

The City of Fairhope Board of Adjustments and Appeals met on Monday, July 19, 2010 at 5:00 PM in the City Council Chambers at the City Administration Building, located at 161 N. Section Street.

Members Present: Vice Chair Cathy Slagle; Troy Strunk; Sam Andrews; Debra Green; Jonathan Smith, Director of Planning & Building; Chris Gill, Attorney and Emily Boyett, Secretary.

Absent: Suzanne Winston; Anil Vira; and Clyde Panneton

The meeting was called to order at 5:00 PM by Vice Chair Slagle.

The minutes of the April 19, 2010 meeting were considered and Sam Andrews moved to accept the minutes as written and was 2nd by Troy Strunk. Motion carried unanimously.

Jonathan Smith welcomed the new Board members and introduced Chris Gill, the City's Planning Commission Attorney. Mr. Gill addressed the Board and handed out the following memorandum regarding the basic guidelines and the role of the Board of Adjustment.

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July 19, 2010

VIA HAND DELIVERY ONLY

Members of the City of
Fairhope Board of Adjustment

Re: City of Fairhope Board of Adjustment/Statutory Powers and Duties

Ladies and Gentlemen:

I would like to congratulate each of you on your appointment to the City of Fairhope Board of Adjustment. It is certainly an honor to be appointed to such an important board.

I am writing at the request of Jonathan Smith to advise you of the role of the City of Fairhope Board of Adjustment with respect to zoning matters and certain procedural issues relative to future actions you, as a board, may seek to take. The Board of Adjustment essentially has two roles: (1) to hear appeals from administrative decisions made by City officials in regard to zoning matters; and (2) to decide variance requests. Each of these matters along with a brief discussion of certain procedural issues relative to the Board of Adjustment is discussed separately below.

I. Administrative Appeals.

With regard to the Board of Adjustment's role in the appeals process for administrative decisions, the Alabama Code grants a board of adjustment the express power "[t]o hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this article or of any ordinance adopted pursuant thereto." Ala. Code § 11-52-80(d)(1) (1975). This power is essentially describing situations where Jonathan Smith, as the Planning and Building Director for the City of Fairhope, makes an administrative decision regarding a matter pertaining to the City's zoning ordinance, and the applicant disagrees with that decision.

Appeals of administrative decisions are not very common. However, if such an appeal is made, the Alabama Code provides for the procedure to be followed in such a case. In the case of an appeal of an administrative decision pertaining to the zoning ordinance, the Alabama Code provides the following discussion of the procedural nature of any such appeal:

Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall transmit forthwith to the board all papers constituting the record upon which the action appealed was taken. An appeal stays all proceedings in furtherance of the action appealed from unless the officer from whom the appeal is taken certifies to the board of adjustment after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would in his opinion cause imminent peril to life or property. Such proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of adjustment or by a court of record on application on notice to the officer from whom the appeal is taken and on due cause shown. The board of adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

Ala. Code § 11-52-80(c) (1975).

2. Variances.

The typical matters that will come before the Board of Adjustment are variance requests. Section 11-52-80(d)(3) of the Alabama Code expressly authorizes a board of adjustment to grant variances from zoning ordinances but only in extraordinary and exceptional circumstances. More particularly, the Alabama Code grants the Board of Adjustment the power to “authorize upon appeal in specific cases such variance from the terms of the [zoning] ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the [zoning] ordinance **will result in unnecessary hardship and so that the spirit of the ordinance shall be observed and substantial justice done.**” Ala. Code § 11-52-80(d)(3) (1975) (emphasis added). The last portion of the quoted power is highlighted in bold text as it provides the basis for the burden that must be overcome by an applicant seeking a variance.

Variance requests can be difficult to review from the standpoint that you rarely, if ever, encounter situations that are exactly the same. However, both the Alabama Code and the Alabama appellate courts have taken a very strict view of variances. The Alabama Supreme Court has held that variances may be granted **only** where necessary to prevent injustice, oppression and arbitrary application, to promote “the public interest” and when a literal application of the ordinance would not be within the spirit of the ordinance. Nelson v. Donaldson, 50 So. 2d 244 (Ala. 1951). The Alabama Supreme Court has further stated that “[v]ariances from zoning ordinances are to be granted sparingly and only under unusual and exceptional circumstances where a literal enforcement of the ordinance would result in

unnecessary hardship.” Ex parte Board of Zoning Adjustment of City of Mobile, 636 So. 2d 415, 417 (Ala. 1994) (citation omitted).

Oftentimes, an applicant for a variance will cite financial difficulties as support for his/her variance request. The Alabama Supreme Court has spoken to this issue as well stating that “[i]t is clear that the loss of potential future economic gain on the part of the landowner is insufficient to establish an ‘unnecessary hardship’ justifying the grant of a use variance.” Ex parte Board of Zoning Adjustment of City of Mobile, 636 So. 2d at 418.

