

BOARD OF ZONING APPEALS

Minutes

6:30 PM

April 21, 2010

City Council Chambers

MEMBERS PRESENT: Bernie Bossio, Leanne Cardoso, George Papandreas, Jim Shaffer, Tom Shamberger

MEMBERS ABSENT: None

STAFF: Christopher Fletcher, AICP

I. **CALL TO ORDER and ROLL CALL:** Bossio called the meeting to order at 6:30 PM

II. **MATTERS OF BUSINESS:**

A. **Approval of January 20, 2010 minutes** – Shamberger moved to accept the minutes as presented; seconded by Cardoso. The motion passed unanimously.

III. **OLD BUSINESS** – None

IV. **NEW BUSINESS**

A. **V10-01 / Hartman – Smola Construction / 249 Dormont Street:** Request by Smola Construction, on behalf of Brad Hartman, for variance approval from the Planning and Zoning Code, Article 1373.02 “Nonconforming Structures” for property located at 249 Dormont Street. Tax Map #37 Parcel #370; R-1, Single-Family Residential.

Fletcher read the Staff Report stating that he petitioner seeks to reconstruct an addition to his home at 249 Dormont Street. The proposed design requires a variance to extend the nonconformity of the existing structure's side yard setback of five (5) feet. The minimum side yard setback in the R-1 District is ten (10) feet. The existing nonconforming side setback extends twenty-two feet on the eastern side of the residence. The proposed reconstruction will extend the nonconforming side setback an additional 44.5 feet.

Article 1373.02 (A) *Nonconforming Structures* of the Planning and Zoning Code provides that:

“No legal, pre-existing structure may be enlarged, moved or otherwise changed in such a manner that increases the extent of its non-conformity, unless a variance from the terms of the ordinance is obtained from the Board of Zoning Appeals.”

The petitioner also seeks variance approval to encroach into the minimum front yard setback for the R-1 District, which will be considered as a separate petition. According to the site plan submitted by the petitioner, the proposed addition appears to conform to minimum rear setback and maximum lot coverage standards. Addendum A of this Report illustrates the location of the site and photographs of the existing structure. Staff received one letter from Mr. Edward Sims in opposition and three phone calls stating no objections.

Bossio recognized Mr. Tom Tretheway of Smola Construction who is the petitioner's agent. Tretheway stated that he did not have anything to add to the information that was provided in the Staff Report and thanked the Planning Department for their assistance.

There being no comments or questions by the Board, Bossio opened the public comment portion of the hearing. There being no comments in favor of the petition, Bossio recognized Mr. Edward Sims of Pursglove, West Virginia.

Sims stated that he opposed the petition because he was concerned that the variance would restrict his ability to access a very narrow land-locked parcel that he owns. Bossio asked how he accessed the property now. Sims stated he was not sure. Papandreas asked why he thought the variance would restrict his access. Sims stated he was not sure. Sims stated that he wanted to make sure he could access his property if he wanted to timber it.

There being no further public comments, Bossio declared the public comment portion closed and asked for Staff's recommendation.

Fletcher distributed images of the County Tax Maps that shows Mr. Sims' property. Fletcher noted that the Sims parcel does not appear to abut the petitioner's property, ends approximately 270 feet from the petitioner's parcel, and that the Sims parcel appears to be less the ten feet in width and approximately 205 feet in length. Fletcher also noted he spoke with Mr. Sims prior to the meeting and learned that he acquired the property through a County tax sale.

Fletcher stated that the Board must determine whether the proposed request meets the standard criteria for a variance by reaching a positive determination for *each* of the "Findings of Fact" submitted by the applicant. Staff concurs with the petitioner's Findings of Fact and recommends approval as requested.

Papandreas moved to accept the Findings of Fact as submitted; seconded by Shaffer. The motion passed unanimously.

(NOTE: The following Findings of Fact were included in the motion)

Finding of Fact #1 – There are exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, because:

The existing 60 to 70 year old single-family structure is situated on a large parcel but is located only five feet from the side property line. The petitioner seeks to reconstruct an addition on the structure that will better complement the historical architecture of the house and provide a two-car garage rather than the present one-car garage. Due to the interior layout of the structure, the property's slope, and the owner's desire to preserve existing grades at the corner of Dormont and Cox Place and along Dormont, it is necessary to reconstruct the addition and larger garage on the side of the house that is closest to the side property boundary. To accommodate the desired area of the addition and two-car garage, it is necessary to increase the extent of the structure's existing non-conformity.

