

## HARRISONBURG BOARD OF ZONING APPEALS

The Harrisonburg Board of Zoning Appeals met in regular session in the City Council Chambers on Monday, January 7, 2019, in order to consider the following request which was duly posted. Members present were Matthew Phillippi, Glen Stoltzfus, Thomas Jenkins, Dany Fleming, and Gil Colman. Also present were Alison Banks, Zoning Administrator, Rachel Drescher, Zoning Specialist, Frank Hopkins, Zoning Inspector, and Wesley Russ, Assistant City Attorney.

Mr. Phillippi called the meeting to order at 4:00 PM. The first item of business was the approval of minutes from the prior meeting.

Mr. Fleming: I move to approve the minutes.

Mr. Stoltzfus: I second.

Mr. Phillippi: All those in favor of the minutes as they have been presented say "aye".

The Board unanimously approved the minutes.

Mr. Phillippi: The minutes have been approved. The next item on the agenda is the variance request for 218 Franklin Street from property owners William and Wendy Thompson.

Mr. Hopkins read the following request:

A request by William and Wendy Thompson for a variance of 20 feet from the required 25-foot front setback adjoining East Bruce Street per Section 10-3-181. – Area and dimensional regulations of the UR, Urban Residential District. If granted, an accessory structure may be built five feet from the rear property line adjoining East Bruce Street. The property is located at 218 Franklin Street and identified as tax map parcel 26-I-2.

Mr. Hopkins stated the property at 218 Franklin Street has two public street frontages, one along Franklin Street and one along East Bruce Street. The applicant wishes to construct an accessory structure to replace an existing carriage house, which is located between the existing house and East Bruce Street. Since the property is a through lot, which is a lot with frontage on two parallel streets, per Section 10-3-114 (d), an accessory structure is permitted to be located between a principal structure and a public street; however, per Section 10-3-112 (1) the accessory structure must meet the principal building front setback, which is 25 feet for the U-R District.

The applicant is requesting a variance of 20 feet from the required 25-foot setback along East Bruce Street. If the variance is granted, the applicant plans to replace the existing carriage house with a pool house/storage garage. It should be understood that if the variance is granted, any structure would be allowed to be constructed within five feet from the property line along East Bruce Street.

Mr. Phillippi: Any questions for staff?

Mr. Phillippi: You said to disregard the rear setback. One of the conversations we had out at the site today was that in other residential districts the rear lot setback for accessory buildings is 5 feet, but in the chart, it is 20 feet. Do we know why they set that?

Ms. Drescher: I want to be clear that for residential districts, the setback for accessory buildings is five feet. For this property, the reason it increases to 25 feet is because it is the front yard for a through lot.

Mr. Phillippi: But what if it wasn't a through lot and was in the UR district?

Ms. Drescher: It would be five feet.

Mr. Phillippi: But I thought the chart said 20 for rear yard.

Mr. Hopkins: That is for principal structures.

Ms. Drescher: There is a difference between accessory buildings and principal buildings. For all residential districts the accessory building setback for side and rear yards is five feet.

Chairman Phillippi opened the public hearing portion of the meeting at 4:03 PM. Chairman Phillippi informed those present that the BZA is a function of the Circuit Court. At that time, he swore in anyone wishing to speak regarding the request.

Mr. Colman: What is going to be the use of this structure?

Mrs. Thompson: It will be a multi-purpose, storage, garage, pool house, and entertainment space.

Mr. Colman: So, it is going to be an accessory structure, not for residential use.

Mrs. Thompson: No, not for residential use.

Mr. Colman: Do you plan to renovate or expand the current building, or shift it over?

Mrs. Thompson: It is an expansion. We are taking down what is currently there, which is dilapidated, and putting in a new structure that is larger.

Mr. Thompson: That meets the five feet setback.

Mr. Colman: So right now, it is about five feet from the back.

Mr. and Mrs. Thompson: Yes. It is six feet.

Mr. Colman: On the side?

Mrs. Thompson: On the side, it goes right up to the property line, on the neighbor's side.

Mr. Colman: The variance would allow you to adjust your setback for an accessory building, so that you have the whole backyard to expand it, except for other provisions of the ordinance that requires certain percentage to be still not built. If your plans are just to expand that building you might still be within your allowance for construction. Do you understand?

Mrs. Thompson: No, could you say that again?

