



County of Yellowstone Board of Adjustment
AGENDA-Thursday, March 8, 2018, 4:00 p.m.
Miller Building, 1st Floor Conference Room
2825 3rd Avenue North, Billings, Montana

NOTICE TO THE PUBLIC

Public Comment:

There will be a Public Comment Section as noted on the agenda. This is the time members of the public may comment on any item not appearing on the agenda. Under State law, matters presented under this section cannot be discussed or acted upon by the Zoning Commission during this time. For items appearing on the agenda, the public will be invited to make comments at the appropriate time. It is very important to speak clearly, and state your name and address for the record. Please limit your comments to three (3) minutes or less.

Call the meeting to order.

Introduction of the County Board of Adjustment Members and Planning Department Staff.

Public Comment

Motion. Approval of Minutes: October 12, 2017

The minutes of the Board meeting of

Disclosure of any Conflict of Interest-Members of the Commission and Staff

Disclosure of an Outside (Ex Parte Communication)-Members of the Commission and Staff
a. The Exparté Communication Binder is available at the Sign-In and Agenda Station.

Regular Business:

- A. Opening of public hearings.
- B. Reading of rules for the procedure by which the public hearings will be conducted.
- C. Reading of notices of the public hearings on the following items:

Public Hearings:

- a. **Item #1: County Variance 287 – 321 Calypso Street – Detached Garage Size** – A variance from Section 27-310(i) requiring the maximum footprint of a detached garage of 1,238 square feet to allow a maximum footprint of 1,500 square feet for a new detached garage in a Residential 15,000 (R-150) zone on Lot 1, Block 7 of Wells Garden Estates, 4th Filing a 26,420 square foot parcel of land. Presented by Nicole Cromwell, Zoning Coordinator

Other Business/Announcements

Adjournment

The County Board of Adjustment will hear all persons wishing to speak relative to the proposed variance. Testimony regarding the above mentioned items may also be submitted in writing to the Planning Division, 4th Floor of the Miller Building, 2825 3rd Ave North, Billings, MT 59101 or phone 657-8246. Additional information on any of these items is available in the Planning and Community Services Office. Public hearings are accessible to individuals with physical disabilities. Special arrangements for participation in the public hearings by individuals with hearing, speech, or vision impairment may be made upon request at least three days prior to the hearing. Please notify Tammy Deines, Planning Clerk, at 247-8610 or e-mail at deinest@ci.billings.mt.us.

County Board of Adjustment

Meeting Date: 03/08/2018

Information

Subject

Motion. Approval of Minutes: October 12, 2017

Attachments

YBOAminutes_2017_10_12__DRAFT

**Yellowstone County Board of Adjustment
Meeting Minutes, October 12, 2017
DRAFT-To be approved at the next scheduled meeting**



The County Board of Adjustment met on Thursday, October 12, 2017 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	01/14/2016	02/11/2016	05/12/2016	06/09/2016	10/13/2016	11/10/2016	04/13/2017	10/12/2017		
Bruce Reiersen	Board member	E	-	1	1	E	1	1	1		
Blaine Poppler	Board member	1	-	E	1	1	E	1	1		
Carlotta Hecker	Chairperson	1	-	E	E	1	1	1	1		
Robert Bailey	Vice Chairman	E	-	1	1	E	E	1	1		
Troy Boucher	Board member								1		

Chairman Hecker introduced the County Zoning Commission members and staff in attendance: Monica Plecker, Planning Division Manager; Dan Schwarz, Yellowstone County Chief Deputy Attorney; Tammy Deines, Planning Clerk

Others in Attendance: G. Andrew (Andy) Adamek, Browning Kaleczyc Berry & Hoven P.C.; Jon & Penny Haynes; Mike Ferguson, Billings Gazette; Tamie J Faw; Darlene Vanderloos; Bill Vanderloos; Phil Taylor; Greg Kosiarek, Karen Kosiarek; Rick & Linda Cebull; Jeff Rice; Jim Hertz; Paul Miron; Jim Baker, Jeff Bollman, DNRC; Paul & D’Anne Holley; Robert Hurd; Jason Foster; Brad Finn

Public Comments

As a point of order, Chairperson Hecker announced the Public Comment portion of the meeting will be held after the public hearing is closed.

Approval of Minutes April 13, 2017

Motion

Board member Boucher made a motion and Board member Poppler seconded the motion to approve the April 13, 2017 meeting minutes as submitted. The motion passed with a unanimous voice vote.

Disclosure of Conflict of Interest: There were no disclosures of conflict of interest.

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Disclosure of Exparte Communication

There were no disclosures of exparte communication from the Board. The letters below were received and emailed and distributed as hard copies by Staff to the members of the Board.

- October 10, 2017, letter from Jack Ramirez, Manager, Yellowstone Farms, LLC in support of Karen Kosiarek's appeal.
- October 10, 2017, letter DNRC to the Yellowstone County Board of Adjustment requesting affirmation of the Planning staff determination that the MTSun project is an allowed use.

PUBLIC HEARINGS:

Planning Division Manager Monica Plecker reviewed the procedures for public hearing 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 and the special procedural considerations for administrative appeals.

SPECIAL PROCEDURAL CONSIDERATIONS FOR ADMINISTRATIVE APPEALS

The administrative appeal is different than a request for variance. An administrative appeal decision will determine the correct interpretation of the code or requirement as written. The appellant is the party who brings the disagreement with staff interpretation to the Board. There are 2 parties of equal standing at an administrative appeal proceeding – the Planning Division and the appellant. Surrounding property owners will be notified and may testify as well. Each party – staff and the appellant – may bring in experts to testify in favor of their interpretation or to support their interpretation of the code.

The public hearing procedure should follow the same basic procedure as variance public hearings, but you should have each party (staff and appellant) present their "case" including any expert testimony before opening the hearing to the public. The parties will not have the right to cross examine persons who testify. Only the Board members may ask questions of persons who are testifying. The Chair may allow any party to provide additional testimony. The Zoning Coordinator will assemble the complete administrative record – all documents and correspondence between the parties – for the Board and this will be provided to the Board in advance of the hearing.

The options for Board action on appeal are as follows:

- Reverse in whole or in part the staff interpretation
- Affirm in whole or in part the staff interpretation
- Modify the order, requirement, decision or determination

The concurring vote of three (3) members of the board shall be necessary to reverse any order, requirement, decision or determination of any administrative official.

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The code sections concerning administrative appeals are Sections 27-1510 (d), (e) and (f). The appeal will determine not just the correct interpretation for the appellant's specific case, but for any future party. This is NOT a variance from the code, it is determining the correct interpretation of the code. The Board decision will become the official interpretation for all County zoning districts where the requirement or regulation applies.

Chairman Hecker acknowledged Planning Division Manager Monica Plecker, who gave the staff report and presented the Statement of Facts, Findings, and Staff Recommendation below.

ZONING COMPLIANCE PERMIT

Section 27-623

A Zoning Compliance Permit is only required for properties that are located outside the limits of the City of Billings but within the Unincorporated Jurisdictional Area. No change of land use may be made; or no building or other structure shall be erected, moved, enlarged, rebuilt, added to, or structurally altered without first having received a Zoning Compliance Permit issued by the Zoning Coordinator or his/her designee, who shall determine that the permit is issued in compliance with the regulations set forth in this Resolution/Ordinance. The review of a Zoning Compliance Permit application shall be limited only to a review of the applicable zoning regulations and shall not constitute a review of compliance with any applicable building codes.

STATEMENT OF FACTS *(Exhibits are included in the staff report)

On February 11, 2017, MTSun L.L.C. requested a zoning compliance permit from the City-County Planning Division. ***Staff Report Exhibit 1 – Application.** MTSun wanted to place solar panels on approximately 369 acres within the County's Zoning Jurisdiction. There are additional panels proposed for lands outside of the zoning jurisdiction. The land within the County's zoning jurisdiction is owned by the State of Montana. Because the land is owned by the State, the County cannot force the State to comply with its zoning regulations.

On February 14, 2017, the Division granted the permit. ***Staff Report Exhibit 2 – Permit.** The Division found that MTSun's proposed solar panels complied with the Agricultural Open zoning designation of the land. The Division did not find a special review was required for the proposed solar panels. The Division did not provide the permit to anyone other than MTSun. No one had requested a copy of the permit.

On May 5, 2017, Karen Kosiarek requested a copy of the permit. ***Staff Report Exhibit 3 – Request for Public Records.** Kosiarek owns land that abuts MTSun's proposed solar project. On May 5, 2017, the Division provided Kosiarek with a copy of the permit. **Staff Report Exhibit 4 – Response Letter.**

On May 12, 2017, Kosiarek requested the decision of the Division to grant a permit to MTSun be appealed to the Yellowstone County Board of Adjustment. ***Staff Report Exhibit 5 – Appeal Letter.** Kosiarek explained why she believed MTSun's proposed solar project did not comply with the Agricultural Open zoning designation of the land and requested the Division initiate a special review process for the solar project.

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On June 2, 2017, Wyeth Friday, the Director of the Planning and Community Services Department, advised Kosiarek that her appeal of the City-County Planning Division's decision to the Board was not timely. ***Staff Report Exhibit 6 – Appeal Response Letter.** Friday explained why the Division believed MTSun's proposed solar project did comply with the Agricultural Open zoning designation of the land and that even if the solar project did not comply that the State could ignore the County's zoning regulations as state statute allows public lands to be used for uses contrary to zoning.

On May 5, 2017, Karen Kosiarek requested a copy of the permit. ***Staff Report Exhibit 3 – Request for Public Records.** Kosiarek owns land that abuts MTSun's proposed solar project. On May 5, 2017, the Division provided Kosiarek with a copy of the permit. ***Staff Report Exhibit 4 – Response Letter.**

On May 12, 2017, Kosiarek requested the decision of the Division to grant a permit to MTSun be appealed to the Yellowstone County Board of Adjustment. ***Staff Report Exhibit 5 – Appeal Letter.** Kosiarek explained why she believed MTSun's proposed solar project did not comply with the Agricultural Open zoning designation of the land and requested the Division initiate a special review process for the solar project.

