



BOARD OF ZONING APPEALS MINUTES
MONDAY, January 25, 2021, 6:00 P.M.
COMMISSION ROOM, CITY HALL
LEAVENWORTH, KANSAS

The Leavenworth Board of Zoning Appeals (BZA) met Monday, January 25, 2021. The following board members present in the Commission Chambers: Mike Bogner, Dick Gervasini and Jan Horvath. Ron Bates and Kathy Kem participated remotely. Staff members Planning Director Julie Hurley and City Planner Jackie Porter were also present in the Commission Chambers.

Chairman Bogner called the meeting to order at 6:00 p.m. and noted a quorum was present.

APPROVAL OF MINUTES: December 21, 2020

Chairman Bogner asked for comments, changes or a motion on the minutes presented for approval: December 21, 2020. Mr. Gervasini moved to approve the minutes as presented, seconded by Mr. Horvath and approved by a vote of 4-0. Mr. Bogner abstained.

OLD BUSINESS:

None

NEW BUSINESS:

1. ELECTION OF OFFICERS

Board members have requested a list of their term dates. Postponed for next month's meeting.

2. CASE NO. 2020-38 BZA – 2500 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.

Chairman Bogner called for the staff report.

City Planner Jackie Porter stated this item was tabled from the December 21, 2020 meeting. 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.

As requested in the December meeting by the Board of Zoning Appeals, a conceptual image and material make-up description of the sign has been provided.

Chairman Bogner called for questions about the staff report.

Ms. Kem asked if decals installed in windows that can be seen from the street are considered signs.

Ms. Hurley responded that according to the Development Regulations they are defined as signs but do not require a permit; therefore, they do not count against exterior signage requirements. Window signs are also limited on how much of the window they can cover.

With no further questions from the board members, Chairman Bogner opened the public hearing. With no one wishing to speak, Chairman Bogner closed the public hearing, and 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 11 (Board of Zoning Appeals), Section 11.03.B (Powers and Jurisdictions – Variances)

Variances: To authorize in specific cases a variance from the specific terms of these Development Regulations which will not be contrary to the public interest and where, owing the special conditions, a literal enforcement of the provisions of these Development Regulations will, in an individual case, result in unnecessary hardship, provided the spirit of these Development Regulations shall be observed, public safety and welfare secured, and substantial justice done. Such variance shall not permit any use not permitted by the Development Regulations of the City of Leavenworth, Kansas in such district. Rather, variances shall only be granted for the detailed requirements of the district such as area, bulk, yard, parking or screening requirements.

1. The applicant must show that his property was acquired in good faith and where by reason of exceptional narrowness, shallowness or shape of this specific piece of property at the time of the effective date of the Zoning Ordinance, or where by reason of exceptional topographical conditions or other extra-ordinary or exceptional circumstances that the strict application of the terms of the Development Regulations of the City of Leavenworth, Kansas actually prohibits the use of his property in the manner similar to that of other property in the zoning district where it is located.
2. A request for a variance may be granted, upon a finding of the Board that all of the following conditions have been met. The Board shall make a determination on each condition, and the finding shall be entered in the record.

- a) *That the variance requested arises from such condition which is unique to the property in question and is not ordinarily found in the same zone or district; and is not created by an action or actions of the property owner or the applicant.*

Vote 5-0

All board members voted in the affirmative.

- b) *That the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents.*

Vote 5-0

All board members voted in the affirmative.

- c) *That the strict application of the provisions of the Development Regulations from which the variance is requested will constitute unnecessary hardship upon the property owner represented in the application.*

Vote 5-0

All board members voted in the affirmative.

- d) *That the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare.*

Vote 5-0

All board members voted in the affirmative.

- e) *That granting of the variance desired will not be opposed to the general spirit and intent of the Development Regulations.*

Vote 5-0

All board members voted in the affirmative.

3. In granting a variance, the Board may impose such conditions, safeguards, and restrictions upon the premises benefited by the variance as may be necessary to reduce or minimize any potentially injurious effect of such variance upon other property in the neighborhood, and to carry out the general purpose and intent of the Development Regulations.

