

**BOARD OF ZONING APPEALS
MUNICIPAL CENTER COUNCIL CHAMBERS**

March 9, 2010

6:00 p.m.

COMMISSION PRESENT:

Chairman Henry Evans; Alderman Carole Hinely; Mr. David Klevan; Ms. Patricia Sherman; Mr. Ron Poe; Mr. Tony Salvaggio; Ms. Elizabeth Boyd

DEVELOPMENT STAFF PRESENT:

Mr. Jerry Cook, Director of Economic and Community Development; Mr. Alan Strain, Attorney; Mr. Wade Morgan, Chief Planner; Ms. Katie Graffam, Economic Development Coordinator; Ms. Carmen Richardson, Secretary.

Interested Individual(s) present:

Mr. John Mazzei – 1897 East Arden Oaks Drive, Germantown, TN 38139

Mr. Eddie Stanford – 7752 Stout Road, Germantown, TN 38138

Mr. Andrew Smothers – 7305 Magnolia Ridge Drive, Germantown, TN 38138

Ms. Heather Scheibelhut – 1877 Elmhurst Drive, Germantown, TN 38138

Mr. John Olsen – 1869 Elmhurst Drive, Germantown, TN 38138

Chairman Evans called the meeting to order and established a quorum.

ROLL CALL: – Ms. Boyd – present; Mr. Poe – present; Mr. Salvaggio – present; Ms. Sherman – present; Mr. Klevan – present; Alderman Hinely – present; Chairman Evans – present

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.

Approval of January 12, 2010 Minutes

Mr. Klevan made a motion to approve the minutes from the October 13, 2009, meeting that was seconded by Alderman Hinely.

ROLL CALL: Mr. Poe – yes; Ms. Boyd – yes; Alderman Hinely – yes; Mr. Klevan – yes; Mr. Salvaggio – yes; Ms. Sherman – yes; Chairman Evans – yes

MOTION PASSED

SUBJECT: **1987 East Arden Oaks Drive – Request a variance to allow a pergola to exceed eight feet in height and to encroach into a utility easement in the “R-3” Two-Family Dwelling zoning district**

BACKGROUND:

DATE SUBDIVISION APPROVED: Lansdowne subdivision was approved by the Planning Commission in 2001, and by the Board of Mayor and Aldermen on 2/5/02.

DATE PRINCIPLE STRUCTURE APPROVED/BUILT: 2002.

PREVIOUS VARIANCE REQUESTS: None.

DISCUSSION:

NATURE OF VARIANCE REQUESTED: The specific request by the applicant is to allow a pergola that he had built as a partial cover for a patio on the south side of his house to continue to exist. The pergola is located in the side yard setback, is 9 feet, 6 inches in height and is attached to both the fence and the principal structure. Code Compliance staff noticed the pergola and cited the homeowner for the violation.

SPECIFIC SECTIONS OF ZONING ORDINANCE: The specific request is a variance from section 6-103 (B) which limits pergolas to eight feet in height. Section 6-103(B) states: Pergola means a structure of usually parallel colonnades supporting a roof of girders and cross rafters or trelliswork that is predominately open to the elements and designed so as to allow climbing plants to grow on it. Any roof constructed on a pergola shall be limited to framework. A minimum of fifty percent of the roof area shall be open to the elements and shall be evenly distributed throughout the roof area. Pergolas are limited to eight feet in height.

APPLICANT'S JUSTIFICATION: The applicant states that the "pergola has existed for 8 years without incident of complaint or safety and well maintained. It was constructed to attach to the house porch overhang. Without the attachment, additional support beams would be needed."

STAFF COMMENTS:

1. The applicant was notified by Code Compliance staff on December 23, 2009 of the violation and advised of his options to correct it. He applied for a variance on January 19, 2010.
2. The applicant has stated that the pergola was built about 2 months after the house was completed.
3. Photos of the house and pergola are attached.
4. Should the variance request be granted, the applicant must apply for a permit through the Department of Economic and Community Development.
5. The pergola encroaches into the utility easement along the lot line between the adjacent dwelling. Therefore, the homeowner shall enter into a hold harmless agreement addressing potential work within the easement.

