

The following are minutes of the Bettendorf Board of Adjustment and are a synopsis of the discussion that took place at this meeting and as such may not include the entirety of each statement made. The minutes of each meeting do not become official until approved at the next board meeting.

**MINUTES
BETTENDORF BOARD OF ADJUSTMENT
NOVEMBER 12, 2015
5:00 P.M.**

Voelliger called the meeting to order at 5:00 p.m.

Item 1. Roll Call

PRESENT: Falk, Gallagher, Johnson, Spranger, Voelliger

ABSENT: None

STAFF: Fuhrman, Soenksen, Connors, Stone

Item 2. Review of Board procedures.

Item 3. The Board to review and approve the minutes of the meeting of September 10, 2015.

On motion by Johnson, seconded by Falk, that the minutes of the meeting of September 10, 2015 be approved as submitted.

ALL AYES

Motion carried.

Item 4. The Board to hold a public hearing on the following items:

- a. **Case 15-073; 2736 Eagle Heights Court (R-1)** – Appeal of the building inspector/zoning administrator’s interpretation and enforcement of the rear yard setback requirements set forth in Section 14.17(5) of the Zoning Ordinance (now found at Section 11-6A-7(E)), submitted by James D. Bruhn for John M. Hoffman and Kimberly D. Hoffman.

Voelliger asked if there was an affidavit of publication. Soenksen stated that notice of public hearing had been received. Notice and affidavit of publication are Annex #2 to these minutes.

Falk stated that he would abstain from discussion and voting with regard to Case 15-073.

Soenksen reviewed the staff report. Staff report is Annex #3 to these minutes. Soenksen indicated that he had received a written response from the attorney representing the applicants which he forwarded to the Board.

Voelliger asked if there was anyone present wishing to speak in favor of the request.

James Bruhn, attorney representing the Hoffmans, stated that they filed a petition in October 2012 against the Blackwells and the subdivision developer asserting that the construction of the Blackwell home is in violation of the city's rear yard setback requirements and the subdivision covenants. He indicated that the procedural history and arguments in support of a formal hearing are detailed in the correspondence sent to staff and includes details of some ancillary litigation that is pending. Bruhn explained that subsequent to the filing of that petition, the city was joined as a defendant in the lawsuit in May 2015 and that the city filed a motion for a summary judgment as the applicants had not raised the issue with the city and had not followed the administrative process available. He stated that the summary judgment was granted and that a continuance was granted by the court to address the remaining issues which is scheduled to begin in December. Bruhn stated that as a part of the motion for summary judgment, Connors asserted that there is no violation of the city's setback requirements and that the construction in question is not defined as a structure according to the zoning ordinance. He explained that the Hoffmans contend that there is an ongoing zoning violation by virtue of the construction of a structure which they feel is not merely a retaining wall or fence which would be allowed. Bruhn stated that a formal hearing would allow introduction of evidence proving that the construction is indeed a large structure with ground footings, that a large amount of fill was brought to the site to substantially change the elevation of the yard, and that the structure encroaches into the rear yard setback by approximately 35 feet.

Bruhn stated that it is his understanding that a rule was adopted by the Board in June that applies to most cases that limits the amount of time an applicant is allowed to appeal a decision made on a variance or special use permit. He indicated that the Hoffman case is not based on a decision made by the Board and therefore the 30-day time limit is not applicable. Bruhn explained that Section 25 of the zoning ordinance states that any construction in violation of the zoning regulations constitutes a nuisance subject to abatement. He stated that at no time during the construction was a variance granted to allow the rear yard encroachment and no decision was ever made by Connors that would have triggered the 30-day time limitation for filing. He reiterated that the issue has been ongoing since 2012 and that he believes that the appeal was timely-filed and requested a formal hearing at the January 2016 meeting at which evidence can be presented.

Voelliger asked if there was anyone present wishing to speak in opposition to the request.

Mike Koury, attorney representing the Blackwells, stated that he is in concurrence with Connor's assertion that there is no violation of the city's zoning regulations. He indicated that the main issue is whether there should even be a formal hearing based on the merits of the case. Koury stated that even if the appeal had been filed immediately after the June 11 meeting at which the 30-day time period was established as a reasonable time to file an appeal, it would not have been considered timely-filed. He stated that even though the wall was completed in 2012, the Hoffmans did not approach the Board. He indicated that the summary judgment was not based

on the merits of the case but because the administrative remedies had not been pursued. He indicated that the Hoffmans should have approached the Board first but failed to do so in a timely manner. Koury stated that in his opinion a decision does not need to be made before the 30-day time limitation is triggered but rather that constructive knowledge of the violation should be the litmus test. He indicated that the Hoffmans lived adjacent to the wall while it was being built which took approximately one year.

Stone stated that the decision before the Board is merely whether the appeal is timely-filed. She indicated that the Board has the authority to determine rules governing the timely filing of appeals which was established in June as 30 days. She explained that the 30 day period begins either when a decision is made or when an applicant should have had knowledge of the violation. Stone explained that the issue is not whether a formal decision was made but rather staff's interpretation of this type of retaining wall or elevated yard and if they are allowed to encroach into the setback. She indicated that the Hoffmans should have had knowledge of the situation especially in light of the fact that the litigation began in 2012. She recommended that the Board deny the request for a public hearing on the basis that the application was not timely-filed.

Gallagher asked for confirmation that a formal decision has never been made by the city with regard to this case. Connors confirmed this. Gallagher stated that he is unaware of any method by which appeals cases reach the Board level except for times when an administrative decision is made by staff or a variance granted. He indicated that the issue at hand does not technically meet either of those standards, adding that it seems as though ample time has passed to allow the Hoffmans to have made that appeal. Gallagher stated that he believes that the 30-day time limit to file an appeal should be enforced and other remedies be pursued by the Hoffmans.

