

**BOARD OF ZONING APPEALS
MUNICIPAL CENTER COUNCIL CHAMBERS
Tuesday, November 12, 2013
6:00 p.m.**

The regular meeting of the Board of Zoning and Appeals was scheduled and held in the Council Chambers of the Municipal Center on November 12, 2013. Chairman Evans called the meeting to order at 6:00 p.m. requesting the roll call. Ms. Regina Gibson called the roll of the Board and established a quorum:

COMMISSIONERS PRESENT:

Mr. Henry Evans, Chairman; Mr. Frank Uhlhorn, Vice Chairman; Ms. Jennifer Sisson; Mr. Tony Salvaggio; and Alderman Forrest Owens

DEVELOPMENT STAFF PRESENT:

Mr. Andy Pouncey, Economic and Community Services Director; Mr. Wade Morgan, Chief Planner; Ms. Regina Gibson, Administrative Secretary, and Mr. Alan Strain, Attorney

Chairman Evans reminded those in attendance that the Board of Zoning Appeals is a Quasi-Judicial body and as such, the latitude for acting on applications is somewhat limited by State Statute and City Ordinance. He also reminded those appearing before the Board that the meeting is recorded and they would need to identify themselves, give their address and be sworn in for the record. He then swore in the staff.

Chairman Evans stated that he would like to make note that the motions made in all meetings are of an affirmative nature. He stated this does not necessarily mean that the motion will be approved, but that the language will be in an affirmative nature when the motion is made.

1. Approval of Minutes for October 8, 2013

Alderman Owens moved to approve the Board of Zoning and Appeals minutes of October 8, 2013, seconded by Mr. Uhlhorn, with no further comments or discussions.

ROLL CALL: Mr. Salvaggio – Yes; Ms. Sisson - Yes; Mr. Uhlhorn - Yes; Alderman Owens – Yes; Chairman Evans – Yes.

MOTION PASSED

2. 1551 E. Churchill Downs – Request Approval of a Variance to Allow a Fence to Exceed Six Feet in Height in the “R” Low Density Residential District Old Business.

BACKGROUND: DATE SUBDIVISION APPROVED: The Poplar Estates, Block J subdivision was approved by the Germantown Planning Commission on December 8, 1969.

DATE PRINCIPLE STRUCTURE APPROVED/BUILT: The home was constructed in 1972.

PREVIOUS VARIANCE REQUESTS: The BZA on August 10, 2010, denied a requested variance to allow an existing fence to exceed six feet in height. The applicant reapplied for the variance, which was discussed at the August 13, 2013 BZA meeting. The applicant withdrew the request to allow discussion between the Mayor and Aldermen about amending the fence regulations to increase the maximum allowed height of fences.

DISCUSSION: NATURE OF VARIANCE REQUESTED: The specific request by the applicant is to allow a wood fence along the rear and side lot lines to be up to 8 feet in height. The proposed fence will replace an existing fence that is 7 ft., 9 in. in maximum height.

The applicant obtained a permit from the City for a six foot tall fence on May 22, 2003. At some point after that, the homeowner added two (2) feet of lattice board to the top of the wood fence along the rear lot line. The Germantown Code Compliance staff notified the owner of the violation via letter on May 24, 2010. The owner then applied to the BZA for a variance to allow the additional height. The request was denied and the owner appealed the decision to Chancery Court.

The owner now proposes to replace the existing rear lot line fence with a solid, stockade-type fence that is 8 feet in height. In addition, the homeowner proposes to construct an 8 foot tall fence along a 24 foot section of the southern side lot line. The intent is for the new fence to follow the natural contour of the side lot line and connect to the 8 ft. rear lot line fence. The remaining approximately 74 feet of the fence will be 6 feet in height.

SPECIFIC SECTIONS OF ZONING ORDINANCE: The specific request is a variance from §6-102(a) of the Code of Ordinances, which states, “the maximum height of any fence shall be six (6) feet.” The applicants’ fence exceeds six (6) feet in height by an additional two feet.

APPLICANT’S JUSTIFICATION: The applicant is requesting the variance due to exceptional topographic conditions of the property. According to the applicant, there is a “4 foot inlet that drains from approximately 5 to 6 other homes. In order for the inlet to provide proper drainage, the grade of our lot is lower than surrounding lots. Thus, when a standard 6 foot fence is installed, because of this lowered grade at the rear of the property, homeowners around ours have complete view of our backyard, allowing us very little privacy.” The applicant further notes that the topographic change causes a hardship in that “homes around us have a more than normal view into our backyard leaving us with less than normal privacy expected from a standard 6 foot fence.”

