

June 11, 2013
City of Erie, Pennsylvania
ZONING HEARING BOARD
1:00 P.M.

The regular meeting of the Zoning Hearing Board was held on Tuesday, June 11, 2013 at 1:00 p.m., in the City Council Chambers, Municipal Building, 626 State Street.

- MINUTES -

THE FOLLOWING APPEALS WERE HEARD:

Appeal No. 12,038 by Taco Bell (2007-110) concerning property located at **1121 French Street** in a C-2 District. The appellant is appealing the zoning office's decision regarding screening requirements as outlined in Section 307. Per Section 307 of the Erie City Zoning Ordinance, for every new commercial development hereinafter established in the City of Erie, one tree is to be planted along all street frontages of the property for every 30 feet of frontage. This is a continuance of the appeal originally scheduled for the Board's May 14, 2013 hearing.

Findings of Fact

1. The appellant was represented by Mr. Kevin Kupniewski, who runs Charter Foods North, a limited liability company with national investors from as far away as Tennessee. Charter Foods North owns the Taco Bell located on the corner of East 12th and French Streets. The issue to be decided by the Board is whether to uphold the Zoning Office's decision regarding the planting of trees along the frontage of the development as required by Section 307 of the Erie City Zoning Ordinance. Mr. Kupniewski claims to have received a waiver from the Erie City Zoning Office in 2010, because, he claims, planting so many trees would create a safety concern.
2. Mr. Kupniewski told the Board that he submitted a site plan in August 2010 which was approved by the City Zoning Office. In this original site plan, Mr. Kupniewski said, it showed that he did not have trees planted all along the frontage of the property. He said that after this original plan was approved, he was only notified about the violation of the Code a day or two before the Taco Bell was scheduled to open.
3. According to Mr. Kupniewski, it was his consideration then, and is his contention now, that he is not planting the trees because of screening – which is the reason for the Ordinance – but rather for the safety of the restaurant and its employees. He said that this area, and in particular this corner, is known

for the large number of robberies; 132 in the City last year alone. It is imperative that the restaurant staff have an unimpeded view of cars coming and going, as well as foot traffic. Mr. Kupniewski said that if he were to plant the number of trees the Code requires, the staff would not have the view that they need.

4. Mr. Kupniewski told the Board that the appellants have spent over \$1 million to renovate the corner and build the Taco Bell. Included in that sum was thirty thousand dollars for state of the art camera equipment. This camera equipment has been used by the Erie Police Department to investigate crimes and apprehend offenders, including several hold-ups that occurred at the Sunoco gas station across the street from the Taco Bell. Mr. Kupniewski said that the corner is now safer, and that safety would be compromised if the Taco Bell were required to plant trees along both streets.
5. Answering questions from several Board members, Mr. Kupniewski said that at the time he presented his original plan it showed two existing trees on the site – one on East 12th and one on French - which he indicated would stay. The tree on East 12th Street is the same as the Wendy's (directly across the street) similarly has planted facing 12th Street, he said, and is part of a beautiful landscape that Taco Bell maintains. Mr. Kupniewski said that if he had known about the Code violation at the time he presented the original site plan, he would have acquired the variance; or, he added, he may have determined to abandon the project entirely.
6. When asked about other Charter Foods properties in the area, Mr. Kupniewski admitted that these other businesses do have trees planted in accordance with the Code. However, he added that none of the other businesses are in the downtown Erie area. Mr. Kupniewski said that he has noticed that there are several properties on State Street that have trees and other shrubberies that have become overgrown, and he believes that this presents an opportunity for perpetrators to hide, further adding to the safety concerns he expressed.
7. There was one other witness who testified to overturn the zoning office's decision about planting trees along East 12th and French Streets. Mr. Luther Mannis, the father of the owner of the Sunoco station directly across the street from Taco Bell, told the Board that his family's business has been the victim of a rash of recent robberies. He said that his family is thankful to the surveillance equipment at both the Taco Bell and the nearby Federal Credit Union building. Mr. Mannis said that he has changed his opinion about the Code in light of the frequency of recent criminal activity in the area. He asked the Board to consider what he referred to as a "shared responsibility" of the downtown community. He said that Taco Bell has actually installed extra cameras in order to cover the Sunoco station, cameras which Mr. Mannis said have assisted in the apprehension of some of the criminals responsible for the crimes.
8. There were several witnesses who testified to uphold the decision of the zoning office regarding the planting of trees for the development. The first to speak was the City's Chief Zoning Officer, Armand Chimenti. Mr. Chimenti said that while he disagrees with some of the testimony already heard, he is