On June 2, 2017, Wyeth Friday, the Director of the Planning and Community Services Department, advised Kosiarek that her appeal of the City-County Planning Division's decision to the Board was not timely. ***Staff Report Exhibit 6 – Appeal Response Letter.** Friday explained why the Division believed MTSun's proposed solar project did comply with the Agricultural Open zoning designation of the land and that even if the solar project did not comply that the State could ignore the County's zoning regulations as state statute allows public lands to be used for uses contrary to zoning.

FINDINGS

Section 27-305 states that Utilities (Public Service Installations), Stations Only, are allowable.

According to the zoning code "Utility, public" is defined as "A private business organization performing some public service and subject to special governmental regulations or a governmental agency performing similar public services, the services by either of which are paid for directly by the recipients thereof. Such services shall include, but are not limited to, water supply, electric power, gas and transportation for persons and freight."

Utilities are an allowed use on land zoned Agricultural Open. Section 27-305 of the Yellowstone County Zoning Regulations. A special review is not required for utilities on land zoned as Agricultural Open. Utilities are defined in Section 27-200 of the Yellowstone County Zoning Regulations. The State's land at issue is zoned Agricultural Open. The proposed solar panels on

the State's land are utilities. The solar panels would produce electricity. The solar panels on the State's land are an allowed use.

Storage areas are only an allowed use on land zoned Agricultural Open with a special review. Section 27-305 of the Yellowstone County Zoning Regulations. The Yellowstone County Zoning Regulations do not define storage area. The general definition of a storage a storage area

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is found in The Illustrated Book of Development Definitions. “Outdoor Storage: The keeping, in an unenclosed area, of any goods, junk material, merchandise, or vehicles in the same place for more than 24 hours.”

The State’s land at issue is zoned Agricultural Open. The proposed solar panels on the State’s land are not items being stored. The solar panels would be items used to produce electricity. The solar panels on the State’s land are not a use that requires a special review.

Agency’s interpretation of its regulations should be given deference. *McGee v. State, Dep’t of Pub. Health & Human Servs.*, 2017 MT 166, ¶ 12, 388 Mont. 129, 132, 398 P.3d 245, 247 (2017). Only if its interpretation is plainly inconsistent with the spirit of the regulation or lies outside the range of reasonable interpretation should deference be denied to the agency’s interpretation.

The Planning Division’s interpretation of Yellowstone County’s Zoning Regulations that solar panels are an allowed use on land zoned Agricultural Open is not plainly inconsistent with the spirit of the Regulations and lies within the range of reasonable interpretation permitted by the wording of the Regulations.

RECOMMENDATION

The Planning Division has determined the term Photo Voltaic facility to appropriately fit the zoning code definition of a Utility. Specifically, the definition says, “A private business organization performing some public service and subject to special governmental regulations or a governmental agency performing similar public services, the services by either of which are paid for directly by the recipients thereof. Such services shall include, but are not limited to, water supply, electric power, gas and transportation for persons and freight.”

The request from MTSun LLC for use of a solar power generation facility substantially meets the definition provided by the zoning code and what is identified as an allowable use according to Section 27-305.

The Planning Division requests the County Board of Adjustment affirm in whole the staff’s interpretation of the Zoning Code requirements.

Discussion

Chairperson Hecker called for discussion and question from the members of the Board.

Board member Poppler: asked for clarification on the ownership for this property.

Ms. Plecker stated she does not know who owns the privately held properties. The lands in question that are zoned are all a part of the State trust.

Board member Boucher: pointed out there is no specific reference to power generation in the determinations and asked if there is anything in the Code other than this section dealing with power generation of some sort. Ms. Plecker stated that the section of the table of allowed uses for Ag-Open zoning for utilities is the only place it references electrical generation. Board member Boucher asked if it would be a permitted use if the applicant changed the source of energy from generating electrical power to a hydrocarbon nature power such as natural gas. Ms. Plecker stated it would be permitted as a utility. She presented a photo of more a conventional power generation plant and explained when zoning came to be in 1973, a lot of the

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more industrial sites for power generation and utilities were already in place and are zoned for more industrial uses. In this case, the definition is a broad and scale is not a consideration. She continued and said even though this looks different than the conventional plant, Planning Staff decided it is allowable. Board member Boucher commented on the Code's consideration of the need to allow for distribution of utilities for the benefit of the public including a substation or pumping station. Ms. Plecker stated transmission is important but given the definition it does not make the distinction between generation and transfer of power.

Board member Poppler: pointed out that transmission and distribution lines require a special review under the zoning regulations. Ms. Plecker said the Zoning Compliance request is for the placement of the solar panels and did not include a request for plans transmission lines.

Board member Hecker: commented on the language pointing to the provider serving the public. She asks if a conflict exists as MTSun will produce the electricity and sell it to Northwest Energy, who will in turn sell it to the public. Ms. Plecker said the end user is the public and often times there are private corporations that serve the public. She noted she took this project midstream as she was not employed with the City when the Zoning Clarification was approved and issued. She stated Yellowstone County Attorney Dan Schwarz and Jeff Bollman, DNRC are in the audience this evening. Mr. Bollman submitted a letter to the Board of Adjustment dated October 10, 2017, letter from DNRC to the Yellowstone County Board of Adjustment requesting affirmation of the Planning staff determination that the MTSun project is an allowed use.

Chairperson Hecker called for presentation by the appellant.

Andy Adamek, 800 N Last Chance Gulch, Suite 101, Helena Montana

Mr. Adamek thanked staff and the Board for convening on this matter and stated the issue of timeliness is a non-issue as this hearing is being held. He responded to Board member's Boucher's question regarding power generation from other facilities such as gas, and coal. He stated that under the Planning Department's determination; an electrical generation plant, whether it be photovoltaic, natural gas, coal fire carbon, or nuclear, would be an allowed use in the A-1 zoning that does not require a special review.

He responded to Board member Poppler's question and stated Unified Code Section 305 allows transmission and distribution lines and does not require special review. This is applicable to electric and accessory structures for transmission.

Mr. Adamek answered Chairperson Hecker's question as to whether this utility is considered public. He stated they feel that MTSun is not a public utility as defined by staff as the definition does not describe the use or the activity but the entity. He said they believe the Planning

Department is incorrect as the power generated on the State land will not be sold to the public but an entity that sells to the public, i.e., NorthWestern Energy.

Mr. Adamek continued and stated the images of the solar farm in today's staff presentation

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were not presented by the applicant to staff and not relied upon by Ms. Vieg and Mr. Friday in their determination but they may be instructive. He stated this is an industrial generation utility plant with the use of solar panels. Mr. Adamek said he does not know where the station and maintenance shop will be installed and he referred to the posted aerial map. He said the issue is not whether a station may be installed but the use of photo voltaic solar panels. He feels staff has "stretched" the definitions in the Zoning Code, as the code may be dated. He gave the example of the lack of reference to power generation within and A-1 or the residential classifications in Section 305, and pointed out it is denoted only in Section 306 when dealing with commercial or industrial areas. The station is an allowed use as it transmits energy to residential, agricultural, and light commercial uses in the A-1 district. There are two substations in this area. Section 306 deals with industrial zones and districts. Electric and natural gas generation is permitted only with special review. He spoke to the differences between power generation and transmission, and the difference between a power utility and a station. He referred to page 1710 of the Zoning Code, Article 27-Sec 306, "...production, manufacture, generation of electric or gas" is only allowed in Controlled Industrial and Heavy Industrial zoning under a special review. Mr. Adamek stated the Planning Division is allowing this permit to be issued for a voltaic generation facility without special review.

He pointed out Staff Report Exhibit 1 –Zoning Compliance Application submitted on February 11, 2017; stamped as received February 13, 2017; and approved on February 14, 2017; with a signature of approval on page 2 of the application. He voiced concern that an Associate Planner, who within a day, approved the permit with no mitigation factors, no special review, and no image of the total acreage or station or warehouse provided. Mr. Adamek stated they are asking for more robust review consistent with the zoning codes without stretching definitions that do not apply. The determination on the permit is four lines of text referring to Section 305. A station and maintenance facility have been proposed along with a generating facility. He referenced the code and read the statement defining A-1 zoning as a district to protect and preserve agricultural lands for the performance of a wide range of agricultural functions. The intent is to limit scattered intrusion of uses not compatible with an agricultural environment to encourage agricultural pursuits and protect environmental concerns. He asked how this serves this purpose or function and stated this will prevent any further agricultural uses on the State lands that are currently used for grazing. Mr. Adamek commented this room is full of people this evening who thought they were purchasing land in an A-1 zoning district with the understanding it would not be high density use and never dreamed they would be looking at a high volume facility for power generation in their back or front yard or adjacent to their property. Mr. Adamek encouraged the Board to look at Section 306 and ask why this should not come under special review to provide a more robust review with a written record for the reasoning for the decision, and has the Zoning Commission's recommendation to the Board of County Commissioners. He stated this is too large of a decision for a single associate planner.

Board Discussion

Board member Boucher: clarified and stated it is the appellant's assertion that this use of a photo voltaic facility is not a permitted use in A-1 zoning. He said the special review process

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would require approval of a zone change prior to this request. Mr. Adamek replied it is the applicant's prerogative to publically state this is not an allowed use. He feels they are going to proceed with this application and are going to go to Statute which says the local regulations do not mean anything. Section 306 deals with generation and requires special review.

Board member Poppler: pointed out Mr. Adamek chose to read the summary paragraph describing A-1 zoning which does not identify residential development and asked if this will be subjected to the Montana Facility Siting Act. Mr. Adamek said he will not comment in this setting as this application is subject to Public Service Commission's rate determination and environmental assessment as it pertains to State Lands.

Board member Bailey: asked Mr. Adamek about his viewpoint of the State's process and noted the DNRC October 25, 2017 neighborhood meeting held for comments on this application. Mr. Adamek deferred this question to Ms. Kosiarek as he did not attend this meeting.

Board member Reierson: asked for comment on the value of the land and noted the information on the DNRC value of funds that could be generated. Mr. Adamek stated it is not the function of the Zoning Code to facilitate the highest and best revenue off of state trust lands. He said he is not here to make an economic argument as to whether a photovoltaic facility is the highest and best use of State lands. He can discuss how it will affect property owner's property but not addressed by zoning.