STAFF COMMENTS:

1. The applicant requests a two foot variance to allow an eight foot tall wood fence along the rear property line and along a 24 foot section of the side (southern) property line.
2. If the variance approved, the existing fence and lattice extension along the rear lot line will be removed.
3. If the variance request is approved, the applicant must apply for a fence permit through the Department of Economic and Community Development.

PROPOSED MOTION: To approve a variance for 1551 East Churchill Downs to allow a fence along the rear property line and along a 24 ft. section of the side property line to be eight feet in height, subject to staff comments and the plans submitted with the application.

Mr. Gail Burnett asked the board to approve his request because he feels it will give him and his neighbors a better quality of life and will increase their property value.

Mr. Jerry Herman, Mr. Charles Downs, Mr. Jim Stock, Ms. Carolyn Downs, Mr. Dewalt Edwards, and Mr. Jessie Smith are all in favor of Mr. Burnett’s request. They feel it is necessary for drainage as well and a better quality of life for everyone involved.

After much discussion, Chairman Evans called for a motion.

Mr. Uhlhorn moved to approve a variance for 1551 East Churchill Downs to allow a fence along the rear property line and along a 24 ft. section of the side property line to be eight feet in height, as discussed and subject to the comments contained in the staff report and seconded by Ms. Sisson.

Chairman Evans explained that the first time that this item was brought before the board, he had voted no because Mr. Burnett had failed to get a permit before he erected this non conforming structure. This situation still exists and there is no way he can vote in favor of this request.

Alderman Owens and Mr. Salvaggio feel that this case constitutes a variance due to the topographic condition and a hardship on Mr. Burnett therefore would be voting yes on this item.

ROLL CALL: Alderman Owens – Yes; Mr. Uhlhorn – Yes; Mr. Salvaggio – Yes; Ms. Sisson – Yes; Chairman Evans - No

MOTION PASSED

3. 2305 McVay Road (McVay Park) – Request Approval of a Use on Appeal for a Religious Institution and Place of Worship in the R-3 Residential District.

DISCUSSION: The request for Use On Appeal is based on Section 23-303 of the Zoning Ordinance, which states, in part, that “Philanthropic or religious institutions; places of worship; public, private or parochial schools offering general educational courses; municipal, county, state or federal uses; public utilities, golf courses; private and country clubs; parks and playgrounds; cultural activities“ shall be permitted [in the “R-3” Residential Zoning District] by the Board of Zoning Appeals,” provided that the use requested is to be located on a route designated as either a major street or collector street on the official major road plan, and that the requirements set forth in Article III, Division 6 (requirements of the “R-3” Residential district), Article II, Division 2 (Board of Zoning Appeals), and Article II, Division 4 (General Exceptions) of the Zoning Ordinance are met. Any additional use or expansion of an existing Use On Appeal requires approval from the BZA.

APPLICANT’S JUSTIFICATION: The applicant proposes the construction of an approximately 100 seat open air amphitheater and stone pulpit area, for the purpose of holding outdoor worship and other services, in the western portion of the property. The amphitheater is to be 90 feet from the west property line and 90 feet from the north property line. A six foot wood fence is to be constructed on the west property line and additional trees are to be planted to the west of the amphitheater, to help buffer the abutting dwellings from the amphitheater. The existing parking areas on the eastern side of the property, and across McVay Rd., will provide parking for people attending events. See the application and attachment for additional information.

STAFF COMMENTS:

1. If the Use on Appeal is approved, the applicant shall apply to the Germantown Planning Commission for site plan approval and then to the Design Review Commission for landscape, fence and lighting plan approval.

PROPOSED MOTION: To approve a Use on Appeal for a religious institution and place of worship at 2305 McVay Rd., subject to staff comments and the site plan submitted with the application.

Chairman Evans recused himself from this item.

Mr. Tim McCullough and Ms. Susan Smith explained that this is primarily a worship area and would be in use during the hours of 6:00 am to no later than 8:00 pm due to daylight. There will be low level lighting and would not be allowed to shine directly into the homes in the neighborhood. Ms. Smith explained that the church has a very strict policy that must be followed for the use of this property.

Mr. William (inaudible) Jr. expressed his appreciation to the church representatives for the time they spent explaining what is going to happen. He explained his concern over the possible damage to the trees in this area and the safety of the children as well as others that may be injured by the falling limbs and

feels that the present maintenance personal may not be enough to maintain the trees. He also requested the drainage issue to be addressed and put in writing. They are also requesting that they have input on the plant wall that will be placed on the west side of the amphitheater.