only appearing as a witness to represent the Zoning Office's official position, and to answer questions the Board may have about the Code itself. Mr. Chimenti said that while he does not remember every single detail for every site plan, or conversation he had from three years ago, he does know that he would not have approved a violation of the Code in the way that the appellant claims. Mr. Chimenti then provided the Board a handout containing a set of guidelines (from a Pennsylvania Commonwealth Court case) to be used in determining whether a permit was issued in error. Specifically the handout delineated five factors that the Commonwealth Court established which the Board must evaluate in determining whether the appellant's request for a waiver should be granted. Mr. Chimenti said that in his opinion the appellant meets none of the five factors set out by the Court.

9. Mr. Chimenti then submitted to the Board the original before and after site plans (the one submitted by Mr. Kupniewski in 2010) for their review. According to Mr. Chimenti, the before plan showed existing trees but not the required number of trees necessary to comply with the Zoning Ordinance.
10. Another witness to testify in opposition to the proposal was the Director of the Erie Housing Authority, Mr. John Horan. Mr. Horan told the Board that the Housing Authority owns the building directly to the North of Taco Bell on the same block, the French Street Apartments. According to Mr. Horan this is a thirty million dollar investment, and it has managed to comply with the Zoning Ordinance. He said that there are at least two dozen trees (fully mature trees) planted around the property, and they have never had a safety-related issue as Mr. Kupniewski said he feared.
11. Mr. Horan said that in his opinion, he could not imagine how small, three inch wide trees could impede safety, especially since the types of cameras that are used by the Housing Authority are adjustable, and could be moved in order to see around the trees. He suggested that since the two properties (the Taco Bell and the French Street Apartments) share a common property line, they could plant several trees along that line, which may alleviate some of Mr. Kupniewski's fears. Mr. Horan added that if the Board were to accept the appellant's argument (not planting trees for safety and law enforcement concerns), there would eventually be no trees left in the City, and the Code would become moot.
12. Another witness to uphold the decision of the zoning office, Mr. Chuck Scalise, agreed with Mr. Horan. Mr. Scalise, who was testifying as a representative of the housing development company H.A.N.D.S., said that he was also a realtor, and he believes that the Code is important to the aesthetics of the City. Mr. Scalise said that he supports the enforcement of the Zoning Ordinance requiring the planting of trees, and added that in most cases it could be accomplished with minimal disruption. There are many neighboring businesses, he said, that comply with the Code and have the required number of trees on their properties.

Conclusions

1. According to the Erie City Zoning Ordinance, Section 307, in a C-2 Zoning District a business must have trees planted along the street frontage no more than thirty (30) feet apart.
2. The appellant is located on the corner of East 12th and French Streets. According to the Code, there should be a total of thirteen trees planted along the two streets. The appellant presently has only two trees planted, one on each street.
3. The appellant claims that they submitted an original site plan in 2010 showing that they would not plant the required trees. The appellant claims that Zoning Office officials waived the zoning requirement, and indicated that the appellant's business did not have to plant the required trees.
4. The appellant claims that they have a sophisticated array of cameras set up so that they can observe all cars and pedestrians coming to and going from the business. If they were required to plant the trees as per the Code, it would create a safety hazard, as the cameras would be blocked from viewing people and cars entering the property.
5. The appellant claims that the cameras have been valuable for law enforcement, helping them apprehend perpetrators of robberies committed at the Sunoco gas station across the street from the appellant's business.