John Mazzei, Owner/Applicant
1897 East Arden Oaks Drive
Germantown, TN 38139

Mr. Mazzei began by saying that he was one of the first occupants of his subdivision. He saw that a builder was erecting a pergola (attached to the side yard) two doors down and asked if the builder would construct a pergola for him. He then advised that the pergola does not stand alone; it is attached to the house as a support side structure. In order to lower the pergola, Mr. Mazzei said that he would have to build support beams on the inside which would be a minor hardship.

Mr. Mazzei further advised that the pergola has been well maintained; it actually uses the neighboring fence as a “site description” for his back porch. An easement is not an issue and there is no permanent concrete, just loose, stone gravel beneath the pergola.

Alderman Hinely asked Mr. Mazzei if the contractor who constructed the pergola obtained a permit. Mr. Mazzei replied by saying “Not to my knowledge...I didn’t ask.”

Mr. Evans then asked Mr. Mazzei if there any other designs considered for this pergola. Mr. Mazzei answered by saying no, the design is relatively simple. It has four posts and fifteen cross hatches that attach to the house.

Mr. Poe asked Mr. Mazzei was there a covered porch at the front rear and if so, how big is it. Mr. Mazzei said yes, it is about eight feet deep and probably twenty feet long. Mr. Poe asked if the pergola extend out to about three feet from the house. Mr. Mazzei said yes, from the covered porch there is a slight overhang approximately a foot long off of the deck of the porch; underneath the overhang setback is the fascia which is about two feet.

Mr. Evans stated that one of the issues that the Board looks at when considering a variance is hardships. What is the hardship caused to the property owner if this is not approved? Mr. Mazzei responded by saying it would cost him money to take it down or to have it redesigned/cut. He further stated that he does not know which will be more expensive...to knock it all the way down and rebuild it at eight feet or to have someone come in and saw the top of it off and put additional posts in. Mr. Evans advised that the enabling legislation that creates this body says that costs cannot be one of the factors considered when evaluating a hardship. Is there any other hardship? Mr. Mazzei said no, nothing else.

PROPOSED MOTION: To approve a variance at 1987 East Arden Oaks to allow an existing pergola to exceed the maximum permitted height by 18 inches, for a maximum height of 9 feet, 6 inches, subject to staff comments.

Ms. Boyd moved to approve a variance at 1987 East Arden Oaks to allow an existing pergola to exceed the maximum permitted height by 18 inches, for a maximum height of 9 feet, 6 inches, subject to staff comments. Ms. Sherman seconded the motion.

ROLL CALL: Mr. Poe – no; Mr. Salvaggio – no; Ms. Sherman – no; Ms. Boyd – no; Mr. Klevan – no; Alderman Hinely – no; Chairman Evans – no

MOTION DENIED

SUBJECT: 7752 Stout Road – Request variances to allow 1) an accessory structure to be located closer to the side property line than the height of the structure, and to allow 2) an accessory structure to be located closer to the rear property line than the height of the structure in the “R” Residential zoning district.

BACKGROUND:

DATE SUBDIVISION APPROVED: Old Village subdivision was approved in July of 1980.

DATE PRINCIPLE STRUCTURE APPROVED/BUILT: The principal structure was built in 1983.

PREVIOUS VARIANCES: None.

DISCUSSION:

Variance #1:

NATURE OF VARIANCE #1 REQUESTED: The applicant is requesting a variance to allow an existing accessory structure to be located closer to the side property line than the height of the structure. The height of the accessory structure from the surrounding grade to the midpoint of the roof is approximately 10'. The accessory structure's current location is eight (8) feet from the side lot line. A variance of two (2) feet is requested.

SPECIFIC SECTION OF ZONING ORDINANCE: The applicant is requesting a variance from §23-261(2) of the Code of Ordinances, which states, "such buildings...shall be located a distance from the rear and side property lines equal to at least the height of the structure."