Karen Kosiarek, Appellant, PO Box 911, Billings, Montana

Ms. Kosiarek introduced herself, her husband, and her son Daniel. She commented on the photo of the solar panels presented during the staff report and said the photo may not be accurate as the proposed MTSun panels will be 10-feet off of the ground. Ms. Kosiarek gave some background as to how she came to this appeal process. In 2016, the Kosiareks purchased their lot in Lone Eagle Subdivision and paid a premium knowing it was adjacent to state trust lands. In the Spring of 2016, they received an invitational letter for neighborhood meeting at the Rod and Gun Club. Mr. Bollman, DNRC, announced the neighborhood meeting is a purely informational meeting to make residents aware of the upcoming proposed project. In April 2017, the Kosiareks received another letter and they put their building plans on hold. Ms. Kosiarek began to research the project; contacted Planning Division staff; and received a copy of the Zoning Compliance permit through a records request. She spoke with Jeff Bollman, DNRC, who told her the issue is resolved as the County felt the solar farm is a compatible use. She stated she was outraged as her observation of the permit was Planning Staff gave no thought into this process and the issues. She voiced frustration with the record as there are seemingly two versions of the zoning clarification letter dated February 14, 2017. The letter she received 6-months ago is not the same as the copy of the February 14, 2017 letter included in the meeting packet. The second version

includes an additional statement which said the entire facility could be surrounded with electrified fence. She emphatically stated they are concerned as they could share a property line with a solar facility surrounded with electrical fencing and they have a seven-year-old son.

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(For the record, the Planning Clerk marked Exhibit #1-February 14, 2017 letter to MTSun LLC from Planning & Community Services Department, received by Ms. Kosiarek,.)

Board Discussion

Chairperson Hecker: asked Ms. Kosiarek if she has read the definition of Section 305 and to state her interpretation. Ms. Kosiarek stated this is not a station but a power generation facility. A \$110 million mega electrical facility, which in her opinion, clearly does not meet the definition in the code for Agricultural Open Space Zoning.

*The Board took a moment to clarify the exhibits provided in the meeting packet.

Board member Poppler: asked for more information on MTSun LLC. Ms. Kosiarek stated MTSun is a Utah based company who approached DNRC with a request for development on State land that is close to an existing substation. The request for proposal was structured and put out by DNRC, titled "Request for Commercial Lease". She believes they are being funded by an overseas company at this point.

Chairperson Hecker called for Proponents of the appeal of administrative decision wishing to address the interpretation made by the Planning Department.

Penny Haynes, 5035 Alkali Creek Road, Billings, Montana

Ms. Haynes distributed a letter to the Board and she said lives across the road from the proposed project. Ms. Haynes feels the Planning Department's interpretation is incorrect as they purchased their land knowing they would live across from State agricultural land forever. They did not know someone would undermine this and stretch the definition of agricultural land to include this proposal. She asked if the Board would like to get up every morning and look at this facility? She continued and the State of Montana has advised property owners to watch properties carefully as once changed it cannot returned to its agricultural use. Ms. Haynes said these facilities belong in the country where it is not a glaring scar on the property and not an agricultural use.

Chairperson Hecker cautioned and asked that the testimonies are related to whether the Planning Staff misinterpreted the zoning code and not aesthetics which may be addressed during the Public Comment portion of the meeting.

Richard Cebull, 4269 Lone Eagle Drive, Billings, Montana

Mr. Cebull is president of the Homeowners' Association. Mr. Cebull stated 90% of the persons in this area are in agreement with Ms. Kosiarek's appeal and have the same position.

Bill Vanderloos, 4700 Lone Eagle Drive, Billings, Montana

Mr. Vanderloos pointed out these sections of code were-written in 1973 and these types of generating facilities did not exist. He said this is a new process and should require a special review. He asked how can staff make this decision as this is new process?

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Penny Haynes, 5035 Alkali Creek Road, Billings, Montana

Ms. Haynes asked if site visits were made by staff and if so, when the photos in the staff report were taken. She said they were taken in February as there is snow in the photo. She clarified and asked if staff made a site visit when making a decision to grant a permit. Chairperson said she is aware of other instances when staff makes site visits.

Per advisement of Yellowstone county Chief Deputy Attorney Dan Schwarz, and there were no other persons wishing to speak as a proponent of the appeal of administrative decision, Chairperson Hecker closed this portion of testimony and called for Opponents of the appeal. Rebuttal will follow.

Jeff Bollman, Montana Dept. Natural Resources and Conservation, 1371 Rimtop Drive, Billings, Montana

Mr. Bollman is speaking in favor of affirming the Planning Department's determination. He provided the Board with a report prior to the meeting giving background on trust lands.

He stated it is a misnomer that State lands will remain agricultural property as it is DNRC's fiduciary duty to manage the lands for the best benefit of the trust. When development is proposed adjacent to trust lands, property owners need to realize the use may change to get the highest and best use from the property. As part of the process for MTSun LLC and this project, DNRC issued a request for proposal for a commercial use as this use is not allowed under an agricultural lease. Commercial leases are used for anything that is *not* agricultural, mining, oil and gas, or forestry. The RFP was not specific to a solar project, and it could have been wind energy, solar, a Cabelas store or a Walmart store. The Land Board approved the lease option and lease for the property. As part of the response, MTSun LLC submitted a request for a Zoning Clarification from the Planning Department asking if this is an allowed use. In March of 2016, the Planning Department issued the Zoning Clarification stating this is an allowed use within the A-1 zone. He said DNRC has relied on the County's determination that this is a permitted use and MTSun LLC has spent time, energy and money pursuing this project including addressing the Public Service Commission on the term of contracts for power generation from this facility. Part of the environmental review process includes the reclamation process, as the site will be reclaimed after lease expires in 30 years. He referred to the photo of the solar panels and said MTSun does not intend to strip the site of the vegetation but will drill the foundation pieces and it could allow some grazing of the land. He pointed out that this land is not appropriate for cultivated agriculture. Mr. Bollman stated DNRC urges the Board to uphold the Administrative Decision of the Planning Department.

(For the record, the Planning Clerk marked Exhibit #3, Zoning Clarification Request, Project # PLN-16-00925, Issue Date: 3/17/2016., Planning & Community Services Department).

Board member Boucher: asked for clarification of the timeline for submitting the Zoning Clarification. Mr. Bollman explained MTSun requested a zoning clarification in addition to the permit. The Zoning Clarification was needed to respond to the RFP. The Planning Department

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issued the Zoning Clarification in March of 2016. At that time no site plan was provided and only the use was considered.

Board member Bailey: noted Director Friday's letter to Ms. Kosiarek dated June 2, 2017. In this letter, Mr. Friday notes the provision of State law allowing the State to use State lands for uses contrary to zoning as long as a public hearing is held to receive comments. Board member Bailey asked if the State is going to function aside from the Board's action today. Mr. Bollman replied he is not in a position to answer this. It is possible for the appellant to appeal the decision to District Court, DNRC and the applicant MTSun LLC could go through zone change and special review process, or the State could invoke the Land Use Contrary to zoning and submit to the Planning Department for a hearing for public comment. DNRC is working on developing a draft Environmental Impact Statement which will have a 30-day public comment period and an open house will be held to obtain comments. MTSun LLC has been working with the PSC to determine pricing guidelines.

Chairperson Hecker: asked if Jeff Bollman was part of making the determination with the Planning Staff. Mr. Bollman stated there were Zoning Clarifications issued stating this is an allowed use and there was no reason to question the basis for the Planning Department's approval. He was not involved in these discussions and this was a requirement by DNRC for MTSun LLC as a part of their application.

Board member Bailey: commented it appears the State is invoking the State law as the letter states the public scoping process concluded on May 19, 2017 and a neighborhood meeting on October 25, 2016. Jeff Bollman explained this is a part of the environmental review process and not the statutory right to invoke land use contrary to zoning. They have not submitted an application to the Planning Department for Land Use Contrary to Zoning. The initial meeting in October was to inform the neighbors of the approved lease option and that MTSun LLC contractors will be on the property. Due to the location, they wanted to be prudent and provide the neighborhood as to what is going on with the property. They have committed to another public meeting when there is a draft EIS and site plan.

Board member Boucher: asked about the RFP for commercial use. Jeff Bollman stated the RFP was for land in Section 8 and Section 10. Board member Boucher asked if there is a comment period for the commercial use? Jeff Bollman stated they are not required to notify neighbors of the RFP but it is legally advertised. The open neighborhood meeting was held to obtain public comments. Board member Boucher asked what constitutes a determination for a commercial use. Mr. Bollman stated most of the RFPs are generated by applicants. It is difficult to determine a particular use but it is often driven by developers who are considering locations for substations and topography. He noted another RFP for a parcel located west of Skyview High School for another solar facility that did not go forward.

Chairperson Hecker called for Rebuttal and cautioned Mr. Adamek to comment on the issue at hand, being the Planning Department's interpretation of the zoning code.

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Andy Adamek, 800 N Last Chance Gulch, Suite 101, Helena, Montana

Mr. Adamek stated the highest and best use of property should not be a part of determination of Zoning Code Section 305 or Section 306, and the questions of whether the land use conforms with local regulation is not being addressed today. Mr. Adamek said apparently there were opinion letters or copies of the Zoning Clarification letters provided before the permit was issued that should be a part of the record. He asked about the introduction of the RFP issued March 15, 2016 which he downloaded from the internet; and Mr. Bollman verified the document.

He stated the DNRC RFP is relevant as Section 5.1(d) of the RFP states that any lease awarded the use of property must comply with State and Local laws and regulations and it is the sole responsibility of the proposer to ensure the proposed use meets the requirements of the section. He argued that the State statute for Land Use Contrary to Zoning should not be a part of this discussion due to this requirement, and the consideration is whether this application is in compliance with local zoning regulations. If the reasoning of the Planning Staff is accepted, it is possible that today they are discussing a photo voltaic facility and tomorrow it may be natural gas. He continued and said A-1 zoning allows residential use special reviews are required for churches, convents, art galleries, public parking lots, museums, auction yards, or roping arenas but this use does not require a special review. He stated photo voltaic generating facility is not a station or substation. A substation is allowed as it delivers what is generated to them.

Mr. Adamek thanked the Board for reading through the packet and appeal letter. He stressed the importance of diving into the details to understand this appeal and he asked that the appellants be allowed a special review of this proposal or determine this is not an allowed use and reverse the determination.

