback of 15 feet to allow a minimum rear setback of 10 feet. No other variance is intended or implied with this approval.
2. The variance is limited to on Lots 39 & 40, Block 12, Suburban Subdivision.
3. This variance is limited to the existing structure. If the existing structure were destroyed by any means, it must be reconstructed to the current setbacks and site development requirements in place at the time it is reconstructed.
4. There will be no construction between 8 p.m. and 7 a.m. daily.
5. The applicant must submit and obtain a building permit to complete the renovations within 6 months of this variance approval.
6. In addition to an approved building permit issuance, the applicant must receive the required building inspections and obtain a certificate of occupancy to verify compliance within 18 months of the building permit issuance.
7. Failure to begin or complete actions required by this approval within the time limits set forth shall void this variance.
8. These conditions of variance approval shall run with the land described in this authorization and shall apply to all current and subsequent owners, operators, managers, lease holders, heirs and assigns.

Board member Chesarek asked if these conditions were reasonably attainable. Staff believes they are. Board member Heinrich explained these are the same conditions. Staff replied that building code compliance or a Certificate of Occupancy is not usually required in the conditions but in this instance the building is already built and needs to be permitted and inspected. Building permits are not enforced by Planning but a Certificate of Occupancy issued by the Building department would indicate compliance to the code.

### **Public Hearing**

Chairman Noennig opened the public hearing and asked if there was anyone wishing to speak in favor or against **City Variance #1231**.

### **Bob Bushing, w/EEC 720 Lohwest Lane, Billings, Mt 59106**

Mr. Bushing explained that he was not involved from the beginning. He does have copies of the building department and planning department comments. He fully intends to submit new plans for permitting. They are ready with the necessary corrections upon approval of this Variance.

Board member Olson asked if the walls were covered or if obtaining inspections is a big deal. Mr. Bushing deferred to the owner Mike Mitzel. Mr. Mitzel confirmed the open walls. Mr. Bushing explains he is ready to submit plans for permitting and a Certificate of Occupancy based on the present location of the building. The plans detail the structural and exiting requirements, etc. Mr. Chesarek asked if the plans will meet permitting requirements and Mr. Bushing they will easily. Chairman Noennig then asked if the basement is the garage. Mr. Bushing said yes and that it is to remain a garage. Chairman Noennig noticed the location of the garage door and asked if it will remain. Mr. Bushing and Mr. Mitzel confirmed it is not intended to be moved. Chairman Noennig

asked if the intent is to have another building on the front of the lot being that the current structure is placed at the rear. The applicant replied there is no plan to build in the front.

**Mike Mitzel, 8412 Shorthorn Drive, Billings, Mt 59104**

Mr. Mitzel explained the reasons for not having necessary permits. He was working with his father building homes when this building was started. His father had a stroke during this time and Mr. Mitzel thought his father had obtained the necessary permits for building. His father was 2 years in recovery. He is now retired and Mr. Mitzel claims he does not believe this is how things should be done. He went on to say that the foundation and concrete meet code requirements. He also indicated that the missing information required by the building department were on the new plans and were not structural but informational. He is confident that the structure will pass inspection. Darren Ruff did the rough in electrical and their plumbing contractor hooked up the sewer.

Chairman Noennig asked why it was started without permits or meeting correct setbacks. Mr. Mitzel said he could not give a fair answer and he thought his father had the permits although the information he had was for a one story structure. They used pins in the alley to identify property lines.

Chairman Noennig asked why the building is placed at the back of the lot and why is the garage door where it is. Mr. Mitzel had no explanation. Chairman Noennig asked what he will do if the variance is denied. Mr. Mitzel would work with EEC to see what is possible cost wise. No redesign has been considered yet. Mr. Mitzel would like it to not be a total loss.

Cost estimates

Board member Olson asked if he had been red tagged during the building process. Mr. Mitzel explained that he had tried to get the electrical hooked up but could not for lack of an electrical permit.

Board member Bollman inquired about his building of other houses. Did he not have inspections during the construction process and did it not occur to him that no inspections were happening during this build? Mr. Mitzel said it did occur to him but it was not the greatest time of his life.

Chairman Noennig asked if he knew he was not in compliance on anything. Mr. Mitzel replied, Yes, my attitude was bad. I did know I was not being inspected and I stand behind the building being structurally correct.

Board member Olson expressed the need to make a decision. Chairman Noennig asserted that the public meeting was still in progress and that the applicant was still speaking.

