

**MINUTES OF THE MEETING
OF THE
GREAT FALLS BOARD OF ADJUSTMENT
July 12, 2012**

CALL TO ORDER

The meeting of the Great Falls Board of Adjustment was called to order by Chair Cummings at 3:01 p.m. in the Commission Chambers of the Civic Center.

ROLL CALL & ATTENDANCE

Great Falls Board of Adjustment Members present:

Mr. Casey Cummings
Mr. Tim Peterson
Mr. Jeff Foster
Mr. Chris Ward
Ms. Kim Martin

Great Falls Board of Adjustment Members absent:

None

City Staff Members present:

Mr. Mike Haynes, AICP, Director, Planning and Community Development
Mr. Charlie Sheets, City Development Review Coordinator
Ms. Galen Amy, Planner I
Ms. Jana Cooper, Planner II
Ms. Phyllis Tryon, Sr. Administrative Assistant
Ms. Patty Cadwell, Neighborhood Youth Coordinator

Action Minutes of the ~~Planning Advisory Board/Zoning Commission~~ Board of Adjustment/Appeals. Please refer to the audio/video recording of this meeting for additional detail.

MINUTES

Chair Cummings asked if there were any amendments to the minutes of the February 16, 2012 meeting, and there were none. Mr. Peterson moved to adopt the minutes as received. Mr. Ward seconded, and all being in favor, the motion passed.

OLD BUSINESS

There was no old business.

NEW BUSINESS

BOA2012-2, 1101 7th Street South, Rothwell **Request for Rear Yard Setback Dimensional Variance** **(Applicant: Gus & Jack's Tire Shop)**

PLANNING STAFF REPORT & RECOMMENDATION

Charlie Sheets, Development Review Coordinator, reviewed the staff report for the request for a rear yard setback dimensional variance for Gus & Jack's Tire Shop at 1101 7th Street South. The requested variance would reduce the required rear yard setback in order for the applicant to build a new commercial retail space. Mr. Sheets stated he was entering the Staff report into the record.

The property is zoned C-2 General district and is about 2.32 acres. The applicant is proposing new construction of 15,000 s.f. of new retail space and parking area and is requesting a 0-foot rear yard setback from the east property line, adjoining existing commercial development. The proposed commercial building would be constructed at the rear of the lot and the development would result in better vehicular and pedestrian circulation on site and through the neighboring commercial development.

Notice of the Public Hearing was mailed to neighboring property owners and published in the *Great Falls Tribune* on June 24, 2012. Staff did not receive any questions or comments from the public.

The standard setback for the rear property line in this zoning district is 1/10th of the property depth. City Commission rezoned all properties within the City in 2005 and established new zoning and setbacks, making the existing warehouse and neighboring commercial buildings legal nonconforming structures with 0-foot rear yard setback. Mr. Sheets stated that due to the deep lot, the City Code setback requirement represents a clear hardship and is not consistent with development in the surrounding neighborhood.

Mr. Sheets concluded his review of the staff report and stated that staff supports this application.

PETITIONER'S PRESENTATION

Mr. Mark Macek, Macek Companies, Inc., spoke on behalf of Mr. Rothwell of Gus & Jack's Tire Shop. Mr. Macek stated the 0-foot rear yard setback is consistent with properties in the area and provides flexibility for good site planning and good traffic and pedestrian flow. He said the proposed building plan will not work if the proposed 15,000 s.f. retail building is required to be built 48 feet into the property, and the area left behind the building would not be useful.

PROPOSERS OPPORTUNITY TO SPEAK

There were no proponents.

OPPONENTS OPPORTUNITY TO SPEAK

There were no opponents.

PETITIONER'S CLOSING

The petitioner had no further comments.

PUBLIC COMMENT

There was no public comment.

