



**BOARD OF ZONING APPEALS MINUTES**  
**MONDAY, January 22, 2018, 7:00 P.M.**  
**COMMISSION ROOM, CITY HALL**  
**LEAVENWORTH, KANSAS**

The Leavenworth Board of Zoning Appeals (BZA) met in regular session on Monday, January 22, 2018. It was determined a quorum was met with the following board members present: Mike Bogner, Dick Gervasini, Ron Bates, Kathy Kem and Jan Horvath. Staff members City Planner Julie Hurley and Administrative Assistant Michelle Baragary were present.

Chairman Bogner called the meeting to order at 7:00 pm and called for the first item on the agenda; approval of minutes from September 18, 2017. As there were no comments or changes, Mr. Gervasini moved to approve the minutes as presented, seconded by Mr. Horvath. The minutes were approved 5-0.

The chairman called for the next item on the agenda – **Case No. 2018-01 BZA – 1050 Wallis Lane – Variance Request** - and requested the staff report.

City Planner Hurley addressed the board stating the applicant, Kyle Whelpley, is requesting a variance from section 4.03 of the adopted Development Regulations to allow a side yard setback on a corner lot of less than 25'. The subject property is located in the Wellington on the Park subdivision and is zoned R1-6, High Density Single Family Residential District, with an existing single family home on the lot. The subject property is surrounded by other single family homes of a similar size and nature.

The R1-6 zoning district requires a minimum side yard setback on a corner lot of 25'. The applicant is proposing to construct a building addition on the west side of the house for the purpose of creating an additional garage, which would be accessed by a new driveway proposed to be built off of Grand Avenue. The home faces Wallis Lane and has an existing two car garage to the front of the house, access off of an existing driveway on Wallis Lane.

The applicant has proposed two options for the addition. The first option would observe a 12' side yard setback. The second option would observe a 16' side yard setback. No other changes to the property are proposed.

Although not specifically requested on the application for a variance, approval of the requested variance in regard to the side yard setback would necessitate approval of a variance for maximum lot coverage in conjunction. Section 4.03 of the Development regulations allows a maximum lot coverage in the R1-6 zoning district of 50%. Per County records, the subject lot is 10,938 square feet, for a maximum allowed lot coverage of 5,469 sqft (total impervious area). Total existing lot coverage is 5,072 sqft. The proposed addition would add between 600-720 sqft of building area, plus the area of the proposed driveway.

After notice was sent to neighboring properties within 200' of the subject property, as is required by Kansas State Statute, staff received three letters in support of the proposed variance, and four letters in opposition to the proposed variance.

The chairman called for questions or comments from the board about the staff report.

Mr. Bates asked if the two variance requests should be taken up separately when evaluating the five criteria/conditions.

Ms. Hurley stated that would be her suggestion.

Mr. Bates asked if the swimming pool is calculated in the 50% lot coverage.

Ms. Hurley stated it is.

Mr. Gervasini asked what takes precedence, the City's ordinance or the property owner's HOA covenants. And how does the board consider the HOA covenants.

Ms. Hurley stated the board cannot take HOA covenants into consideration. The City has no jurisdiction over HOA covenants. HOA covenants are a civil matter between property owners and the Home Owners Association. If the board were to approve the variance it would then be in the jurisdiction of the HOA to take the matter up in civil court or any other manner they deem appropriate with their attorney.

Mr. Bogner asked if it would have been more prudent for the applicant to have first gone to the HOA to see if they had any objections before coming to the Board of Zoning Appeals; especially since HOA's are typically stricter plus it would have been cheaper or free to take this matter before the HOA.

Ms. Hurley responded that would be a question for the applicant.

Ms. Kem asked if there have been other similar cases in this particular area.

Ms. Hurley stated not that she is aware of.

Mr. Bogner asked the applicant to approach the board to answer questions regarding the property. Mr. Bogner asked if the proposed addition is a one-story or two-story.

Kyle Whelpley, applicant, stated it is a one-story. It would have the same roof pitch and color of the house. The garage addition would have one double door and would be used for storage.