ACTION:

Approve or deny the appeal to allow installation of an additional sign to the east side of the Kare Pharmacy building located at 2500 S. 4th Street.

Chairman Bogner stated the board approves the variance request to install an additional sign on the east side of the building located at 2500 S. 4th Street. No conditions, safeguards or restrictions were imposed.

3. CASE NO. 2021-03 BZA – 1922 5TH AVENUE

Hold a public hearing for Case No. 2021-03 BZA – 1922 5th Avenue, 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.

Before providing the staff report, Planning Director Julie Hurley explained the difference between “exceptions” and “variances”. Ms. Hurley stated a property owner can request a variance for any requirement listed in the Development Regulations except for “use”. A property owner cannot request a variance to allow a “use” that is specifically prohibited in a zoning district. Variances typically deal with new situations (i.e. a variance would be requested before constructing an accessory structure that does not meet the required setbacks for the zoning district). Exceptions typically deal with existing situations. So there may be an existing situation where in order to continue or modify the existing situation, an “exception” to the regulations would be required.

Ms. Hurley further stated the City of Leavenworth is pretty much in-line with other nearby cities in regards to the instances in which an “exception” would be an appropriate action. However, we are a little disharmonious with the conditions/criteria a-g that the board votes on. State statute defines an exception but does not list the criteria the board needs to go through as it does for a variance.

Ms. Hurley suspects that whoever wrote the Development Regulations in 2011, was trying to address some specific instances with putting the criteria in there, which is not the correct way to address an exception. However, since the criteria is already listed in the regulations, staff cannot change it. Every year, staff goes through the Development Regulations and any modifications to be made goes through the Planning Commission and City Commission for approval. Staff is currently undertaking this year’s modifications to the regulations and will address the criteria for an exception.

To help the board work through the current criteria, Ms. Hurley added commentary for each criteria. Criteria a-c are applicable to the current exception request and d-g are not.

Mr. Gervasini asked if a residential structure is conforming and over 50% of the structure was destroyed by fire, would an exception be required.

Ms. Hurley responded if the structure is conforming to our current regulations then an exception is not needed to rebuild the home.

Referring to last month’s exception request that was reviewed by the Board of Zoning Appeals, Mr. Gervasini suggested when making modifications to the “exception”, staff define a little more on what is nonconforming, especially if the original building permit was granted by the City.

Ms. Hurley stated the case last month was a bit more complicated because it was a PUD and had established required side yard setbacks. That particular house was not constructed in conformance with the setbacks that were established at the time it was built. Staff does not have a copy of the building permit from back then so it was either 1) approved at the staff level incorrectly or 2) was constructed incorrectly. These are two complicating factors with that particular case. With a more typical situation, you might think of the homes in the north part of Leavenworth where the required setbacks at the time of construction are different from the required setbacks today. We can assume these houses were constructed conforming at the time they were built although they no longer meet our current standards.

Ms. Kem pointed out the application states the applicant is requesting to reduce the side yard setback by one foot, which sounds like that would be a variance request. Shouldn’t the application more clearly define the request is for an exception and not a variance.

Ms. Hurley responded the applicant actually wrote that on the application. From an administrative standpoint, staff will look at having two separate applications; one for a variance request and one for an exception request.

Ms. Kem asked if the board is voting to allow a reduction in the setback or to allow reconstruction of a structure damaged more than 50% by fire.

Ms. Hurley stated the board is voting on reconstruction of a nonconforming structure that was more than 50% destroyed.

Ms. Kem asked if the applicant could have requested a variance for the one-foot reduction in the side yard setback.

Ms. Hurley responded the applicant could have done that. However, the reason a variance may not be the best option is that the applicant would need to meet all five criteria for a variance, which is different from the criteria for an exception.

Mr. Bogner asked about the "grandfather clause" for structures that are legal and conforming and the time of construction but are now considered legal nonconforming and must go through this process of getting a variance or exception.

