

Birmingham Board of Zoning Appeals Proceedings
Tuesday, February 9, 2021
Held Remotely Via Zoom and Telephone Access

1. Call To Order

Minutes of the regular meeting of the City of Birmingham Board of Zoning Appeals (“BZA”) held on Tuesday, February 9, 2021. After staff’s resolution of a technical difficulty, Chair Charles Lillie convened the meeting at 7:37 p.m.

2. Rollcall

Present: Chair Charles Lillie; Board Members Jason Canvasser (left at 8:53 p.m.), Kevin Hart, Richard Lilley, John Miller, Erik Morganroth; Alternate Board Member Ron Reddy, Erin Rodenhouse (all located in Birmingham, MI except Richard Lilley who was in St. Augustine Beach, FL.)

Absent: Board Member Francis Rodriguez

Administration:

Bruce Johnson, Building Official
Brooks Cowan, City Planner
Laura Eichenhorn, City Transcriptionist
Mike Morad, Assistant Building Official
Jeff Zielke, Assistant Building Official

Chair Lillie explained the meeting was being held virtually due to the Covid-19 pandemic. He explained the procedures to be followed for the virtual meeting. He then assigned duties for running the evening’s meeting to Vice-Chair Morganroth.

Vice-Chair Morganroth described BZA procedure to the audience. He noted that the members of the Board of Zoning Appeals are appointed by the City Commission and are volunteers who serve staggered three-year terms. They are a quasi-judicial board and sit at the pleasure of the City Commission to hear appeals from petitioners who are seeking variances from the City’s Zoning Ordinance. Under Michigan law, a dimensional variance requires four affirmative votes from this board, and the petitioner must show a practical difficulty. A land use variance requires five affirmative votes and the petitioner has to show a hardship. He pointed out that this board does not make up the criteria for practical difficulty or hardship. That has been established by statute and case law. Appeals are heard by the board as far as interpretations or rulings. In that type of appeal the appellant must show that the official or board demonstrated an abuse of discretion or acted in an arbitrary or capricious manner. Four affirmative votes are required to reverse an interpretation or ruling.

Vice-Chair Morganroth took rollcall of the petitioners. All petitioners were present.

T# 02-07-21

3. Approval Of The Minutes Of The BZA Meeting Of January 12, 2021

Mr. Lillie asked that 'alone' be deleted from his comments on page four.

Motion by Mr. Miller

Seconded by Mr. Canvasser to accept the Minutes of the BZA meeting of January 12, 2021 as amended.

Motion carried, 7-0.

ROLL CALL VOTE

Yeas: Miller, Canvasser, Lillie, Lilley, Morganroth, Reddy, Hart

Nays: None

T# 02-08-21

4. Appeals

**1) 1208 Bird
Appeal 21-02**

ABO Zielke presented the item, explaining that the owner of the property known as 1208 Bird was requesting the following variance to construct a new home with a detached garage:

A. Chapter 126, Article 4, Section 4.74(C) of the Zoning Ordinance requires that the minimum total distance between principle residential buildings on adjacent lots be 14.0 feet or 25% of the lot width whichever is greater. The required total is 14.00 feet. The proposed is 13.53 feet on the east side. Therefore, a variance of 0.47 feet is being requested.

ABO Zielke confirmed that if the home to the east were not non-conforming, then 1208 Bird would not require a variance.

Rick Merlini, appellant, reviewed his letter describing why this variance was being sought. The letter was included in the evening's agenda packet.

Mr. Merlini told Mr. Reddy that he reduced the width of the proposed home by 4 inches in an attempt to reduce the requested variance.

Motion by Mr. Miller

Seconded by Mr. Canvasser with regard to Appeal 21-02, A. Chapter 126, Article 4, Section 4.74(C) of the Zoning Ordinance requires that the minimum total distance between principle residential buildings on adjacent lots be 14.0 feet or 25% of the

lot width whichever is greater. The required total is 14.00 feet. The proposed is 13.53 feet on the east side. Therefore, a variance of 0.47 feet is being requested.