Mr. Bogner stated the proposed driveway width looks to be 30'.

Mr. Whelpley stated the driveway would be the standard 20' – 22' width driveway.

Mr. Bogner asked if the applicant runs a home business out of the property.

Mr. Whelpley stated he does not. He works for JF Denney. His work van is parked in his driveway only when he is on-call. Mr. Whelpley further stated the garage addition would be used for storage of kid's toys, pull-behind trailer, etc. The applicant stated a property similar in nature to his variance request would be 702 Deerfield Street.

Mr. Bogner asked what kind of hardship there would be if the board considered the smaller addition.

Mr. Whelpley stated there would not be a hardship.

Ms. Kem asked where the trailer is currently stored.

Mr. Whelpley explained the trailer is currently stored behind his house under the deck.

Mr. Bogner asked if the applicant had met with his HOA about the addition.

Mr. Whelpley responded he visited with Rich Keller, HOA Vice President, about the garage addition. He understands he must get approval from the HOA even if the City of Leavenworth approves it.

With no further questions from the board, Chairman Bogner opened the public hearing.

Rich Keller, HOA Vice President, approached the board stating the board always asks property owners to get city approval prior to HOA approval. The HOA does this so they are not approving something that is not allowed by city code. In this case, the HOA covenants for setbacks read the same as city code.

Mr. Bates commented that by having the applicant come before the Board of Zoning Appeals, the HOA is making the members of the Home Owners Association incur a substantial amount of cost, time and effort and taking up the time of the BZA board members for something the HOA might not approve.

Mr. Keller stated most requests are for sheds or painting buildings a particular color. Most requests are not as substantial as the request presented today. Typically, the applicant contacts the city to find out if their request is acceptable by the city. The property owner then submits their request to the HOA for approval.

Mr. Bates stated he was just commenting on the fact the applicant would need to come before the Board of Zoning Appeals before having the HOA consider the issue and that it seems to be an inefficient procedure.

Mr. Bogner stated he understands how the HOA would have property owners contact the City if they were seeking a permit for construction or erection of a fence that already meets city codes; however, this applicant is requesting a variance, which is an exception to the code. In cases like this, the HOA may want to consider conducting an informal review to see if the HOA is in concurrence with the exception with city code.

Allan Boyce, 4107 Grand Ave, stated he submitted a letter in opposition and would like to make a statement to amend a couple paragraphs of the written statement. Mr. Boyce would not like his statement considered about Kyle Whelpley's porch. He has since spoke with Mr. Whelpley and was informed about some information which he was unaware of at the time. This is the first time a major variance has come up in the 13 years Mr. Boyce has lived in the Wellington community. He agrees with Commissioner Bates that the HOA may want to discussion procedures for variances of such a magnitude. Mr. Boyce stated his main concern is safety with possible visibility problems.

Ms. Kem asked that if the board approved the variance, would it then go to the Development Review Committee (DRC) for consideration.

Ms. Hurley stated it would not necessarily need to formally go before the DRC. These are things that are looked at when a building permit is submitted. Part of the reason for the required 25' setback is for visibility issues.

With no one wishing to speak, Chairman Bogner closed the public hearing and asked for discussion among the commissioners. With no further discussion among the commissioners, Chairman Bogner read the following criteria regarding the Board's authority and reviewed each item. The commissioners will have two series of votes. The first series of votes will be on the variance request to allow a side yard setback on a corner lot of less than 25'.

**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 to 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 2-3**

***Ms. Kem voted in the negative stating it's not unique to the property as there are corner lots everywhere around the City of Leavenworth.***

***Mr. Gervasini voted in the negative.***

***Mr. Bogner voted in the negative commenting it was created by the applicant.***

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

**Vote 0-5**

***All board members disagreed; the granting of the variance would adversely affect the rights of adjacent property owners or residents.***

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 0-5**

***All board members disagreed; the strict application of the Regulations would not constitute unnecessary hardship...***

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

**Vote 0-5**

***All board members disagreed; the variance desired will adversely affect the public health, safety...***

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

**Vote 0-5**

***All board members disagreed; granting of the variance will be opposed to the general spirit and intent of the Development Regulations.***

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 these Development Regulations.