BOARD DISCUSSION AND ACTION

Board members inquired of Mr. Macek regarding traffic flow in the area in relation to setbacks. Mr. Cummings asked where the Cine 4 building was located in reference to the Cine 4 lot line. Mr. Sheets confirmed the building was right on the lot line with a 0-foot rear setback. Mr. Macek said it is possible the proposed new building could attach to the Cine 4 building. He said they have been working closely with the owners of the Cine 4 building to establish a connection between the proposed new building and Cine 4. However, the practicality is there may need to be room for footings with the proposed new structure. Mr. Haynes confirmed for the board that either of these possibilities can be achieved with accepted construction practices.

Mr. Ward inquired about the spirit of the Code for rear yard setbacks and how this might apply to this request. Mr. Haynes explained that rear yard setbacks protect the neighboring property owner, but in this case, property owners are working together and a 0-foot rear yard setback makes sense for this development.

Mr. Ward said that if this request was for a proposed building right on the property line next to the Comfort Inn, this would be a different discussion. He stated that, in his opinion, the unique quality of this request was not the shape of the lot but that the Cine 4 building is built onto the property line with no windows or ventilation on that elevation, indicating an expectation that an adjacent property owner would also build up to the property line. Mr. Haynes said the variance process is not a "one size fits all" approach, and that a key to the variance process is to look at the specific characteristics of a site to determine if a variance request is appropriate in that particular condition.

Mr. Cummings agreed with Mr. Ward's assessment and said he would view the 0-foot rear yard setback differently if the Cine 4 building was not on the lot line. He also said he had some reservations about setting a precedent and that the wording of a motion is an important consideration. There was discussion about the need to include or not include each of the conditions proposed in the staff report. Mr. Cummings noted the Board is being asked to make a decision without having many specifics. There was continued discussion about possible changes in the development plans and how that might be affected by a 0-foot rear yard setback. Mr. Macek confirmed that a 0-foot rear yard setback is essential to this particular project. Mr. Cummings suggested it would be helpful in the future to have a site plan included for the Board's review. Ms. Martin stated that the part of the special circumstances for this variance is that it will improve circulation and safety.

MOTION: That the Board of Adjustment approve the requested variance for 1101 7th Street South to waive the minimum rear yard setback of 1/10 of the lot depth.

Made by: Mr. Ward
Second: Mr. Foster

VOTE: All being in favor, the motion passed.

Mr. Sheets advised the petitioner on the next procedural steps. For the record, Mr. Haynes stated that on the staff report, the record number for this project was listed as 2012-3 when in fact it is record number 2012-2.

**BOA2012-3, 2101 1st Avenue Southwest
Request for Variance - Accessory Building Height Dimensional Variance
(David & Lauren Fleming)**

PLANNING STAFF REPORT & RECOMMENDATION

Jana Cooper, Planner II, presented the City staff report for a dimensional variance request by David and Lauren Fleming at 2101 1st Avenue Southwest. Ms. Cooper stated she was entering the staff report into the record. The subject property is zoned R-1 Single-family suburban residential district and the variance request is related to the detached garage on the subject property. The applicant is requesting a variance to City Code Title 17, Chapter 20, Article 4, Exhibit 20-4, related to the maximum height of accessory buildings. Maximum permitted height of accessory buildings is 12 feet, and the owner is requesting approval of a 21-foot high accessory structure.

Ms. Cooper reviewed a brief history related to the project. The owner received a building permit in May 2009 to construct a 21-foot high detached garage. Email communications between the home owner and City staff indicate a second story would not be permitted within the structure. From June 2009 to December 2010, inspections were done on this project up to about the framing of the structure. Ms. Cooper stated that in August 2011, she received a complaint that the garage was being used as a second dwelling. The City Building Official and Ms. Cooper inspected the building on August 26, 2011, and determined a second story dwelling unit had been constructed. Ms. Cooper showed slides of areas in the garage with bedrooms, full bathroom facilities, complete kitchen, living area, as well as a second bathroom and laundry facilities on the first floor.

Two dwelling units are expressly prohibited in the R-1 Single-family residential district. Staff supports the request for a height variance to this accessory structure to bring this non-conforming structure into conformance with City Code. Ms. Cooper noted that it is not within the authority of this Board to approve a second dwelling unit in this zoning district. Notice of this public hearing before the Board of Adjustment was published in the *Great Falls Tribune* on June 24, 2012. There is an outstanding complaint from neighbors, who were present at this meeting. Ms. Cooper stated that information was also provided to Neighborhood Council 2.