Alderman Owens explained that if this item was approved by the Design Review Commission then it would go to the Planning Commission and they would require them to submit a tree, drainage, and landscape plans.

Ms. Sisson moved to approve Use on Appeal for a religious institution and place of worship at 2305 McVay Road, as discussed and subject to the comments contained in the staff report and seconded by Mr. Salvaggio.

ROLL CALL: Mr. Salvaggio – Yes; Alderman Owens – Yes; Ms. Sisson – Yes; Vice Chairman Uhlhorn - Yes

MOTION PASSED

4. 7169 River Reach Rd. – Request Approval of a Variance to Allow a Fence with a Required Front Yard to Exceed Thirty Inches in Height in the “R” Low Density Residential District.

BACKGROUND: DATE SUBDIVISION APPROVED: The River Birch Farms subdivision was approved in 1976.

DATE PRINCIPLE STRUCTURE APPROVED/BUILT: The home was constructed in 1978.

PREVIOUS VARIANCE REQUESTS: On September 10, 1985, the BZA approved a variance to allow an accessory structure within the Texas Gas easement.

DISCUSSION: The specific request is for a variance from § 6-102(b) of the Germantown Code of Ordinances, which limits the height of fences within the required front yards of lots to a maximum of 30 inches in height. The property’s “R” zoning district establishes a minimum front yard extending 40 behind the property line (50 ft. behind the curb). The applicant proposes a fence that is 6 feet in height and located as close as 30 feet to the front lot line, which is a 10 foot encroachment into the required front yard. The proposed fence will require a variance of 10 feet from the standard setback.

APPLICANT’S JUSTIFICATION: The applicant requests the variance on the basis of “exceptional narrowness, shallowness or shape” resulting in an undue hardship upon the owner. He notes that the sidewalk on Riverdale Rd. is approximately 3 feet higher than their yard, which reduces the privacy of their yard. Furthermore, the previous 3 foot-tall fence was removed by Texas Gas Easement contractors. The applicant has provided a more detailed explanation in his application.

STAFF COMMENTS:

1. Approximately one-half of the applicant’s yard is taken up by a gas line easement.
2. The applicant’s proposed fence is located as close as 30 feet to the front lot line, which is a 10 foot encroachment into the front yard.

The applicant’s proposed fence will align with the existing fence on the abutting lot to south.

PROPOSED MOTION: To approve a variance to allow a fence within the required front yard of 7169 River Reach Rd. to be up to six feet in height, subject to staff comments and the site plan submitted with the application.

Mr. Clifford Priestley is asking the board to approve this variance request for his family’s privacy and because he has a 110 pound German Sheppard that will jump a three foot fence with ease. He explained

that the fence company misunderstood his directions and had already put the fence post in place before he could stop them.

Chairman Evans asked Mr. Priestley if the contractor put the fence posts in without first acquiring a permit which Mr. Priestley confirmed. Chairman Evans explained that the contractor has a responsibility to obtain a permit before beginning any work and then requested that staff provide the board with the contractors' name.

After much discussion, Chairman Evans called for a motion.

Mr. Uhlhorn moved to approve a variance to allow a fence within the required front yard of 7169 River Reach Road to be up to six feet in height, as discussed and subject to the comments contained in the staff report and seconded by Mr. Salvaggio.

ROLL CALL: Ms. Sisson – Yes; Alderman Owens – Yes; Mr. Salvaggio – Yes; Mr. Uhlhorn – Yes; Chairman Evans - Yes

MOTION PASSED

5. 7007 Poplar Ave., Madonna Learning Center – Request Approval of a Use on Appeal for a Private School in the “R” Low Density Residential District.

DISCUSSION: The request for Use On Appeal is based on Section 23-303 of the Zoning Ordinance, which states, in part, that “Philanthropic or religious institutions; places of worship; public, private or parochial schools offering general educational courses; municipal, county, state or federal uses; public utilities, golf courses; private and country clubs; parks and playgrounds; cultural activities “shall be permitted [in the “R-3” Residential Zoning District] by the Board of Zoning Appeals,” provided that the use requested is to be located on a route designated as either a major street or collector street on the official major road plan, and that the requirements set forth in Article III, Division 6 (requirements of the “R-3” Residential district), Article II, Division 2 (Board of Zoning Appeals), and Article II, Division 4 (General Exceptions) of the Zoning Ordinance are met. Any additional use or expansion of an existing Use On Appeal requires approval from the BZA.

APPLICANT’S JUSTIFICATION: The applicant proposes 1) the construction of a 3,770 sq. ft. training building on the southwest side of the site that will house the school’s Adult Training Program; and 2) the demolition of the existing chapel in order to construct a 25,580 sq. ft. single-story addition to the existing 2-story classroom building. The larger addition will contain classrooms for grades K-12 and a multi-purpose gym. See the application and attachment for additional information.

