

MINUTES
OF
DOUGLAS COUNTY BOARD OF ADJUSTMENT
3015 MENKE CIRCLE
OMAHA, NEBRASKA 68134
April 19, 2006
6:03 p.m.

The meeting was called to order by Chair Mayo with roll call.

Members Present: Scott Bruhn, Colleen Mayo, Mark Roseland, Patricia Trebbien, and Steve Wright.

Barbara Hayes joined the Board at 6:05p.m.

Other County officials, staff, and representatives present: Barb Frohlich (Environmental Services) and Bernie Monbouquette (Deputy County Attorney).

Motion by Mr. Wright to make the spelling correction and then move seconded by Ms. Trebbien to approve minutes of March 15th, 2006.

Voting Yes: Bruhn, Trebbien, and Wright.

Voting No: None.

Abstain: Mayo, and Roseland.

APPLICATION V-3-06

REQUEST: Allow construction of accessory building in floodway.

LEGAL: Section 3, Township 14 N, Range 10 E of the 6th P.M., cabin on leased land, Lot 1.

LOCATION: 23809 "F" Plaza

INTENDED USE: Accessory Building, 12 x 20.

APPLICANT: Jeffrey R. Ziegler, 7430 Grover, Omaha, Nebraska

Jeffrey Ziegler, 7430 Grover Street, presented the application stating he proposed an outbuilding, 12x20, on the property at 23809 "F" Plaza.

Ms. Hayes confirmed that the property is located in the floodway.

Ms. Frohlich stated that the staff report contains the portion of the floodplain regulations. allows variances in the floodway providing the listed items have been considered.

Mr. Wright asked if the property was under ½ acre in size? Mr. Ziegler responded the lot is 150 x 150, just under ½ acre. Ms. Frohlich also stated she understood all the lots were ½ acre lots.

Mr. Wright and Ms. Hayes questioned whether a variance could be granted because the lot is more than ½ acre.

Mr. Ziegler stated that he lost the driveway located on the north side of the property so it might be less than ½ acre.

Mr. Monbouquetted suggested checking the County Assessor's record for the size of the property. Ms. Frohlich checked the records and stated that the improvement on the leased property is shown not the size of the property.

Mr. Ziegler explained that he would like to have a shed to house miscellaneous property such as lawn equipment to keep the property clean. Also stated that his property is less than ½ acre or less in size and a variance is required to obtain a building permit. The shed is on 2 x 8 treated timbers so it can be moved easily if there is flooding. He further explained that there originally was a shed and driveway on the north side of the property. It had been explained to him that when the owner of the land died, the property was surveyed and the shed and driveway were found to belong to the new owner of the north half of the property and a post and cable fence was installed. He understood there was some type of family feud going on.

Chair Mayo opened the public hearing.

Pauline Merryweather, 15415 Summerwood Drive, made the following comments:

1. She is not opposed to the application.
2. She thinks the shed looks lovely.
3. She also explained that she owns the property to the north side of this cabin.
4. She explained that the shed was given to the neighbor to the north when the cabin was sold.
5. The fence is not new but was moved when the property line was established.
6. The property that this cabin is located on is owned by Steve Vencil.
7. She also stated there is no family feud.
8. She also stated that she believed the establishment of the property line made Mr. Ziegler's lot smaller.

No one else from the public spoke for or against the application. Chair Mayo closed the public hearing.

Questions, Comments, and Discussion among Board members:

1. Mr. Roseland asked if the Board was going to consider the property as being less than ½ acre in size?
2. Ms. Hayes stated she would treat it as less than ½ acre based on the explanation but was concerned because the property is located in the floodway and other requests for variances in the floodway have not been approved.
3. Mr. Wright pointed out that in those cases, a foundation was proposed.
4. Ms. Hayes asked how quickly the building could be moved. Mr. Ziegler answered that four lag bolts would have to be removed and then the building could be loaded onto a trailer; estimated about three to four hours.
5. Mr. Roseland asked what the building is bolted to. Mr. Ziegler stated it is bolted to 5 x 8's with gravel underneath the floor so it will not sink.
6. Ms. Hayes asked if no rise certificates had been required in past. Ms. Frohlich stated this is the first circumstance with the ½ acre provision for variances.
7. Mr. Wright asked where the provision came. Ms. Frohlich stated it has always been part of the floodplain regulations and the floodplain regulations were approved by FEMA in December, 2005.
8. Chair Mayo expressed concern the part of the regulations that says "Variances shall not be issued within any designated floodway if any increase in flood levels during the base flood discharge would result."
9. Ms. Hayes stated the other concern is that something would become a hazard during a flood.
10. Mr. Wright asked if anyone could replat property to ½ acre in the floodway so they could obtain building permits.
11. Mr. Monbouquette stated the regulations say that "as the lot size increases beyond ½ acre the technical justification for issuing a variances increases." Because this lot is under ½ acre, the regulation states that you don't have to be as strict in finding these conditions.
12. Mr. Wright again asked why someone with one acre in the floodway could not divide it into ½ acre lots to be able to get building permits.
13. Ms. Frohlich stated she could not think of any way to create new lot in the floodway to get building permits. Mr. Monbouquette concurred.
14. Ms. Hayes pointed out that the lot was not reconfigured, the lot line had just not been properly identified.
15. Mr. Monbouquette stated that is there is no fact owing to the shape of the lot, he didn't what could be found as a conditional causing exceptional hardship.
16. Ms. Hayes reminded everyone that certain findings of fact have to be made by law or the Board of Adjustment can be sued.
17. Mr. Monbouquette clarified that statute from the legislature defines the reasons for granting variance and in addition Douglas County's Floodplain Regulations add additional requirements for granting variances. The Board of Adjustment makes specific findings that something about this lot makes it special, it is different from the other lots, and because of some exceptional hardship, there is no other relief available and it is generally hard to make those findings of fact.

18. Ms. Trebbien asked if it were possible to make the structure mobile in some way. Mr. Ziegler stated that the structure could be jacked up and axles put under it.
19. Mr. Ziegler also stated that he installed two 8 inch pipes under the structure so water could flow through.
20. Mr. Roseland pointed out that if the structure was not bolted down it could just break away in a flood. Mr. Ziegler stated he bolted it down because of what is in the Floodplain Regulations but the bolts could be removed.
21. Ms. Hayes asked when the structure was put up. Mr. Ziegler stated he put the structure up last September and was told by the neighbors that he did not need a permit because it was not going to have a foundation.
22. Mr. Wright asked how the Permit Department found out about this. Mr. Ziegler stated there was an anonymous call by someone who had been turned down for something else by the Permit Department.
23. Ms. Trebbien commented that she did not know how the structure could cause a problem if he has installed pipes underneath the structure and made it temporary.
24. Ms. Mayo asked about the part of the regulation that says "the applicant shall be given written notice about flood insurance." Mr. Ziegler responded that he was aware of that provision.
25. Mr. Roseland asked if a motion would just be that it was considered under ½ acre provision in the regulations. Mr. Monbouquette stated he does not believe the ½ acre provision excuses all of the findings that must be met (the regular findings of fact plus those required by the Floodplain Regulations).

Motion by Mr. Roseland to grant the variance based on the following findings of fact.

1. Undo hardship is the security of his property.
2. The hardship is not shared generally by the other properties in the same zoning district and the same vicinity.
3. The authorization of such variance will not be of substantial detriment to the adjacent property and the character of the district will not be changed by the granting of the variance.
4. The granting of such variance is based upon reasons of demonstrable and exceptional hardship as distinguished from variations for purposes of convenience, profit or caprice.
5. No variance shall be granted unless the Board finds that the condition or situation of the property concerned or the intended use of the property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the zoning regulations.

The motion was seconded by Ms. Trebbien.

Voting Yes: Bruhn, Hayes, Mayo, Roseland, Trebbien, and Wright.
Voting No: None.
Abstain: None.

APPLICATION

V-4-06

REQUEST: Allow construction of single family dwelling on parcel of land less than 20 acres in size.

LEGAL: Parcels 1-7 in SW ¼ of Section 12, Township 16N, Range 10 E of the 6th P.M.

LOCATION: Approximately 211th and Bennington Road

INTENDED USE: Construction of single family dwellings.

APPLICANT: Scott Bruhn, 9191 North 225th Street, Elkhorn, NE 68022

Scott Bruhn excused himself from the Board at 6:52 p.m.