Mr. Bates moved to close the case and not vote on the variance for the lot coverage since the variance request for the setback was denied. Ms. Kem seconded the motion. Chairman Bogner asked City Planner Julie Hurley if there were any procedural issues with moving to close the case. Ms. Hurley responded there were not. Motion carried 5-0.

The chairman called for the next item on the agenda – **Case No. 2018-02 BZA – 1000 Delaware Street – Variance Request** - and requested the staff report.

City Planner Hurley addressed the board stating the applicant, Sharon Jones, is requesting a variance from Section 4.03 of the adopted Development Regulations to allow a maximum lot coverage of over 50%, and from Section 5.05B to allow a driveway separation of less than 50’.

The subject property is a vacant lot at the northwest corner of 10<sup>th</sup> and Delaware Streets, with single-family residential structures to the north, west and south, and a City of Leavenworth fire station to the east. The property is zoned R1-6, High Density Single Family Residential District. The applicant intends to develop the property with a structure and associated parking for the Faith Mission Church. Churches are an allowed use within the R1-6 zoning district.

The R1-6 zoning district requires a maximum lot coverage (total impervious area) of 50%. The applicant is proposing a lot coverage of 59.9% in order to accommodate the building, required parking, and associated walkways.

Section 5.05B of the Development Regulations requires that any driveway for a non-residential use be located a minimum of 50’ from any other access driveway. Due to the nature and size of the lot, the only reasonable location for the parking area requires that the driveway be at the northern end of the lot, putting it a distance of 10’ from the existing residential driveway on the property immediately adjacent to the north.

The Development Review Committee reviewed the proposal at their November 30, 2017 meeting. No other significant issues were identified.

Staff has received no contact from property owners within the required 200’ notification area.

The chairman called for questions or comments from the board about the staff report.

Ms. Kem asked what the required minimum number of parking spaces is.

Ms. Hurley stated the applicant is providing the minimum number of parking spaces required by the Development Regulations, which is 1 parking stall per 4 seats or 1 parking stall per 30 sqft if no fixed seating is provided.

Ms. Kem asked if the pond is currently on the property.

Ms. Hurley stated it is not. Public Works staff required detention on site to account for water quality issues, which is why the pond is shown on the site plans.

Ms. Kem stated notes on the plan state the site will be raised. How will this affect neighboring properties.

Mr. Hurley responded that by speaking with the City's engineering staff the detention pond plus the grading would keep any draining issues from affecting the surrounding properties.

Ms. Kem asked if grading would impact the adjacent duplex located to the west of the subject property.

Ms. Hurley stated they are required not to impact adjacent property owners. This would be reviewed when they come in with grading or building plans and would be a stipulation when permits are issued.

Ms. Kem asked if the house to the north of the subject property is currently their house church.

Ms. Hurley stated the applicant could answer that and that the applicant does own the house to the north.

Mr. Gervasini asked if the City plans on doing anything with the first 150' of Delaware St west of 10<sup>th</sup> Street; the curvature in the road.

Ms. Hurley stated she is not aware of any plans to improve that section of Delaware St.

Mr. Bogner asked if this block is part of a normal plat. All the other houses seem to have uniform lot lines but this block seems very complicated.

Ms. Hurley stated they are all platted lots; part of the Central Subdivision. When dealing with plats that were done 80 to 100 plus years ago lots have sometimes been re-subdivided and combined. But this block was originally part of an actual platted subdivision.

Mr. Bogner asked if the City plans on doing anything with 10<sup>th</sup> Street.

Ms. Hurley stated she is not aware of any plans to improve this section of 10<sup>th</sup> Street.

Chairman Bogner asked if there were any more questions for staff or the applicant or representative of the church.