Johnson stated that while she has been unaware of this case until now even though the litigation has been ongoing for quite some time, the Hoffmans were informed on May 20, 2015 that they would be required to return to the city in order to exhaust all other administrative remedies available to them. She indicated that in June the 30-day time limit to file appeals was imposed, adding that at the time it seemed very reasonable to do so. Johnson stated that she is uncomfortable with the fact that staff was aware of the litigation at the time the rule was changed but that Board members were not informed. She asked for an explanation of the reason for the timing of the rule change. Stone stated that the city's outside counsel who has been involved in this case recommended that the rule be changed. She indicated that it was mentioned at the June meeting that the city had been involved in case involving a setback issue that was never presented to the Board. Johnson commented that she is uncomfortable with the timing. She asked when the Hoffmans appealed to the city as required by the court decision. She stated that she is uncertain whether the 30-day time limit should be applied because the rule change was not in place at the time the Hoffmans were instructed to return to the city to exhaust other remedies. Johnson commented that when the instructions were given to the Hoffmans in May, the definition of reasonable had not yet been specified. She suggested that perhaps there is somewhat of a gray area with regard to whether or not the current appeal was

timely-filed. Stone stated that she might agree with that reasoning if there had actually been a pending appeal in June. She stated that the appeal was filed after the rule was adopted. Bruhn stated that this appeal is not typical in that there has been no official decision by the city for which an appeal would have been filed. He requested that Connors give a formal decision with regard to whether the construction violates the ordinance regulations so that it could be appealed officially. He added that even though litigation has been pending and the involved parties met in court in May, no notice was given to him with regard to the rule change. Bruhn stated that if he had been made aware of the new rule that would be applied retroactively, he would have ensured that the appeal was filed in a timely manner. He indicated that while he is aware that ignorance is no excuse, in this case he would like to request a formal decision from Connors that could then be appealed. He explained that he was not required by the court to return immediately to the city to pursue other remedies and instead took time to re-strategize and to submit a formal appeal.

Connors stated that when an application for a permit is received a review of zoning ordinance compliance and of the plans is completed. He indicated that when the permit is issued, that constitutes a formal decision that the proposed construction is in compliance. Gallagher commented that it has been approximately 4 years since the permit was issued. Bruhn commented that the permit was issued to the Blackwells, not the Hoffmans who could not reasonably be expected to be aware of it. Koury stated that in his opinion there is no need for a formal decision to trigger the 30-day time period limitation but that case law states that the Hoffmans should have had constructive knowledge of the construction given their proximity to the Blackwells. He stated that the city is not required to inform Bruhn of the rule change, adding that he is certain that it was published as required. He reiterated that the appeal was not timely-filed even after the rule changed.

Spranger asked if public notice of the proposed rule change was given as Koury indicated. Stone stated that the proposed rule change was indicated on the agenda which is posted as is the common practice for all Board cases.

Johnson asked why the rules that were in place when litigation began with regard to appeals to the Board should not be imposed rather than retroactively applying the new 30-day deadline to a case that began in 2012. Stone explained that the appeal regarding the alleged violation was not filed until after the rule changed.

Johnson asked what options are available to the Board so that more time could be available to research the history of the litigation, the rule change, and the subsequent appeal by the Hoffmans. Soenksen stated that if the Board chooses, the case could be deferred until such time as more information is available to the members to determine whether a public hearing should be held.

On motion by Gallagher, seconded by Voelliger, that the appeal of the building inspector and zoning administrator's interpretation and enforcement of the rear yard setback requirements set forth in Section 14.17(5) of the Zoning Ordinance (now found at Section 11-6A-7(E)) be denied in accordance with the Decision and Order as it was not timely-filed.

ROLL CALL ON MOTION

AYE: Gallagher, Spranger, Voelliger
NAY: Johnson
ABSTAIN: Falk

Motion carried.

Decision and Order is Annex #4 to these minutes.

- b. **Case 15-078; 3486 Spencer Drive (A-2)** – A request for a variance to increase the allowable area of a garage from 773 square feet to 1,234 square feet to allow for construction of a 26-foot by 28-foot garage, submitted by Scott Pfitzenmaier.

Voelliger asked if there was an affidavit of publication. Soenksen stated that notice of public hearing had been received. Notice and affidavit of publication are Annex #2 to these minutes.

Soenksen reviewed the staff report. Staff report is Annex #5 to these minutes.

Gallagher asked if a variance would be required if the proposed structure was not a garage. Connors explained that if the applicant proposed to build an ancillary structure such as a workshop without a garage door a variance would not be required. Gallagher commented that the proposed structure is not a typical garage in that there is no driveway access leading to it.

Johnson asked if the applicant has determined an exact location for the proposed garage. Scott Pfitzenmaier, the applicant, stated that a final determination as to location has not yet been made. Johnson asked if the proposed structure would be compliant with zoning regulations with regard to setbacks. Soenksen confirmed this, adding that fire separation requirements would also be imposed.

On motion by Johnson, seconded by Spranger, that a variance to increase the allowable area of a garage from 773 square feet to 1,234 square feet to allow for construction of a 26-foot by 28-foot garage be granted in accordance with the Decision and Order.

ALL AYES

Motion carried.

Decision and Order is Annex #6 to these minutes.

There being no further business, it was unanimously approved to adjourn the meeting at approximately 5:30 p.m.

These minutes and annexes approved _____

John Soenksen, City Planner