

BOARD OF ZONING APPEALS

Minutes

6:30 PM

October 21, 2009

City Council Chambers

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

MEMBERS ABSENT: George Papandreas

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 September 16, 2009 minutes** – Fletcher reported that the September 16 minutes would be postponed until the November 18 meeting.

III. **OLD BUSINESS** – None.

IV. **NEW BUSINESS**

A. **V09-27 / Stockwell / 728 West Virginia Ave:** Request by William Stockwell for variance approval from the Planning and Zoning Code, Article 1331.08 Accessory Structures and Uses in Residential Districts as it relates to setbacks and height for property located 728 West Virginia Avenue; Tax Map #40, Parcel #192; an R-1A, Single-Family Residential District.

Fletcher read the Staff Report stating that Mr. Stockwell seeks to raze a legal pre-existing, non-conforming accessory structure that is approximately twenty (20) inches from the side property line and construct a new accessory structure in its place using the same setback distance. The new accessory structure will include a second level that will be used as an office. The proposed height of the structure is twenty-two (22) feet. The applicant has been instructed by Staff that no part of any such structure may be designed or used for sleeping purposes, and no cooking fixtures shall be placed or permitted therein. Addendum A of this report illustrates the location of the subject site.

Article 1331.08 (A) (3) of the Planning & Zoning Code provides that:

“Accessory structures, if detached from a principal structure, shall not be located closer than five feet to the side or rear property line.”

Article 1331.08 (A) (9) of the Planning & Zoning Code provides that:

“Accessory structures shall not exceed eighteen (18) feet in height.”

As such, the petitioner must obtain a 3.33 foot variance to encroach into the required minimum rear setback for the accessory structure and a height variance of four (4) feet.

The petitioner submitted photographic documentation of similar accessory structures situated close to or at the property lines and accessory structures that include and second level, which is attached hereto.

Bossio recognized Mr. Stockwell and asked if he had anything to add to the Staff Report. Stockwell stated that he wanted to remove a dilapidated garage and replace it within that a car could fit into and also provide a music studio area above. Stockwell stated that he provide photographs of several garages in the neighborhood that do not meet the minimum setback or maximum height standards for garages.

There being no questions from the Board, Bossio opened the public comment portion asking if anyone present wished to speak in favor or opposition of the variance petition. There being none, Bossio asked for Staff's recommendations.

Fletcher read the Staff Report stating that the Board of Zoning Appeals 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 recommends approval of the variance with the revisions to the petitioner's Findings of Fact (deleted matter struck through; new matter underlined).

Shamberger moved to accept the Findings of Fact with revisions recommended by Staff; 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:

Many properties in the First Ward have detached garages with little or no setback from the rear or side property lines. Some are built with two stories, deviating from the 18 foot regulated height. This proposed structure would allow extra space that does not appear to be present within the existing home or accessory. The proposed setback is consistent with the setback of the existing accessory structure, which appears to have been constructed several years ago.

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:

Several properties in First Ward have two-story garages erected that do not conform to zoning regulations. The proposed garage would, as with these present structures, allow for inside parking of one vehicle and add useful space above. As documented by the applicant's photographs, there are other accessory structures in the First Ward, specifically on Madigan Avenue which is near West Virginia Avenue, that have non-conforming setbacks and exceed the height requirement.

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 garage should enhance the aesthetics the subject property and surrounding area in general by replacing an old, dilapidated structure. Because the new building will be built on the site of the old one with a slightly larger footprint, no changes to traffic or to the neighborhood in general should occur. This should enhance properties nearby.

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:

There will be no change in the use of the property. The new building will be replacing the existing structure, no change to traffic will come about. The new garage should enhance the beauty of the neighborhood, and should therefore affect property values positively. Granting this variance should not in any way alter the land-use characteristics of the neighborhood, its vicinity, or its zoning district.

Shaffer moved to approve V09-27 / Stockwell / 728 West Virginia Avenue as requested; seconded by Shamberger. The motion passed unanimously.

Bossio advised the petitioner 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. V09-28 / Rice Rentals / Stewart Street:** Request by Rice Rentals, Inc. for variance approval from the Planning and Zoning Code, Article 1374.04 as it relates to setbacks and Article 1337.07 as it relates to Performance Standards for property located on Stewart Street; Tax Map #14, Parcels #473 & 474; an R-2, One and Two-Family Residential District.