Variance #2:

NATURE OF VARIANCE #2 REQUESTED: The applicant is requesting a variance to allow an existing accessory structure to be located closer to the rear property line than the height of the structure. The height of the accessory structure from the surrounding grade to the midpoint of the roof is approximately 10'. The accessory structure's current location is seven (7) feet from the rear lot line. A variance of three (3) feet is requested.

SPECIFIC SECTION OF ZONING ORDINANCE: The applicant is requesting a variance from §23-261(2) of the Code of Ordinances, which states, "such buildings...shall be located a distance from the rear and side property lines equal to at least the height of the structure."

All Variances:

APPLICANT'S JUSTIFICATION: The applicant bases his request on the exceptional narrowness of the property resulting in peculiar and exceptional difficulties. According to the applicant, "several trees [on the property] limit where the shed can be placed." The applicant was notified via mail on January 25, 2010, by the Code Compliance Division of the violation. A copy of that letter is enclosed in this packet. After notification, the applicant halted construction on the shed. If approved, he will place siding on the shed and paint it to match the house.

STAFF COMMENTS:

1. The applicant is requesting two variances:
 - a. **A variance of two (2) feet** to allow an existing accessory structure that is 10' in height to be located eight (8) feet from the side property line.
 - b. **A variance of three (3) feet** to allow an existing accessory structure that is 10' in height to be located seven (7) feet from the rear property line.
2. If the variances are approved, the applicant will finish the construction of the shed by placing siding on the shed, and paint it to match the house.
3. If the variances are approved, the applicant shall contact the Economic and Community Development Department and the Memphis / Shelby County Office of Construction Code Enforcement to acquire any necessary permits. Failure to obtain the permit within one hundred eighty (180) days will result in the cancellation of all variances.

Eddie Stanford, Owner/Applicant
7752 Stout Road
Germantown, TN 38138

Mr. Stanford started out by saying that he lives in a house that has very limited storage space and after acquiring some extra money, he decided to build a storage shed. At the time that he was building the shed, he said that he had no idea that the ground was so unlevel. Also, because there were so many trees on one side he had difficulty with placing the unit.

Ms. Boyd asked if the rest of the yard is treed. Mr. Stanford replied by advising that there are trees behind the shed and trees to the left side. He also advised that his property backs right up to the back of The Germantown Horse Show. Ms. Boyd then asked if there was anywhere else that he could put the shed without the requirement of a variance. Mr. Stanford said just two feet. He didn't realize at the time that he was encroaching on a setback. He then said that he thought that it had to be five feet and that it would not be a problem.

Mr. Evans asked why he was building a shed ten feet high; what is the purpose of having it that height? Mr. Stanford replied by saying that it is just a normal wall being eight feet long and that he put a low pitch roof for a total height of 12 feet. Per Mr. Stanford, it's just the way that it came out when he built it. Mr. Evans asked if he was aware that he needed a permit. Mr. Stanford said that he knew that he was supposed to have a permit, but he did not obtain one. Alderman Hinely advised Mr. Stanford that a variance would not have been necessary if it had been eight feet.

Mr. Salvaggio asked what would preclude the building from being moved to meet that guideline. Mr. Stanford said that he had not really measured, but the trees on the side are very close. He further stated that he just put it in a position that he thought was sensible because of the trees and because of his limited space.

PROPOSED MOTION #1: To approve a variance for 7752 Stout Road to allow an accessory structure to be located closer to the side property line than the height of the structure in the "R" Residential district, subject to staff comments and the site plan filed with this application.

Ms. Boyd moved to approve a variance for 7752 Stout Road to allow an accessory structure to be located closer to the side property line than the height of the structure in the "R" Residential district, subject to staff comments and the site plan filed with this application. Ms. Sherman seconded the motion.

ROLL CALL: Ms. Boyd – no; Mr. Poe – no; Mr. Salvaggio – no; Mr. Klevan -- no; Ms. Sherman – no; Alderman Hinely – no; Chairman Evans – no

MOTION DENIED

PROPOSED MOTION #2: To approve a variance for 7752 Stout Road to allow an accessory structure to be located closer to the rear property line than the height of the structure in the "R" Residential district, subject to staff comments and the site plan filed with this application.