**The Public Hearing was closed.**

**Discussion**

Board member Olson asked what is the decision to made and what is the best answer. Board member Heinrich asked Board member Olson what he proposed. Board member Chesarek asked if it normal to have alternate conditions provided for approval when denial is recommended. It is not out of the question. Staff explained alternate conditions are often provided in case additional information is provided at the public hearing that leads the Board members to a different finding of fact. Board member Chesarek suggested that it is not out of the question to let the applicant "fix" this. Mr. Bushing stated that Mr. Mitzel is comfortable with the alternative recommendations for approval and what would happen if the structure should be damaged to the point of necessary replacement. He also addressed the need and desire to improve the appearance of the structure. Board member Chesarek is inclined to go with the alternative recommendations to approve the Variance. Board member

Bollman discussed the normalcy of the alternative recommendations being presented. Chairman Noennig said it is notable no neighbors came this evening to protest the variance. He also stated he is aware it is a big chore to change the location of the structure. Mr. Bushing interjected that he had received three phone calls from neighboring properties that claimed no issue with the proposal. Chairman Noennig said it is good information for the board to hear.

Board member Hagen asked Board member Chesarek what alternative recommendations he is referring to. Board member Chesarek said he is in favor of granting the applicant with the 8 conditions by Staff. He explained that it would be cost prohibited to have to tear it down and start over. He believes this is a hardship and the neighbors have no objection. Board member Hagen shared his concerns regarding the applicant not having a building permit stating that should have been done. Board member Bollman agreed stating this is especially true for persons who build houses. Board member Heinrich also agreed since this has been a situation since 2011 and there have been many opportunities to correct this.

Board members Hagen and Heinrich are discouraged because they seemingly “thumbed their nose” at the process.

Board member Heinrich took umbrage with the discussion period including the applicant and agent stating the Public Hearing was closed, this time is only for Board member discussion and the applicant and agent should not comment.

Chairman Noennig called for a motion.

**Motion**

Board member Bollman made a motion and Board member Heinrich seconded the motion to **deny** City Variance #1231 per the conditions and Findings of Fact presented by Staff.

Board member	Yes	No	Abstain	Not Present
Jeff Bollman	x			
James Olson		x		
Paul Hagen	x			
Frank Chesarek		x		
Oscar Heinrich	x			
Martin Connell				x
Mark Noennig		x		

**The motion to deny Variance request #1231 failed with a 3-3 vote.**

Board member Chesarek offered an alternative motion to approve Variance #1231 with the alternate conditions set forth by Staff and Board member Olson seconded the motion.

**Discussion**

Board member Bollman asked the Board what the hardship is. Board member Chesarek replied regarding the expense stating the hardship is financial. Board member Bollman retorted it is self-imposed. Board member Chesarek reminded everyone that Mr. Mitzel was working for his dad, who is not in attendance, and following his lead assuming that he was taking care of the necessary permitting.

Chairman Noennig then asked staff procedural questions regarding the what ifs of this new motion failing. Staff advised the Chairman of the option to delay the action for not more than 30 days, take additional information and renotice. Board member Bollman mentioned that 4 votes are needed to approve the Variance.

Board member Heinrich disagreed with the notion of a decision being made by an absent Board member who would only review the audio with no ability to question the applicant and such and make an appropriate determination.

Staff advised the Chairman the Public Hearing would have to be reopened and the only reason for delaying the action would be to obtain additional information.

<b>Board member</b>	<b>Yes</b>	<b>No</b>	<b>Abstain</b>	<b>Not Present</b>
<b>Jeff Bollman</b>		<b>x</b>		
<b>James Olson</b>	<b>x</b>			
<b>Paul Hagen</b>		<b>x</b>		
<b>Frank Chesarek</b>	<b>x</b>			
<b>Oscar Heinrich</b>		<b>x</b>		
<b>Martin Connell</b>				<b>x</b>
<b>Mark Noennig</b>	<b>x</b>			

**The motion to approve with alternate conditions failed with a 3-3 vote.**

**Discussion**

Options were discussed to proceed. To table and rehear this at next meeting or leave the building as it is and wait one year and apply for a new Variance. The applicant was in favor of tabling the action to the next meeting.

**Board member Chesarek a motion to table the decision and reopen the public hearing at the July 6, 2016 meeting and Board member Olson seconded.**

<b>Board member</b>	<b>Yes</b>	<b>No</b>	<b>Abstain</b>	<b>Not Present</b>
<b>Jeff Bollman</b>	<b>x</b>			
<b>James Olson</b>	<b>x</b>			
<b>Paul Hagen</b>	<b>x</b>			
<b>Frank Chesarek</b>	<b>x</b>			
<b>Oscar Heinrich</b>		<b>x</b>		
<b>Martin Connell</b>				<b>x</b>
<b>Mark Noennig</b>	<b>x</b>			

**The motion passed 5-1 to reopen public hearing on July 6, 2016 and Staff to present again. Board member Heinrich recommends new information be presented.**

**The action to City Variance #1231 is to be presented and reconsidered on July 6, 2016.**

**Other Business/Announcements:**

There will be a meeting on July 6, 2016.

Adjournment: 7:03 p.m.

**ATTEST: DRAFT. To be approved by a motion on July 6, 2016**

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**Robbin Bartley, Administrative Support I**

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**Mark Noennig, Chairman**