Board member Poppler: asked for clarification of the relief requested. Mr. Adamek is asking the Board to overturn the Planning Department's decision and decide the permit is not an allowed use.

Board member Reimann: stated he is confused with Mr. Adamek's statement that there are letters that supposedly existed and why he would bring up something that he does not have in his possession. Mr. Adamek concurred and said he is unsure why the letters were not provided with Ms. Kosiarek's records request.

(For the record, the Planning Clerk marked Exhibit #2, Montana department of Natural Resources and Conservation, March 15, 2016, "Request for Proposals for Commercial Leas of State Land").

Planning Division Manager Monica Plecker stated she does not have letters referred to in her working file. She distinguished between a Zoning Compliance Permit and a Zoning Clarification. The application for Appeal of the Administrative Decision submitted was to appeal the Zoning Compliance Permit (Pln-17-00345). This is a separate type of request to

address an approval of a specific project proposal whereas a Zoning Clarification different type of request for a general statement concerning a use.

Yellowstone County Board of Adjustment Meeting Minutes, October 12, 2017



DRAFT-To be approved at the next scheduled meeting

Board member Bailey: asked about the two different letters dated February 14, 2017 provided by Planning Assistant Jeannette Vieg. Ms. Plecker stated from her understanding, MTSun requested further clarification about electric fencing which generated the additional paragraph in the second Zoning Compliance permit.

Andy Adamek asked that the letters be read into the record. Ms. Plecker stated the difference between the letter included in the staff report and the one Ms. Kosiarek received is the statement on the fencing. She read aloud the highlighted text below.

RE: Yellowstone County, Tax ID# X00416, X00417 and COS 2074 Parcel 1A2 Tax ID# D07005B PLN-17-00345

The property located in Area A & Area B 3916 Alkali Creek Rd., Tax ID# X00417 and the property located in Area C Tax ID# X00416 is within our Jurisdictional Area of Yellowstone County and is located in an Agriculture Open (A-1) zoning district. Solar Photo-Voltaic Facilities is an allowed use in the A-1 zoning district. Section 27-604 of the Unified Zoning regulations regarding the fence shall be constructed with allowed materials found within the Unified Zoning Regulations;**(g) Material exception--Barbed wire or electric fence. In the Billings City Limits, no barbed wire or electrical fencing shall be permitted in any residential zoning district. Barbed wire and electrically charged fencing is allowed in the A-1 and A-S districts within Yellowstone County. When electrically charged fences are used in an A-1 or A-S district, such fences shall be posted with warning signs or fluorescent markings at intervals not to exceed one hundred fifty (150) feet, where such fences are adjacent to public rights-of-way.** The property located at Area D C/S 2074 Parcel 1A2 AMD., is located within Yellowstone County outside of our jurisdictional boundary. Therefore, there may be county ordinances and regulations that apply. You are encouraged to call Yellowstone Public Works if you are planning to develop property beyond our jurisdictional boundary. You may reach Yellowstone County Works Department at 406-256-2735. Certain building, plumbing, mechanical and electrical permits will be required, from the State of Montana, Building Codes Division. You may reach them at 406-841-2040 or <http://bsd.dli.mt.gov/bc/bsindex.asp>

Mr. Adamek stated he was referring to the letters noted by Jeff Bollman, DNRC.

(For the record, the Planning Clerk marked Exhibit #3, Zoning Clarification Request, PLN-16-00925, marked Exhibit #3. (PLN-16-00925). The only reason the additional language is relevant is the requirement for a warning sign on the fence which is the only mitigating factor.

At 5:51 pm, Chairperson Hecker closed the public hearing portion of this meeting and asked for consideration by the Board.

Ms. Plecker clarified and stated the purpose the testimony for the public hearing is specifically for the interpretation of the zoning and the Zoning Compliance permit. Because some of the

things we assume the public wishes to hear are not relevant to the zoning, such as view shed or determination of property values. These concerns will be heard during the Public Comment portion of the meeting after the Board has made its decision.

Yellowstone County Board of Adjustment

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Board Discussion

Board member Poppler: said he finds the differences between the definitions of a station and a generating plant problematic. A station appears to be an allowed use. However, a generating plant is referenced in the other portion of the allowed uses for commercial zonings. He stated he finds it difficult to call this a station.

Board member Bailey: agreed with Board member Poppler's comments. He said as a Board member, it is alarming that all the information was not provided in the meeting packet and to have members of the public bring in additional documents that should have been part of the record.

Board member Riemann: commented on the difficulty of interpreting the Planning Staff's interpretation as he does not have all of the background they had at the time of the decision. He asked how to decide they made the right decision, when looking at the same statutes. This is different than what this Board normally deals with and he is trying to come to grips with the testimony and the interpretation of the verbiage.

Board member Boucher: after careful review of the information he has come to the conclusion that Sec. 27-305 was erroneously applied for this particular use. Even though the Code is 40+ years old, the authors of the Code were fairly specific on how they wanted to preserve and protect agricultural uses which allows residential use within that zoning from controlled industrial and heavy industrial uses. The question is this particular use is an allowed as use. This facility generates electricity; is a substantial facility for commercial use; and wholesales electrical power to a retailer who will subsequently deliver it through substations to residential and commercial customers. In his view, the Planning Department's decision should be overturned so the permit can allow the use of the substation but not the Solar Photo Voltaic Facility. Chairperson Hecker pointed out the fact the substation and photo voltaic facility have to be considered together as one cannot operate without the other. Board member Boucher stated the permit should be denied as a whole. Board member Bailey asked for County Attorney Schwartz' opinion.

Dan Schwarz, Yellowstone County Chief Deputy Attorney clarified his role and said this is the Board's decision. His role is to represent the Board in any further appeals, actions, and proceedings after this Board makes the decision.

Chairperson Hecker: stated this is a difficult decision. She said if this use is appropriate the energy would be sold directly to the public from MTSun, and in this case, it is sold to NorthWestern Energy. It would not be a benefit to have a substation and/or a shop. She feels this should be a reversed decision.

Chairperson Hecker called for a motion.

**Yellowstone County Board of Adjustment
Meeting Minutes, October 12, 2017
DRAFT-To be approved at the next scheduled meeting**



Motion

Board member Boucher made a motion and Board member Bailey seconded the motion to overturn Permit PLN-17-00345 in its entirety, reverse the administrative decision and declare the solar voltaic facility as not an allowed use.

Name	Title	FAVOR	AGAINST	ABSTAIN
Board member Reierson	Board member	1	-	-
Board member Poppler	Board member	1	-	-
Board member Hecker	Chairperson	1	-	-
Board member Bailey	Vice Chairperson	1	-	-
Board member Boucher	Board member Boucher	1		

The Appellant’s Appeal of the Administrative Decision is affirmed. The administrative decision for Zoning Compliance Permit PLN-17-00345 is overturned with a 5 members in favor and 0 (noone) opposed. Motion carries with unanimous voice vote.

Public Comment Period

Chairperson Hecker opened the Public Comment Period and asked of comments. There were none. Chairperson Hecker thanked all who attended and participated in this hearing.

Other Business/Announcements

- **City/County Board training October 18, 2017, Billings Community Center, 4:00-6:00 p.m. Ethics Training.** This Board is invited to attend. Presentations will be given by representative s of the Yellowstone County and City Legal Departments, and Dan Clark, Local Government Center.
- **Board member Riemann** announced he will be resigning as a Board member as he is moving out of state. Staff asked that he submit a formal letter of resignation to the BOCC office.

Other Business/Announcements, (continued)

- **Announcement: The November 9, 2017** Yellowstone County Board of Adjustment meeting is cancelled due to a lack of applications. The next meeting will be held as legally announced and advertised.

Adjournment: Adjourned 6:05 pm.

Yellowstone County Board of Adjustment Meeting Minutes, October 12, 2017 DRAFT-To be approved at the next scheduled meeting



DRAFT-To be approved by motion of the Board at the next legally and announced Yellowstone County Board of Adjustment meeting. (Tammy Deines, Planning Clerk (406-247-8610))

ATTACHMENTS:

1. Staff Report with referenced Exhibits** Handwritten numbering on these pages is for clerical identification purposes only. TLD

- Aerial Image
- Exhibit 1 Application
- Exhibit 2 Permit
- Exhibit 3 Request for Public Records
- Exhibit 4 Appeal Letter
- Exhibit 5 Appeal Response Letter
- Exhibit 6 Board Letter
- Exhibit 7 Public Hearing Notice

2. Meeting Exhibit #1 Planning & Community Services Department Zoning Compliance Letter, dated February 14, 2017 to MTSun LLC from Jeannette Vieg, Planning Assistant
3. Meeting Exhibit #2-Request for Proposal for Commercial Lease of State Trust Land, Alkali Creek Commercial Lease, Montana Department of Natural Resources and Conservation, March 15, 2016
4. Meeting Exhibit #3-City/County Planning Division, Zoning Clarification Request, PLN-16-00095, Issue Date: March 17, 2016
5. October 10, 2017 Letter from Jack Ramirez, Manager, Yellowstone Farms, LLC in support of Karen Kosiarek's appeal.
6. October 10, 2017 letter DNRC to the Yellowstone County Board of Adjustment requesting affirmation of the Planning staff determination that the MTSun project is an allowed use.
7. City/County Planning October 12, 2017 Yellowstone County Board of Adjustment meeting sign-in sheet
8. Yellowstone County Board of Adjustment Meeting Agenda, Thursday, October 12, 2017



County Board of Adjustment

Meeting Date: 03/08/2018

SUBJECT: County Variance 287 - 321 Calypso St - Detached Garage

THROUGH: Nicole Cromwell

PRESENTED BY: Nicole Cromwell

Information

REQUEST

Item #1: County Variance 287 – 321 Calypso Street – Detached Garage Size – A variance from Section 27-310(i) requiring the maximum footprint of a detached garage of 1,238 square feet to allow a maximum footprint of 1,500 square feet for a new detached garage in a Residential 15,000 (R-150) zone on Lot 1, Block 7 of Wells Garden Estates, 4th Filing a 26,420 square foot parcel of land. Presented by Nicole Cromwell, Zoning Coordinator

RECOMMENDATION

Staff recommends conditional approval based on the proposed findings of the 7 criteria for Variance 287.

