

**CITY BOARD OF ADJUSTMENT**

MINUTES November 6, 2019

Name	Title	01/02/2019	02/06/2019	03/06/2019	04/03/2019	05/01/2019	06/05/2019	07/03/2019	08/07/2019	09/04/2019	10/02/2019	11/06/2019	12/04/2019	
David Mitchell	Member	-	-	-	E	E	E	1	1	1	-	E		
Dave Hagstrom	Member	-	-	-	1	1	1	1	1	1	-	1		
Paul Hagen	Member	-	-	-	1	1	1	E	E	E	-	1		
Jeff Bollman	Member	-	-	-	1	E	1	E	E	E	-	E		
Oscar Heinrich	Member	-	-	-	1	1	1	1	1	1	-	1		
Martin Connell	Member	-	-	-	1	1	1	1	E	E	-	1		
Mark Noennig	Chair	-	-	-	1	1	1	1	1	1	-	1		
<b>TOTAL NUMBER OF APPLICATIONS 2019</b>		<b>01/02/2019</b>	<b>02/06/2019</b>	<b>03/06/2019</b>	<b>04/03/2019</b>	<b>05/01/2019</b>	<b>06/05/2019</b>	<b>07/03/2019</b>	<b>08/07/2019</b>	<b>09/04/2019</b>	<b>10/02/2019</b>	<b>11/06/2019</b>	<b>12/04/2019</b>	<b>TOTAL</b>
<b>Variance</b>		-	-	-	1	1	2	2	3	2	-	2		<b>13</b>

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

Nicole Cromwell introduced the City Board of Adjustment members and Planning Department staff. Attending Staff members are Nicole Cromwell, Zoning Coordinator; Karen Husman, Planner I; and Tamara Deines, Planning Clerk.

**Attending:** Al Towleron, Bob & Sonja Edelman; Jerry Odegard; Doug Kory; Greg Reid, WWC Engineering; Tom Zurbuchen; Eric Bennett; Greg Judson

**Public Comment**

Chair Noennig opened the public comment period and asked if there was anyone wishing to speak during the public comment portion of the meeting. There was none. Member Heinrich visited both sites.

### **Approval of Meeting Minutes**

Meeting minutes for August 7, 2019; September 4, 2019. (The October 1, 2019 meeting was canceled).

### **Motion**

**Member Heinrich motioned to approve the August 7, 2019 minutes and September 4, 2019 minutes. Member Hagen seconded. The motion carried with a unanimous voice vote.**

### **Disclosure of any Conflict of Interest, Ex Parte Communications and Site Visits**

A form has been implemented for disclosures. If any Member circled yes to a Conflict of Interest or Ex Parte Communication, it will be explained here. There was none.

### **Public Hearings**

Nicole Cromwell reviewed the procedures for public hearings and stated the Board will open a public hearing and allow public comment this evening. She reviewed the hearing and presentation processes for the meeting and acting on each variance.

**Item #1 City Variance 1302 205-205.5 Terry Ave** – Lot size and setbacks - A variance from Section 27-308 requiring a minimum lot area of 6,000 square feet for a single family dwelling to allow a minimum lot area of 3,825 square feet: from 27-308 requiring a twenty (20) foot rear setback to allow a minimum of 2.5 feet; in a Residential-6000 (R-60) zone, on Block 6, Lots 3-5 of Suburban Subdivision, a 10,500 square foot parcel of land. The purpose of the variance is to allow a division of the property with two existing single-family dwellings into one 3,825 square foot parcel and one 6,675 square foot parcel, and to allow the northern parcel a rear setback of 2.5 feet. Tax ID: A15823.

### **Recommendation:**

Staff recommends conditional approval of the proposed variance.

Staff is recommending the following conditions for the variance request:

1. The variance is to allow a minimum lot area of 3,825 square feet: from 27-308 requiring a twenty (20) foot rear setback to allow a minimum of 2.5 feet; No other variance is intended or implied with this approval.
2. The variance is limited to Block 6, Lots 3-5 of Suburban Subdivision, generally located at 205 & 205.5 Terry Avenue.
3. Evidence will be provided to show the property along the alley will have legal and physical access from Terry Avenue.
4. Preliminary plat for the proposed relocation of lot lines will be submitted within one year of approval of variance.
5. The applicant shall meet all other city code requirements with the exception of this variance.
6. 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, leaseholders, heirs and assigns.