Mr. Miller moved to approve the variance and tied it to the plans as submitted. He noted that the need for the variance was not self-created and that allowing the variance would do substantial justice to the appellant and the neighbors.

Motion carried, 7-0.

ROLL CALL VOTE

Yeas: Miller, Canvasser, Morganroth, Hart, Reddy, Lilley, Lillie

Nays: None

**2) 646 Chapin
Appeal 21-03**

ABO Zielke presented the item, explaining that the owner of the property known as 646 Chapin was requesting the following variance to construct a new home with an attached garage.

A. Chapter 126, Article 4, Section 4.74(C) of the Zoning Ordinance requires that the minimum total distance between principle residential buildings on adjacent lots be 14.0 feet or 25% of the lot width whichever is greater. The required total is 14.25 feet. The proposed is 11.57 feet on the west side. Therefore, a variance of 2.68 feet is being requested.

In reply to Mr. Canvasser, ABO Zielke said it was unlikely that the orientation of the proposed home could be changed in any way to eliminate the need for a variance.

Rick Merlini, appellant, reviewed his letter describing why this variance was being sought. The letter was included in the evening's agenda packet.

In reply to Vice-Chair Morganroth, Mr. Merlini said he did not attempt to make the home less than 40 feet wide because there is a market in Birmingham for homes of that width. He confirmed that he could build a narrowed home on the lot with an attached garage that would not require a variance.

Motion by Mr. Miller

Seconded by Mr. Hart with regard to Appeal 21-03, A. Chapter 126, Article 4, Section 4.74(C) of the Zoning Ordinance requires that the minimum total distance between principle residential buildings on adjacent lots be 14.0 feet or 25% of the lot width whichever is greater. The required total is 14.25 feet. The proposed is 11.57 feet on the west side. Therefore, a variance of 2.68 feet is being requested.

Mr. Miller motioned to approve the variance and tied it to the plans as submitted. He noted this case was similar to the previous case because the locations of the houses on either side of 646 Chapin are causing the hardship for 646 Chapin itself. He said

this means the problem was not self-created but due to existing adjacent houses. He said approval would do substantial justice to the appellant and the neighbors.

Mr. Reddy said he would not support this motion because, as Vice-Chair Morganroth had pointed out, the appellant could narrow the house a bit to meet the required dimensional setback.

Vice-Chair Morganroth said he would support the motion even though he thought Mr. Reddy had a legitimate reason to vote against the motion. He said that while a conforming building could be built on the lot, he agreed it was not the fault of the petitioner that the adjacent homes are forcing 646 Chapin's need for a variance.

Motion carried, 6-1.

ROLL CALL VOTE

Yeas: Miller, Hart, Canvasser, Morganroth, Lilley, Lillie

Nays: Reddy

**3) 1021 Pleasant
Appeal 21-04**

ABO Zielke presented the item, explaining that the owner of the property known as 1021 Pleasant was requesting the following variance to construct an addition to the existing accessory structure:

A. Chapter 126, Article 4, Section 4.03(H) of the Zoning Ordinance requires that the maximum area of the first floor of any accessory structure or accessory structures in combination shall not exceed 10% of the lot area or 600 square feet in R1, whichever is less. The required total is 600 square feet. The existing is 945.70 square feet. The proposed is 1703.70 square feet. Therefore, a variance of 1103.70 feet is requested.

Mr. Lillie addressed correspondence from the neighbors of 1021 Pleasant. He noted that the BZA cannot consider drainage issues as part of its deliberations.

ABO Zielke confirmed for Mr. Lillie and the public that the Building Department would conduct a drainage review as part of the permitting process for this project.

Matt Moser, representative for the appellant, reviewed his letter describing why this variance was being sought. The letter was included in the evening's agenda packet.

Motion by Mr. Lillie

Seconded by Mr. Reddy with regard to Appeal 21-04, A. Chapter 126, Article 4, Section 4.03(H) of the Zoning Ordinance requires that the maximum area of the first floor of any accessory structure or accessory structures in combination shall not exceed 10% of the lot area or 600 square feet in R1, whichever is less. The required total is 600

square feet. The existing is 945.70 square feet. The proposed is 1703.70 square feet. Therefore, a variance of 1103.70 feet is requested.