STAFF COMMENTS: If the Use on Appeal is approved, the applicant shall apply to the Germantown Planning Commission for site plan approval and then to the Design Review Commission for landscape, fence and lighting plan approval.

PROPOSED MOTION: To approve a Use on Appeal for Madonna Learning Center, a private school at 7007 Poplar Ave., subject to staff comments and the site plan submitted with the application.

Ms. Tamara Redburn w/Fleming Architects and Mr. Harvey Marcom w/Reeves Firm asked for the board to approve the Use on Appeal for the construction of a 3,770 sq. ft. training building for their Adult Training Program, demolition of the existing chapel, and construction of a 25,580 sq. ft single-story addition to the existing 2-story classroom building.

After much discussion Chairman Evans called for a motion.

Mr. Uhlhorn moved to approve a Use on Appeal for Madonna Learning Center, a private school at 7007 Poplar Avenue, as discussed and subject to the comments contained in the staff report and seconded by Mr. Salvaggio.

ROLL CALL: Mr. Uhlhorn – Yes; Ms. Sisson – Yes; Mr. Salvaggio – Yes; Alderman Owens – Yes; Chairman Evans - Yes

MOTION PASSED

6. 1438 Ashtone Cove – Request Approval of a Variance to Allow a Fence within a Required Front Yard to Exceed Thirty Inches in Height in the “R” Low Density Residential District.

DISCUSSION: NATURE OF VARIANCE REQUESTED: The applicant was granted approval to build a six-foot (6’) solid fence along the north side of the property parallel to Ashtone Cove. The proposed fence was permitted in compliance with code, but staff did not see to it that the drawing was amended to agree with the code. The applicant’s drawing illustrated a fence that was located on the property line. The result was a fence that came off the house 16.5 ft. and turned 90 degrees to the east which has resulted in a fence that is 16.5 ft. from the house (35 ft. from curb) on the western end, and 16.5 ft. from curb at the back property line on the eastern end. The resulting fence location is not parallel to the street. The property owner requests a variance to keep the fence section 16.5 ft. from the house as it currently exists and rebuild the balance of the fence to be the same distance off the curb (35 ft.) at both ends. This would require a variance of 15 ft. from the required front yard setback.

SPECIFIC SECTIONS OF ZONING ORDINANCE: The specific request is for a variance from § 6-102(b) of the Germantown Code of Ordinances, which states, “Fences over 30 inches in height are not permitted within the required front yards of lots as specified in the zoning ordinances...” Section 23-257 (1)(a) of the Zoning Ordinance states that, “there shall be a required front yard of not less than forty (40) feet” for any lot within the “R-1” Residential District.

APPLICANT’S JUSTIFICATION: The applicant is requesting the variance based on “other extraordinary and exceptional situation or condition” which has resulted in a hardship upon the owner. While the permit did indicate the proper code dimensions, staff did not correct the drawing and the fence installer built the fence off the incorrect plans and not the permit information. Staff should have caught the problem and they didn’t. In the event of the sale of the house, the fence location may hold up the sale as it is not according to code.

COMMENTS:

1. The required front yard setback for the “R-1” Residential zoning district is forty feet (40’). The proposed fence is set back at an angle with the curb 35 feet on the western end and 16.5 feet on the eastern end.

Should the Board of Zoning Appeals approve the request, the applicant shall obtain an amended fence permit for the fence from the City of Germantown Office of Code Enforcement. The permit must be obtained within one hundred eighty (180) days of the approval unless otherwise expressly authorized by the Board of Zoning Appeals.

PROPOSED MOTION: To approve the request for a variance at 1438 Ashtone Road to allow a fence to exceed thirty inches in height in the required front yard setback fronting on Ashtone Cove.

Mr. Joseph Chamoun admitted that he knows that this fence does not look good and should be parallel to the street. He asked the board to approve his request for a variance so he can make the necessary changes.

Mr. Robert Bivens spoke in favor of the variance request and Patricia Webb explained that she didn’t object of how they have it proposed however, she is requesting that the board keep in mind that this

request has not been allowed anywhere else in the neighborhood and it still looks odd. However she expressed that this was an unusual situation and asked the board to make sure that their decision reflects what is best for the City of Germantown while keeping her best interest protected.

Chairman Evans called for a motion.

Alderman Owens moved to approve the request for a variance at 1438 Ashtone Road to allow a fence to exceed thirty inches in height in the required front yard setback fronting on Ashtone Cove, as discussed and subject to the comments contained in the staff report and seconded by Mr. Uhlhorn.