Decision

By a unanimous decision, the Board voted to uphold the zoning office's decision regarding the compliance with Section 307 of the Erie City Zoning Ordinance. Board Chairman Richard Wagner said that he does not believe that the safety issue has been proven sufficiently to consider it a hardship. He added that the thirty feet between trees is not excessive and would not create a safety hazard. Member Lisa Austin agreed, and added that there was no supporting evidence to show how the trees specifically would alter the safety of the restaurant. Additionally, she said that she was impressed by the neighboring residents who spoke in support of the Code. Board member Patty Szchowski said that she agreed with what Ms. Austin said, and added that the surveillance is really an issue in apprehension, and not an issue that affects the screening (planting trees) requirement of the City Ordinance. Member Angela McNair agreed with the other members, adding that the surveillance provided by the cameras is important to her. Lastly, member Mike Hornyak said that given the size specification in the Code, he thinks that a landscape architect could set up a plan that would be minimally invasive for the appellant. For all the aforementioned reasons, each Board member voted to reject the appellant's request.

It is So Ordered.

Appeal No. 12,039 by Sandra Franco (5142-212) concerning property located at **2221 Fairmont Parkway** in a R-1A District. The appellant is seeking a dimensional variance to construct an 832 square foot detached accessory structure one foot from the side and rear property lines that would replace an existing nonconforming detached accessory structure. Per Section 205.18 of the Erie City Zoning Ordinance, a detached accessory structure shall be located at least three (3) feet from any side and/or rear property line and shall be no larger than seven hundred twenty (720) square feet in size.

Findings of Fact

1. The appellant Sandra Franco appeared to testify on her own behalf and told the Board that she is seeking to replace several old garages on her Fairmont Parkway property. In addition to the diagram and site plan of the proposal that was included with the variance application, Ms. Franco provided the Board with photographs to examine while she testified. One of the photos was of the old garages slated to be demolished, and another photograph was of the new, pre-fabricated structure that Ms. Franco plans to install to replace the old garages.
2. There are eight attached garages slated to be torn down. The garages are very old wooden structures built in 1928, and will be entirely demolished. In their place Ms. Franco plans to erect a new, pre-fabricated pole barn, which would occupy essentially the same foot print as the existing garages. The new structure comes in a uniform size, and is in slightly larger dimensions than the existing structures. The pre-fabricated pole barn is 26' x 32', and would be larger than the Code allows for detached accessory structures. This larger structure would also be closer to the side and rear property lines than the existing garages; this too is in violation of the City Ordinance.
3. Referring to the photographs that she provided to the Board, Ms. Franco explained that the hardship in this matter is an egress issue. The existing garages span across two adjoining properties, and share a common driveway. Due to this lone access point, Ms. Franco explained that the new structure must face the same way as the existing garages.
4. Answering several questions from the Board, Ms. Franco said that another reason why she must use the larger detached structure is to insure access for some of the larger vehicles she owns. Ms. Franco added that the project will benefit the neighborhood. By demolishing the old garages she will free up land to provide off-street parking for nearby residents in the area.
5. The appellant told the Board that since the pole barn would be slightly different dimensions than the existing structures, she must obtain a variance – a continued nonconforming use does not apply in this matter.

Conclusions

1. The appellant owns eight attached, old wooden garages that span two adjoining properties. The properties share the same driveway, which is the lone access point for the garages.
2. The appellant plans to demolish the garages and replace them with a pre-fabricated, detached accessory pole barn on one side, and open parking spaces on the other side.
3. The appellant claims that the pre-fabricated structure must be larger so as to enable access to her larger vehicles; the pole barn must face the same way as the existing garages to insure egress to the lone driveway on the property.

Decision

By a four to one decision, the Board voted to deny the appellant's request for a dimensional variance. Board Chairman Richard Wagner said that he believes that the appellant only showed a financial hardship, which is not sufficient to grant the variance. He said that the appellant must construct a conforming-size garage, rather than relying on the pre-fabricated larger detached structure. Board members Lisa Austin, Patty Szchowski and Angela McNair agreed with the Chairman, and voted to deny the variance. Board member Mike Hornyak disagreed with the other members, and voted to approve the proposed variance.

It is So Ordered.

