

MEETING RECORD

NAME OF GROUP: CITY BOARD OF ZONING APPEALS

DATE, TIME AND PLACE OF MEETING: Wednesday, October 12, 2011, 1:00 p.m., Conference Room 214, Second Floor, County-City Building, 555 S. 10th Street, Lincoln, Nebraska

MEMBERS IN ATTENDANCE: Andrew Budell, George Hancock, Scott Sandquist and Lynn Sunderman; (Tim Francis absent). Tim Sieh of City Attorney; Terry Kathe of Building and Safety; Steve Henrichsen, Brian Will and Teresa McKinstry of the Planning Department.

STATED PURPOSE OF MEETING: Orientation and Information

Brian Will opened the meeting and acknowledged the posting of the Open Meetings Act in the room. Everyone introduced themselves. A binder of information was distributed to everyone. A sample agenda was prepared. He will give an overview of how the process works. Building and Safety will talk about the role of the building permit process and how the appeal comes to be. Normally, these appeals spring from a deficiency during the building permit process. He would like Tim Sieh to give a brief legal overview. Lincoln Municipal Code 27.75 relates specifically to the Board of Zoning Appeals. In the binder are two old cases for example and discussion.

A time line is included in the binder. This shows when an application needs to be submitted to be heard at a specific hearing. There is an application in process. It has been delayed for a few months. Will is waiting on information from the applicant. He anticipates it being on the November 2011 agenda. Notice is mailed to everyone within 200 feet of the application area letting them know what has been requested.

Terry Kathe clarified that when an application is made, typically staff wants it to go through a full building review so they know if the design works or not.

Will continued that a list of all the board members and their contact information was given to everyone. Building and Safety has an internal process that they go through. They need to be very specific about the issue of the noncompliance. A thorough review is done up front. The section of the municipal code is specifically identified that is in need of a variance. The application goes to the Planning Dept. These are unique from other Planning applications in that a recommendation is not given to the board. The Board of Zoning Appeals is quasi-judicial. A report is given that states the facts, gives any unique conditions and tries to present an objective review. The agenda is prepared. Notice is sent out to the neighbors and notice sign is placed on the property in question. If there were any questions relative to an application, it would be distributed to all the members so there is a distribution of information to everyone.

Chapter 27.75 is a chapter from the Lincoln Municipal Code that relates to the Board of Zoning Appeals. This chapter talks about the membership. It is somewhat specific. At least one member must be from Planning Commission. Lynn Sunderman is also a member of the Planning Commission. The code talks about the process of an application and the board's authority on appeals. Scope and factors considered is subject to a bit of interpretation. The Resolution voted on by the board is submitted to the City Clerk. Any appeal of this board's decision is to the District Court.

Scott Sandquist wondered about the final Resolution. Kathe replied that a modification can be made to the application at time of the vote. A reason must be given as to the reason for the modification. This holds true for any decision that is made. This helps the Law Dept. in preparing their Resolution.

Tim Sieh noted that if this decision was to be appealed to the District Court, this is the record of how this decision was reached and why.

Will stated that the bylaws are included in the binder. The board can amend these by a majority vote. It specifies when meetings are held, the agendas and the legal notice.

George Hancock stated that occasionally, the board is split on their decision. The application is automatically deferred to the next meeting. He questioned if another legal notice is given relative to the continued hearing. Will replied that a notice is not mailed to the surrounding neighbors again, but the sign will remain on the property and the legal advertisement will be published again.

Will further noted that another distinction is that anyone giving testimony to the board is sworn in, including staff. This is a function of the quasi-judicial nature of the Board. The bylaws talk about the rules, election of Chair and Vice-Chair. Elections will be the first order of business at the next meeting. This is a brief overview of what happens behind the scenes.

Kathe stated that sometimes an appeal comes from someone who applies for a building permit and discovers that something is not right. Staff tries to be very open with the applicant and let them know what they have to prove to the board. Many times, a survey has to be provided to show exactly what the situation is. A house built in the wrong location is one of the toughest cases. Sometimes, property stakes have been moved and someone finds they are too close to a property line. These can be the hardest because sometimes there is no hardship, but a decision could result in part of someone's house being torn down. Staff tries to make sure that all the information is provided so everyone can review and make a decision.

Will believes that Building and Safety does a very good job in explaining everything to an applicant. Additionally, relative to the lack of applications lately, there are a fair number of community unit plans throughout the city and changes have granted a certain amount of administrative authority to the Planning Director to make minor modifications.

Hancock stated that staff at all levels should be complimented on their work and efficiency.