Bob Daily, 1601 Dodge Street, made the following comments as representative for Mr. Bruhn:

1. He also represents the proposed developer, Don Gardiner.
2. Mr. Gardiner has developed a similar subdivision across the road from this property.
3. The application is requesting relief from a new provision in the AF-1 zoning district that requires a minimum of 20 acres to obtain a building permit.
4. The previous requirement allowed for building permits to be obtained on 10 acres.
5. Mr. Bruhn owns the site and has entered into an agreement to sell the property to Mr. Gardiner.
6. The 20 acre minimum requirement does not affect the legality of the sites; it just affects the ability to obtain building permits.
7. Mr. Gardiner does not want to develop the property into 20 acre sites because there is not a real market for that lot size.
8. Mr. Bruhn can't sell the sites at 20 acres.
9. His other option is to subdivide the property like an urban development which really wouldn't fit the character of the area.
10. We are asking the Board to grandfather this development under the rules that existed at the time the parcels were created.
11. The enforcement of the 20 acre minimum requirement would result in a peculiarly exceptional difficulty for the owner and developer.
12. It would also result in an exceptional and undo hardship for the owner and developer.
13. A variance could be granted without detriment to the public and would be consistent with development in this area.
14. A variance would not substantially impair the zoning regulations that exist now.
15. The hardship is not shared by anybody else in the area that he is aware; it a pretty unique circumstance.

16. A variance would not be a detriment to the adjacent property and the character of the area.
17. The ten acre sites are consistent with the existing area and forcing him to do an urban development would actually be inconsistent with the area.
18. Believes there is a demonstrable and exceptional hardship because development will not occur at 20 acres so the other alternative would be urban density development which is not consistent with the character of the area.

Ms. Hayes made the following comments:

1. Disagreed that no one would develop 20 acre sites there.
2. Mr. Bruhn was trying to comply with the zoning regulations that existed at the time the parcels were created.
3. Agrees this is a unique situation because we can't plat 10 acres any more so we aren't going to see them.

Chair Mayo opened the public hearing.

Iris Moore, 9036 Harney, made the following comments:

1. She and Judy Leibrock own the property just north of this property.
2. It was her understanding when they purchased the land that it could not be divided in less than 20 acre parcels and they did not want a lot of houses around them.
3. Believes that many people are interested in 20 acre parcels..
4. Was her understanding that land within one mile of the landfill could not be subdivided. Ms. Hayes clarified that a subdivision could not be created at the time the property was divided.
5. Also stated that all the water runs down into the creek and onto her land.
6. Asked how long had it been that the land could be divided into 10 acre parcels.

Ms. Frohlich clarified that state statute requires that any property less than 10 acres in size must go through the subdivision process. Ms. Hayes explained that the County changed their regulations last November to require property 20 acres or less must go through Planning Commission and County Board approval.

Ms. Moore asked if the 20 acre requirement is for the whole County or related to the landfill. Ms. Hayes explained that it has nothing to do with the landfill.

Ms. Frohlich clarified that the new Comprehensive Plan states that there can be no residential subdivisions within ½ mile of the landfill where it used to be one mile.

Ms. Hayes asked Ms. Moore when she purchased her property. Ms. Moore stated she purchased the property from Mr. Bruhn in 1997.

Ms. Hayes explained that at that time the property could be divided into 10 acre parcels but a subdivision could not be platted because of the distance to the landfill. Ms. Hayes

further stated that Mr. Bruhn divided the property under the assumption that building permits could be obtained on 10 acre parcels.

Ms. Moore stated that before last November, she had offered to buy the land. Ms. Hayes responded that situation is between Mr. Bruhn and her. Ms. Moore further stated that the fact she offered to buy it goes against the attorney's argument that no one would buy the property. She emphasized that she would rather not have seven houses built there.

Mr. Monbouquette addressed the board with the following comments:

1. Mr. Dailey mentioned grandfathered rights and he legally doesn't think there is any place for grandfathering in this case.
2. In order to be considered under the prior regulations, the applicant would have to say they had expended substantial amounts of effort and money based on the previous regulations and the new regulation is depriving them of their investment.
3. Without that, doesn't think there is any grandfathering of rights to build.
4. Would be concerned if the Board was going to act favorably on this application that you expand the required findings on #4 that the granting is based on reasons of demonstrable and exceptional hardship as distinguished from variations for purposes of convenience or profit. Believes the Board would have to make a finding that the land wouldn't be marketable because otherwise you make the conclusion that the only real reason for this is that it is worth more as 10 acre parcels as opposed to 20 acre parcels.