Ms. Hurley stated any legal nonconforming structure is allowed to stay and continue in operation until the structure is destroyed, they want to expand the structure, etc.

Mr. Bogner asked where the 50% damage came from.

Ms. Hurley stated that is standard.

As a footnote, Mr. Bogner stated many fences were not built on the property lines. If someone is reviewing an existing fence, they may want to crosscheck that through GIS or with a surveyor to validate the fence is actually on the property line.

Ms. Hurley stated staff checks fence installations as much as they can. However, the City Commission has determined they do not want to require a survey for fence permits. It would be up to the applicant and contractor to install the fence in the correct location. Staff does provide the applicant with a copy of the GIS showing the property lines; but that can be 10+ feet off. Furthermore, any dispute between neighbors would be a civil matter.

Chairman Bogner called for the staff report.

Planning Director Julie Hurley stated the applicant, Savannah Nelson, is requesting an exception as allowed by section 1.05.C of the adopted Development Regulations to allow the restoration of a nonconforming structure. The subject property is developed with an existing single family home, which suffered a fire in 2020, requiring repairs totaling more than 50% of the fair market value of the home. The property is zoned R1-6, High Density Single Family Residential District. Section 4.03 of the Development Regulations requires side yard setbacks of 6' for properties zoned R1-6. The existing home has side yard setbacks of approximately 4', making the home a legal nonconforming structure.

Section 1.05.C of the Development Regulations states in regards to the destruction of nonconforming structures:

4. ***Destruction.*** *If a nonconforming structure is damaged by more than fifty percent (50%) of its fair market value, such building shall not be restored if such building is not in conformance with the regulations for the zoning district in which it is located, or an exception is granted by the Board of Zoning Appeals.*

The home is intended to be restored in its original state, with the existing original setbacks.

Mr. Bogner asked if they are voting based on this being a residential property not a daycare center.

Ms. Hurley responded the owner did have a valid special use permit for a home daycare operation at this location. One of the requirements for home daycares is that it is the primary residence of the operator, which had been the case prior to the fire. After the fire, in order to keep operating the home daycare, the owner did purchase another home in Leavenworth and obtain a new special use permit to operate her home daycare at the new location. If the owner wants to move back into the property at 1922 5th Avenue and continue her home daycare, she will need to obtain a new special use permit.

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

Dan Thorman, applicant and contractor, stated (inaudible) he has met the criteria for building code but not for zoning. The structure will be rebuilt on its existing footprint.

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

With no further discussion among the commissioners, Chairman Bogner 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.**

The requested exception relates to a reduced side yard setback, as specifically allowed in Section 1.05 of the Development Regulations, and complies with all other applicable provisions.

Vote 5-0

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.**

The proposed exception contributes to and promotes the welfare of the public by allowing the reconstruction of an existing nonconforming single-family residence after the property suffered damage by fire, displacing the former residents.

Vote 5-0

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.**

The proposed exception will not cause substantial injury to the value of the other property in the neighborhood, as the home will be restored to its original state, no other modifications are proposed.

Vote 5-0

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

This item is not applicable to the specific exception proposed.

Vote 5-0

All board members voted in the affirmative this item is not applicable.

- 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.**

This item is not applicable to the specific exception proposed.

Vote 5-0

All board members voted in the affirmative this item is not applicable.

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

This item is not applicable to the specific exception proposed.

Vote 5-0

All board members voted in the affirmative this item is not applicable.

- 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.**

This item is not applicable to the specific exception proposed.

Vote 5-0

All board members voted in the affirmative this item is not applicable.

ACTION:

Approve or deny the request for an exception as allowed by section 1.05.C of the Development Regulations to allow restoration of a nonconforming structure located at 1922 5th Avenue.

Chairman Bogner stated the board approved the exception request to allow restoration of a nonconforming structured located at 1922 5th Avenue.

Mr. Gervasini moved to adjourn, seconded by Mr. Horvath and approved by a vote of 5-0.

The meeting adjourned at 6:38 p.m.

JH/JP