Finding of Fact #2 – The variance is necessary for the preservation and enjoyment of a substantial property right that is possessed by other properties in the same vicinity and zoning district, but which denied to this property, because:

The proposed addition reconstruction will not alter existing grades or result in a new driveway entrance along Dormont or closer to the Dormont – Cox Place intersection, thereby preserving the character of the built and natural environments and mature landscaping and trees that are currently enjoyed by neighboring residents and visitors.

Finding of Fact #3 – The granting of this variance will not be harmful to the public welfare and will not harm property or improvements in the vicinity and zoning district in which the subject property is located, because:

The proposed addition reconstruction will be a significant architectural improvement to the existing single-family home. There are only two homes that front on the approximate 250-foot Cox Place cul-de-sac. The location of the proposed addition will preserve existing grades and will not result in a new driveway entrance along Dormont or closer to the Dormont – Cox Place intersection that would otherwise be necessary in providing additional integral garage parking as desired by the owner. The proposed expansion is in a portion of the property currently used for a driveway and a covered patio. The addition should enhance adjacent properties, improvements, and the neighborhood's overall built environment, all of which will not be diminished by granting this variance.

Finding of Fact #4 – The granting of this variance will not alter the land-use characteristics of the vicinity and zoning district, or diminish the market value of adjacent properties, or increase traffic congestion on public streets, because:

The proposed addition reconstruction will be a significant architectural improvement to the existing single-family home and should contribute to the quality, character, and value of a neighboring older estate homes. The requested variance to extend the nonconforming side setback by 44.5 feet can not contribute nor mitigate traffic that is already present within the neighborhood, although the project should result in an increase the number of available off-street parking spaces.

Shamberger moved to approve V10-01 as requested; seconded by Papandreas. The motion passed unanimously.

Bossio advised Mr. Tretheway that the Board's decision can be appealed to the Circuit Court within thirty (30) days and that any work done during that time is at the sole financial risk of the applicant.

- B. V10-02 / Hartman – Smola Construction / 249 Dormont Street:** Request by Smola Construction, on behalf of Brad Hartman, for variance approval from the Planning and Zoning Code, Article 1333.04 “Setbacks” for property located at 249 Dormont Street; Tax Map #37 Parcel #370; R-1, Single-Family Residential.

Fletcher read the Staff Report stating that in addition to variance relief sought in petition V10-01 that would allow a proposed reconstruction of an addition to extend a nonconforming side setback, the petitioner also seeks a fifteen (15) foot variance to encroach into the twenty-five (25) foot front setback standard. It appears by the proposed site plan submitted by the petitioner, that the reconstructed addition will conform to the minimum rear and maximum lot coverage standards of the R-1 District. Addendum A of this report illustrates the location of the

subject site and photographs. Staff received one letter from Mr. Edward Sims in opposition and three phone calls stating no objections.

There being no comments or questions by the Board, Bossio recognized Mr. Tretheway. Tretheway stated that the reconstruction of the addition will increase the number of off-street parking provided by the petitioner.

Bossio opened the public comment portion of the hearing. There being no public comments offered, he declared the public comment portion closed and asked for Staff's recommendation.

Fletcher stated that The Board must determine whether the proposed request meets the standard criteria for a variance by reaching a positive determination for *each* of the "Findings of Fact" submitted by the applicant. Staff concurs with the petitioner's Findings of Fact and recommends that variance relief be granted as requested.

Papandreas moved to accept the Findings of Fact as submitted; seconded by Cardoso. The motion passed unanimously.

(NOTE: The following Findings of Fact were included in the motion)

Finding of Fact #1 – There are exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, because:

The existing 60 to 70 year old single-family structure is situated on a large parcel but is located only five feet from the side property line. The petitioner seeks to reconstruct an addition on the structure that will better complement the historical architecture of the house and provide a two-car garage rather than the present one-car garage. Due to the interior layout of the structure, the property's slope, and the owner's desire to preserve existing grades at the corner of Dormont and Cox Place and along Dormont, it is necessary to reconstruct the addition and larger garage on the side of the house that is closest to the side property boundary. To accommodate the desired area of the addition and two-car garage, it is necessary to encroach fifteen feet into the minimum twenty-five foot front setback requirement.

Finding of Fact #2 – The variance is necessary for the preservation and enjoyment of a substantial property right that is possessed by other properties in the same vicinity and zoning district, but which denied to this property, because:

There are a number of single-family homes within the immediate R-1 District, particularly along Maple, Lebanon, and Dormont, that do not appear to meet the minimum twenty-five foot front setback standard.