### **Discussion**

Chair Noennig called for questions and discussion from the members of the Board. Board member Heinrich noted the garage would be removed and asked if there are conditions to address the easements. Ms. Husman explained these items would be addressed when the exempt survey for a boundary line relocation is submitted. Board member Noennig asked for clarification on the access to the two homes. Karen Husman provided clarification and posted a proposed site plan. She said an easement or dedication would be needed to provide access to both homes.

**Public Hearing**

Chairman Noennig opened the public hearing at 6:11 PM and asked if there was anyone wishing to speak in favor or against City Variance #1302.

**Eric J. Bennett, 205 Terry Ave., Billings, MT 59106**

Mr. Bennett clarified and said the garage does not have to be removed. Documentation of ownership and an agreement for use of the garage will be needed. In response to question by Board member Heinrich, Mr. Bennett stated that the intent is for the storage unit to remain on the property.

Chair Noennig asked if there is anyone wishing to speak in favor or against City Variance #1302. There was none. At 6:13 pm, Chairman Noennig closed the Public Hearing and called for a motion.

**Motion**

**Board Member Heinrich made a motion to and Board Member Connell seconded the motion to conditionally approve City Variance #1302 with the six conditions of approval and Findings of Fact.**

Member	Yes	No	Not Present
David Mitchell			X
Dave Hagstrom	X		
Paul Hagen	X		
Jeff Bollman			X
Oscar Heinrich	X		
Martin Connell	X		
Mark Noennig	X		

The motion to conditionally approve **City Variance #1302** passed with a unanimous roll call vote.

**Item #2 City Variance 1303 – 2001 Lake Hills Drive – To allow a front setback of 15 feet for a garage** - A variance from Section 27-308 requiring a minimum front setback of 20 feet for a garage to allow a minimum front setback of 15 feet for a new 4-unit townhome with attached garages in a Residential Multi-Family Zone (RMF) zone on Lot 4, Block 13, Lake Hill Sub, 18<sup>th</sup> filing, a 14,400 square foot parcel of land. The purpose of the variance is to allow a 15-foot front setback for the attached garages.

**Recommendation**

Staff recommends conditional approval of the proposed variance. Staff is recommending the following conditions for the variance request:

1. The variance is to decrease the required front setback from 20 feet to 15 feet for the purpose of

constructing attached four-unit townhomes with attached garages. No other variance is intended or implied with this approval.

2. The variance is limited to on Lot 4, Block 13, Lake Hills Subdivision, 18<sup>th</sup> filing, generally located at 2001, 2003, 2005, 2007 Lake Hills Drive.

3. The site shall be developed in substantial conformance to the site plan presented to the BOA, reflecting the 15-foot front setback. No other nonconformity shown on the site plan is/are considered with this variance approval.

4. Construction shall be completed within 18 months of Board approval.

5. Failure to complete actions required by this approval within the time limits set forth shall void this variance.

6. All construction will require compliance with all other zoning regulations and City ordinances that apply at the time of construction.

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, leaseholders, heirs and assigns.

### **Background**

Ms. Husman and Ms. Cromwell explained that this application is due to a plan review error in the Master Site Plan review process. Planning staff reviewed the project as a Master Site Plan and issued approval for the proposed 15' setback in June 2019. During the staff review it was believed that the intent of the zoning regulation was met since there was more than 20' of separation from the sidewalk to the garage structure was provided. Following a complaint this fall, staff further researched the item and discovered 20' was required from the property line not the sidewalk. Staff advised Mr. Boeshen to stop work and apply for a variance. The staff report acknowledges staffs error in approving the site plan by using the distance to the sidewalk rather than property line.

