



**BOARD OF ZONING APPEALS MINUTES
MONDAY, December 21, 2020, 6:00 P.M.
COMMISSION ROOM, CITY HALL
LEAVENWORTH, KANSAS**

The Leavenworth Board of Zoning Appeals (BZA) met Monday, December 21, 2020. It was determined a quorum was met with the following board members present: Dick Gervasini and Ron Bates were present in the Commission Chambers and Kathy Kem participated remotely. Mike Bogner and Jan Horvath were absent. Staff members City Planner Jackie Porter and Administrative Assistant Michelle Baragary were present in the Commission Chambers.

Vice Chairman Gervasini called the meeting to order at 6:00 p.m. and called for the first item on the agenda – approval of minutes from November 16, 2020. Mr. Bates moved to accept the minutes as presented, seconded by Ms. Kem and approved by a vote of 3-0.

OLD BUSINESS:

None

NEW BUSINESS:

1. CASE NO. 2020-38 BZA – 3500 S. 4TH STREET

Hold a public hearing for Case No. 2020-38 BZA – 2500 S. 4th Street, wherein the applicant is requesting a variance to allow more than one sign on a storefront for a property zoned GBD, General Business District.

Vice Chairman Gervasini called for the staff report.

City Planner Jackie Porter stated the applicant is requesting a variance to allow more than one sign on a wall for a property zoned GBD, General Business District.

Kung Fu Tea, located at 2500 S. 4th Street, is a business operating inside the main business operation of Kare Pharmacy. The Development Regulations limit the number of wall signs allowed for each side of a structure or part of a structure clearly identified as a storefront to one sign. Kare Pharmacy has one existing wall sign on the East wall, “Kare Pharmacy”.

The variance request is for an additional sign on the east side of the building. The proposed sign is located on the Northeast portion of the building reading “Kung Fu Tea” and a logo, and is roughly 9.5 sqft.

The proposed sign meets the size requirement of the GBD zoning district.

Vice Chairman Gervasini called for questions about the staff report.

Ms. Kem asked if the sign will be lit.

Ms. Porter stated she is not sure if the sign will be a lighted sign.

Mr. Gervasini asked if the Kare Pharmacy sign is illuminated in any way.

Ms. Porter responded she does not believe the Kare Pharmacy is lit but she's not absolutely positive.

Ms. Kem asked if there is a rendering of the Kung Fu Tea sign.

Ms. Porter stated there is not a rendering. The sign application states the sign is an aluminum LED sign.

Ms. Kem asked if it is individual letters or a box.

Ms. Porter stated it will be a raceway.

Mr. Bates asked if there are additional businesses in the building that the board will need to review for a sign variance request.

Ms. Porter responded there are not.

Ms. Kem asked for clarification that staff does not have a rendering or sketch of the sign for the board to view.

Ms. Porter stated she has seen a picture of the sign but unfortunately it is not in the policy report and staff will need to request another rendering of the sign.

Ms. Kem asked what the dimensions of the sign are.

Ms. Porter responded 1.25' H x 8' W.

Mr. Bates stated it would be difficult to approve something without seeing what the sign will look like.

Mr. Bates moves to table the item for additional information/consideration, seconded by Ms. Kem and approved by a vote of 3-0.

The board stated they want all the specifications of the sign and a rendering of what the sign will look like.

2. CASE NO. 2020-39 BZA – 2614 S. 24TH STREET

Hold a public hearing for Case No. 2020-39 BZA – 2614 S. 24th Street, wherein the applicant is requesting an exception from section 1.05.C.4 of the adopted Development Regulations to allow the restoration of a building that is not in conformance with the regulation for the zoning district.

Vice Chairman Gervasini called for the staff report.

City Planner Jackie Porter stated the applicants, Robert H. & Patricia A. Steele, are requesting an exception from section 1.05.C.4 of the adopted Development Regulations to restore a nonconforming structure that was damaged by more than 50% of its fair market value. The dwelling structure located at 2614 S. 24th Street suffered damage by a fire on October 12, 2020, and the reconstruction cost is more than 50% of the market value. The proposed reconstruction project is going to use the existing foundation to rebuild a like construction of the prior structure. In May 2020, the roof was replaced. 2614 S. 24th Street is part of the Whispering Hills Phase 5A with the dwelling structure being built in 2003. The current zoning for this location is Planned Unit Development (PUD). All of Whispering Hills subdivision as a whole was annexed into the City limits. The subdivision phases have been developed meeting the R1-9 (Medium Density Single Family Residential District) zoning restrictions, even though the subdivision is a PUD. R1-9 regulations require for a 6 feet interior side yard setback. There is no variance on file that allows for the subject dwelling structure to encroach the side yard setback requirement. The current structure is roughly five feet from the property line. Leaving the structure to be considered a legal nonconforming structure since the adoption of the current Development Regulations.

There has been one inquiry by Erin Sullivan who has requested to be on record in support of the exception.

Vice Chairman Gervasini called for questions from the board members.

Ms. Kem asked if the outbuilding in the rear yard is also nonconforming.