Ms. Kem asked how close the churches driveway will be to the church house.

Patrick Joyce, civil engineer representing the church, stated it's just over 10 feet.

Ms. Kem stated she knows there are a lot of cars at the church house and asked how that would impact the new church. Will the two buildings coexist or will services only be operated out of the new church.

Sharon Jones, applicant, stated services will be operated out of the new location. She further stated she has a very large family that has dinner at her house on Sundays so there will be numerous cars at her residence (church house).

Mr. Joyce stated they are installing as many parking stalls as possible. He further stated the City is allowing them to add a gravel shoulder on the corner of Delaware in front of the church. It will not go beyond the property line.

Mr. Bogner asked which way the drainage will flow.

Mr. Joyce stated some water will continue to drain toward Delaware Street. Some water will drain out through the houses, which feeds to a storm water system.

Mr. Bogner asked how much the site will be altered.

Mr. Joyce stated the site will be raised some to even it out and create the pond.

Mr. Bates asked staff how many variances will be considered.

Ms. Hurley stated the first variance request is 10' separation between the two driveways and the second variance request is over 50% lot coverage.

Mr. Bates asked if the setbacks are good.

Ms. Hurley stated that on a corner lot it has the 25' setback. The regulations do allow for these older platted lots to take into account the existing average setback on the same block; therefore, they are able to take into account the setback created by the existing homes surrounding the subject property. This then becomes their setback.

Mr. Bates asked if the City takes into consideration easement near the street and how that impacts the 50% lot coverage.

Ms. Hurley responded that staff cannot count the right-of-way; can only count what is inside the lot line for the 50% lot coverage calculations.

Mr. Gervasini asked the frequency of services.

Ms. Jones stated services are held Sundays and Wednesdays.

Mr. Gervasini asked if the Wednesday services are in the evening.

Ms. Jones responded in the affirmative.

Ms. Kem asked if the church sidewalk is adjacent to the building; walking from the parking lot to the building.

Mr. Joyce stated the sidewalk is adjacent to the building on the north side by the parking lot. There is some green space between the building and the sidewalk on the 10<sup>th</sup> Street side, the east side of the building.

Ms. Kem mentioned her concern about kid's safety around 10<sup>th</sup> Street.

With no further questions or comments from the commissioners, Chairman Bogner opened the public hearing.

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

Mr. Bates stated his only concern on this project is that they have identified that this area is cobbled up and has all sorts of issues and he wonders if we should be improving something that is going to add additional issues to the area.

Mr. Bogner stated is it going to make it worse or just change.

Ms. Kem asked if there have been variances for lot coverage in the area.

Ms. Hurley responded not that we have recorded going through the Board of Zoning Appeals (BZA).

Mr. Gervasini stated his primary concern is safety. 10<sup>th</sup> Street is heavily travelled. If permitted, parking will occur on 10<sup>th</sup> Street. If the congregation grows, this can create a problem. He is also concerned about the fire station located across the street.

Ms. Hurley stated the fire department is part of the Development Review Committee and they had no concerns. She further stated parking is allowed on this section of 10<sup>th</sup> Street.

Mr. Bogner asked the engineer why he decided against installing the church parking lot and driveway on Delaware Street.

Mr. Joyce stated his decision was based on the proximity to the busiest access point. The space requirement from a residential driveway is 12'. By putting the parking lot and driveway on Delaware Street, it would now violate the 50' rule for a driveway at the intersection of 10<sup>th</sup> Street and Delaware.

Ms. Hurley stated there is a requirement that non-residential access drives be 75' from an intersection which this meets. If it were to be on the Delaware side it could not be 75' from that intersection due to the narrowness of the lot. No matter which way the church and parking lot was designed, they would need to request one variance or another.

Ms. Kem asked if there was a driveway entrance off Delaware Street or is that just from casual use.

Ms. Hurley believes that is just from casual use.