### **Recommendation**

Planning staff has reviewed this application & is recommending conditional approval of Variance #1303 based on the Determinations for granting a variance. Staff is recommending the following conditions for the variance request:

1. The variance is to decrease the required front setback from 20 feet to 15 feet for the purpose of constructing attached four-unit townhomes with attached garages. No other variance is intended or implied with this approval.
2. The variance is limited to on Lot 4, Block 13, Lake Hills Subdivision, 18<sup>th</sup> filing, generally located at 2001, 2003, 2005, 2007 Lake Hills Drive.
3. The site shall be developed in substantial conformance to the site plan presented to the BOA that reflects the 15-foot front setback. No other nonconformity shown on the site plan is/are considered with this variance approval.
4. Construction shall be completed within 18 months of Board approval.
5. Failure to complete actions required by this approval within the time limits set forth shall void this variance.
6. All construction will require compliance with all other zoning regulations and City ordinances that apply at the time of construction.

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, leaseholders, heirs and assigns.

### **Discussion**

Chair Noennig called for questions and discussion from the members of the Board. Board member Heinrich asked what will happen if the variance request is denied. Nicole Cromwell said potentially the City Planning office would issue a halt notice on the project and ask that the builder bring the foundation into conformance. In response to question by Board member Hagstrom, staff said a complaint was received from a neighbor that the building does not meet the required setback. Chairman Noennig asked for clarification on the review process. Ms. Cromwell stated a Master Site Plan was submitted which is required when there are more than two buildings that share a common lot. During the staff review, it was believed the intent was met as the setback was met. Section 27-308 stated RMF-R zoning allows a 15-foot setback with a footnote. The error is that it does not meet the minimum from setback of 20-feet. Board member Hagen asked if the retention pond would be covered. Board member Hagstrom said the property line is actually 8.4-feet from the sidewalk, which is part of the right-of-way. Board member Heinrich pointed out the difference between the required setback for a garage and the required setback for a house.

### **Public Hearing**

Chairman Noennig opened the public hearing at 6:27 pm and asked if there was anyone wishing to speak in favor or against City Variance #1303.

### **Greg Reid, WWC Engineering, 51 N 15th St #1, Billings, MT 59106**

Mr. Reid explained the error in the required setback was not caught during the proposal, and this setback was carried through to the initial submittal. Discussions with staff did not identify the need for a variance. The foundation is in the ground and the neighbor notified staff with a code enforcement complaint. He said this variance makes sense as the purpose of the front setback of 20-feet so a vehicle has enough room to park without parking on the sidewalk. A four-plex must meet the required storm water and for this lot, the backyard must act as a storm water area. He stated they have determined it is safer to push the house forward and have a deeper pond area. He believes the variance request is warranted. Board member Heinrich asked if the other houses meet the storm water requirements. Greg Reid said there is a low infiltration rate on this particular site. Zoning Coordinator Cromwell pointed out the storm water requirements have significantly changed in the last few years.

### **Opposition**

#### **Alan Towleron, 658 Hillcrest Drive, Billings, Montana**

Mr. Towleron stated he is disappointed in this mess and the way we got here. He feels the developer has the primary responsibility to conform to the regulations. He said it is visually intrusive. He feels the terms of a solution and any associated costs should be borne by the developer. Mr. Towleron said the builder continued to work while the variance was in process, which will make it more difficult to bring the structure into conformance. He said new truck models range from 22-24 feet in length and the probability of a truck parked on this driveway is high. Mr. Towleron spoke to the need for an allowance for additional parking area to allow truck parking.

**Terry Odegard, 2101 Lake Hills Drive, Billings, Montana**

Mr. Odegard thanked the Board members for their time and service. Mr. Odegard gave background on his work history and his experience with builders. He believes in due diligence and accountability. He suggested this is a "stupid mistake" and the person in error should have attended this meeting. He said his concern is if they can make a simple mistake, they can make a big mistake. He asked, "What is justice?" He said another four-plex is scheduled to be built across from his lot. He gave a photo to the Board of the over dig that has been left from this project.