Sieh stated that the Lincoln Municipal Code states that a majority vote must happen for a vote to be final. A record of testimony is kept, both with minutes and audio recording. Appeals can come from two different parties: any person who is aggrieved by a decision of Building and Safety, or any City department. There are notice requirements. The Director denies the building permit and then an applicant has 60 days to make an application to the Board of Zoning Appeals. Notice must give the grounds for appeal. Powers relative to errors is where the applicant alleges that an error was made by the Director of Building and Safety. Sometimes, it can be a difference in interpretation. There are two different types of variances, use and area. Use is a property that wants to be used for something that is not in the zoning code. A specific reason must be given.

Kathe does not believe this has ever been used.

Sieh continued that area variances are where the use is fine, but there is something about this property that doesn't allow the house to be built within the ordinance, height variance or something. There must be something unique about the property that necessitates the variance; the size of the lot, topography, something unique about the land. The factors that the Board of Zoning Appeals is allowed to consider is if strict compliance with the rules would cause the applicant a hardship.

Will stated that in his staff report, he tries to note what would make this property unique.

Sieh stated that a request could be modified for a kind of compromise position. Public safety and welfare must be considered. Perhaps lots lines were changed or a survey stake possibly moved. Say a homeowner went to the city with plans that he knew were in violation. He starts building and the neighbors notice. For whatever reason, the City Engineer approved the plans. The court says you can't create a hardship by doing something that you know is in violation of the Ordinance. That is in contrast to a case in Omaha where a piece of property was purchased. Before development, the State wanted to take some of the property and as a consequence, there would no longer be access on the south side of the property. This problem wasn't created by the owner, it was brought upon them. Another case from York was where a business came in and said they could create jobs if a building could be built with a smaller setback. The City agreed. The court said making more money is not a practical hardship. What is unique about the property, what is peculiar about this situation, those two questions must be answered for a court to look favorably on this application.

Steve Henrichsen stated that usually the person who is drawing the plans has invested in the idea. Staff asks them what to explain what is unique. Understanding the rules is a part of the process.

Hancock noted that the health or disability of an applicant cannot be considered. Some decisions can be tough, but there are rules to follow. Sieh stated that is the difference between this board and another. This is quasi-judicial.

Henrichsen also noted that we frequently hear testimony that the neighbors have been talked to and they are in support. The rules must still be followed with regard to a unique situation.

The Clerk questioned if there is a need to call for ex parte communications at the beginning of a public hearing. Sieh believes it is a good idea. Ex parte communications should be asked for and disclosed. He agreed that if someone contacts a board member, they should be advised that they should appear before Board of Zoning Appeals and testify. Sieh believes it is a good idea to call for ex parte communications before a public hearing and have members state who contacted them and what was talked about.

Henrichsen also wondered if Sieh could address a possible conflict of interest.

Sieh stated that if a board member has any question about a possible conflict, they should bring it to his attention in advance of the meeting and state the situation. He can let the member know what is and isn't a conflict.

Kathe stated that the board doesn't hear a lot of errors in interpretation. Staff goes to the Law Dept. first to hear their interpretation.

Sieh stated that the Law Dept. can give you their interpretation. We can advise the board, but the board can make a decision to the contrary.

Will is going to review two previous cases with the board. One was approved and one was denied. The first application was a request for a variance to the front yard setback. They were encroaching approximately three to four feet. The lot was on the inside of the curve of a public street. The area of encroachment was on two small points of the building. The Board found that this lot was unique. This contrasts to the application that was denied. It was a property on a typical residential lot. The applicant wanted to construct a garage in the rear yard. The code states you can't occupy more than forty percent of your rear yard. The applicant was proposing to occupy a little more than fifty percent of the property. There was nothing unusual about the property. There was other area where the structure could be located. The board agreed that there was no unique circumstance and this application was denied.

Hancock stated that the board is often challenged about the peculiar and unusual circumstances in connection with the land. The connection is often questioned. Rick Peo with the City Attorney's office has previously told the board that a connection must be inherent. Size can't be considered. Sieh would agree. If a lot size is similar to other lots in the area, lot size is not peculiar. Trees or other things planted or built is a self imposed problem. Each case is unique and must be considered with all available information.

Kathe noted that every one's interpretation can be different. If an applicant has hired legal counsel, it is the attorney's job to try and convince you of their interpretation.

Lynn Sunderman would like an overview of the public process. Sieh believes it is upon the applicant to state their situation first.

Hancock stated that the applicant speaks first, then persons testifying in favor, then persons testifying in opposition. The hearing is closed and the board goes into an administrative session. Questions can be asked of staff or the applicant.

Will stated that usually staff does not make a presentation. They are available for questions.

Sunderman wondered if the applicant is given a chance to address any testimony given in favor or opposition. Hancock replied that if questions are raised, the applicant would have opportunity to answer any questions the board might have.

Henrichsen believes that the reason it has been two and a half years since an application is there are more tools in place for staff now. The rules are a little more flexible. Planned Unit Developments are another tool. The Planning Director can make some administrative changes. Other venues have been created for more flexibility in development.

The meeting was adjourned at 11:45 p.m.