Ms. Porter stated the outbuilding is conforming; the regulations require a 3 feet rear setback and 3 feet side setback for accessory structures.

Mr. Gervasini asked if the property is zoned PUD and if the property was in the county when the building was constructed.

Ms. Porter stated the property is zoned PUD and was within the city limits when constructed.

Mr. Gervasini stated PUDs go through the Planning Commission for recommendation and then the City Commission for final approval. Mr. Gervasini stated he has a problem if the City Commission approved the PUD with the foundation of the subject property located where it is today.

Ms. Porter stated the land making up Whispering Hills Subdivision was originally located in the county. In 1986, the preliminary plat had the setbacks. However, when the property was annexed in 1987, the PUD focused on streets and sewer and did not mention setbacks until Phase 3 was proposed in 1997. The meeting minutes in 1997 based the setback requirements on the R1-9 district (Medium Density Single Family Residential District).

Ms. Porter further commented the covenants for the PUD stated no building shall be closer than five feet to the interior lot line, or as required by city ordinance. However, the city cannot enforce covenants.

Mr. Gervasini still has an issue with this as the structure was built in 2003 with a building permit issued by the city. Mr. Gervasini further stated since the board is now being asked to clean up what transpired in

2003 when the city allowed this structure to be built without meeting the required side yard setbacks, he does not believe the property owner should pay the application fees for the exception request.

Ms. Porter stated the city must use the current Development Regulations, which states an exception is required to rebuild the subject dwelling since it is not in conformance with the regulations for the zoning district.

Mr. Gervasini stated the City allowed the construction of the foundation within the six feet side yard setback requirement; therefore, the property owner should not be required to pay a fee to clean up the City's mistakes.

Ms. Kem stated it sounds like the PUD is not binding. She understands the PUD is an overlay on top of the zoning but why would the PUD not be binding.

Ms. Porter responded that not until Phase 3 of the Whispering Hills subdivision did it state it was outlined through the R1-9 zoning district. The PUD is over the entirety of the land and the plats were submitted in phases. Furthermore, the various plats did not identify the setbacks. Ms. Porter further stated there is no clear documentation explaining how or why this subdivision was approved to be developed this way.

Mr. Gervasini is not asking staff to explain what happened because it is apparent somebody approved something that was not in conformance with the Development Regulations. The property owner of the subject property along with future property owners within this subdivision should be exempt from application fees for any variance/exception requests related to nonconforming setbacks because the City has caused this problem.

Ms. Porter stated the structures in the Whispering Hills subdivision that do not meet the current Development Regulations are legal nonconforming. When a particular incident happens, such as the subject property suffered over 50% damage by fire, this incident triggers the exception requirement.

Mr. Gervasini stated he does not have a problem granting the exception. His issue lies with the fact the board is cleaning up a mess that was created by the municipality and the municipality charges a fee to the property owner to process the exception request.

Ms. Kem stated it is possible staff and board members do not have the full history of this subdivision and therefore do not understand what the zoning was prior and what the Development Regulations stated at that time. Obviously the structure was built five feet from the lot line. It's possible the structure wasn't legal and the City did not notice it or the builder built it in the wrong place or it could have been legal at that time. Ms. Kem further stated she is not sure if the board has the authority to waive the fee but maybe they could include that as a condition.

With no further questions about the staff report, Vice Chairman Gervasini opened the public hearing.

Erin Sullivan, 2615 S. 24th Street, stated the property owner is not at fault for the structure not being built six feet from the property line. Ms. Sullivan is in favor of the exception request.

David Gunning, 2619 S. 24th Street, stated he too is in favor of the applicant's request to rebuild his home where it is. He further stated many homes in this subdivision probably do not meet the six feet side yard setback requirement.

The applicant, Robert Steele, stated he agrees with Mr. Gervasini's stance that the fee should be waived for property owner's in his situation as he did not know his home was not in conformance when he purchased it in 2003. Mr. Steele further stated it has been 10 weeks since the fire and he is anxious to get moving with reconstruction of his home.

With no one else wishing to speak, Vice Chairman Gervasini closed the public hearing and called for discussion among the board members.

In regards to voting on conditions "a-g", Mr. Bates asked how the board is supposed to make findings of facts directly based on the evidence presented to them. Mr. Bates would like to grant the exception; however, it needs to be done correctly.

Ms. Porter responded the exception is strictly for the side yard setback. The Development Regulations state an exception is required from the Board of Zoning Appeals to restore a nonconforming structure that has been damaged by more than 50% of its fair market value.

In reading condition "a" below, Mr. Bates asked if the staff report is saying that the "proposed exception complies with all applicable provisions of these Development Regulations, including intensity of use regulations, yard regulations, and use limitation".

Ms. Porter responded in the affirmative. Ms. Porter further stated she will be suggesting a text amendment change to the Development Regulations changing this from an exception to a variance.

Ms. Kem asked if the board is giving an exception because the structure does not meet the side yard setback or because the structure was destroyed by more than 50% of its value.

Staff responded the exception is for the side yard setback but what triggered the exception is the structure was damaged by more than 50% of its fair market value.