**Doug Cary, 1943 Lake Hills Drive, Billings, Montana**

Mr. Cary stated he is the complainant. He said the builders poured the foundation on Columbus Day and he contacted the Planning Department the following day. He said he spoke with the owner/builder, Kenn Boeschen, and told him he may want to seek a variance. He also discussed with Mr. Boeschen regarding the parking issues and the location of the garbage receptacles as they are often placed on the street and left there. He pointed out the existing limitations to an adequate parking area that does not conflict with the sidewalk. He said the driveway is too tight to park a pickup. He said he does not see any other way other than granting the variance due to the large expense of rectifying the issues on the property. Mr. Cary spoke of a potential lawsuit due to the City's errors. He provided a list of notices to the Board and asked, "What is going on?" He stated he did not receive a notice and he is located 120-feet south of the lot in question. In response to question by Chairman Noennig, Mr. Cary pointed out that his property tax identification number does not appear on the notification list. Discussion followed on whether the setback would be met if the garage sizes were reduced and the front of the building is flat instead of protruding. Mr. Cary said he spoke the owner who seemed to be conducive to pouring the driveway with an additional slab alongside with green space or purchasing a gang mailbox to free up a parking space in front of the four-plex.

**Bob Edelman, 2026 Lake Hills Drive, Billings, Montana**

Mr. Edelman said the last variance that went into effect was to change the driveway configuration. The vehicles park in front of his house as there is not enough a room to park a larger vehicle. He stated this is an error on the City's part for allowing this structure, and something needs to be done to avoid having vehicles forced to park on the street. He said he did not receive notification of the meeting. Ms. Cromwell verified that this address is on the certified notification list.

**Ron Hill, 142 Annandale, Billings, Montana**

Mr. Hill is a developer/builder and has been actively building homes in Lake Hills for several years. He stated he believes the variance needs to be denied to avoid setting a precedence. He feels the suggestion to shorten the garage length is a good idea. He said the builder has not conformed to the City's request to cease. It was discovered staff had measured the setbacks from the sidewalk. He said a redesign is needed if the specifications are not met. Mr. Hill said the property owner is in a rush as he wishes to do a 1031 Exchange for the builder's benefit. Mr. Hill reviewed the Staff determinations. Determination #1-This has been applicable to other lands in the area and this application is not peculiar to the land, and it is the law. Determination #2 & #3-are weak determinations as the last variance was granted over 26-27 years ago, and there should have been more comparisons. Determination #4- Set back rules are 20 feet. (15-ft plus 5-ft for the garage). If granted, Mr. Hill feels the variance would be a special privilege to get his 1031 Exchange done in time. He feels the builder is arrogant as he failed to show up for this hearing and did not stop work when notified by the City. Mr. Hill asked that the Board deny the variance request or cutback the size

of the foundation.

**Tom Zurbuchen, 1747 Wicks Lane, Billings, Montana**

Mr. Zurbuchen stated somebody made a very expensive mistake, and chances are it is going to cost the City. Mr. Zurbuchen said as a taxpayer, he would rather pay now than when the street is widened to the full width in the future. When the street is widened, there will be no legal off street parking on a 4-plex. He feels if the variance is approved, it will grant a special privilege as everybody else is conforming. He said the Board cannot grant a special privilege today and then and ask the taxpayers and the City to fix it in the future. He asked the Board to "Get it right now".

**Rebuttal**

**Greg Reid, WWC Engineering, 51 N 15th St #1, Billings, MT**

Mr. Reid responded to the questions brought up during the public hearing as to what can be done with this property. He said he is unable to answer the suggestion of altering the front of the garage, as the owner is not in attendance, which is regrettable. Board member Hagstrom said that from the site plan it looks as if the building could have been moved 3-feet towards the pond. Mr. Reid said he thinks the three options are to decrease building size; slide the building back and potentially deal with a variance on the storm water; or deal with a variance on the front.

At 7:11 pm, Chairman Noennig asked if there is anyone else wanting to speak in favor or against City Variance #1303. There was none. Chairman Noennig closed the Public Hearing and called for a motion.