Ms. Boyd moved to approve a variance for 7752 Stout Road to allow an accessory structure to be located closer to the side property line than the height of the structure in the "R" Residential district, subject to staff comments and the site plan filed with this application. Ms. Sherman seconded the motion.

ROLL CALL: Alderman Hinely – no; Mr. Klevan – no; Mr. Poe – no; Ms. Boyd -- no; Mr. Salvaggio – no; Ms. Sherman – no; Chairman Evans – no

MOTION DENIED

SUBJECT: 7305 Magnolia Ridge Drive – Request a variance to allow an accessory structure to be located a distance less than its height from the rear and side property lines in the “R” Low Density Residential zoning district.

BACKGROUND:

DATE SUBDIVISION APPROVED: The Timbers Subdivision was approved in 1977.

DATE PRINCIPLE STRUCTURE APPROVED/BUILT: 1979.

PREVIOUS VARIANCE REQUESTS: None.

DISCUSSION:

NATURE OF VARIANCE REQUESTED: The specific request by the applicant is to obtain approval for an existing tree house that was built by the homeowner. The homeowner began construction on the tree house, was cited by Code Compliance staff of the violation, ceased construction, and applied for a variance. The tree house is 15.25 feet in height (to roof mid-point) and is 3 feet from the rear lot line and 6 feet from the west side lot line. In addition, it encroaches 2 feet into a 5 foot-wide utility easement that extends along the rear lot line.

SPECIFIC SECTIONS OF ZONING ORDINANCE: The specific request is a variance from §23-236(2) which requires accessory structures over 8 feet in height to be located a distance equal to or greater than their height from the rear and side lot lines and to not extend into an easement. The tree house requires a variance of 12.25 feet from the required setback distance from the south lot line and a variance of 9.25 feet from the required setback distance from the west lot line.

APPLICANT’S JUSTIFICATION: The applicant is requesting the variance based on the criteria of other extraordinary and exceptional situation or condition of the property” that results in peculiar and exceptional practical difficulties. According to the applicant, the “structure location is set by the tree location.” He states “there are no other suitable tree configurations within my property” and the trees serving as the anchors for the fort are mature pine trees and cannot be moved.

STAFF COMMENTS:

1. The subject property abuts the Norfolk-Southern Railroad along the property line where the tree house is located.
2. The applicant was notified of the violation on January 14, 2010 and applied for the variance on February 11, 2010.
3. Should the variance request be granted, the applicant must apply for an accessory structure permit through the Department of Economic and Community Development.

Andrew Smothers, Owner/Applicant
7305 Magnolia Ridge Drive
Germantown, TN 38138

Mr. Smothers began by saying that the reason he is building the tree house is to get his kids out of the house away from television/video games, thereby making his intentions good. He further stated the fact that he did not secure a permit was pure ignorance on his part, and thereby gave an apology. He then asked if the Board would show some mercy. He then referred to photos of the tree house and the surrounding trees. He advised that during the summer, the trees are full of foliage and that no body can see the tree house from the other side of the railroad and across the park; the only people who will be able to see it are his immediate neighbors.

Alderman Hinely asked Mr. Smothers if the tree house contains windows. Mr. Smothers said yes, there are windows. He further stated that he was planning on using siding that matches his house on the tree house. Alderman Hinely then asked if there is any reason why he had to make it so tall. Mr. Smothers said that he wanted his boys to be able to stand up in it until they become teenagers. Mr. Evans intervened and clarified that Alderman Hinely meant why so tall from the height off of the ground. Mr. Smothers said that he wanted it to be high enough to be cool but low enough for it to be safe. He further stated that if he is allowed to keep it that it would look nice and that his kids would enjoy it.

Mr. Evans went back to the original question clarifying the height from the ground, the fifteen plus feet. Mr. Smothers said that he just went out and built it; this was his first tree house so he really didn't know how he should build it.