Finding of Fact #3 – The granting of this variance will not be harmful to the public welfare and will not harm property or improvements in the vicinity and zoning district in which the subject property is located, because:

The proposed addition reconstruction will be a significant architectural improvement to the existing single-family home. There are only two homes that front on the approximate 250-foot Cox Place cul-de-sac. The location of the proposed addition will preserve existing grades and will not result in a new driveway entrance along Dormont or closer to the Dormont – Cox Place intersection that would otherwise be necessary in providing additional integral garage parking as desired by the owner.

Finding of Fact #4 – The granting of this variance will not alter the land-use characteristics of the vicinity and zoning district, or diminish the market value of adjacent properties, or increase traffic congestion on public streets, because:

The proposed addition reconstruction will be a significant architectural improvement to the existing single-family home and should contribute to the quality, character, and value of a neighboring older estate homes. The requested front yard variance can not contribute nor mitigate traffic that is already present within the neighborhood, although the project should result in an increase the number of available off-street parking spaces.

Papandreas moved to approve V10-02 as requested; seconded by Cardoso. The motion passed unanimously.

Bossio advised Tretheway that the Board’s decision can be appealed to the Circuit Court within thirty (30) days and that any work done during that time is at the sole financial risk of the applicant.

C. BA10-01 / Smith Rentals, LLC / 348 Elysian Avenue: Request by Smith Rentals, LLC for Administrative Appeal relating to the Planning and Zoning Code and an interpretation made by the Planning Department for property located at 348 Elysian Avenue; Tax Map #37 Parcel #54; R-1A, Single-Family Residential District.

Bossio stated that he would have to recuse himself from the discussion and decision for this petition due to previous business dealing with the petitioner. Bossio left the Chambers and Cardoso chaired the meeting.

Fletcher read the Staff Report stating that On March 15, 2010, the Planning Department received an email from the petitioner requesting a “variance” that would allow the subject structure to be used as a duplex rather than a single-family dwelling unit. Addendum A of this report illustrates the location and photographs of the subject property.

According to Article 1329.02 “Definition of Terms” of the Planning and Zoning Code, a “variance” is defined as:

“...A deviation from the minimum standards of this ordinance. A variance cannot permit a land use that is otherwise prohibited in the zoning district and cannot change the zoning classification of a parcel of land.”

As such, a “variance” petition could not be requested nor approved by the Board of Zoning Appeals as suggested.

Staff researched the occupancy history and current land use status of the structure to determine whether or not a duplex could be considered a grandfathered use. The following table provides a chronological account of the related information included in the subject property’s rental registration case file, which is maintained by the City’s Code Enforcement Division. Fletcher summarized the information presented in the table.

In a responding email dated March 15th, Staff advised the petitioner that:

- The aforementioned property is zoned R-1A, Single-Family Residential.

- According to the Planning and Zoning Code, Article 1329.02, Definition of Terms, a variance is defined as “A deviation from the minimum standards of this ordinance. A variance cannot permit a land use that is otherwise prohibited in the zoning district and cannot change the zoning classification of a parcel of land.”
- According to the Planning and Zoning Code, Table 1331.05.01, Dwelling, Two-Family is not permitted in an R-1A, Single-Family Residential District.
- The Code Enforcement Rental File makes clear that the aforementioned property has not had a Letter of Compliance since December 5, 2005 and has remained vacant.
- It is abundantly apparent from the attached photographs that the structure was built as a single-family residential structure.
- Therefore, it is my [Lisa Mardis, Deputy Planning Director] determination that the structure located at 348 Elysian Avenue can only be used as a single-family residential structure.

Smith Rentals, LLC now seeks an administrative appeal of this determination. The petitioner contends that the grandfathered duplex use of the structure at 348 Elysian Avenue should be upheld. He further contends that financial hardship will result from interior modifications to the structure that may be necessary to establish a single-family dwelling use.

Fletcher stated that according to Article 1329.02 “Definitions” of the Planning and Zoning code, “Grandfathered” is defined as:

“The status accorded certain properties, uses, and activities that are legally existing prior to the date of adoption of the Zoning Ordinance or amendments of the Zoning Ordinance. No use that is nonconforming shall be permanently grandfathered after the adoption of this Ordinance. If nonconforming uses and structures are modified they are subject to regulations provided herein.”

Attached hereto is Article 1373 “Nonconforming Provisions” of the Planning and Zoning Code.

Fletcher stated that the following line of reasoning was used to justify the Planning Department’s determination.