Ms. Cooper reviewed staff findings and conditions of approval as noted in the staff report. She noted that while the situation was clearly self-created by the property owner, staff finds the most reasonable solution to be a height variance with conditions of approval for the subject building.

Part of the kitchen facility would need to be removed to bring the structure into compliance as an accessory structure and not a second dwelling unit. The property owner would also need to apply for building permits, pay all fees, and complete all inspections with the City Building Safety Division. The alternative is for the owner to remove all improvements and bring the property into compliance per the submitted building plans.

PETITIONER'S PRESENTATION

David Fleming, 2101 1st Avenue Southwest, stated that he was unaware the staff would recommend approving this variance until Monday of this week. Mr. Fleming spoke at length about the history of his family in Great Falls and on this property. He stated that they prepared the house on the property to rent out, and did so up until December of last year, saving \$30,000. He stated the garage holds two cars, three motorbikes, and an ATV. He said they decided to build a structure in which they can prepare a meal and use a bathroom while building a new house on the property. He then introduced Curtis Thompson, a member of his scout troop, to represent him, stating he and the City had a great deal to disagree about on this issue. He handed out a photograph of his garage building to the Board.

Curtis Thompson, #201 600 Central Avenue, spoke on behalf of the applicant. He stated the proposed solution to this problem carries with it a perpetual guarantee for a restrictive covenant on land which makes it clear that the garage structure can never be used as a second dwelling. Mr. Thompson said that Mr. Fleming's intention is to eventually tear down the existing house on the property, built circa 1950s, and build a larger modern home.

Mr. Thompson spoke regarding the City's condition that the gas piping to the subject structure, which serves a gas oven, be removed. Mr. Thompson spoke in favor of Mr. Fleming's commitment to Boy Scouts and the use of the structure to facilitate Boy Scout activities. He suggested a change in the wording of the motion to specify that this accessory structure can never be used as a second dwelling, instead of as a dwelling. He commended Ms. Cooper and staff for working toward a solution to this issue.

PROponents OPPORTUNITY TO SPEAK

Lonnie Adkins, 2723 4th Avenue North, said he was current Scout Master of Troop 7 and presented photographs to the Board demonstrating boy scouts building kayaks and motors at the subject garage. Mr. Adkins testified to the success of these boy scouts and to the commitment of Mr. Fleming to the troops and spoke of Mr. Fleming's receipt of awards from the Boy Scouts organization as a leader.

Patrick Watt, 1917 4th Avenue North, spoke on behalf of Mr. Fleming allowing Boy Scout troops to use his garage. He stated this building is definitely a garage, but is also used for building kayaks, and holding Scout meetings and birthday parties. He said that if the second floor was taken out, the mass and footprint of the building would not change but it would create a hardship. He said this structure is the best part of this property. He supported leaving the structure intact and putting a restrictive covenant on the property.

OPponents OPPORTUNITY TO SPEAK

Laurie Miller, 2029 1st Avenue Southwest, said her property shares a border with the subject property and she began expressing her concerns to the City in 2009 about building activity on her neighbor's property. She said at that time, the tenant renting the house on the neighbor's property told her that the owner intended to build living quarters in the garage. She gave a history of her concerns and the development of this structure. She said that about two years after initial construction began, Lauren Fleming told her they were planning on living in the structure and that the City would not be able to tell. She stated Mr. Fleming also told her they would be living in that structure. She said the Flemings did move into the structure while renting out the original house on the property.

Ms. Miller said the City changed the Land Development Code so that separate buildings could have accessory structures with kitchens, an option that was not part of R-1 zoning before this. Ms. Miller explained her concerns and frustrations about lighting, traffic, parking and late evening activities on the Fleming property. She stated many neighbors protested the proposed Code changes and much of the integrity of the neighborhood has been given up due to those changes. She expressed concern over the City's inability to properly inspect work that is done but not outwardly visible and was not previously inspected in the structure. Ms. Miller said she was opposed to the requested variance and reviewed her reasons for that statement. She said she is concerned that Mr. Fleming is going to run his business from this property in the future.