Alderman Hinely asked Mr. Smothers what is his hardship. Mr. Smothers replied by saying that first of all, he and his kids spend time building the tree house together and they will be really upset if they have to take it down. He also said that his wife is going to be upset as well; if you knew her you would understand the hardship. Mr. Smothers further stated that another hardship would be the time and expense that it would take to physically dismantle the tree house.

Alderman Hinely then asked if the tree house is moveable to another area. Mr. Smothers said no, this was the only spot between the trees that suited his configuration.

Mr. Evans said that if Mr. Smothers had talked with the Board for approval before he had started building the tree house, the question he would have asked is why fifteen feet. Mr. Smothers replied by saying that he just wanted his kids to be able to stand up in it and have some head room; as far as the truss and the pitch of the roof, I sort of matched it to my house so that it would be aesthetically pleasing.

PROPOSED MOTION: To approve a variance at 7305 Magnolia Ridge Drive to allow an existing accessory structure (15.25 foot tall tree house) to be located 3 feet from the rear lot line, 6 feet from the west lot line and encroach 2 feet into a utility easement, subject to staff comments and the site and elevation plans submitted with the application.

Ms. Boyd moved to approve a variance at 7305 Magnolia Ridge Drive to allow an existing accessory structure (15.25 foot tall tree house) to be located 3 feet from the rear lot line, 6 feet from the west lot line and encroach 2 feet into a utility easement, subject to staff comments and the site and elevation plans submitted with the application. Alderman Hinely seconded the motion.

ROLL CALL: Mr. Klevan – no; Mr. Poe – no; Ms. Boyd – no; Mr. Salvaggio – no; Ms. Sherman – no; Alderman Hinely – no; Chairman Evans – no

MOTION DENIED

SUBJECT: 1877 Elmhurst Drive – Request a variance to allow a fence to exceed six (6) feet in height in the “R” Residential zoning district.

BACKGROUND:

DATE SUBDIVISION APPROVED: The Oak Run subdivision was approved in June, 1978.

DATE PRINCIPLE STRUCTURE APPROVED/BUILT: The home was constructed in 1981.

PREVIOUS VARIANCE REQUESTS: None.

DISCUSSION:

NATURE OF VARIANCE REQUESTED: The specific request by the applicant is to allow an existing wood fence that is eight (8) feet in height. The aforementioned fence runs along the east (front) of 1877 Elmhurst, and along the north (side) property line, between 1877 Elmhurst and 1869 Elmhurst. The remaining fencing along the property does not exceed six (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 (2) feet.

APPLICANT’S JUSTIFICATION: The applicants are requesting the variances due to exceptional topographic conditions of the property. According to the applicants, “the fence was built eight (8) feet in height in this specific location only because this area slopes downward to such a degree that a six (6) foot fence would not provide adequate privacy to either property owner.”

STAFF COMMENTS:

1. The applicant is requesting a **two (2) foot variance** to allow an existing eight (8) foot fence along the east and north property lines.
2. Should the variance requests be granted, the applicant must apply for a fence permit through the Department of Economic and Community Development.

**Heather Scheibelhut and John Olsen, Owners/Applicants
1877 and 1869 Elmhurst Drive
Germantown, TN 38138**

Ms. Scheibelhut started out by saying that when Mr. Olsen moved in he had planned on building a fence between their two properties. That’s when Ms. Scheibelhut got the bright idea of offering to pay the difference of a six feet fence and an eight feet fence. She said that she had referenced the pamphlet that is distributed to new residents of Germantown and saw that there was a height restriction. However, the pamphlet never said what the height restriction was. When Ms. Scheibelhut spoke with the contractor, he said that would check on the height restriction but apparently, he did not.

Mr. Evans asked Ms. Scheibelhut who the contractor was. Mrs. Scheibelhut said that it was “Rivers Edge Construction.”

Ms. Scheibelhut further advised that the way the lots are situated, her house is higher than Mr. Olsen's house; her back porch is about three feet, eight inches off of the ground. When she goes out on her back porch, with the six foot fence they are able to sit eye to eye and talk with each other. Ms. Scheibelhut then referred to photos and advised that the fence along the rear line is six feet and is actually taller than the eight feet fence on the side line.