Mr. Wright asked when the regulations were changed and what the public hearing process was. Ms. Frohlich stated the public hearing before the Planning Commission was probably in October and then another public hearing was held before the County Board of Commissioners in November.

Mr. Wright asked how many other 10 acre plots existed and would those owners say they should have grandfathered rights. Ms. Frohlich stated there would be no way to know how many others there are.

Mr. Monbouquette responded that only when a substantial investment has been made in property can the old requirements be used.

Ms. Moore asked if the property could be divided into smaller lots. Ms. Hayes stated only if an application was submitted to the Planning Commission and recommended for approval to the County Board. She further stated that the variance request is only to allow building permits on 10 acre parcels.

Mr. Monbouquette suggested that the Board should know the number and sizes of the lots less than 20 acres in size.

Ms. Mayo stated that if Mr. Bruhn intended to further subdivide the property, he would not have applied for a variance.

Motion by Mr. Roseland to grant the waiver with the following findings:

1. The strict application of the zoning resolution would produce undue hardship because of the timeliness of the changes requirement in the size of the lot after the plat was finished.
2. Such hardship is not shared generally by the other properties in the same zoning district and the same vicinity which there are already 10 acre lots across the street.
3. The authorization of such variance will not be of substantial detriment to adjacent property and the character of the district will not be changed by the granting of the variance. Again, there are already 10 acre lots division going in there and it would be better than 30 acre lots.
4. The granting of such variance is based upon reasons of demonstrable and exceptional hardship as distinguished from variations for purposes of convenience, profit or caprice. Again, it's back to the timeliness of the 10 acre than the 20 acre.
5. Further, no variance shall be granted unless the Board finds that the condition or situation of the property concerned or the intended use of the property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the zoning regulations.

Motion seconded by Ms. Treibbien.

Discussion:

1. Mr. Wright expressed concern about how many other 10 acre parcels are out there and does this say that everybody that has a 10 acre parcel can get a building permit.
2. Ms. Trebbien commented that she believed this was platted in good faith before the regulation was changed.
3. Mr. Roseland commented about the work and expense for the legal issues shows that he has put forth monetary effort.
4. Mr. Monbouquette stated that no evidence has been offered of substantial investment and the expenses for legal issues are not the type of investment case law refers to. Reminded the Board that they were making a finding of fact that is not based on anything they have been told.
5. Mr. Bruhn stated that he did not think anyone was a large subdivision because this is an acreage area. Further stated that the property was in the process of being sold and doesn't understand the comments about substantial investment. There has been a substantial amount of engineering work done.
6. Ms. Mayo commented that if he really wanted to make more of a profit, he would have subdivided the property.
7. Mr. Wright again expressed concern about setting a precedence for anything already divided into 10 acre parcels.
8. Mr. Monbouquette stated that he had explained what case law says about grandfather rights in response to being asked the question. He also asked that if the person asking the question or their legal counsel had a difference of opinion to

- contact him. No one has contacted him, no one has questioned his opinion and he stands by it. None of the cases he has read establish having a plat drawn and recorded as a substantial investment.
9. Ms. Trebbien stated she believes Mr. Bruhn is not making this request for profit sake and appreciates his intent to keep the parcel size at 10 acres.
 10. Mr. Monbouquette pointed out that there is presumption that the property could be re-zoned for a subdivision. Re-zoning for a subdivision would be spot zoning and there is no guarantee that the property would be approved for re-zoning.
 11. Mr. Wright said by granting the variance, the regulations are being changed back to the 10 acre requirement and the Board would be accepting any 10 acre parcels created before the change as the standard.
 12. Mr. Roseland commented that there would still have to be proof that the parcels were created before the regulation change.
 13. Mr. Bruhn stated that he knows where the County Board members are coming from on a lot of issues and questions their reaction to this issue.

Chair Mayo closed the public hearing, then re-opened it for Mr. Mellon to comment.

Mike Mellon, Pacific Realty, made the following comments:

1. Asked if there was a way to grant the variance specific to the way the land is currently divided and specify that it was under contract before the Comprehensive Plan was adopted.
2. There are purchase agreements that are dated before the Comprehensive Plan was adopted.

Ms. Frohlich explained that the regulation change that occurred in November is the reason for the denial of building permits.