Mr. Lillie motioned to deny the variance, noting that there was no showing of practical difficulty. He stated that there was nothing uniquely challenging about the property and stated that this variance, if granted, would expand the already existing non-conformity on the lot. He noted that every lot zoned R1 cannot go over 600 feet for accessory structures, which is not unduly burdensome.

While expressing appreciation for the design, Vice-Chair Morganroth agreed with Mr. Lillie that the 600 foot limit for accessory structures zoned R1 could not appropriately be overridden in this case.

Motion carried, 7-0.

ROLL CALL VOTE

Yeas: Lillie, Reddy, Miller, Hart, Canvasser, Morganroth, Lilley

Nays: None

**4) 1264 Bird
Appeal 21-05**

ABO Zielke presented the item, explaining that the owner of the property known as 1264 Bird was requesting the following variance to construct a new home with a detached garage:

A. Chapter 126, Article 4, Section 4.74(C) of the Zoning Ordinance requires that the minimum total distance between principle residential buildings on adjacent lots be 14.0 feet or 25% of the lot width whichever is greater. The required total is 14.00 feet. The proposed is 13.30 feet on the east side. Therefore, a variance of 0.70 feet is being requested.

Brian Alimov, appellant, reviewed his letter describing why this variance was being sought. The letter was included in the evening's agenda packet.

Motion by Mr. Canvasser

Seconded by Mr. Lilley with regard to Appeal 21-05, A. Chapter 126, Article 4, Section 4.74(C) of the Zoning Ordinance requires that the minimum total distance between principle residential buildings on adjacent lots be 14.0 feet or 25% of the lot width whichever is greater. The required total is 14.00 feet. The proposed is 13.30 feet on the east side. Therefore, a variance of 0.70 feet is being requested.

Mr. Canvasser moved to grant the variance and tied it to the plans as submitted. He said he was moving to grant the variance for the same reasons the BZA chose to grant the same variance in 2018 when it was before the Board at that time. He noted the variance being proposed currently is even smaller than the one granted in 2018. He said the problem was not self-created and is due to the non-conforming property to

the east. He said granting the variance would do substantial justice to the petitioner as well as the nearby property owners, and said he found that strict compliance with the ordinance would be unnecessarily burdensome.

Motion carried, 7-0.

ROLL CALL VOTE

Yeas: Canvasser, Lilley, Lillie, Reddy, Miller, Hart, Morganroth

Nays: None

**5) 2282 W Lincoln
Appeal 21-06**

ABO Zielke presented the item, explaining that the owner of the property known as 2282 West Lincoln was requesting the following variance to construct an addition to an existing nonconforming home:

A. Chapter 126, Article 2, Section 2.06.2 of the Zoning Ordinance requires that the minimum combined total side yard setback for residential lots are 14.0 feet or 25% of the lot width whichever is greater. The required total is 20.00 feet. The proposed is 15.50 feet. Therefore, a variance of 4.50 feet is being requested.

Roger Marchetti, appellant, reviewed the letter describing why this variance was being sought. The letter was included in the evening's agenda packet.

In reply to Mr. Lillie, Mr. Marchetti said he considered pulling the sunroom in but that doing so would disrupt many of the extant windows. He said it was ultimately determined that pulling the sunroom in would be impractical.

Mr. Miller noted that to comply with the ordinance the sunroom would have to be approximately 14 feet wide instead of the proposed width. He asked why the appellant was not pursuing the ordinance-compliant 14 foot width for the room.

Mr. Marchetti said a 14 foot wide room would obscure the views and that the aesthetics are more pleasant at the proposed width.

Teresa Bailey, builder for the project, said that bringing the sunroom in any further would cause the door for the laundry room to hit the side wall. She said that in repairing the deck the project would be reducing some of the existing non-conformities in the sideyard setbacks.

Vice-Chair Morganroth said he was not sure he would consider the laundry room door hitting the side wall a hardship, but thanked Ms. Bailey for her explanation.