Mr. Colman: How much of the rear property can be built?

Mr. Stoltzfus: 30%.

Ms. Drescher: Yes. If this was a typical rear yard, then we would only allow 30% of the required rear yard to be built. Mr. Hopkins has a drawing that shows what they can do, currently. They could build anywhere in this blue area. What the variance would allow them to do is increase that buildable area for their accessory structure.

Mr. Fleming: I do not think they can add on to that structure without a variance. Is that correct?

Mrs. Banks: It depends on how they wanted to add on to it. They cannot encroach any closer to the rear. They could not encroach any more to their neighbor.

Mr. Fleming: But into the lot, even if it is not a building.

Mrs. Banks: Depending on how much and where they wanted to. We would have to take it on a case by case basis.

Mr. Colman: The building setbacks would be expanded to five feet from the rear and five feet from the side, if we were to approve the request.

Mr. Stoltzfus: Do you know how far it is from the concrete edge of the pool to the back of the lot?

Mrs. Thompson: I don't know

Mr. Stoltzfus: I didn't measure that out there. It looks like it would be 20 feet plus another 15 feet maybe. About 35 feet.

Mr. Thompson: About 40 feet. Somewhere in that range. The pool concrete is not very square.

Mr. Stoltzfus: When did that pool go in?

Mr. Thompson: It was there when we purchased the house in 2003.

Mrs. Thompson: It had been there for two previous owners.

Mr. Phillippi: Did you get an estimate for what it would cost to refurbish or renovate the garage?

Mr. Thompson: We did not. It is in pretty bad shape. It's a slab, it's broken. We could probably save some of the wood, but it wouldn't be worth rebuilding on that spot.

Chairman Phillippi asked if there were any further questions. Hearing none, he closed the public hearing portion of the meeting at 4:09 PM and asked if there was a motion.

Mr. Colman: I move to approve the variance, as requested.

Mr. Phillippi: There is a motion to approve the 20-foot variance.

- Mr. Stoltzfus: I second.
- Mr. Phillippi: Going into the discussion here, it is definitely one of those situations, and we have seen these a lot, where things have been done this way and those buildings are there, but when you look at the requirements for variance, when they say unreasonably restrict the utilization of property, it essentially means that the property is unbuildable or unlivable without the variance and we know that is not the case here. With that, the board does not actually have the authority under the state code to grant this variance.
- Mr. Jenkins: One of the challenges here is that, if there was a structure built there, it would fit right in with the rest of the neighborhood. It would fit right in with other adjacent properties. A big challenge for me is the hardship, which we always talk about at these meetings. Is there any structure on East Bruce Street where they are using that as a frontage? It seems that on Bruce Street everything is more of a rear entrance.
- Mr. Fleming: We had that case on Campbell Street, but I do not think we have that case on Bruce Street. The other side are all business.
- Mr. Hopkins: Some are residences, but they are all rear entrances for residents.
- Mr. Fleming: We have had this discussion in other meetings. It is an important one and I am glad that you bring it up. We have the conditions to meet for variance. One of the reasons for the conditions is because there are districts where there are a lot of variance requests, and this does give the board the ability to draw a line pretty clearly in places. One of the reasons that we have some discretion, or that the law allows for discretion, is because in areas like ours where we do not have many requests that come forward, allows us to have some discretion. I hear what you are saying about the exact conditions. I think that the discretion is what applies to us here in an area where we do not have very many of these that come forward. That is how I view it and I appreciate when you hold that line because I think it is an important one to consider.
- Mr. Phillippi: One of the things that I think about when we approve variances that by law we do not have the authority to approve.
- Mr. Stoltzfus: I do not understand that. I am not aware that that is the case.
- Mr. Phillippi: That is the case law. Essentially, when they say *the strict application of this chapter would unreasonably restrict the utilization of the property* means that they could not have a house there. They could not live on that property. That is the line for hardship. Since they have a house there, since they are living there, we know that is not the case. They do not meet that requirement for variance. The case law says that as the Board of Zoning Appeals, we do not have the authority to grant that variance unless all of these are met. When we overstep that authority, the City of Harrisonburg could have the city attorney bring us to court and sue this board for overstepping our authority. That is one of the reasons why I have to bring it up every time. This board does overstep that authority on a regular basis. We need to be cognizant of the fact that doing that opens us up to liability as individuals and as this board.
- Mr. Fleming: That is fair. That is a good reason for you to bring that up at each meeting. That is a valid reason to do that. That is important to do.

