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YELLOWSTONE COUNTY ATTORNEY

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,  
YELLOWSTONE COUNTY

TODD CARLSON,

Petitioner,

vs.

YELLOWSTONE COUNTY BOARD OF  
ADJUSTMENT,

Respondent.

Cause No.: DV-15-1536

Judge Michael G. Moses


**ORDER AND MEMORANDUM  
AFFIRMING THE YELLOWSTONE  
COUNTY BOARD OF ADJUSTMENT'S  
DENIAL OF PETITIONER'S VARIANCE  
NO. 277**

This matter comes before the Court on Petitioner Todd Carlson's ("Carlson")  
Petition for Variance filed on November 25, 2015. Carlson filed Petitioner's Brief on  
July 19, 2016. Plaintiff Yellowstone County Board of Adjustment ("BOA") filed a Brief  
in Opposition to Appeal on August 10, 2016. Carlson filed Petitioner's Reply Brief on  
September 6, 2016.

1 The Court has considered all the papers and briefs on file, and listened to the  
2 variance hearing recording in its entirety. Being fully informed, the Court orders the  
3 following:

4 **IT IS HEREBY ORDERED** that Carlson's Petition for Variance No. 277 is  
5 **DENIED** and the Yellowstone County Board of Adjustment is **AFFIRMED**.  
6

7  
8 DATED this 16<sup>th</sup> day of November, 2016.

9  
10   
11 DISTRICT JUDGE

12 **MEMORANDUM**

13 **I. BACKGROUND**

14 In the spring of 2015, Carlson began constructing a 2,140 square foot detached  
15 garage on his 321 Calypso Street property located in Yellowstone County, Montana.  
16 The property is legally described as Lot 1 of Block 7 of Wells Garden Estate  
17 Subdivision 4th Filing. Carlson's property, located within the jurisdictional zoning  
18 area of the county, is subject to Yellowstone County's zoning regulations: specifically §  
19 27-310(j)(1). Section 27-310(j)(1) requires a minimum side and rear setback of eight feet  
20 for a detached garage standing over eighteen feet. Section 27-310(j) limits the  
21 maximum area for a detached garage on a parcel of a quarter-of-an-acre-to-one-acre to  
22 the area of the parcel as a percentile of an acre times 667 plus 833 square feet.  
23

1           Upon receipt of a complaint that Carlson's building was in violation of the  
2 county's zoning regulations, the Yellowstone County Code Enforcement Officer  
3 investigated. The officer found that the garage violated the regulations because the  
4 building: was too close to the property line with a setback of only three-and-a-half feet,  
5 not the requisite eight; built over a utility easement meant to accommodate water and  
6 sewer lines in any future annexation; and, exceeded the 1,238 square foot restriction by  
7 902 square feet. The 1,238 square feet was calculated as provided by the regulations by  
8 taking .607 acres (the size of Carlson's lot) times 667, equaling 405 plus 833, or 1,238  
9 square feet. The officer advised Carlson of his options—either construct the garage in  
10 compliance with the regulations, or go before the BOA and request a variance.  
11 Regardless of how Carlson chose to proceed, the officer told Carlson he should cease  
12 construction until he could get into compliance with the regulations.  
13  
14

15           Despite being advised to stop construction on the garage, Carlson continued his  
16 project in knowing violation of the regulations. Carlson submitted a permit request to  
17 the Yellowstone County Planning Department seeking approval to continue  
18 construction. He was denied the zoning compliance permit on May 11, 2015, because  
19 of the setback and size violations of his building. On August 3, 2015, Carlson filed a  
20 request for a variance, which the BOA designated as Variance No. 277. On September  
21 10, 2015, after investigating the request for the variance, the Yellowstone County  
22 Planning Department recommended the BOA deny it. The BOA held a hearing on the  
23

1 variance on October 29, 2015, and ultimately denied the request on a 4-0 vote. BOA  
2 Hrg. CD-R Recording (Oct. 29, 2015). Carlson appealed the BOA's decision to this  
3 Court on November 25, 2015. The Court received on May 9, 2016, and subsequently  
4 reviewed, a certified record of all documents and media pertinent to the BOA's denial  
5 of Variance No. 277.  
6

7 **II. LEGAL STANDARD**

8 Montana Code Annotated § 76-2-327 provides a District Court appellate review  
9 authority over decisions made by a city adjustment board; included in this authority  
10 are the abilities to hold a hearing, take further evidence on the matter, reverse or  
11 affirm, wholly or partly, or to modify the decision. *See Arkell v. Middle Cottonwood Bd.*  
12 *of Zoning Adjustment*, 2007 MT 160, ¶ 24, 338 Mont. 77, 162 P.3d 856.  
13