Motion by Mr. Reddy

Seconded by Mr. Hart with regard to Appeal 21-06, A. Chapter 126, Article 2, Section 2.06.2 of the Zoning Ordinance requires that the minimum combined total side yard

setback for residential lots are 14.0 feet or 25% of the lot width whichever is greater. The required total is 20.00 feet. The proposed is 15.50 feet. Therefore, a variance of 4.50 feet is being requested.

Mr. Reddy moved to grant the variance and tied it to the plans as submitted. He said this home was struggling with ordinance non-conformities on both sides, that the appellant was attempting to mitigate their variance request, and that the plans were staying within the existing footprint of the home. He said for these reasons the need for a variance was not self-created.

Mr. Miller said he was not convinced that the plans demonstrated sufficient effort to mitigate the non-conformity since they would be replacing an existing deck with a sunroom. He said he did not see why the appellant could not move the wall further in to comply with the ordinance.

Vice-Chair Morganroth concurred with Mr. Miller, saying that once the deck is demolished the appellant would have a blank slate to build an ordinance-compliant sunroom.

Motion failed, 2-5.

ROLL CALL VOTE

Yeas: Reddy, Hart

Nays: Canvasser, Lilley, Lillie, Miller, Morganroth

**6) 798 N Old Woodward
Appeal 21-07**

Mr. Canvasser said he would be recusing himself citing a potential conflict-of-interest.

There were no objections from the Board regarding Mr. Canvasser's recusal.

Mr. Canvasser left the meeting at 8:53 p.m. Alternate Board Member Erin Rodenhouse took Mr. Canvasser's place for the Board's consideration of the appeal.

CP Cowan presented the item, explaining that the owner of the property known as 798 N Old Woodward was requesting a use variance in the O2 Office-Commercial district to permit the sale of alcoholic beverages for off-premise consumption:

A. Chapter 126, Article 2, Section 2.23(B)(4) specifies Commercial Permitted Uses, Section 2.23(C)(1) specifies Accessory Permitted Uses, and Section 2.23(C)(2) specifies Uses requiring a Special Land Use Permit. Alcoholic beverages for off-premise consumption is not listed as a permitted use, an accessory permitted use or a use requiring a Special Land Use Permit within Section 2.23 for the O2 Office-Commercial zone, therefore a use variance for alcoholic beverage sales for off-premise consumption is being requested.

Gregory Need, attorney for the appellant, reviewed the letter describing why this variance was being sought. The letter was included in the evening's agenda packet. Helene Fertal, appellant, and Hunter Korth, owner of the property, were also present.

Mr. Lillie noted that difficulty finding a tenant is not a sufficient reason for the granting of a use variance. He noted that the existence of a salon next door also demonstrated that an ordinance-allowed business could be run in the same location. He said he felt that the situation was at least somewhat self-created since the landlord should know what zoning uses are permitted before renting out a property. He also said that since alcohol is a regulated use granting the variance could be seen as altering the essential characteristics of the area, which were intended to disallow takeaway alcoholic sales in the O2 zone.

Vice-Chair Morganroth echoed Mr. Lillie's point about the salon.

Ms. Rodenhouse noted that while the space had been vacant for six years, the property owner only hired a commercial real estate agent to rent out the space in 2018. Upon doing so, a tenant was found within the next 12 to 18 months. Ms. Rodenhouse said this demonstrated that finding a tenant for the space was not actually as significant a hardship as the six year vacancy might otherwise have indicated.

Mr. Need reiterated that his client attempted to verify her right to operate at 798 N. Old Woodward with the City, and that she was given inaccurate information by the City. He ventured that the spirit of O2 zoning is to keep lower-intensity uses close to residential as a buffer, and that Birmingham Wines is a perfect example of such a use.

Mr. Lilley said the City needed to do more to support local businesses during the slow retail recovery resulting from the Covid-19 pandemic. He said Birmingham Wine is well-run, low-volume, and boutique. Given the owner's attempts to operate within the ordinance and the unique circumstances that caused this issue to be known, Mr. Lilley said it would be appropriate for the City to show a bit of flexibility.