ROLL CALL: Alderman Owens – Yes; Mr. Salvaggio – Yes; Mr. Uhlhorn – Yes; Ms. Sisson – Yes; Chairman Evans - Yes

MOTION PASSED

7. McDonald’s Restaurant, 2030 S. Germantown Road – Request for an Interpretation of the Method to Compute the Required Number of Parking Spaces.

BACKGROUND: The McDonald’s restaurant was first approved by the City in March, 1978. It has been modified to some extent during its history. McDonald’s Corp. now proposes to replace the existing building with a more up-to-date design and incorporate a double drive-through lane.

DISCUSSION: The original plan provided an 18 foot-wide drive aisle around the building. The proposed McDonald’s restaurant redesign proposes to incorporate a double drive-through area on the east end of the building. However, changes in fire dept. access requirements necessitate a 26 foot-wide drive aisle around part of the building. In order to provide the double drive-through, a 26 foot-wide drive aisle for fire access and an appropriately designed restaurant, the parking on the north side of the site have been removed.

Required parking for a restaurant is determined by the number of seats and the number of employees (one space for every two seats plus one space for each employee on the largest shift). The current restaurant re-design eplan provides a sufficient number of parking spaces for the regular dining area seating. However, the restaurant also includes seating in the play area. McDonald’s representatives have requested the ability to exclude seating within the play area from the calculations that determine the required number of parking spaces.

One of the functions of the Board of Zoning Appeals, in addition to the usual authority to grant variances, and approval of uses on appeal, is the authority “To hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or change made by the building inspector or other administrative official in the refusal, carrying out or enforcement of any provision of this chapter”. McDonald’s restaurant proposes that the required number of parking spaces be determined by the number of regular, dining area seats, and that play area seating be excluded from the calculations.

STAFF COMMENTS: The only other existing restaurant within Germantown with a play area is Chick-Fil-A. That restaurant provided parking spaces based on the total number of seats, without regard to their location, whether inside, outside or within the play area.

PROPOSED MOTION: To accept as policy that only regular seating, as opposed to special purpose seating, is considered when calculating the number of required parking spaces for a restaurant.

Chairman Evans asked Alderman Owens to make a motion.

Alderman Owens moved to approve that only regular seating, as opposed to special purpose seating, be considered when calculating the number of required parking spaces for this specific location as discussed and subject to the comments contained in the staff report and seconded by Ms. Sisson.

ROLL CALL: Mr. Uhlhorn – Yes; Ms. Sisson – Yes; Alderman Owens – Yes; Mr. Salvaggio – Yes; Chairman Evans - Yes

MOTION PASSED

NEW BUSINESS: Mr. Tony Salvaggio made the following announcement: “I wanted to take this opportunity to extend my appreciation for the Board of Zoning Appeals members past and present. I have enjoyed my time of this board and feel the BZA is a difficult board to serve on with the neighbors we have to take into account. Respectfully I am of the opinion some of the Mayor and Board to encourage the staff to take a strong look at the zoning regulations as they relate to the BZA. Many of the zoning regulations need to be reconsidered and revised. Also, on the board we as a group want to change regulations on pool equipment on side yards which is still on our books is a violation of code. One of the reasons Germantown has maintained city property values due in part to restrictions and regulations. However it is the duty of the BMA, commissions, boards, and staff to recognize that some things are not working, it is our duty to recognize as property owners live in their homes, grow in their homes, and use their homes differently year after year. They change. I encourage the BMA and staff to take on the challenge of bringing all regulations and codes up to a modern and ever changing lifestyle. I appreciate the opportunity of working on the board and with Chairman Evans. I know the city right now has a big challenge before them with the school system and everything that we are facing there. I do feel like this board specifically is constantly challenged by what we saw tonight. I think this board needs more parameters to work under so that it makes the job a little more defined and quite frankly keeps the volunteers of this board as well as others out of particular situations. Thank you again”.

Chairman Evans expressed his appreciation to Tony Salvaggio’s for his time working with the Board of Zoning Appeals and his disappointment that he had chosen to no longer serve on this commission. He asked for the other board members to help talk him out of leaving this board and joining them for another year. Chairman Evans announced that we would miss Andy Pouncey as well and that this would be the last meeting of the year and would like to wish everyone a Happy Thanksgiving, Merry Christmas, and a Happy New Year. We will see you the second week of January.

ADJOURNMENT

There being no further business, comments, or questions by the Commission, the Chairman adjourned the meeting at 7:45 p.m.