

**VILLAGE OF YELLOW SPRINGS  
BOARD OF ZONING APPEALS  
MINUTES**

**Bryan Center Gym @ 7:00 P.M.**

**Wednesday, July 8, 2020**

**CALL TO ORDER**

The meeting was called to order at 7:00 p.m. by Matt Reed, Chair.

**ROLL CALL**

Matt Reed, Chair, members Scott Osterholm and Anthony Salmonson were present, and Alternate Richard Zopf. Zoning Administrator for the Village, Denise Swinger, was present, with Assistant Raven Behrens. Outgoing Solicitor Chris Conard, and Incoming Solicitor Breanne Parcels were also present. Ellis Jacobs and Dino Pallotta were not present.

**REVIEW OF MINUTES**

Minutes for BZA Meeting of May 7, 2020. Salmonson MOVED and Osterholm SECONDED a MOTION TO ADOPT THE MINUTES AS WRITTEN. The MOTION PASSED 3-0 on a voice vote, with Zopf abstaining due to absence from that meeting.

**COMMUNICATIONS**

James and Betty Felder re: 607 Omar Circle.

**REVIEW OF AGENDA**

There were no changes made to the agenda.

Salmonson made a statement that the first in-person to be held in the Village since the COVID-19 shutdown is this meeting, comprised of volunteers. He stated that this indicates a lack of leadership on the part of Council.

**PUBLIC HEARINGS**

1. A variance seeking relief from Chapter 1260 General Provisions Section 1260.01 Fences and Walls (a) (4) regarding the height of a fence within a side or rear yard in a Residential District - Property owner Mary Lynn McCown – 205 West Whiteman Street – R-B, Moderate Density Residential District. Greene County Parcel ID #F19000100090003400.

Swinger summarized the petition, stating that Nadia Malarkey of Nadia Malarkey Garden Design, with permission from the owner Llyn McCown, is seeking a one-foot variance to the height of a fence between 205 W. Whiteman and 209 W. Whiteman Street. The fence/gate will attach to the west side of the house at the location of the chimney and will extend to the western property line. The new fence will then run north on the western property line to at or near the garage. The single yellow highlighted area will be a custom solid fence to provide the most privacy for the property owner and her neighbors. The property owner indicated that the fence will be aesthetically pleasing and will create privacy for herself, as well as her neighbors.

Malarkey described the proposed fence, stating that on reason for the height variance was that the neighbors have a raised deck in their yard, and this will provide more privacy.

Zopf asked whether “there is a rationale for limiting fence height to six feet”. This was not addressed.

Reed OPENED THE PUBLIC HEARING.

Lisa Russel, the neighbor with a raised deck, stated her approval of the petition.

Reed CLOSED THE PUBLIC HEARING.

BZA members deliberated the Duncan Standards as a means of reaching a decision on the petition.

Reed read the standards as follows, with some discussion of each, and the Clerk calling roll on each.

- (1) Whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance; Osterholm: Yes; Salmonson: Yes; Zopf: Yes, Reed: Yes;
- (2) Whether the variance is substantial; Osterholm: Yes; Salmonson: No; Zopf: No, Reed: No;
- (3) Whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance; Osterholm: No; Salmonson: No; Zopf: No, Reed: No;
- (4) Whether the variance would adversely affect the delivery of governmental services such as water distribution, sanitary sewer collection, electric distribution, storm water collection, or refuse collection; Osterholm: No; Salmonson: No; Zopf: No, Reed: No
- (5) Whether the property owner purchased the property with knowledge of the zoning restriction; Osterholm: No; Salmonson: No; Zopf: Yes, Reed: Yes;
- (6) Whether the property owner's predicament feasibly can be obviated through some method other than a variance; Osterholm: No; Salmonson: Yes; Zopf: No, Reed: No;
- (7) Whether the existing conditions from which a variance is being sought were self-created; Osterholm: No; Salmonson: No; Zopf: No, Reed: No
- (8) Whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance. Osterholm: Yes; Salmonson: Yes; Zopf: Yes, Reed: Yes;

Salmonson MOVED TO APPROVE the variance as requested. Zopf SECONDED, and the MOTION PASSED 4-0 on a ROLL CALL VOTE.