Susan Marble Woyth, 2100 Central Avenue West, said she lives directly north of the Fleming property. She stated that her view to the south is a 21-foot monstrosity, and while Mr. Fleming states he is not living in the subject building, she can hear the television every evening from about 7:30 until 10:30 or 11:00 p.m. She said her concern was how the property can be monitored for enforcement. She said the City wrote new zoning codes for this area, and that in December the Neighborhood Council for that area sent the City a letter asking for enforcement of the building codes. She said this is a classic case of someone being forgiven rather than receiving permission and that she thinks Mr. Fleming knew what he was doing all along. She said this building is three times the footprint of the original structure on the property and in clear violation of being an accessory structure. She stated she was not in favor of this Board approving the requested variance, and that everything should be torn out of the living space. She read a letter to the Board from Sandy Ramstead, 2104 1st Avenue Southwest, which stated that Ms. Ramstead is against this requested variance and is not in favor of a 21-foot high structure on this property.

Tim Miller, 2029 1st Avenue Southwest, said his concern was the subject structure would become a rental, and the lower portion would house Mr. Fleming's business. He said this problem has gone too far and the City should have known and stopped it, and it looks like Mr. Fleming will get away with what he has done.

PETITIONER'S CLOSING

Mr. Thompson addressed privacy rights, the fact that the subject building was permitted as a 21-foot high garage, and various concerns of the neighbors. He said the building was originally intended to have a catwalk around the second level perimeter, and that a City inspector told Mr. Mr. Fleming that the footprint of the building did not preclude including a second floor. He said the definition of accessory structure when Mr. Fleming built the garage was vague, subjective and may be deemed void. He asked for clarification of when the new Codes take effect, and Mr.

Haynes stated the Code changes will be effective in a few days time. He said the solution proposed solves the essential core problem.

Mr. Fleming said this property was being built as a go-to place for his family.

PUBLIC COMMENT

There was no public comment.

BOARD DISCUSSION AND ACTION

Mr. Foster stated that in his opinion, the subject structure was built as a dwelling unit. He said there has to be a balance for the property owner and the neighbors. Ms. Martin inquired if the structure was originally permitted at 21-feet high. Ms. Cooper confirmed that it was permitted under Code as a garage at that height. Ms. Martin inquired about the footprint of subject structure in relation to the principle structure. Mr. Haynes clarified that the footprint of the subject structure is larger than the principle structure. He also noted that changes in the Land Development Code, approved by the City Commission, was for the entire City and was not amended for one person. He said garage heights are allowed up to 24-feet in height to accommodate large vehicles and boats. He defined further that detached accessory spaces cannot be a second dwelling unit and cannot contain home occupations while still allowing property owners reasonable use of their property and also protecting neighbors.

Ms. Martin asked Mr. Fleming what his intention was regarding tearing down the original house on his property and building a new one. Mr. Fleming said he was planning on tearing the original house down and building a new house as soon as the current issue is resolved. Ms. Cooper explained that the City has never told Mr. Fleming he could live in the garage structure while building a new home, since that would make the garage a second dwelling unit. Mr. Foster asked Mr. Fleming if he had intended to live in the garage while building a new home and if he had ever lived in the garage structure. Mr. Fleming said no, the upper level was built for his wife and to support family activities. He said the garage could probably be easily converted to a dwelling unit, but he had never lived there.

Mr. Cummings asked if the Code changes that are about to take effect would make the subject structure acceptable. Mr. Haynes said that does not really impact this application since the Code changes were intended to clarify accessory structure use. Ms. Cooper explained this structure does not meet the accessory structure standards of being subordinate to the primary structure. Mr. Cummings inquired if the Code change was made to fit this situation, and Mr. Haynes said it was not. Staff clarified the garage inspections during the building process stopped after the framing inspection and no inspections have been conducted on any of the improvements. Mr. Haynes noted that one of the conditions of approval suggested by staff is to have permitting and inspections of all the subsequent work. It was noted that if this variance request is refused, all the improvements on the second floor will have to be torn out and the structure brought back to conformance with the original submitted plans.