Mr. Wright again pointed out that by granting the variance, the Board is deciding that any 10 acre parcels will be able to get building permits.

Ms. Hayes and Mr. Roseland stated they did not believe granting of the variance does not mean all 10 acre parcels will be able to get building permits. Mr. Roseland further stated that each situation should be considered individually.

Mr. Monbouquette again stated that his legal opinion is that owning a 10 acre parcel for 10 years does not entitle the owner to obtain a building permit. There is no grandfathering of rights, that is not the law in Nebraska.

Mr. Roseland stated he didn't believe someone should be penalized for buying property five or ten years ago to build a house when they could afford to.

Mr. Monbouquette stated that is the exact opposite of the legal opinion he is trying to explain. The only way to make a finding to grant a variance would be to find that they made some substantial investment in the land during the time they were waiting to build a

house. The size limitation at the time the building permit is applied for must be complied with.

Ms. Frohlich stated that the only other option is to re-zone the property in order to comply with current regulations.

Mr. Wright asked what the hardship in this case is. Mr. Roseland responded it is the work that he has done to divide the property into seven parcels and now he can't sell it to the purchaser because of the change in the regulations;

Mr. Wright stated that the hardship is not supposed to be financial. Mr. Roseland stated that everything is financial.

Mr. Dailey made the following comments:

1. There is an application filed with the Planning Commission to re-zone the property. It is scheduled for the May meeting.
2. The application was originally scheduled for the March meeting but was delayed because applying for the variance is a more direct approach and better fit the circumstances.
3. Re-zoning means subdividing the property into smaller lots and nobody wanted to do that.
4. If the variance is granted, the re-zoning request will be withdrawn. drop it actually.

Mr. Wright commented that as far as usage goes, this size of parcels is better than a large development, so it can be thought of as a hardship for the county

Chair Mayo closed the public hearing.

Voting Yes: Mayo, Roseland, Trebbien, Wright, and Hayes.

Voting No: None

Abstain: None

Mr. Bruhn returned to the Board.

APPLICATION

V-5-06

REQUEST: Allow 16" front yard instead of required 25" front yard setback

LEGAL: Lot 157, Newport Landing

LOCATION: 11717 North 179th Street

INTENDED USE: Additional garage

APPLICANT: Ed Stepanek, 11717 North 179th Street, Bennington, NE 68007

Ed Stepanek, 11717 North 179th Street, made the following comments regarding his application:

1. The variance request is for his residence that was built with a two car garage.
2. The request for an additional single car garage to be located where he now parks his truck.
3. Has talked to his neighbors regarding the plans and they have no objections.

Mr. Wright asked if the red and green lines on the concrete indicated where the garage will be built. Mr. Stepanek stated that was the proposed location and that the pine tree is beyond the proposed location.

Mr. Roseland asked if the proposed plan had been reviewed by the developer. Mr. Stepanek stated it had been.

Mr. Roseland asked if a vehicle could be parked in front of the proposed garage without impeding the sidewalk or right-of-way. Mr. Stepanek stated there would be room for a parked vehicle.

Chair Mayo opened the public hearing.

Bill Fleming, 11913 North 179th Street, stated that he lives in the house south of Mr. Stepanek and would rather look at his garage door than the front of his truck. Also stated that he does not believe it will impede anyone's sight line.

Chair Mayo stated that she did notice that most houses do have three car garage so this would be in conformity to the other property owners.

Chair Mayo closed the public hearing.

Motion by Mr. Wright to grant approval of the variance application with the following findings of fact:

1. The strict application of the zoning resolution would produce undue hardship because of the topography of the lot.
2. Such hardship is not shared generally by other properties in the same zoning district and the same vicinity.
3. The authorization of such variance will not be of substantial detriment to adjacent property and the character of the district will not be changed by the granting of the variance.
4. The granting of such variance is based upon reasons of demonstrable and exceptional hardship as distinguished from variations for purposes of convenience, profit or caprice.
5. The Board finds that the condition or situation of the property concerned or the intended use of the property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the zoning regulations.

Ms. Trebbien seconded the motion.

Voting Yes: Bruhn, Hayes, Mayo, Roseland, Trebbien, and Wright.

Voting No: None

Abstain: None

Announcement: No meeting scheduled for May.

Meeting adjourned at 7:55 p.m.