**Motion**

**Board member Connell made a motion and it was seconded by Board member Hagen to deny City Variance #1303.**

Zoning Coordination Cromwell pointed out to the Chairman this motion is in conflict to the Staff Findings and she requested findings to support the motion for denial. Chairman Noennig called for discussion and questions for staff.

**Board member Connell withdrew the motion.**

Board member Heinrich commented that per City code a vehicle cannot park over a sidewalk. Ms. Cromwell agreed and stated this is considered a parking violation. Board member Heinrich asked if Project Recode will affect this situation. Ms. Cromwell said it will not, as at least 20-feet to the property line is needed to park a vehicle in the front of a residence. Board member Heinrich asked if granting this variance will set a precedent. Ms. Husman stated findings are needed to warrant the same type of variance. Chairman Noennig asked regarding the widening of the street. Ms. Cromwell said the right of way is 80-feet wide. Regarding the plan for the development of the street, the engineer said that if it met the minimum requirement for a collector street, it would require an additional 1.5-feet on either side. Chairman Noennig reiterated that if the minimum collector street width is met, the sidewalk could be shortened or moved to allow for a 20-foot driveway and sufficient width to the street.

Ms. Cromwell gave a clarifying example. Lake Elmo Drive is a collector street built to the maximum width and amenity for a collector street, where this street is not currently built to the maximum width. In response to question by Board member Heinrich, Ms. Cromwell stated only one variance was previously granted as noted in the Staff Findings and Determinations.

**Motion**

Board member Connell made a motion to deny City Variance #1303 on the following grounds: 1. It grants a special privilege to land owner and developer. 2. The developer failed to cease working when notified by the City so this could be worked out in an amicable fashion. 3. It is not good for the neighborhood. 4. This is another example of the City Planning Department passing off their mess to the Board of Adjustment. 5. The developer did not attend this hearing to defend his position. Board member Hagen seconded the motion and stated he does not see where the lay of this land creates a unnecessary hardship per Determination #1 and Determination #3.

**Discussion**

Board member Connell strongly voiced his frustration and said there are fifteen ways the storm water area could have been designed fifteen different ways. He said although there is fear of a lawsuit, the courts serve a purpose as they arbitrate and come up with reasonable solutions to difficult problems. He asked why this Board should be put in this position and said he stated he resents it.

Zoning Coordinator Cromwell interjected and explained a lawsuits would be brought forward on the grounds and basis and findings of this Board but the court sit as a super Board of Adjustment and grant the variance. Instead, the court would determine whether the variance was granted or not by the Board of Adjustment in a reasonable fashion. If not, it will be returned the to the Board to be approved. Board member Connell said the lawsuit will be from the landowner and builder for the mistakes made coming up to this variance request. Chairman Noennig said there are two different issues and he doesn't feel whether or not the City is liable from the State is directly related to the variance. He said in his experience he does not recall a case where you can have a stop hold against the government like they do for private parties. Board member Connell said he feels denial of the variance will give the developer a means of finding an amicable means of a solution with the landowners who had vaid points to consider. Chairman Noennig advised basing a decision based on Findings and determinations, and not on the behaviour of the applicant. Board member Heinrich asked if the intent of the motion is to reverse Determination #1 and Determination #7. Zoning Coordinator said this is an allowed use. The special priveledge is denoted in Determination #3. Chairman Noennig stated the motion is to deny Variance #1303 and called for a roll call vote.

Member	Yes	No	Not Present
David Mitchell			X
Dave Hagstrom	X		
Paul Hagen	X		
Jeff Bollman			X
Oscar Heinrich	X		
Martin Connell	X		
Mark Noennig	X		

**The motion to deny City Variance #1303 carries 5-0. City Variance #1303 is denied.**

**Other Business:** The next City Board of Adjustment meeting will be held on Wednesday, December 3, 2019. The Board will consider one variance application.

**ADJOURNMENT: The meeting adjourned at 7:25 PM.**

**ATTEST: DRAFT. To be approved by a motion at the next regularly scheduled meeting.**  
*Tamara L. Deines, Planning Clerk*