It should also be noted that a “self-inflicted hardship” should not be considered as justifying the grant of a variance. While a “self-inflicted hardship” could take any number of forms, it is essentially a situation where the applicant for the variance has done something to his/her property that has necessitated the variance request. In these situations where the applicant (or the applicant’s predecessor in title with respect to the real property in question) has brought about the harsh condition of which the applicant is now complaining, a variance is probably not appropriate.

3. Procedural Matters.

As you can probably discern from the discussion above, the Board of Adjustment should only act in extreme situations. This principle is further established in the voting requirements imposed by the Alabama Code upon the Board of Adjustment for any particular matter to be granted. The Alabama Code expressly provides that “[t]he concurring vote of **four members of the board** shall be necessary” to reverse any administrative decision of the Planning and Building Director or to grant any variance request. Ala. Code § 11-52-80(e) (1975) (emphasis added). This “super-majority” voting requirement is indicative of the height of the hurdles that must be overcome for an applicant/appellant to succeed before the Board of Adjustment.

Please note that the discussion set forth above is only intended as an overview of items that may come before the Board of Adjustment. The discussion set forth above is not intended to be (and is not) comprehensive with respect to the law of administrative appeals to the Board of Adjustment or the granting/denial of variance requests. While some of the discussion set forth herein may provide you with some guidance relative to specific applications that may come before you in the future, you should always direct specific questions to the Planning Department of the City of Fairhope. The Planning Department can help ensure that you are provided with the tools necessary to address a particular application.

Very truly yours,



Christopher M. Gill
For the Firm

cc: Mr. Jonathan I. Smith

Mrs. Slagle asked if Mr. Gill reviews all of the Board's cases and Mr. Gill responded he does not usually unless Mr. Smith asks him to. Mr. Smith stated he reviews the cases and states the literal provisions of the Zoning Ordinance. He added the most common reason to grant a variance is due to the size, shape or topography of the property. Mrs. Slagle asked what if the applicant purchased a piece of property knowing the restrictions of the land and requests a variance. Mr. Gill said all aspects of the case should be considered including that type of information. Mr. Andrews asked how long the Board will have to review cases and Mr. Smith responded the packets will be delivered the Monday prior to the meeting, so one week. Mr. Andrews asked if the members can talk about cases prior to the meeting. Mr. Smith said the Board can call him anytime. Mr. Gill explained the Board must never meet with three or more members and discuss a case because it would violate the Open Meeting Law.

ZBA 10.03 Request of Mike and Kathy Baugh for a setback variance of an accessory structure for property located on the west side of Mershon Street just south of Morphy Avenue, at 210 Mershon Street.

Jonathan Smith, Planning and Building Director, came forward and gave the Staff Interpretation.

STAFF INTERPRETATION: The subject property is zoned R-2 Medium Density Single Family Residential District. Mike and Kathy Baugh are seeking a variance to the provisions of Table 3-3: Dimension Table – Residential Accessory Structures in the Fairhope Zoning Ordinance.

Table 3-3 requires that all accessory structures in the R-2 zoning district be built “behind the rear building line of the principle structure”. In this particular case, there is a natural drainage path that flows behind the principle structure on the subject property, prohibiting the construction of an accessory structure behind the rear building line without significant alterations to the lay of the land.

The applicant is proposing the accessory structure be constructed forward of the rear building line of the principle structure.

The property is surrounded and bordered on all sides by R-2 zoned property.

Facts to be considered in this case:

1. The applicant is requesting that an accessory structure be constructed forward of the rear building line of the principle structure, which is contrary to the provisions of Table 3-3: Dimension Table – Residential Accessory Structures in the Zoning Ordinance.
2. There is a natural path for drainage flow in the applicant's back yard, as indicated by the evidence submitted.

3. There are extraordinary and exceptional conditions pertaining to the particular piece of property in question because of its size, shape, or topography, due to the existing natural topographic storm water path behind the rear building line of the principle structure on the subject property.

STAFF RECOMMENDATION: Staff feels that this application meets the minimum criteria established by the Zoning Ordinance for the issuance of a variance; therefore, staff recommends the Board of Adjustment approve the proposed variance and allow the applicant to build the accessory structure forward of the rear building line of the principle structure as shown on the site plan submitted. All other aspect of the project shall be in compliance with all applicable regulations.