Lengthy discussion ensued between the Board and staff regarding clarification of Land Development Code updates, which Codes apply to this situation, and whether a variance would be required if this public hearing was being conducted a few weeks from now. Discussion included what the options are for the homeowner on this property depending upon the result of

this hearing. Mr. Haynes encouraged the Board to look at the specifics of this case and make a recommendation. There was discussion about what constitutes an accessory structure and if this structure fits that definition.

Mr. Cummings said he wondered that if this situation had involved some activity other than Boy Scouts, if that would affect the Board's decision. Mr. Peterson said that he thought this situation occurred because someone did not go through the proper channels, and he did not feel it is okay to teach Boy Scouts that this is an okay thing to do. He noted some issues such as lighting and television use should be worked out between neighbors, and he did not have an issue with the Flemings living in this structure if the original house is removed.

Mr. Cummings asked Mr. Fleming if he had planned to build the living unit in this structure when he turned in plans to the City to build the garage. Mr. Fleming stated that the plan that was approved was his fifth attempt at getting a garage plan approved. His fourth attempt was not approved because, as he understood, a second level was not allowed because it exceeded the allowable 1,600 s.f. Mr. Fleming claimed a City inspector came out after a year and a half into the project and asked when he was putting in his second level. Mr. Fleming told the inspector he was not allowed to put in a second level, and the inspector told him that 1,600 s.f. only applied to the square foot displacement of the lot. Mr. Fleming said that the inspector told him that putting a second level in the building was a "no brainer." Mr. Fleming stated the inspector did not tell him he could add the second level without a permit.

Mr. Cummings again asked Mr. Fleming if he knew he was going to add the living unit. Mr. Fleming stated it was something he wanted in plan number four, and something he knew he couldn't have in plan number five.

Mr. Ward asked if the Board had handled a similar case in the past, and Board members and staff could not recall a similar situation. Discussion ensued about the consequence to the owner of the property if this variance request was denied. Mr. Foster noted the owner can appeal a denial to District Court. Mr. Haynes clarified that if the request was denied, the building would have to be returned to a state which meets Code. Mr. Ward asked why City Code uses the wording, "conditions unique to the property" and Montana Code uses the words, "special conditions." Mr. Haynes said City Codes were established many years ago, and encouraged the Board to make a decision based on information at hand and in the best interest of the community.

Mr. Cummings called for a motion. Mr. Foster stated that in his opinion, the requested variance was contrary to the public interest, the conditions unique to the property are conditions that the applicant himself caused, and the requested variance would not conform to the spirit of R-1 zoning or the Land Development Code.

MOTION: That the Board of Adjustment deny the application from David and Lauren Fleming, property owners of 2101 1st Street Southwest, for the requested variance of City Code Title 17, Chapter 20, Article 4, Exhibit 20-4, maximum height of other accessory buildings of 12-feet to 21-feet.

Made by: Mr. Foster
Second: Mr. Cummings

VOTE: The motion passed by a vote of 4 in favor and 1 opposed. Mr. Peterson voted against the motion.

Mr. Sheets informed the applicant of the next procedural steps. He said the applicant would be contacted by the City Building Official and would be asked to correct all violations that exist at the property which were not inspected and completed per the original building permit. He also stated the applicant has 30 days to appeal this decision to District Court. Mr. Haynes stated it is the responsibility of staff to provide the applicant with a letter which reiterates the Board's decision and reminds the applicant he has the right to appeal the decision to District Court within 30 days.

PUBLIC COMMENT

Mr. Fleming thanked the Board for their service.

COMMUNICATIONS

There were no communications.

ADJOURNMENT

The meeting was adjourned at 5:47 p.m.