- By the photographs provided in Addendum A, it is apparent to Staff that the subject structure was built as a Cape Code style, single-family residential structure. According to the Monongalia County Assessor’s website, it appears the structure was constructed around 1940, which was nearly thirty years prior to the issuance of Ms. DeBerry’s Letter of Compliance for a duplex.
- The Code Enforcement rental registration case file makes clear that the subject structure has remained vacant since at least June 14, 2005.
- The Code Enforcement rental registration case file makes clear that the subject structure has not maintained an active Letter of Compliance as a duplex since December 5, 2005.
- Article 1373.01 “Nonconforming Uses” of the Planning and Zoning Code clearly provides that the legal, pre-existing nonconforming use of the subject duplex was abandoned on December 15, 2006. Further, said Article clearly provides that the structure may only be put to a permitted use and the nonconforming use may not thereafter be resumed.
- Article 1331.05.01 “Permitted Land Uses” of the Planning and Zoning Code clearly provides that two-family dwelling units (duplexes) are not permitted in the R-1A Single-Family Residential District.

Cardoso recognized Mr. Scott Krabill, agent for the petitioner.

Krabill stated that the structure's address is important 346 and 348 Elysian Avenue which indicates the past use as a duplex. Mr. Smith purchased the home in March 17, 2010. The structure was purchased with the intention of using it as a duplex. The building has separate utility setups. The building has three separate entrances. There is no connection between the two units. There are two baths for each floor. There are two furnaces and two sets of appliances. It would take quite some effort to join the units including cutting into floors and a lot of structural rehabilitation. Although the home was built around 1940 as a single-family unit and he agrees with Staff on this point, almost half of the time this structure has existed it was used as a duplex. The buyer envisioned that he would have to go through the variance process to reinstate its use a duplex. It was made abundantly clear that the variance was not the proper vehicle to reinstate the duplex. So he and the buyer are here tonight with an administrative appeal so that the structure can be a duplex. There are a few points that need to be made. The structure across the street is a five-unit rental. Behind this structure is a duplex. His client has already gone to some extent to cleaning the house up. He has already purchased fifteen windows and invested \$4,000 to \$5,000 already on the building. He has thoroughly cleaned it. He has put a new roof on the rear portion of the building. Removed flooring and replaced it with concrete slabs and replaced floor joists that were degraded. He has replaced three doors and fifteen windows. The client told him that during his efforts to clean up the property, the neighbors have approached him and thanked him for trying to eliminate this eyesore. All the work and activities have been well intended. He is trying to rehabilitate this home and get it back on the tax base for the City and try to make a viable venture of this past eyesore. Granted, it went for a number of years...since 2005 as vacant. The Staff prepared a very nice chronological table in their report. It went for many years dormant, vacant and with no correspondence with the City. That eliminated the twelve-month extension period that was available. He is not sure but he said there is one point that he did see in the Code under non-conforming structures under Section 1373.02, Section "D" there is the possibility of extending the twelve-month abandonment clause for a reasonable period of time. He is not sure that they would fall underneath that but he is grasping at straws looking at what can be found to get this building back on the City's tax base and trying to make it a viable venture for the purchaser and for the neighbors who have to deal with it. He would be more than willing to answer any questions the Board has.

Cardoso stated that looking specifically at Section 1373.02 (D), she asked Krabill to explain a little bit more why he believes this is going to help his client.

Krabill stated that as it reads...normal maintenance and repair of a building or other structure containing a nonconforming use may be performed, including any alterations that would have the effect of bringing the building or other structure into further compliance...where he is going with that is he is trying to bring the structure into compliance with BOCA [ICC] Code and doing what he can to make it a habitable structure. Krabill stated that again he is looking for a loophole or anything that can be found to grant him an extensive of the normal twelve-month grandfathering. He stated that everything was well-intended trying to improve upon a past eyesore. It is going to be an economic hardship if he has to move forward as a single-family structure. His client wants to utilize the structure as it was provided to him...or as it was setup as a duplex.

Shaffer stated that in November 2006, the grandfathering status ended and the buyer should have been aware of that.

Krabill agreed and stated that his client should have been aware of that and he was aware of that. He incorrectly thought that he could have applied for a variance...shame on us. Again, he falls back on commonsense and logic, looking for some help, and throwing himself at the court to make this a better situation for everyone involved, that's all.

Papandreas asked Krabill if he said that he had acquired the property on the 17th of March. Krabill stated yes...on March 17, 2010. Papandreas noted that one of the statements Krabill provided is that his client contends that he will suffer financial hardship as a result of the necessary interior modifications but it seems like he new exactly where this was standing on March 15 because he sent an email to the City and the City responded on the 15th that that [duplex] would not be doable so I would think that anything he did as far as windows, renovations, things like that were probably done at knowing that he was probably fighting an uphill battle.