Mrs. Slagle opened the floor to the applicant and Mr. Baugh said he would answer any questions. Mrs. Slagle opened the public hearing, having no one present to speak she closed the public hearing. Mr. Andrews asked what direction the water flowed and Mr. Smith responded it flows to the storm drain. Mr. Strunk asked if the storm drain is owned by the City. Mr. Baugh explained the drain is part of the engineering for the development of a subdivision and is located within an easement. He added he petitioned the City to address the drainage in the area, but nothing has been done. Mr. Andrews asked if the City is looking into fixing the drainage and Mr. Smith stated the City does not accept drainage facilities on private property or in common areas. Mrs. Green stated the pipe was put in just before the surrounding houses were built. Mr. Baugh said it is part of the subdivision. Troy Strunk moved to accept the staff recommendation to approve the request to build the accessory structure forward of the rear building line of the principle structure. Debra Green 2nd the motion and the motion carried unanimously.

ZBA 10.04 Request of Cole Thompson for an approximate five foot (5') rear yard setback variance for property located at 378 Dover Street, Lot 9 of Steel Branch Subdivision.

Jonathan Smith, Planning and Building Director, came forward and gave the Staff Interpretation.

STAFF INTERPRETATION: The subject property is zoned R-2 Medium Density Single Family Residential District. Mr. Thompson is seeking a variance to the provisions of Table 3-2: Dimension Table – Lots and Principle Structures in the Fairhope Zoning Ordinance.

Table 3-2 requires that all principle structures in the R-2 zoning district adhere to a minimum rear-yard setback of thirty-five feet (35'). The applicant is proposing a 30'-7" rear setback for a principle structure to be built on a vacant piece of property.

The minimum area and dimensional standards for an R-2 lot include a minimum lot area of 10,500 square feet and a minimum lot width (at front setback) of 75'.

The subject property is approximately 13,000 square feet and has a lot width at the front setback of approximately 77 feet. As it is currently platted, the subject property can accommodate an approximate allowable building footprint area of over 5,500 square feet, although maximum percentage requirements (max 37%) limit any principle structure on the lot to approximately 4,800 square feet.

The property is bordered to the north, south, and west by City of Fairhope R-2 zoned property. There lies un-zoned property in Baldwin County to the east.

Facts to be considered in this case:

1. The property is currently vacant.
2. The applicant is requesting a 4'-5" rear setback variance (a setback of 30'-7").
3. The applicant is requesting a variance from Zoning Ordinance provisions to construct a principle structure over the required minimum rear setback established for R-2 lots.
4. There are not extraordinary and exceptional conditions pertaining to the particular piece of property in question because of its size, shape, or topography.
5. The granting of the variance will confer on the applicant special privileges that are denied by this Ordinance to other lands, buildings, or structures in the same zoning district.

STAFF RECOMMENDATION: Staff recommends the Board of Adjustment deny the variance request due to the application not meeting the mandatory criteria established in the Zoning Ordinance for the issuance of a Variance.

Mrs. Slagle opened the floor to the applicant but no representative was present. Mrs. Slagle opened the public hearing and having no one present to speak, she closed the public hearing. Mrs. Green asked what the property to the east was being used as and Mr. Smith responded it is common area for the subdivision. Mrs. Slagle asked if the applicant has received approval from the subdivision's homeowners association for this request. Mr. Smith stated a homeowner association is not in affect at this time. Mr. Andrews asked why the applicant wanted this particular lot and Mr. Smith answered there is a buyer for this lot and this is the house plan they want. Mr. Strunk stated he flipped the house on the lot and it fit within the setbacks and he would recommend the applicant look at that option. Troy Strunk moved to accept the staff recommendation to deny the approximate five foot (5') rear setback variance due to the application not meeting the mandatory criteria for the issuance of a variance. Sam Andrews 2nd the motion and the motion carried unanimously.

New/Old Business – Election of Officers - Jonathan Smith announced that a Chairperson and Vice-Chair need to be elected to serve until the Board's annual

organizational meeting in October. Troy Strunk moved to elect Cathy Slagle as Chairperson. Sam Andrews 2nd the motion and the motion passed with the following votes: AYE – Troy Strunk, Sam Andrews, and Debra Green. ABSTENTION: Cathy Slagle. There was discussion regarding the election of a Vice-Chair. Troy Strunk moved to table the Vice-Chair election until the next regularly scheduled meeting to allow for the additional Board members to be present. Sam Andrews 2nd the motion and the motion passed unanimously.

Continuing Education Classes – Cathy Slagle stated the University of North Alabama offers classes that are very informative and helpful for Board members. She stated the classes are offered locally and she recommended the new members attending if possible. Mr. Smith stated he has budgeted for the new Board members to attend some of the classes.

Having no further business, Sam Andrews made a motion to adjourn. Troy Strunk 2nd the motion and the motion carried unanimously. The meeting was adjourned at 5:49 pm.