Mr. Klevan asked what was there prior, was there not a fence? Ms. Scheibelhut replied by saying that there was a six feet fence, but privacy was not an issue, because the backyard had been so overgrown with lots of foliage. Mr. Klevan asked who cleared all of the overgrowth/foliage. Ms. Scheibelhut said that it had gotten out of hand with the previous owner who was really into gardening; the real estate agent had to bring someone in to cut it all down.

Mr. Olsen advised that his house was in foreclosure and had been uninhabited for quiet a while. He said that the overgrowth consisted mainly of thick brush and sticky bushes, the kind that you can't get through because they were all so thorny. He also said the fence that was there before was truly an eyesore; it was in very poor condition, sagging in many places with missing boards throughout.

Mr. Poe asked Mr. Olsen how tall was the pre-existing fencing along his back property line. Mr. Olsen said that it is six feet all the way around. Mr. Poe then asked did the same contractor build that fence; Mr. Olsen said yes. Mr. Poe asked did Mr. Olsen obtain a permit for the previous fence. Mr. Olsen said that there were so many permits obtained when cleaning up and clearing off the property (gazebo removal, porch repair, etc.), that he automatically assumed that one had been taken out for the fence.

Ms. Scheibelhut went on to explain that the rear porch is more of the issue than the pool area. Per Ms. Scheibelhut, when on the back porch, it is like she and Mr. Olsen are sitting right next to each other. Mr. Poe asked if the fence was only six feet tall would Ms. Scheibelhut be able to see Mr. Olsen's deck. Ms. Scheibelhut said yes; depending on the angle from which you are looking, you would be able to see the roofline of the porch.

Ms. Boyd stated that if Ms. Scheibelhut were to lower the eight feet fence in the front yard down to six feet, then that would pull it down and make it match between the two properties; this should not interfere with the privacy issue.

Mr. Evans asked did the porch extend further than beyond the side of the house. Ms. Scheibelhut replied by saying no, the porch goes almost the entire length of the back of the house, but it does not extend past the north side of the house.

Mr. Klevan stated that the builders and contractors who work here in Germantown know the rules, but continue to break them. He said that we should take as many names as we can and do the appropriate letter writing holding them accountable for their action and cancel their abilities to build in Germantown. Mr. Evans then asked the staff to get in touch with the contractor for this particular case (River's Edge Construction); he said that he would like a report on that conversation at the Board's next meeting.

Mr. Poe stated that he was trying to look at this as though the fence was not there. Given the fact that these lots drop off as much as they do, and by looking at the property photos, he's more inclined to find a reason to grant the variance because of the topography.

PROPOSED MOTION #1: To approve a variance for 1877 Elmhurst Drive to allow an existing fence along the east (front) lot line of the house to exceed six (6) feet in height in the “R” Residential district, subject to staff comments.

Ms. Boyd moved to approve a variance for 1877 Elmhurst Drive to allow an existing fence along the east (front) lot line to exceed six (6) feet in height in the “R” Residential district, subject to staff comments. Chairman Evans seconded the motion.

ROLL CALL: Ms. Sherman – no; Mr. Poe – no; Ms. Boyd – no; Mr. Klevan – no; Mr. Salvaggio – no; Alderman Hinely – no; Chairman Evans – no

MOTION DENIED

PROPOSED MOTION #2: To approve a variance for 1877 Elmhurst Drive to allow an existing fence along the north (side) lot line to exceed six (6) feet in height in the “R” Residential district, subject to staff comments.

Ms. Boyd moved **to** approve a variance for 1877 Elmhurst Drive to allow an existing fence along the north (side) lot line to exceed six (6) feet in height in the “R” Residential district, subject to staff comments. Chairman Evans seconded the motion.

ROLL CALL: Alderman Hinely – yes; Mr. Salvaggio – yes; Mr. Klevan – yes; Ms. Boyd – yes; Mr. Poe – yes; Ms. Sherman – yes; Chairman Evans – no

MOTION PASSED

Meeting Adjourned at 6:49 p.m.