Ms. Porter stated the exception is to allow the structure to continue as a nonconforming structure.

Ms. Kem stated there are two issues: 1) more than 50% destroyed and 2) the setback, which is a variance issue. The board can approve the exception to rebuild the structure the way it was but the structure will still be legal nonconforming because of the setback issue.

Mr. Gervasini asked if the subject structure was ever damaged by more than 50% of its value in the future, would the owner need to request another exception.

Ms. Porter responded that is her understanding the property owner would need to apply for another exception.

Ms. Kem asked if it wouldn't be easier for the applicant to request a variance for a five feet side yard setback.

Staff stated they will need to research the variance request option further.

Ms. Kem stated condition "a" states the exception must meet yard regulations but it doesn't meet the yard regulations so how is the board to approve the exception request.

Mr. Gervasini stated he would rather give a variance so the applicant can proceed with restoring his home.

Mr. Bates stated half of the conditions the board is to vote on has nothing to do with this subject property.

There is a consensus the board cannot approve the exception request with the information provided to them.

Mr. Gervasini asked if the board can grant a variance instead.

Staff responded a variance request may not be granted on as a variance application was not submitted.

Mr. Gervasini responded this puts the property owner in a bind for another month.

Ms. Kem asked if the board could have a special meeting for the variance.

Staff responded in the negative because Kansas Statute requires notification be sent to all property owners within 200' of the subject property at a minimum of 20 days prior to a scheduled meeting.

Staff called Planning Director Julie Hurley for direction.

Ms. Hurley stated when reviewing the conditions, if a condition is not applicable for the current exception request, then the Chairman will state as such during the voting process. Ms. Hurley believes conditions a-d are applicable and conditions e-g would not be applicable to the current property.

Mr. Bates asked how the 5' side yard setback would comply with yard regulations.

Ms. Hurley stated the exception is to rebuild the nonconforming structure as a nonconforming structure. The exception allows the home to be rebuilt to its original state of legal nonconforming.

Ms. Kem asked if the property owner can receive his building permit if the board approves this exception.

Ms. Hurley responded in the affirmative.

With no further discussion among the commissioners, Vice Chairman Gervasini read the following criteria regarding the Board's authority and reviewed each item.

BOARD OF ZONING APPEALS AUTHORITY:

The Board's authority in this matter is contained in Article XV (Board of Zoning Appeals), Section 11.03.C (Powers and Jurisdictions – Exceptions)

Exceptions: To grant exceptions which are specifically listed as permitted in these Development Regulations. In no event shall exceptions to the provisions of the Development Regulations be granted where the exception contemplated is not specifically listed as in the Development Regulations of the City of Leavenworth, Kansas. An exception is not a variance. Further, under no conditions shall the Board have the power to grant an exception when the conditions of this exception, as established by these Development Regulations, are not found to be present.

1. The Board shall not grant an exception unless it shall, in each specific case, make specific written findings of facts directly based upon the particular evidence presented to it, that support conclusions that:

a. *The proposed exception complies with all applicable provisions of these Development Regulations, including intensity of use regulations, yard regulations, and use limitation.*

Vote 3-0

All board members voted in the affirmative.

b. *The proposed exception at the specified location will contribute to and promote the welfare or convenience of the public.*

Vote 3-0

All board members voted in the affirmative.

c. *The proposed exception will not cause substantial injury to the value of other property in the neighborhood in which it is to be located.*

Vote 3-0

All board members voted in the affirmative.

d. *The location and size of the exception, the nature and intensity of the operation involved or conducted in connection with it, and the location of the site with respect to streets giving access to it are such that the exception will not dominate the immediate neighborhood so as to prevent development and use of neighboring property in accordance with the applicable zoning district regulations. In determining whether the exception will so dominate the immediate neighborhood, consideration shall be given to:*

(1) *The location, nature and height of buildings, structures, walls, and fences on the site, and*

Vote 3-0

All board members voted in the affirmative.

(2) *The nature and extent of landscaping and screening on the site.*

Vote 3-0

All board members voted in the affirmative.

e. *Off-street parking and loading areas will be provided in accordance with the standards set forth in these Development Regulations, and such areas will be screened from adjoining residential uses and located to protect such residential uses from any injurious effect.*

There is consensus this is not applicable to the current exception request.

f. *Adequate utility, drainage, and other such necessary facilities have been or will be provided.*

There is consensus this is not applicable to the current exception request.

- g. Adequate access roads or entrance and exit drives will be provided and shall be so designated to prevent traffic hazards and to minimize traffic congestion on public streets and alleys.*

There is consensus this is not applicable to the current exception request.

ACTION:

Approve or deny the request for an exception of section 1.05.C.4 of the Development Regulations to allow 2614 S. 24th Street to restore a nonconforming structure that was damaged by more than 50% of its fair market value in the Whispering Hills PUD zoning district.

Mr. Bates moved to adjourn, seconded by Mr. Gervasini and approved by a vote of 3-0.

The meeting adjourned at 7:13 p.m.

JP:mb