APPLICATION DATA

OWNER: Todd Carlson

AGENT: Rich Naylor, MHS Construction

LEGAL DESCRIPTION: Lot 1, Block 7, Wells garden Estates, 4th Filing

ADDRESS: 321 Calypso Street

CURRENT ZONING: R-150

EXISTING LAND USE: Single family residence

PROPOSED USE: Same with proposed 1,500 square foot detached garage

SIZE OF PARCEL: 26,420 square feet (.606 acres)

CONCURRENT APPLICATIONS

Zoning Compliance Permit PLN-18-00195 - to construct a new detached garage

APPLICABLE ZONING HISTORY

Subject Property: The owner submitted a variance application in August 2015 - Variance 277 - to allow the construction of a much larger garage to continue and to allow the side and rear setbacks to be less than the required 8 feet. The application for the variance came after construction of the garage was started and nearly completed. The Board eventually denied the requested variance. The denial was appealed first to District Court (13th District) and then to the Supreme Court of Montana. Both courts found the Board's decision was legal and supported by the facts presented. The decision of the District Court and MT Supreme Court are attached. The detached garage associated with the previous variance has been demolished. Construction of the new detached garage will not commence until the decision on this variance has been made.

Surrounding Property: Staff found 1 variance application on file within the subdivision in addition to the previous 2015 variance for the subject property. This variance was for a side adjacent to street setback for a small detached shed to reduce the setback to 5.5 feet. The shed was under construction and the property owner became aware of the incorrect setback. The variance was denied on June 8, 1990, and the detached shed was moved to meet the 10 foot

setback.

Three similar variances in surrounding subdivisions have been approved. One was approved for 606 48th Street West (aka 4825 Custer Avenue) to increase the size of a detached garage to 1,500 square feet (sf) on a 3 acre parcel of land in a R-150 zone. The garage met the minimum setbacks. The variance was approved in 1999, prior to the change in the zoning regulations that now allows detached garages up to 1,500 sf on lots of at least 1 acre. Another variance was approved for property in Shiloh Estates (R-150) to allow a detached garage on a 1-acre property at 4131 Wells Place. The variance approved a 1,300 sf garage and the garage met the required setbacks. A third variance was approved in Cloverleaf Meadows Subdivision (A-S) prior to the 1999 zoning amendment that now allows up to 3,000 square foot detached garages in any A-S zoning district. This variance allowed a 1,200 sf detached garage at 1020 Larkspur, a 1.18 acre parcel.

Two variances have been approved for larger garages in the Harvest Subdivision at 44th St West and Neibauer Road. The first variance was approved in 1997 for a garage of 1,500 sf at 4698 Harvest Lane. The second variance was approved in 2004 for a 1,296 sf garage at 4511 Robbie Lane.

SURROUNDING LAND USE & ZONING

NORTH:	Zoning: R-150 Land Use: Single family residence
SOUTH:	Zoning: R-150 Land Use: Single family residence
EAST:	Zoning: R-150 Land Use: Single family residence
WEST:	Zoning: R-150 Land Use: Single family residence

BACKGROUND

This is a request by the owner to re-construct a detached garage in the north east corner of the parcel. In 2015, the owner started and nearly completed construction of a detached 2-story garage that was too large (2,140 square feet) and did not meet the minimum required setbacks from neighboring properties. The Board denied the requested variance and the decision has been upheld by the Montana Supreme Court. The owner has hired a new construction company to design a detached garage that meets the required setbacks and the maximum allowable square footage if this variance request is granted. The maximum allowed area for a detached garage on this parcel is 1,238 square feet. The maximum foot print calculation does not apply in the A-S 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. The owner would like to increase this allowable area by 262 square feet to allow a maximum area of 1,500 square feet. This is a 20% increase over the maximum allowed area. The variance requested in 2015 was for a much larger area - a 73% increase over the allowable area - and to encroach into the required 8 foot setbacks and in to the 10-foot utility easements along the north and east property lines.

The surrounding properties in the Wells Garden Subdivision are all single family dwellings with and without detached garages on lots of at least 1/2-acre in area. A "windshield" and aerial map review of the surrounding properties shows at least 2 parcels in the immediate area with detached garages that exceed the maximum allowable area. This includes garages at 606 Calypso (1,500 sf) & 616 Calypso (1,270 sf). Neither of these locations have applied for or received variances. Subdivisions with R-150 zoning in the area also have parcels with detached garages exceeding the maximum area allowed without variances of record including:

- 1016 52nd St West (3 garages - 1,127 sf; 1,200 sf; 809 sf)
- 1236 52nd St West (1,792 sf)
- 4729 Lewis Ave (3,200 sf)
- 4630 Cliffview (2,400 sf)
- 4711 Jericho (1,440 sf)
- 4729 N. Woodhaven (1,368 sf)
- 5202 Bell Ave (1,270 sf)
- 5221 Millstone (1,320 sf)
- 5202 Onyx (1,320 sf)

- 303 Summer Sky (1,200 sf)
- 322 S 52nd St W (1,700 sf)
- 327 White Star Circle (1,200 sf)
- 325 Feldspar (1,200 sf)
- 214 Feldspar (1,200 sf)
- 5224 Central (2,880 sf)
- 302 White Star Circle (1,200 sf)
- 5420 Rustic Ave (3 garages - 2,304 sf, 1024 sf, 712 sf)
- 5515 Hennessy (2,400 sf)
- 5545 Hennessy (1,800 sf)

There is no hardship with the land that prevents the applicant from constructing the detached garage at the maximum area required by the code. No part of the previous structure will be re-used. The area limitation for garages does not apply to an attached garage, so the applicant could attach the garage to the existing dwelling. The property is served by an on-site well and an on-site septic system. Any structure must maintain a separation distance from both of these on-site systems. Attaching the proposed garage is not an option due to the location of the on-site water and waste water systems. The only area available for new construction is in the north east corner of the property.

Planning staff did find several other over-sized detached garages in the vicinity and in the same zoning district as the subject property. The requested area is similar to these existing garages that have not had the benefit of a zoning variance and are not out of character with the surrounding property.

Planning staff is recommending conditional approval based on the size of the requested variance, 242 sf, and that denying the variance would deny this owner of rights commonly enjoyed by others in the same district. Granting the variance would not be a special privilege to this owner and is in harmony with the County's adopted Growth Policy. The proposed garage will meet all of the required setbacks from the property lines, will be outside the utility easements and will be a structure more in keeping with the surrounding parcels.

RECOMMENDATION

Staff recommends conditional approval based on the proposed findings of the 7 review criteria for Variance 287.

Attachments

Zoning Map and Site photos
District Court Decision
Supreme Court Opinion
Proposed Findings of the Review Criteria
Applicant Letter and Site Plans

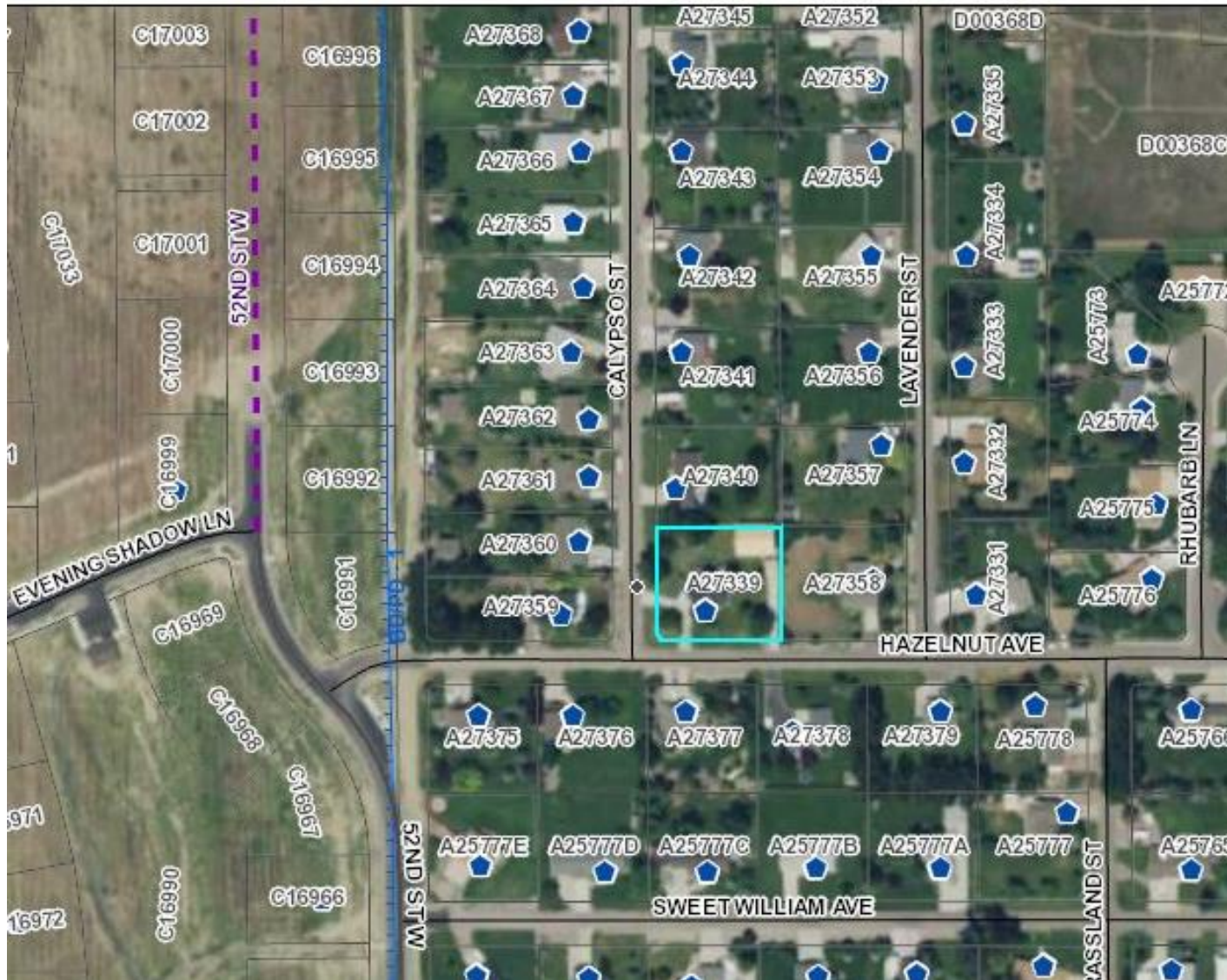
Variance 287 – 321 Calypso Street – Detached Garage Area
Zoning Map