With no further discussion among the commissioners, Chairman Bogner read the following criteria regarding the Board's authority and reviewed each item. The commissioners will have two series of votes. The first series of votes will be on the variance request from Section 4.03 of the adopted Development Regulations to allow a maximum lot coverage of over 50%.

**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 to 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 4-1**

**Mr. Horvath voted in the negative.**

- 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 agreed; the granting of the variance would not adversely affect the rights of adjacent property owners or residents.**

- 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 agreed; the strict application of the Regulations would constitute unnecessary hardship upon the property owner...**

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

**Vote 3-2**

**Mr. Gervasini and Mr. Horvath voted in the negative.**

- 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 agreed; granting of the variance will not be opposed to the general spirit and intent of the Development Regulations.**

Chairman Bogner stated the next series of votes will be on the variance request from Section 5.05B of the adopted Development Regulations to allow a driveway separation of less than 50'.

- 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 agreed; 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.**

- 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 agreed; the granting of the variance would not adversely affect the rights of adjacent property owners or residents.***

- 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 agreed; the strict application of the Regulations would constitute unnecessary hardship upon the property owner...***

- 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 agreed; the variance desired would not adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare.***

***Ms. Kem agreed with some hesitation because of the safety issue with it being on 10<sup>th</sup> Street.***

- 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 agreed; granting of the variance would not be opposed to the general spirit and intent of the Development Regulations.***

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 these Development Regulations.

Ms. Kem asked if there is room for a wrought iron fence or some other low fencing to be installed between the building and the public sidewalk to prevent children from running out into 10<sup>th</sup> Street.

Ms. Hurley stated the regulations allow for a fence to be placed on the property line.

Mr. Bogner asked if it could be landscaping instead of a fence.

Ms. Hurley stated it can be landscaping, a hedge row or something to the affect.

Mr. Bogner asked if the board can leave it open enough for the applicant to decide how to handle it rather than the Board dictate on what should go there.

Ms. Hurley stated the board can impose a condition that some sort of physical barrier must be placed along the walkway from the parking lot to the front of the building.

Mr. Bates stated he has attended many churches that have been located on busy streets and there were not handrails or fences to keep kids out of the street. His first thoughts are that a handrail may be inviting for kids to hang and spin on.

Ms. Kem stated the uniqueness of the proposed church is that it would be so close to 10<sup>th</sup> Street. Most churches are set farther back from the street.

Mr. Bates is not opposed to making anything safer. There just may be unintended consequences.

Mr. Gervasini suggested the applicant reimburse the City for posting signs facing north and south about church crossing or other such sign which would be appropriate.

Ms. Hurley stated sign requests must go through the Traffic Safety Committee, which is composed of the City Planner, Police Chief and Public Works Director. Ms. Hurley is not sure of what the criteria are for posting such signs but she can bring it up to the committee that the Board had made that suggestion and see what the consensus is.

Mr. Bogner said the condition would be for the applicant to work with the City on opportunities to improve the safety around the church. This would leave it open for review and considerations.

Ms. Kem stated that would address the traffic down 10<sup>th</sup> Street but would not necessarily address the kids that may try to run and play around 10<sup>th</sup> Street.

Mr. Joyce stated the applicant would not have any objections to the recommendation.

Mr. Bates moved to approve both variance requests as presented, seconded by Mr. Gervasini. Variance request 2018-01 BZA and 2018-02 BZA passed by a unanimous vote 5-0.

#### **OTHER BUSINESS**

Mr. Gervasini stated in the past they have had decisions from various courts around the country with regard to zoning ordinances in the form of newsletters. Mr. Gervasini asked what happened to those newsletters.

Ms. Hurley asked what body put the newsletters together.

Mr. Gervasini stated he was not sure but that they were judicial court cases.

Ms. Hurley stated The American Planning Association does put out legal reviews. She will look into this and get back with the Board.

Finding no other business, chairman Bogner called for a motion to adjourn. Mr. Gervasini moved to adjourn, seconded by Ms. Kem and passed by a unanimous vote 5-0.

The meeting adjourned at 8:11 pm.

JH:mb