Krabill stated that he thinks March 17th is when he signed final papers. Krabill agreed with Papandreas and stated that he can not deny this. Krabill stated that he is assuming his client had already committed himself to the purchase after the standard 30 to 60 due diligence period.

Krabill stated that he is trying to make something work for everyone. He understands the letter of the law. He stated that the Board knows the law better than anyone else. He is looking or some help and assistance quite frankly.

Shaffer stated that quite honestly he would be much more sympathetic if the structure had lost duplex status two months prior to the petitioner buying the property. But the Board is looking at a five-year period, which makes it a little hard to look at it in the manner the petitioner is requesting. Krabill stated that he could not argue that point and that a good title attorney would have picked up on.

There being no further comments or questions by the Board, Cardoso opened the public comment portion of the hearing. There being no public comments offered, Cardoso declared the public comment portion of the hearing closed and asked for Staff's recommendation.

Fletcher asked if he could first respond to some of the issues raised by Mr. Krabill. Fletcher stated that he believes the Planning Department has a good track record of assisting when assistance can be given. Mr. Krabill stated that there are some non-single-family uses around the petitioner's property. Fletcher stated that, after visiting the site, he believes the area could be characterized as predominantly single-family, owner-occupied. Fletcher explained that the Code provides for non-conforming uses and non-conforming structures. Staff contends that if the structure was originally constructed as a duplex, for instance a side-by-side duplex, than the structure would be non-conforming. Fletcher stated that he believes that if the structure was left vacant for a period longer than twelve months, then the Planning Department and the Board would have some leeway to aid in allowing the nonconforming structure to be occupied rather than requiring it to be razed or significant renovations and retrofitting to turn the nonconforming duplex structure into a single-family dwelling. Fletcher noted that Mr. Krabill stated that the petitioner purchased the property on or about March 17, 2010. However, the City received an application dated March 5, 2010 from the petitioner requesting a letter of compliance, under the Rental Registration Program, to register the structure as a three-bedroom, single-family rental unit. Fletcher stated that he does not know when the petitioner decided to pursue the duplex approach, but wanted to bring this to the Board's attention.

Fletcher stated that the Planning Department recommends that the subject administrative determination be upheld and that the structure at 389 Elysian Avenue may only be used in compliance with Table 1331.05.01 "Permitted Land Uses" of the Planning and Zoning Code.

Fletcher noted that Morgantown's single-family neighborhoods are highly sensitive to the continuation of non-conforming uses.

Papandreas stated that he wanted to make the same point. There is a movement in Morgantown right now to try to reclaim some of the neighborhoods. Any opportunity the Board would get, especially in one that is this old, to reclaim a house that is a single-family house is probably an opportunity the Board should take.

Shamberger stated that the ordinance does not give the Board any leeway to grant a variance at all. Shamberger stated that he believes the time period lapsed some time ago. You can read the Section "D" as something that helps someone who is making good faith progress in moving forward. But this structure has remained dormant for such a long period and goes way beyond the one-year grace period in the ordinance. He stated that he does not see any latitude for consideration.

Shaffer stated that he agreed with Shamberger and this lengthy period takes the "woops" factor out of the application.

Shaffer moved to deny the petitioner's appeal by finding that the Planning Department correctly interpreted and administered related nonconforming and permitted land use provisions of the Planning and Zoning Code; that the grandfathered status of the previous two-family dwelling (duplex) use of the structure at 348 Elysian Avenue (Parcel 37 of Tax Map 54) expired on December 15, 2006; and, that the subject structure may now only be put to a use permitted in the R-1A, Single Family District. The motion was seconded by Shamberger. The motion passed unanimously with Bossio abstaining.

Mr. Krabill left the Chambers before Cardoso could advise him that the Board's decision could be appealed to the Circuit Court within thirty (30) days. Fletcher stated that this information would be included in the notification letter to the petitioner.

Bossio returned to the Chambers to chair the meeting.

V. OTHER BUSINESS

A. Public Comments – None

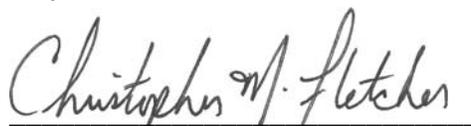
B. Staff Comments – None

VI. ADJOURNMENT – The meeting was adjourned at 7:10 PM.

MINUTES APPROVED:

May 19, 2010

BOARD SECRETARY:



Christopher M. Fletcher, AICP