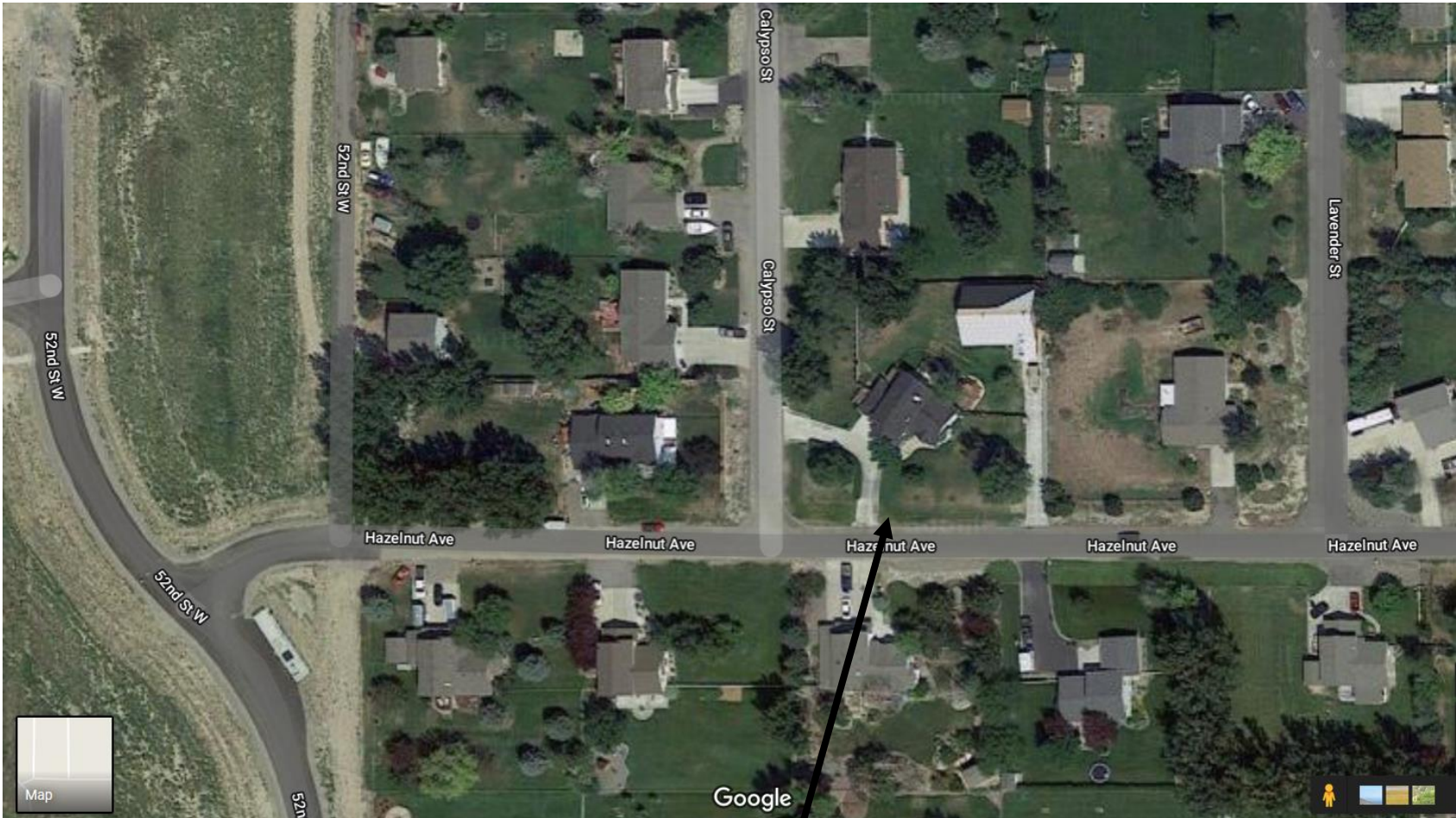
321 Calypso St



Subject Property

321 Calypso St





Subject Property



Subject Property – view from Calypso Street



Subject Property – view from Hazelnut



View south across the property from Calypso to Hazelnut



View north along Calypso Street



View from intersection of Calypso and Hazelnut



View from Hazelnut

RECEIVED

NOV 16 2016

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 16th 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
not exist within this subdivision or in nearby subdivisions with or
21 without zoning variances. Detached structures over 18 feet in height
need to meet the minimum side setback of 8 feet and staff found no
22 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.

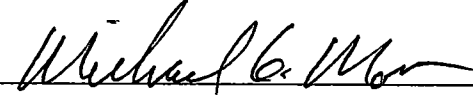
1 There is a great deal of he-said-she-said in the instant case. The BOA has stated
2 that Carlson was told several times to cease construction throughout the course of the
3 investigation, and that this occurred before Carlson began to set trusses. Carlson says
4 that half the trusses were already set 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
21
22
23

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 16th 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 **Daniel L. Schwarz, Deputy County Attorney**
21 **Mark A. English, Deputy County Attorney**
22 **YELLOWSTONE COUNTY ATTORNEY'S OFFICE**

23 CERTIFICATE OF SERVICE
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.

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

DA 17-0016

IN THE SUPREME COURT OF THE STATE OF MONTANA

2017 MT 186

TODD CARLSON,

Petitioner and Appellant,

v.

YELLOWSTONE COUNTY
BOARD OF ADJUSTMENT,

Respondent and Appellee.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DV 15-1536
Honorable Michael G. Moses, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Thomas J. Stusek, Stusek Law Firm, P.C., Bozeman, Montana

For Appellee:

Daniel L. Schwarz, Mark A. English, Deputy Yellowstone County
Attorneys, Billings, Montana

Submitted on Briefs: June 21, 2017

Decided: August 1, 2017

Filed:



Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Todd Carlson began construction on a detached garage on his property in a subdivision outside of Billings, Montana, without first obtaining a zoning compliance permit. The garage's size and setbacks from the property line violated county zoning regulations. Carlson requested a variance from the Yellowstone County Board of Adjustment (Board). The Board held a public hearing and denied the variance request. Carlson appealed to the District Court. The District Court upheld the Board's decision. We consider on appeal whether the District Court abused its discretion in affirming the Board's denial of Carlson's variance request.

¶2 We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 Carlson employed a contractor in the spring of 2015 to construct a detached garage on his property. The property is located in a residential subdivision in Yellowstone County outside of the Billings city limits. The garage was over eighteen feet tall, spanned 2,140 square feet, and was situated with side and rear setbacks of three and one-half feet from the property line.

¶4 The subdivision in which Carlson lives is subject to Yellowstone County zoning regulations. Section 27-310(j) of the City of Billings and Yellowstone County Jurisdictional Area Unified Zoning Regulations (Unified Zoning Regulations) requires, among other things, that detached garages over eighteen feet tall maintain eight-foot side and rear setbacks from the property line and that a garage on a property the size of

Carlson's be no larger than 1,238 square feet. Neither Carlson nor his contractor applied for a zoning compliance permit before beginning construction.

¶5 Carlson's next-door neighbor, Jason Frank, filed a complaint with the Yellowstone County Code Enforcement Office due to the close proximity of Carlson's garage to Frank's fence. A Code Enforcement Officer responded by investigating Carlson's property. The officer informed Carlson that the garage violated county zoning regulations and advised him to cease construction until he could come into compliance. Carlson continued construction on the garage nonetheless.

¶6 Carlson applied to the County Planning Division in late April 2015 for a zoning permit to build his garage. On May 11, 2015, the Planning Division sent Carlson a letter denying his permit request because his garage violated the size and setback requirements of § 27-310(j) of the Unified Zoning Regulations. The letter informed Carlson that he could apply for a variance with the Board.

¶7 Carlson petitioned the Board for a variance on August 3, 2015—eighty-four days after receiving the Planning Division's letter—to allow him to complete construction of his garage. The Board scheduled a public hearing on Carlson's variance request for September 10, 2015, postponed the hearing twice, and then finally held the hearing on October 29, 2015.

¶8 At the variance hearing, the Board heard testimony from numerous witnesses, including Carlson, his attorney, his contractor, some of his neighbors, and County staff who had investigated Carlson's property. The Planning Division recommended denial of Carlson's variance, based on its investigation of Carlson's property and other properties

in the surrounding area. Nicole Cromwell, the Zoning Coordinator for the Planning Division, and others testified that Carlson began construction on his garage before acquiring the required permit, that he submitted a permit request, that the request was denied, that Carlson was informed he could apply for a variance, and that he continued construction despite being advised that the garage violated zoning regulations.

¶9 Carlson testified that he needed the detached garage in order to store his valuable car collection and that the garage was of high quality and was aesthetically pleasing. He alleged that other structures in his subdivision violated zoning regulations and that his garage was not unique in this regard. Carlson submitted photographs of his property and of neighboring properties to the Board. He testified that he was not initially aware that he needed a permit, and that he had relied on his concrete contractor to comply with any relevant regulations. Carlson argued that it would cause him significant hardship to have to tear down the garage, in which he had invested approximately \$40,000 to \$50,000.

¶10 Frank, Carlson's next-door neighbor, testified that the proximity of the tall garage to his property created a safety hazard of snow and ice falling into his backyard. Another neighbor testified that Carlson's garage was constructed over a utility right-of-way for sewer and water lines.

¶11 At the close of public testimony, the Board members discussed Carlson's request. The members expressed concern about the economic waste of Carlson tearing down his nearly-completed garage, but also noted that Carlson had not done his due diligence and had carelessly disregarded zoning regulations. The Board noted the garage's close proximity to the property line and its presence over the utility right-of-way. One member

voiced concern that granting the variance would set a precedent of the Board permitting significant deviations from the zoning regulations. At the close of discussion, the Board voted unanimously to deny Carlson’s variance request.