Appeal No. 12,040 by Waterstone Homes, LLC (5005-119) concerning property located at **2115 French Street** in an R-2 District. The appellant is seeking a dimensional variance to convert an existing single-family dwelling to a two-family dwelling. Per Section 205 of the Erie City Zoning Ordinance, a two family dwelling requires 6,000 square foot lot size. The lot is 1,705 square feet.

Findings of Fact

1. The appellant was represented by Mr. Kevin McGregor (d.b.a. Waterstone Homes). Mr. McGregor told the Board that he recently purchased the single-family house that has been vacant for several years. He hopes to convert the property into two separate units, a practical renovation that he thinks would make the house more accommodating to the current rental market. Mr. McGregor said that the exterior of the home is in good condition, and will not

require many changes; the appearance of the house and its foot print will not be affected.

2. Mr. McGregor said that his proposal would only require changes to the present plumbing and utility hook-ups. He repeated that he does not expect to make many exterior changes to the dwelling. The house is adjacent to an alley that runs behind it, and does not have much exterior space. This is another reason, he believes, that it is more suited for a two-unit arrangement, as keeping it as a single-family house would not likely attract families with children who want to have a large backyard.
3. According to Mr. McGregor the neighborhood, which is zoned residential, has become increasingly business-oriented in recent decades. Citing the Siebenburger Club, Miller Brothers, Hallman Chevrolet and others, he said that the area does not have much of a residential feel anymore. If the proposal would change the character of the neighborhood it would be in a positive way, he said, making it more residential like the homes on East 22nd Street. He added that his hardship is in the difficulty he would face in trying to rent a single-family house given the surrounding businesses.

Conclusions

1. The appellant recently purchased a vacant, single-family dwelling on French Street, and proposes to convert the house into a two-unit structure.
2. The house is in a R-2 Zoning District. According to Section 205 of the Erie City Zoning Ordinance, a two-family dwelling must provide at least 6,000 square feet in lot size.
3. The appellant claims that as a result of the house's location in a largely business-oriented neighborhood, together with the lack of any real back yard, it would be much more practical to make the house a two-family dwelling.
4. The appellant claims that this part of French Street is becoming increasingly less of a residential neighborhood. His proposal would help occupy a vacant building, and help make the neighborhood more residential.

Decision

By a unanimous vote, the Board approved the appellant's request for a dimensional variance. Board Chairman Richard Wagner said that due to the unique circumstances explained by the appellant, the house is almost an island among the many large businesses in the area, and that this is a creative approach to not let the home remain vacant. Board member Lisa Austin agreed, and added that as the house is abutted by the business area as it is, converting the house would anchor it to the nearby residential street. Board members Mike Hornyak, Patty Szychowski and Angela McNair all agreed, and voted to approve the appellant's request.

It is So Ordered.

Appeal No. 12,041 by Verizon Wireless (5093-102) concerning property located at **2146 McKinley Avenue** in an M-2 District. The appellant is proposing a communication tower. Per Section 204.20 of the Erie City Zoning Ordinance, communication towers are a special exception in the M-2 District and shall be referred to the Zoning Hearing Board for approval.