2. A variance seeking relief from Chapter 1260 General Provisions Section 1260.04 Uses (a) (3) regarding the setback for an accessory structure - Property owner Ruben Schultz – 607 Omar Circle - R-A, Low Density Residential District. Greene County Parcel ID #F19000100080023900.

Swinger explained that the zoning office received a complaint on April 14, 2020 regarding storm water runoff coming from a neighboring property due to the construction of an accessory structure at 607 Omar Circle. A GIS map of the property shows the location of the shed in the northwest corner of the

backyard. The property owner was contacted by zoning assistant Raven Behrens on April 17, 2020 after no permit was found on file for the structure. Apparently, the Schultzes (Ruben and Emily) were told by their contractor that no permit was required because the shed is under 200 sq. ft. This is a Greene County Building Regulations requirement, not a Village zoning requirement. The Village does not require a zoning permit for accessory structures that are less than 144 sq. ft. in size and no higher than 10 feet. After the phone call, a follow up email was sent on April 17, 2020 requesting additional information. A follow-up letter was later sent certified mail on May 5, 2020 with a zoning permit application enclosed. In a follow up conversation with Mr. Schultz, staff explained gutters could mitigate the storm water, but that the setback is still in violation of the zoning code. He was also reminded that a zoning permit is required.

On May 13, 2020 staff received an email from Emily Schultz providing measurements and asking if there is anything they can do besides moving the shed. Staff provided a BZA variance application.

The shed measurements provided were 10'10" x 14'7" or 158 sq. ft., from the building footprint - not the roof edge, and a height of 11'8". A shed this size and height requires a zoning permit from the Village even without a measurement from the roof edges.

If the applicants or their contractor had submitted a permit in advance of building the accessory structure, staff would have denied it based on its location inside the rear yard setback area, and would have requested its relocation outside the setback in order to be approved. In their application, the Schultzes asked if there was anything they could do besides move the shed, and staff responded that their only recourse is to seek a variance from the Board of Zoning Appeals. With the shed's location over the Village's waterline, as well as its encroachment in the utility easement as recorded in the original subdivision, staff's recommendation is denial of the variance. The location of the shed without the gutters is currently set back approximately one foot from the rear yard lot line.

Reed asked whether the Village could be held liable for damage resulting to the shed if the Village needed to access its water line.

Conard said that in the absence of an agreement with the property owner there could be a possibility of the Village being held liable, but Conard did not make clear whether the possibility was small because the need for access under the shed was small, or because of the Village's limited liability.

Reed determined from Swinger that a neighbor has in fact noted "a real swamp" in their yard since the shed was constructed.

Swinger expressed concern regarding an agreement with the property owner in that the agreement might be lost in a future transfer of property.

Behrens stated that she had conferred with the Greene County Clerk of Courts, AJ Williams, regarding this, and had been informed that the property owner could include the agreement with the deed, but that that the Village has no way to compel this.

Swinger clarified that the Recorder's office had not been able to address the question, so Swinger suggested that Behrens ask Williams, who serves on Planning Commission and who used to serve as the Deputy Recorder for Greene County.

Conard disagreed, stating that there should be a way to record an agreement that is binding upon the property and any future owners.

Reuben Schultz stated that the shed has been up for two years. He stated that the contractor is also his brother-in-law, who told him a permit was not needed. He stated that he had noticed before the shed was built that “there was a potential for flooding”. He stated that he had told the neighbor whose yard is impacted that he would put gutters on the shed. “long story short,” he stated, “I procrastinated.”

Schultz stated that “I felt like I got screwed by my brother-in-law, but hey I take responsibility.”