¶12 Carlson appealed the Board’s denial to the Thirteenth Judicial District Court. The court determined that Carlson had not met his burden of showing that the Board abused its discretion in denying his request for a variance, and it affirmed the Board’s decision. The court explained that its “responsibility is not to examine the ‘wisdom’ of the [Board’s decision], but to give it deference so long as the evidence shows the [Board] acted legally and within its jurisdiction, which is precisely what it did when it denied Carlson’s variance.” Carlson appeals.

STANDARDS OF REVIEW

¶13 A district court reviews a board of adjustment’s decision for an abuse of discretion. *Flathead Citizens for Quality Growth, Inc. v. Flathead Cnty. Bd. of Adjustment*, 2008 MT 1, ¶ 32, 341 Mont. 1, 175 P.3d 282 (hereafter “*Flathead*”). A board abuses its discretion when it relies for its decision on information so lacking in fact and foundation that it is clearly unreasonable. *Flathead*, ¶ 32. A court does not examine the wisdom of a board’s decision if it is established that the board acted within its jurisdiction and that its action was not illegal. *Schendel v. Bd. of Adjustment*, 237 Mont. 278, 283, 774 P.2d 379, 382 (1989). We review a District Court’s affirmation of a board of adjustment’s decision for an abuse of discretion. *Schendel*, 237 Mont. at 283, 774 P.2d at 382.

DISCUSSION

¶14 *Whether the District Court abused its discretion in affirming the Board's denial of Carlson's variance request.*

¶15 As an initial matter, Carlson argues for the first time on appeal that the Board and the District Court erroneously required that he show that denial of his variance would cause him “unnecessary hardship.” Carlson claims that the “unnecessary hardship” standard applies only to “use” variances, but that his request was for an “area” variance, which required the less burdensome showing of a “practical difficulty.” “[T]his Court generally will not address an issue or new legal theory raised for the first time on appeal. We will not unfairly fault a trial court for failing to rule correctly on an issue that it was not asked to consider.” *Ryffel Family P'ship v. Alpine Country Constr., Inc.*, 2016 MT 350, ¶ 24, 386 Mont. 165, 386 P.3d 971 (internal citations omitted). Carlson did not present this argument to the District Court. We therefore decline to address it.

¶16 Carlson contends also that the various factors that this Court employs to determine whether a variance should have been granted weigh in his favor. He argues that the economic hardship he will endure if he has to tear down his garage was not self-inflicted and that the Board failed to consider equitable principles underlying his claim.

¶17 “Montana case law clearly establishes that the following conditions must be present before the granting of a variance is proper: (1) The variance must not be contrary to the public interest; (2) a literal enforcement of the zoning ordinance must result in unnecessary hardship owing to conditions unique to the property; and (3) the spirit of the ordinance must be observed and substantial justice done.” *Cutone v. Anaconda Deer*

Lodge, 187 Mont. 515, 521, 610 P.2d 691, 695 (1980). A board of adjustment “is bound to apply” the relevant zoning regulations. *Flathead*, ¶ 37. A board may not “disregard the provisions of, nor exceed the powers conferred by, a zoning ordinance and must act in accordance with the law.” *Flathead*, ¶ 37 (citation and internal quotations omitted).

¶18 Section 27-1506(d) of the Unified Zoning Regulations states, in relevant part, that the Board must determine the following before it grants a variance request:¹

- (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;
- (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;
- (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; [and]
- (4) That the granting of the variance will be in harmony with the general purpose and intent of this chapter and with the comprehensive plan.

¶19 The Board issued findings in conjunction with its denial of Carlson’s variance request in which it addressed the criteria of § 27-1506(d). Based on the testimony and evidence before it, the Board determined that Carlson did not satisfy the criteria.

¶20 As to the first criterion, the Board reasoned that Carlson’s hardship—the economic waste of tearing down a partially-built garage—was not a hardship that was peculiar to

¹ This section of the Unified Zoning Regulations lists a total of seven criteria that the Board must determine, the final three of which apply only in cases in which the Board grants a variance. Because the Board denied Carlson’s variance, those three criteria are not relevant here.

his land. The record before the Board supports its determination that Carlson's hardship was strictly economic and was not due to any conditions unique to his property.

¶21 As the Board observed, the "practical difficulties" Carlson urges are in large part due to his own actions. He began construction without first requesting a zoning compliance permit, and he continued construction even after he was informed that his garage did not comply with zoning regulations. Carlson acknowledges that he had the garage framed in and nearly enclosed by the time the Board considered his application in October, for the stated reason that he wanted to complete the structure before winter. Carlson's contractor's failure to seek a permit and Carlson's decision to proceed with construction—not anything inherent in Carlson's land—caused his hardship. Carlson thus failed to satisfy this first criterion. He was unable to show that "a literal enforcement of the zoning ordinance [would] result in *unnecessary* hardship *owing to conditions unique to the property*." *Cutone*, 187 Mont. at 521, 610 P.2d at 695 (emphasis added).

¶22 In examining the second criterion, the Board concluded that literal interpretation of the zoning regulations would not deprive Carlson of any right enjoyed by nearby property owners. Carlson presented photographs to the Board depicting other zoning violations in his neighborhood; he acknowledged that the Board had not granted variances in those cases and did not present other evidence of the circumstances of the construction on those properties. Carlson presented no evidence that the Board previously had granted variances similar to the one he requested. The Board noted that it had granted variances for oversized, detached garages, but that it had permitted a

maximum size of 1,500 square feet—far less than Carlson’s 2,140-square-foot garage. The evidence presented to the Board substantiated its conclusion that Carlson did not satisfy this criterion.

¶23 As to the third criterion, the Board found that granting Carlson’s variance would improperly confer a special privilege on him. The Board noted that it had never granted variances for such significant deviations from the zoning regulations as Carlson requested. It reasonably determined, based on its knowledge of the zoning regulations and its history of approving variances, that to grant Carlson’s request would unfairly allow him—but not others in the area—to deviate substantially from the zoning regulations.

¶24 Finally, under the fourth criterion, the Board concluded that Carlson’s variance would conflict with the general purpose of the zoning regulations. Based on its assessment of Carlson’s and the surrounding properties, the Board found that the detached garage was exceptionally large and “out of character with the surrounding residential properties.” Although Carlson substantiated his position with evidence that his garage was well-built and aesthetically pleasing, he did not dispute that it violated the size and setback requirements, or that it was considerably larger than other structures the Board had permitted. The factors that the Board addressed in its decision adequately account for the equitable considerations that Carlson argues. The testimony and evidence concerning the nature of Carlson’s and other nearby properties supports the Board’s conclusion.

¶25 The District Court properly declined to second-guess the Board’s discretionary determinations. The record before the Board substantiated its rationale in denying Carlson’s request for a variance. Carlson failed to demonstrate that he was legally entitled to the relief he requested. *See Cutone*, 187 Mont. at 521, 610 P.2d at 695. Carlson cites a number of our cases to support his position, including *Rygg v. Kalispell Board of Adjustment*, 169 Mont. 93, 544 P.2d 1228 (1976), *Lambros v. Board of Adjustment of City of Missoula*, 153 Mont. 20, 452 P.2d 398 (1969), and *Freeman v. Board of Adjustment of City of Great Falls*, 97 Mont. 342, 34 P.2d 534 (1934). These cases recognize that a board of adjustment’s decision on a variance request is a case-by-case, fact-specific inquiry, and they do not show that the Board abused its discretion in Carlson’s case. The Board acted “in accordance with the law,” and its decision was not “so lacking in fact and foundation that it [was] clearly unreasonable.” *Flathead*, ¶¶ 32, 37.

CONCLUSION

¶26 We conclude that the District Court did not abuse its discretion when it upheld the Board’s denial of Carlson’s variance request. *See Schendel*, 237 Mont. at 283, 774 P.2d at 382. We therefore affirm the District Court’s order.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ MICHAEL E WHEAT
/S/ DIRK M. SANDEFUR
/S/ JIM RICE

DETERMINATIONS

The Board of Adjustment shall make the following determinations prior to granting a variance:

- 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;**

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 size (1,238 square feet) allowed by the zoning regulations. Attaching the garage to the house to eliminate the size limitation is not an option due to the location of on-site water and waste water systems.

- 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 literal interpretation of the provisions of this chapter will deprive the applicant rights commonly enjoyed by similar tracts in the area. Similar variances in nearby subdivisions have been granted for garages of 1,300 to 1,500 square feet. Detached garages of 1,500 square feet do exist within this subdivision or in nearby subdivisions with or without zoning variances. The proposed garage will meet the required setbacks and will not be in the existing utility easements along the north and east property lines.

- 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;**

Granting this variance would not confer a special privilege to this applicant as similar sized detached garages existing within this subdivision and in similar neighborhoods.

- 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 variance is in harmony with the general purpose and intent of the zoning regulations and the growth policy. The size of the detached garage is not out of character with the surrounding residential properties and will be constructed at the required setbacks. The requested variance to add 242 square feet to the foot print of the garage is not a large request and conditions are recommended to mitigate any possible negative impacts.

- 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;**

Staff is recommending the following conditions:

1. The variance is to increase in the allowable footprint area for 1 (one) detached garage from 1,238 sf to 1,500 sf and no other variance is intended or implied.
2. The variance is limited to Lot 1, Block 7 of Wells Garden Estates 4th Filing Subdivision generally located at 321 Calypso Street.

3. The new detached garage will be built in substantial conformance with the submitted site plans. Minor deviations that do not create a violation of another zoning or building requirement are acceptable.
4. There will be no construction prior to 7 am or after 8 pm daily.
5. The applicant will obtain a Zoning Compliance Permit in accordance with the approved variance within 6 months of Board approval.
6. Construction on the approved detached garage will be completed within 18 months of Board approval.
7. 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.

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

Staff is recommending the applicant obtain an approved Zoning Compliance Permit within 6 months and the structure be completed within 18 months of Board approval.

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.

Granting this variance will not approve a use that is not otherwise allowed in the R-150 zoning district. Detached garages and accessory buildings are allowed in the county residential zoning districts.

Variance 287- 321 Calypso Street – Detached Garage
Applicant Letter, Site Plan

APPLICATION FORM

COUNTY VARIANCE County Variance # 287 - Project # P2-18-00023

The undersigned as owner(s) of the following described property hereby request a Variance from the terms of the Yellowstone County Unified Zoning Regulations.