Mr. Stoltzfus: That being the case, I cannot imagine that there would ever be a time that we could grant a variance. Which means, why bother.

Mr. Phillippi: That is the situation, really. The legislature needs to fix it. That is the bottom line. We are supposed to be upholding the laws as a quasi-judicial function. We are not a legislative authority. It is up to the legislature to fix that.

Mr. Stoltzfus: When you look at these five or six finds that have to be met, it depends a lot on your interpretation of the word unreasonably, on the word hardship. In good faith, I think that these are all met.

Mr. Phillippi: I understand that. I am basing it on case law.

Mr. Stoltzfus: On case law, if these are met, then you can. Is that correct?

Mr. Phillippi: Yes.

Mr. Stoltzfus: So, if in my interpretation of these they are met, then I, in good faith, can vote to grant it.

Mr. Phillippi: The case law gives the definition of unreasonable hardship. That is what I was talking about. The case law says that if the property can be lived on without the variance, if it can be used as its primary purpose without the variance, then it is not an unreasonable hardship. That is what the courts say about it, as far as our authority. That is why I am saying that, as a board, we do not have the authority to grant this variance. I have to bring that up to make sure that everybody is aware that it opens us up to that liability.

Mr. Fleming: The question was interesting. For the cases that do come up, that we have seen, is it the case that in each of those that we know that all five criteria are actually being met? They are making the ruling on some specific circumstance. I do not actually know that they are using that criteria to say all five of these need to be met for this particular case. Mr. Russ, do you have any idea on that?

Mr. Russ: I do not. I do not understand.

Mr. Fleming: Any case that comes up that goes through the appeals system, presumably you still have the criteria to meet. If the judge at the next level is going to be ruling on whether the variance was granted properly or not usually based on the argument which may not include any of those five criteria.

Ms. Drescher: They are going to be looking at what the state code says. That criteria are verbatim from the state code.

Mr. Fleming: If there is a ruling at the next level, do they actually apply these criteria?

Mr. Stoltzfus: Apparently, they have. Mr. Phillippi, you are saying that case law has determined that it is what they go by and that they interpret it in the strictest manner possible.

Mr. Phillippi: Yes.

Mr. Colman: That begs the question, why do we need a Board of Zoning Appeals?

Mr. Phillippi: It is something we can talk about. We need to be aware of that situation. It needs to be fixed legislatively.

Mr. Fleming: If you look at last year, we had as many declines as accepts. I do not know if all the accepts met that criteria. In fact, they all did not. We use some discretion in that because we have so few cases that come forward. I can understand that it does open up a decision for a lawsuit. Has that happened ever, Alison?

Mrs. Banks: Not that I am aware of.

Mr. Phillippi: Not in Harrisonburg. It has happened in the state.

Mrs. Banks: There have been decisions made that have been contested. It was an appeal, not a variance case.

WHEREAS: Mr. Phillippi called for the vote: Mr. Colman: Yes; Mr. Fleming: Yes; Mr. Jenkins: No; Mr. Stoltzfus: Yes; and Mr. Phillippi: No, and,

BE IT, THEREFORE, RESOLVED: The Board voiced a decision of 3-2 to approve the variance 218 Franklin Street.

OLD BUSINESS:

NONE

NEW BUSINESS:

NONE

OTHER BUSINESS: Review of Summary of Board of Zoning Appeals 2018 Activities

Ms. Drescher: This will be sent to City Council. On the second page, where it lists the membership, please add the dates by when people were chair and vice chair.

Mr. Colman: When did that happen?

Ms. Drescher: October. Any other comments or changes?

Mr. Fleming: Thank you for another great deal of staff production for these details. I make a motion to move the Summary of Board of Zoning Appeals 2018 Activities on to City Council with the membership list corrections.

Mr. Colman: I second.

Mr. Phillippi: All those in favor of moving the Summary of Board of Zoning Appeals 2018 Activities on to City Council say "aye".

The Board unanimously approved the Summary.

With no further business, the meeting adjourned at 4:23 PM.

\_\_\_\_\_ Chairman

Respectfully submitted,

\_\_\_\_\_ Vice-Chairman

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Frank Hopkins

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Staff representative

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