BZA members spent some time determining that the shed is set in concrete piers, but does not have a slab floor.

Zopf noted that putting gutters on the shed will not deter the flooding.

Schultz stated that he had planned to use rain barrels.

Zopf commented that he would not count on the rain barrel mitigating the runoff.

In response to Salmonson’s comment asking why Schultz had waited two years and had not yet put gutters on, Schultz stated that he meant to once the complaint was filed, but then was told not to start that work, pending the hearing process.

Conard read a statement from an e-mail sent from Emily Schultz to Raven Behrens in which she states, “the posts are set deep in the ground and it (the shed) even has a concrete floor. It can’t be moved.”

Schultz clarified that this is not true.

There was some exchange in determining the method of erecting the posts.

Zopf asked to “split the discussion into two parts”, one being the setback issue, and the other being the shed’s location over a utility.

The Clerk suggested that the legal issue of access to the Village utility could be secured by the Village solicitor if in fact the BZA decides to grant the variance, so that BZA might continue the hearing with that reassurance in mind.

Behrens confirmed that the Public Works Director has stated that he “is fine” with the location of the shed as long as the potential legal issue regarding limited liability is sufficiently addressed.”

Swinger stressed that staff are recommending against granting the variance due to the proximity of the shed to the property line.

Zopf contemplated moving the shed “part of the way” so that it is not located over the water main, but is still within the setback.

Salmonson commented that increasing the setback slightly will not solve the runoff issue.

Reed determined from Swinger that the neighboring property owner has issue only with the runoff, which they stated had not been an issue prior to the building of the shed.

Salmonson asked whether a temporary permission could be granted to see whether the solution proposed by the property owner is effective.

Salmonson stated that the “problem that isn’t being addressed” is the runoff, proposing a six-month variance in which the gutters are added to the shed and the runoff issue is assessed.

Conard suggested that the matter could be tabled at the request of the petitioner in order to buy him time to add the gutters and gain proof of runoff mitigation.

Conard added that “there has been no apparent remediation of the drainage issue to date,” which is further argument for the continuation. This will also allow time for the Village to draft an agreement for limited liability to be able to present to BZA when the matter is brought back.

Reed asked BZA if they were agreeable to Conard’s suggestion to table.

Conard argued that all relevant information may not be available at present, since the applicant has not yet attempted to mitigate the runoff, and that the tabling can allow time for more clarity to be brought to the hearing.

Conard asked whether Schultz was ready to ask for a continuance and to consider an agreement with the Village.

Conard asked whether Schultz was willing to ask for a continuance, and he indicated that he was.

Schultz asked whether BZA wanted him to “get a plan together and see what BZA thinks of it.”

Reed stated, “I think you need to get your plan together and implement it, so that you actually have evidence.”

Conard suggested that the neighbor also submit a comment regarding the effectiveness of the mitigation.

The Clerk asked whether a new hearing would be needed since the structure would be substantially different.

Swinger went on record stating that addition of gutters will create a further violation of the setback requirement.

Salmonson asked about the proper length of time to table the hearing.

Conard recommended that BZA table the hearing to allow the applicant to take remedial steps and to present additional information to the body.

Zopf asked what the Board does if the applicant does nothing in the meantime, and was reassured that in that case the structure is in violation and steps could be taken in that regard.

Zopf moved to continue the hearing so that the applicant can take remedial steps including a draft of an agreement providing the Village access to the site, to be presented to the BZA. Salmonson SECONDED, and the MOTION PASSED 4-0 ON A ROLL CALL VOTE.

## **AGENDA PLANNING**

There was no Agenda Planning.

**ADJOURNMENT**

There being no further business, Zopf MOVED and Salmonson SECONDED a MOTION to adjourn. The MOTION PASSED 4-0. Meeting ADJOURNED at 8:10pm.

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Matt Reed, Chair

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Attest: Judy Kintner, Clerk