Mr. Hart concurred with Mr. Lilley, adding that Birmingham Wine has been operating in the area for a number of years and has been a boon to the neighborhood.

Vice-Chair Morganroth and Mr. Lillie emphasized that the ordinances must be enforced unless the appellant is able to prove a hardship, no matter how sympathetic to the Board members the case might otherwise be.

Mr. Reddy said he did not believe the issue was self-created because of the City's mistake in this case. He said a term and/or ownership limit on the variance might be a fair compromise.

There was some discussion among the Board members about the possibility of imposing term and/or ownership restrictions on the granting of a variance in this case.

Building Official Johnson reported that the City Attorney confirmed the BZA was allowed to impose conditions on a variance.

Ms. Rodenhouse observed that the owner of Birmingham Wine had other mechanisms at her disposal to recoup the money from her lease.

Vice-Chair Morganroth noted that in similar cases the BZA has ruled in favor of maintaining the ordinance. He said in order to vote to grant the variance in this case he would need the hardship to be very clear in order to merit going against both precedent and ordinance.

Motion by Mr. Reddy

Seconded by Mr. Hart with regard to Appeal 21-07, A. Chapter 126, Article 2, Section 2.23(B)(4) specifies Commercial Permitted Uses, Section 2.23(C)(1) specifies Accessory Permitted Uses, and Section 2.23(C)(2) specifies Uses requiring a Special Land Use Permit. Alcoholic beverages for off-premise consumption is not listed as a permitted use, an accessory permitted use or a use requiring a Special Land Use Permit within Section 2.23 for the 02 Office-Commercial zone, therefore a use variance for alcoholic beverage sales for off-premise consumption is being requested.

Mr. Reddy moved to grant the use variance subject to the following conditions:

- 1. The variance would only last for the duration of the current lease; or,**
- 2. When the ownership of the operating LLC changes; or,**
- 3. If the current business model were to change in any way beyond selling a limited amount of wine or other alcoholic beverages.**

Mr. Lillie recommended amendments to the motion. He said the motion should be to grant the use variance with the understanding that the variance shall expire at the first to occur of the following conditions:

- 1. When the current lease ends, which would be no more than three years from February 9, 2021; or,**
- 2. When Birmingham Wine ceases conducting business at its current location; or,**
- 3. When Helene Fertal no longer has an interest in the LLC, with proof of ownership to be provided to the City of Birmingham annually.**

Mr. Reddy and Mr. Hart both accepted the recommended amendments to the motion.

Mr. Lillie said he would not be supporting the motion. He said he did not believe they met the requirements to establish the need for a use variance. Because the appellant did not meet the criteria, he said granting the variance would set a legal precedent. In addition, alcohol sales are legally regulated. He noted that deciding on the location of alcohol sales falls under the Commission's jurisdiction and said they should be making the determination.

Mr. Miller said the evidence was that Birmingham Wine dealt in good faith with the City and conducted their due diligence. He observed that the business also has also

operated on the same block for a number of years and has proven to be an asset to the neighborhood. He said his vote would hinge on those facts.

Vice-Chair Morganroth reminded those present that a use variance requires a 5-2 vote to pass.

Motion failed, 4-3.

ROLL CALL VOTE

Yeas: Reddy, Hart, Lilley, Miller

Nays: Rodenhouse, Lillie, Morganroth

T# 02-09-21

5. Correspondence

Included in the agenda packet.

T# 02-10-21

6. General Business

None.

T# 02-11-21

7. Open To The Public For Matters Not On The Agenda

Helene Fertal thanked the Board for their work and for their consideration of her appeal.

T# 02-12-21

8. Adjournment

Motion by Mr. Lilley

Seconded by Mr. Lillie to adjourn the February 9, 2021 BZA meeting at 9:38 p.m.

Motion carried, 7-0.

ROLL CALL VOTE

Yeas: Lilley, Reddy, Morganroth, Rodenhouse, Lillie, Miller, Hart

Nays: None



Bruce R. Johnson, Building Official