14 The District Court reviews a BOA decision for illegality. Mont. Code Ann. § 76-  
15 2-227(b). The code does not define illegality, thus an abuse of discretion must be  
16 shown before a District Court can set aside an adjustment board's decision. *Schendel v.*  
17 *Board of Adjustment*, 237 Mont. 278, 774 P.2d 379 (1989). This Court is not to examine  
18 the wisdom of an adjustment board so long as it acted legally and within its  
19 jurisdiction. *Id.* However, a board of adjustment abuses its discretion when its  
20 decisions are "so lacking in fact and foundation as to be unreasonable." *DeVoe v. City*  
21 *of Missoula*, 2012 MT 72, ¶ 10, 364 Mont. 375, 274 P.3d 752.  
22  
23

1 A board of adjustment is required to apply the zoning regulations as  
2 promulgated by its city commissioners. *Flathead Citizens for Quality Growth, Inc. v.*  
3 *Flathead County Bd. of Adjustment*, 2008 MT 1, ¶ 37, 341 Mont. 1, 175 P.3d 282. A board  
4 cannot disregard the provisions of, nor exceed the powers conferred by, a zoning  
5 ordinance and must act in accordance with the law. *Id.*  
6

7 When interpreting zoning ordinances, a reviewing court applies basic rules of  
8 statutory construction: e.g., if the language of an ordinance is plain and unambiguous,  
9 it is not subject to interpretation or open to construction but must be accepted and  
10 enforced as written. *Id.*

11 While a board of adjustment does have the power to grant variances to an  
12 ordinance in situations where a literal enforcement would work an undue hardship on  
13 a requesting landowner, it does not have the authority to ignore, alter, or nullify  
14 zoning ordinances. *Flathead*, ¶ 66.  
15

### 16 III. DISCUSSION

17 In the case at bar, the BOA articulates several reasons why their decision to  
18 deny Carlson's variance was not an abuse of discretion. The Court finds these  
19 arguments persuasive: the BOA correctly complied with Yellowstone County Unified  
20 Zoning Code Regulation § 27-1506(d) and the decision was not "so lacking in fact and  
21 foundation as to be unreasonable." *DeVoe*, ¶ 10.  
22  
23

1 Pursuant to § 27-1506(d), the BOA must analyze seven criteria before it can  
2 make a determination on a variance request:

- 3 (1) That special conditions and circumstances exist which are peculiar to  
4 the land, the lot, or something inherent in the land which causes the  
5 hardship, and which are not applicable to other lands in the same  
6 district;
- 7 (2) That a literal interpretation of the provisions in this chapter would  
8 deprive the applicant of rights commonly enjoyed by other tracts in  
9 the same district;
- 10 (3) That granting the variance requested will not confer on the applicant  
11 any special privilege that is denied by this chapter to other land in the  
12 same district;
- 13 (4) That the granting of the variance will be in harmony with the general  
14 purpose and intent of this chapter and with the comprehensive plan;
- 15 (5) In granting any variance, the board may prescribe appropriate  
16 conditions and safeguards in conformity with this chapter. Violations  
17 of such conditions and safeguards, when made a part of the terms  
18 upon which the variance is granted, shall be deemed a violation of  
19 this chapter;
- 20 (6) The board shall prescribe a time limit within which the action for  
21 which the variance is required shall be begun or completed, or both.  
22 Failure to begin or complete such action within the time limit set shall  
23 void the variance; and
- 24 (7) Under no circumstances shall the board grant a variance to allow a  
25 use not permissible under the terms of this chapter in the district  
26 involved. A variance shall not be a grant of special privilege  
27 inconsistent with limitations placed upon other property in the  
28 district.

19 Carlson argues that the BOA conducted the variance hearing in a rather  
20 arbitrary manner and that their actions were contrary to case law. The Court, having  
21 listened to the entire hearing recording, has a different interpretation. The meeting  
22 was called to order at 4:00 p.m. and ran for roughly an hour and a half. Nicole  
23 Cromwell, Zoning Coordinator for the City/County Planning Division, outlined an

1 agenda for the hearing and subsequently went through the seven criteria as applied to  
2 the facts of the instant case. Ms. Cromwell discussed the Planning Division's reasoning  
3 for their recommendation that the BOA deny the variance. There was public testimony  
4 from several neighbors opposing the variance, testimony and rebuttal from Mr.  
5 Stusek, testimony from Carlson and his contractor, and various questions, discussion,  
6 and commentary from members of the BOA.  
7

8 The BOA, in analyzing the seven criteria, showed they had both facts and  
9 foundation to support their decision as clearly reasonable. The BOA, adopting the  
10 findings and conclusions of the Planning Division's staff report titled *Findings of the 7*  
11 *Review Criteria*, found the following:

- 12 (1) The BOA finds there are no special circumstances that exist which are  
13 peculiar to the land. The lot is slightly over ½ acre, is flat, and soils in  
14 the area appear to be suitable for construction. The applicant has not  
15 stated a hardship with the property other than the need for  
16 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.
- 17 (2) The BOA finds the literal interpretation of the provisions of this  
18 chapter will not deprive the applicant the ability to construct a  
detached garage in conformance with the zoning regulations. Similar  
19 variances in nearby subdivisions have been granted for garages of  
20 1,300 to 1,500 square feet. Detached garages of 2,140 square feet do  
21 not exist within this subdivision or in nearby subdivisions with or  
22 without zoning variances. Detached structures over 18 feet in height  
need to meet the minimum side setback of 8 feet and staff found no  
other detached structures of this height in the subdivision that were  
setback less than 8 feet from the property line.
- 23 (3) The BOA finds that granting this variance would confer a special  
privilege to this applicant as all other detached accessory buildings

1 within this subdivision appear to have been constructed according to  
2 the zoning regulations with the proper size and setbacks.

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

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

10 (6) The BOA finds there is insufficient cause to approve the variance so  
11 no time limits are proposed.

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

16 BOA Hrg. CD-R Recording (Oct. 29, 2015).

17 Carlson focuses on three criteria articulated in *Freeman v. Bd. of Adjustment*  
18 known today as the *Lowe* criteria. A petitioner for a variance must show: (1) that the  
19 variance was not contrary to public interest; (2) that a literal enforcement of the zoning  
20 ordinance would result in unnecessary hardship; and (3) the spirit of the ordinance  
21 must be observed, and substantial justice done. 97 Mont. 342, 348, 34 P.2d 534. Carlson  
22 avers that his requested variance is not contrary to public interest, that a literal  
23 enforcement of the zoning ordinance would result in undue hardship, and the spirit of  
the ordinance would still be observed and substantial justice done by granting the  
variance. Carlson states that his neighbors did not mind the deviation from the  
regulations and that because he has already built the garage it would cause him undue  
hardship to tear it down and rebuild in conformance with the regulations.

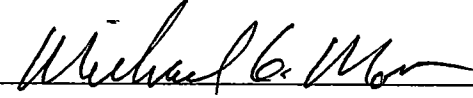
1           There is a great deal of he-said-she-said in the instant case. The BOA has stated  
2 that Carlson was told several times to cease construction throughout the course of the  
3 investigation, and that this occurred before Carlson began to set trusses. Carlson says  
4 that half the trusses were already set before the county sent him a letter. Carlson also  
5 maintains that he relied on his concrete contractor to secure the necessary permits, and  
6 that the contractor failed to do this before pouring concrete in excess of the allowable  
7 dimensions. Carlson additionally provided the Court with photos to support his  
8 argument that there are many non-conforming eyesores in the area and the  
9 subdivision accepts a "live and let live" attitude regarding zoning. The BOA declares  
10 that Carlson's hardship is self-inflicted and that economic hardship is not the  
11 standard, rather Carlson must prove a physical hardship due to any unique nature of  
12 the land, which is not present in this case. The BOA further contends that Carlson  
13 knew he was out of compliance yet continued to build, and that Montana and  
14 surrounding jurisdictional case law supports a finding that such self-created hardship  
15 is an improper ground on which to grant a variance. This all may in fact be true, but  
16 the bottom-line for the Court is this: Carlson has the burden to prove that the BOA  
17 abused their discretion and that their decision to deny his variance lacked both fact  
18 and foundation. Carlson has failed to do that. The Court's responsibility is not to  
19 examine the "wisdom" of the BOA, but to give it deference so long as the evidence  
20 shows the BOA acted legally and within its jurisdiction, which is precisely what it did  
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1 when it denied Carlson's variance. *Schendel*, 237 Mont. at 283. The Court's findings  
2 and conclusions on this matter are consistent with those of the BOA.

3 **IV. CONCLUSION**

4 Having reviewed the BOA's certified record of documents, including the DVD  
5 recording of the variance hearing, and for the reasons delineated above, the Court  
6 finds that the BOA's decision to deny Variance No. 277 was legal, founded in a factual  
7 basis, and not a manifest abuse of discretion; therefore, the Court affirms the BOA and  
8 Carlson's Petition for Variance No. 277 is hereby denied.

9  
10  
11 DATED this 16<sup>th</sup> day of November, 2016

12  
13   
14 DISTRICT JUDGE

15 cc:  
16 **Thomas J. Stusek**  
17 STUSEK LAW FIRM, P.C.  
18 2115 Durston Rd., Ste. 10  
19 Bozeman, MT 59718

20  
21 **Daniel L. Schwarz, Deputy County Attorney**  
22 **Mark A. English, Deputy County Attorney**  
23 **YELLOWSTONE COUNTY ATTORNEY'S OFFICE**

24 CERTIFICATE OF SERVICE  
25 This is to certify that the foregoing was duly served by mail/hand  
upon the parties or their attorneys of record at their last known  
addresses this 16 day of November, 2016.

26 BY Deanne Bushears  
27 Judicial Assistant to Hon. Michael G. Moses