Fletcher read the Staff Report stating that the petitioner seeks variance relief from Article 1337.07 (A) of the Planning & Zoning Code, "Performance Standards" which provides that:

"All residential construction shall substantially conform in street orientation and massing to adjacent structures."

The proposed duplex structure will not be oriented toward the Stewart Street. Typically the interpretation of Article 1337.07 assumes that orientation of the surrounding structures will be oriented consistently toward the adjacent street. This is not the case with immediate area on Stewart Street. The orientation of two adjacent three-story multi-family residential structures, which are owned by the applicant, do not front the Stewart Street. As such, there does not appear to be a consistent contextual precedence of Stewart Street facing residential structures within the immediate area. Additionally, the first floor elevation of the proposed duplex will be well below the grade of the road so that the view from Stewart Street will be the upper portion of the second floor and roof.

The petitioner also seeks variance relief from Article 1337.04 (A) of the Planning & Zoning Code, "Setbacks" which provides that the maximum front setback in the R-2 District is twenty (20) feet. The proposed front setback is forty-six (46) feet. Therefore, the applicant is requesting a variance of twenty-six (26) feet.

The petitioner's grounds for both requests are based primarily on the elevation change from Stewart Street to the building site.

The proposed site plan demonstrates conformance with the rear and side setback standards. The petitioner must also obtain minor subdivision approval by the Planning Commission to create a new buildable parcel (scheduled for November 2009 hearing).

Addendum A of this report illustrates the location of the site and photographs of the subject area taken by Staff.

Bossio recognized Mr. Rice and asked if he had anything to add to the Staff Report. Rice stated that Fletcher had covered the variance completely and thanked Staff for preparing the photographic illustrations to better show his variance request.

There being no questions from the Board, Bossio opened the public comment portion asking if anyone present wished to speak in favor or opposition of the variance petition. There being none, Bossio asked for Staff's recommendations.

Fletcher read the Staff Report stating 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 recommends the following revisions to the petitioners Findings of Fact (deleted matter struck through; new matter underlined) and that variance relief be granted as requested with a condition that minor subdivision be approved by the Planning Commission.

Shamberger moved to accept the Findings of Fact with revisions recommended by Staff; 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:

Due to the elevation change between the road and the building site, the first story level of the proposed duplex will not be visible from Stewart Street. Therefore, the structure's front door and related porch/stoop will not be at an elevation, regardless of orientation, to meet the Planning & Zoning Code's intended development pattern. Observing the maximum setback requirement would result in excavating into the hill, which will unnecessarily and impractically increase development costs due to resulting geotechnical measures required for sustaining hillside stability.

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:

Other buildings in the vicinity have similar setbacks to the one proposed and oriented away from Stewart Street. The adjacent structure appears to set back approximately 54-64 feet from the front property line. Because of the topography of the area, the proposed property will not be visible from Stewart Street. Orienting the building toward Stewart Street would not be feasible due to the elevation difference. There appears to be several instances of buildings that do not meet the Planning & Zoning Code's orientation and maximum setback standards.

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:

Over excavation of what appears to be a stable hillside would be unnecessary given the several instances of nonconforming orientation and setbacks within the immediate area along Stewart Street.

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:

Parking already exists, thus having no major impact on congestion on the street. The granting of this variance will allow the proposed structure to be more uniform with existing adjacent properties in terms of orientation and setback.

Shaffer moved to approve V09-28 / Rice Rentals / Stewart Street as requested with the condition recommended by Staff; seconded by Cardoso. The motion passed unanimously.

Bossio advised the petitioner 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. V09-29 / JMTKE, LLC / 692 N. High Street:** Request by JMTKE, LLC for variance approval from the Planning and Zoning Code Article, Article 1343.04 as it relates to setbacks for property located 692 N. High Street; Tax Map #26, Parcel #158; an O-I, Office and Institutional District.

Shamberger stated that several years ago he was involved in advising a fraternity in the area where the petitioner is seeking variance relief. His involvement was not with the Tau Kappa Epsilon fraternity. Shamberger stated that he did not believe his leadership and advisory duties, which he has not had for ten or more years, would affect his ability to fairly consider that petitioner's request but that he would recuse himself if the petitioner requested.

Bossio recognized Justin Byers of JMTKE, LLC and asked he wished Shamberger to recuse himself from the discussion and decision. Byers stated that he did not think that was necessary.