TAX ID # A27339 COUNTY COMMISSIONER DISTRICT # _____

Legal Description of Property: Lot 1, Block 7 of Wells Garden Estates 4th, S04, T01 R25E

Address or General Location (If unknown, contact County Public Works):

321 Calypso ST Billings, MT 59106

Zoning Classification: Residential R-10

Size of Parcel (Area & Dimensions): 26,420 SQFT

Covenants or Deed Restrictions on Property: Yes _____ No _____

If yes, please attach to application

Variance Requested: 1500 SQFT Detached garage. Maximum SQFT Allowable by Current Zoning Regulations is 1238 SQFT

Facts of Hardship: Additional Enclosed & Heated Storage is Needed beyond 1238 SQFT

*** Additional information may be required as determined by the Zoning Coordinator in order to fully evaluate the application.

Owner(s): Todd Carlson
(Recorded Owner)
(Address) 321 Calypso ST Billings, MT 59106
(Phone Number) 406-591-3303 (email) N/A.

Agent(s): Rich Naylor / MHS Construction
(Name)
(Address) 423 South 25th ST Billings MT 59101
(Phone Number) 406-861-8925 (email) Rich@MHSCMT.com

I understand that the filing fee accompanying this application is not refundable, that it pays for the cost of processing, and that the fee does not constitute a payment for a Variance. Also, I attest that all the information presented herein is factual and correct.

Signature: Todd Carlson Date: 1-30-18
(Recorded Owner)





REMODELING • CONSTRUCTION • HANDYMAN
Proudly Serving the Billings, Montana area

January 31, 2018

Planning & Community Services Department

2825 3rd Ave North 4th Floor

Billings, MT 59101

On Behalf of:

Todd Carlson

321 Calypso Street

Billings, MT 59106

To: Chairperson of the Board of Adjustment

Thank you for your time considering this Variance Application. A variance request has been before your committee before and declined. Variance # 277. Mr. Carlson is currently required to remove the existing structure. Our plan is to demolish and remove the existing detached garage structure, and reconstruct a new structure at 321 Calypso St, in Spring of 2018. Weather depending. We are working to coordinate the demolition and re- construction in a consecutive manner. We have attached and are submitting the new plans that meet the required setbacks, size (SQFT), and height parameters, as per the Sub Division covenants, and County Building Code requirements.

Intensions: The structure is intended to be used for additional storage. Mr. Carlson plans to store collectable and antique automobiles.

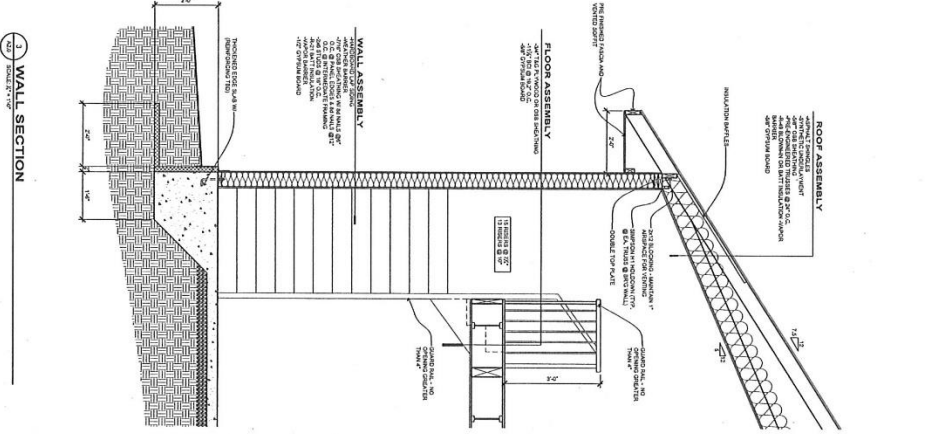
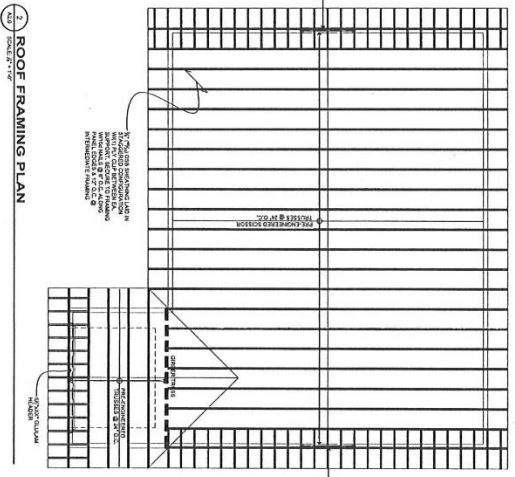
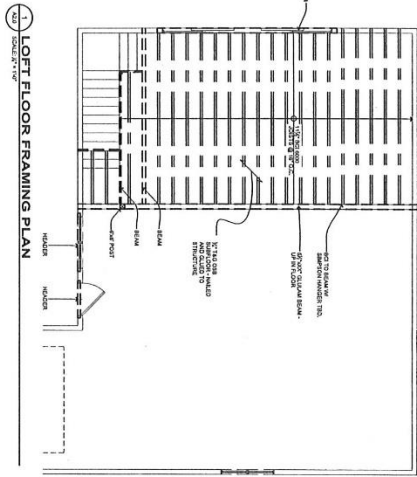
Facts of Hardship: Mr. Carlson is in need of additional enclosed heated storage space.

We are requesting your team consider approving this Variance Application for a 1500 SQFT Detached garage structure. See the Site plans for details.

A handwritten signature in blue ink that reads "Rich Naylor".

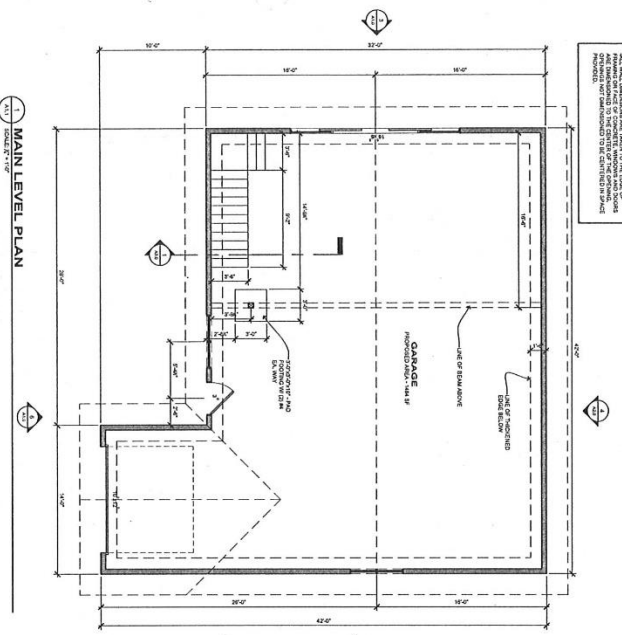
Rich Naylor

NOTES
 1. ALL WORK SHALL BE PERFORMED ON PILING TO BE DETERMINED BY THE CONTRACTOR.
 2. THE CONTRACTOR SHALL VERIFY THE EXISTING FOUNDATION AND MAKE ANY NECESSARY REPAIRS OR REINFORCEMENT.
 3. THE CONTRACTOR SHALL VERIFY THE EXISTING FOUNDATION AND MAKE ANY NECESSARY REPAIRS OR REINFORCEMENT.

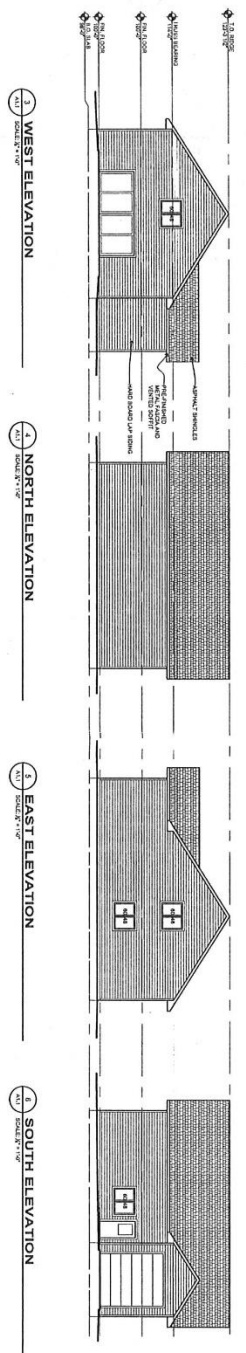


	TODD CARLSON - GARAGE 321 CALYPSO ST. BILLINGS, MONTANA		response DESIGN 2201 SPRUCE ST. BILLINGS, MT 59101 406-698-8958
	FRAMING PLANS & SECTION		
	PROJECT PROJECT NO. 1001		
	SHEET A1.0		

FLOOR PLAN NOTES
 1. ALL DIMENSIONS ARE TAKEN TO THE EDGE OF THE CONSTRUCTION LINE UNLESS OTHERWISE NOTED.
 2. FINISH FLOOR IS INDICATED BY A DASHED LINE.
 3. FINISH GRADE IS INDICATED BY A DOTTED LINE.
 4. FINISH ELEVATION IS INDICATED BY A NUMBER IN CIRCLES.



LOCAL REGULATIONS:
 1. ALL DIMENSIONS ARE TAKEN TO THE EDGE OF THE CONSTRUCTION LINE UNLESS OTHERWISE NOTED.
 2. FINISH FLOOR IS INDICATED BY A DASHED LINE.
 3. FINISH GRADE IS INDICATED BY A DOTTED LINE.
 4. FINISH ELEVATION IS INDICATED BY A NUMBER IN CIRCLES.



PROJECT PROJECT NO. 100 DRAWN BY: JCS CHECKED BY: JCS PHASE: CONSTRUCTION PRINT DATE: 10-20-2011	TODD CARLSON - GARAGE 321 CALYPSO ST. BILLINGS, MONTANA		response DESIGN 203 SPRUCE ST. BILLINGS, MT 59101 406-258-0803 WWW.RESPONSEDESIGN.NET
	PLAN, SITE PLAN, ELEVATIONS		
	SHEET A1.0		
			