Fletcher read the Staff Report stating that the petitioner has reconstructed the Tau Kappa Epsilon fraternity house at 692 North High Street that includes a front porch leading to the second floor. According to the petitioner, sidewalk demolition along the street that followed the construction of the building, uncovered historical survey pins. This apparently adjusted where the petitioner understood the front parcel boundary to be located resulting in an encroachment of the front porch into the minimum front setback.

The minimum front setback in the O-I District is fifteen (15) feet. The proximity of the front porch to the front property line is thirteen (13) feet, which requires a variance of two (2) feet. The petitioner has halted construction of the porch roof pending a variance determination by the Board. Addendum A of this report illustrates the location of the subject site.

Bossio recognized Byers and asked if he had any additional information for the Board to consider. Byers stated that his surveyor and engineer failed to locate the correct parcel boundary pins. After the building was constructed, Byers felt that porch and deck was closer to the property line than designed or allowed under the zoning regulations. Byers stated that he contacted the Planning Department and was advised that a variance was necessary to avoid replacing the porch/deck with one that meets the setback requirements.

Bossio asked if there was sufficient room to reconstruct the porch/deck so that it could be used in a way that complies with setback standards.

Byers stated that it could be reconstructed but I wanted to pursue a variance to see if that's what the City wanted. Byers stated that there are several instances within the fraternity area where buildings and porches do not meet setback requirements. Byers stated that an adjacent porch attached to an offsite building currently encroaches into his property. Because small lot sizes of the area and the difficulty in finding survey pins, he did not require the adjacent property owner to remove the encroaching porch.

There being no questions from the Board, Bossio opened the public comment portion asking if anyone present wished to speak in favor or opposition of the variance petition. There being none, Bossio asked for Staff's recommendations.

Fletcher stated that the Planning Department received a letter of opposition, which was included in the Board's meeting packet, from Kevin Mallison, Kappa Sigma House Association. Fletcher read the letter into the record. [NOTE: subject letter is located in associated case file managed by the Planning Department]

Bossio recognized Byers and asked if wanted to rebut the issues raised in the letter.

Byers stated that he agreed with the letter and that developers should be required to observe required setbacks. However, this project was designed to meet all setback requirements and that it wasn't until after construction was nearly completed and the porch built was the encroachment identified. Byers stated that he believes he did the right thing by bringing it to the attention of the City and that he is here seeking a variance to correct the problem.

Bossio asked for Staff's recommendations.

Fletcher read the Staff Report stating that the Board of Zoning Appeals must determine whether the proposed request meet the standard criteria for a variance by reaching a positive determination for *each* of the “Findings of Fact” submitted by the applicant. Staff recommends the following revisions to the petitioners Findings of Fact (deleted matter struck through; new matter underlined) and that variance relief be granted as requested.

Shaffer moved to accept the Findings of Fact with revisions recommended by Staff; seconded by Shamberger. 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 property is exceptional in that it is shallower than the surrounding O-I parcels. The depth range for the other properties is approximately 150-214 feet. The realty in question is 97 to 103 feet deep. After a measuring error by the contractor, it was discovered that the porch had been placed two feet into the required setback.

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:

Several properties in the area do not appear to meet the required fifteen (15) foot front setback. Most properties in the zoning district are owned by West Virginia University, which is exempt from meeting City Planning and Zoning Code requirements.

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 depth of the subject parcel, the topography of the area, and the lack of conforming front yard setbacks along North High Street.

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:

Land use characteristics of properties in the area are fraternity/sorority houses and rentals dwelling units. The porch encroachment will not alter the land use characteristics of the area, as it is similar to surrounding development. The encroachment of two feet should not undermine the benefit of delivering a reconstructed fraternity house to the neighborhood where other fraternity/sorority houses have recently been either reconstructed or significantly improved. The encroachment of two feet into the minimum front setback cannot contribute to nor mitigate traffic congestion within the subject area.

Shaffer moved to approve V09-29 / JMTKE, LLC / 692 North High Street as requested with the condition recommended by Staff; seconded by Shamberger. The motion passed unanimously.

Bossio advised the petitioner 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.

V. OTHER BUSINESS

A. Public Comments – None

B. Staff Comments – Fletcher stated that a memorandum and draft ordinances concerning the Administration's proposed changes to the definition of "Family" and residential occupancy citywide were distributed to Board Members for their information.

VI. ADJOURNMENT – The meeting was adjourned at 7:55 PM.