Findings of Fact

1. The appellant was represented at the hearing by Ms. Dana McCarty, from the Pittsburgh company of Sittig, Cortese & Wratcher, a limited liability company doing business as Verizon Wireless (hereafter referred to as “Verizon”). Prior to her testimony, Ms. McCarty presented each Board member with an information packet containing exhibits that supported the proposed tower.
2. Ms. McCarty told the Board that Verizon proposes to construct a communication tower on McKinley Avenue, which is a special exception in the M-2 Zoning District. According to Ms. McCarty, Verizon has met all of the requirements set forth in Section 305.45 of the City Zoning Ordinance governing communication towers.
3. Referring to the information packet, Ms. McCarty discussed each section of the Code (305.45(c)), and provided proof that Verizon’s proposal is in compliance with the Ordinance. The information packet contained several individual exhibits which included site plans, maps, licenses, landscaping and fencing plans and insurance certificates, all provided to address an individual specification of the Code.
4. Verizon is proposing the construction of a 100’ monopole tower (with a 9’ lightning rod), together with an equipment shelter which will not exceed 15’; all surrounded by a 8’ fence with a barbed wire top. The size of the tower, equipment shelter and fence are all in compliance with height and setback requirements of the City Zoning Ordinance in an M-2 District. Access to the proposed tower site is provided via a 50-foot wide easement from McKinley Avenue, also in accordance with the City Ordinance.
5. Section 305.45(c) requires that an applicant demonstrate that it is fully licensed by the Federal Communication Commission to operate a communication tower. Verizon provided a copy of their FCC license and a copy of their Certificate of Insurance, together with documentation that the company has satisfied the minimal coverage for liability, as specified in the Ordinance.
6. The engineer for the project, Mr. Jim Rickard, also appeared to testify in support of the proposal. Mr. Rickard, who told the Board that he prepared the exhibit that discusses the coverage (power) of the tower, said that a tower of 150’ would have met their needs more. However, he dropped the height to the existing 100’ in order to better accommodate the area, and still have adequate coverage. He said that in his experience, it often prevents problems by working within the requirements and wishes of the municipality. Thus, Verizon decided on constructing the smaller tower.

7. The final witness to testify in support of the proposal was Mr. James Duchini, the owner of the property upon which the tower will be erected. Mr. Duchini said that he already has a fence surrounding the entire area where the tower would be sitting. This additional fence, he said, is even higher than the one required by the Code for the tower and equipment shed.

Conclusions

1. According to the Erie City Zoning Ordinance, communication towers are a special exception in an M-2 Zoning District.
2. Section 305.45(c) of the Code governs the standards for communication towers as special exceptions.
3. Using Section 305.45(c) as a checklist, the applicant prepared for the Board an informational packet with several individual exhibits containing site plans, maps, licenses, landscaping and fencing plans, and insurance certificates, all provided to show compliance with individual specifications of the Code.
4. The communication tower is 100'. The project's engineer testified that it would have served the company better to have used a 150' tower; however, they settled on a smaller tower to better accommodate the area, comply with the Code, and still provide adequate coverage.

Decision

By a three to one vote, with one member abstaining, the Board voted to approve the applicant's request for a special exception to construct a communication tower. Board Chairman Richard Wagner said that he felt the applicants met all the requirements - including height, setback, fences and FCC licensing - as specified by the Code. Given the unusual circumstances of the location, he said that he thought this site is good for the proposal. Board members Angela McNair and Patty Szcowski also voted to approve the proposal, but both had reservations. Ms. McNair said that she is voting to approve the request only because the applicant met the requirements for a special exception. She said that she was disturbed by what she called the "lack of communication" between the applicant and members of the community. Similarly, Ms. Szcowski said that she would have expected there to be some residents of the area to speak in opposition to the proposal, but suggested that there was nobody there because the applicant made no effort to get the message out about the proposal. She asked that the company should do something beneficial for the neighborhood to remedy this lack of communication. For similar reasons, Board member Lisa Austin voted to deny the request. She said that even though the criteria for a special exception was met, this is a historic Erie neighborhood (citing the nearby park and school), and suggested that neighbors did not receive notice to object to the proposal. She added that if this was Fronteir Park, or some other wealthier neighborhood, there would have been many people objecting to the proposal. Board member Mike Hornyak abstained from the vote citing a conflict of interest.

It is So Ordered.

Appeal No. 12,042 by Joseph and Debra Gamble (6006-219) concerning property located at **262 West 21st Street** in an R-2 District. The appellants are seeking a dimensional variance to continue to use this property as a four-family dwelling. Per Section 305.24(a) of the Erie City Zoning Ordinance, a 4-family dwelling is permitted in the R-2 District provided that each dwelling has at least two thousand square feet of lot area per family. There is currently 1,250 square feet of lot area per family.

Findings of Fact

1. The appellant was represented by the owners of the property, Joseph and Debra Gamble. Mrs. Gamble said that the house is presently zoned as a 3-unit, but that previously it has been used as a four, and even five-unit dwelling. She said that since it was built in 1887 the house has probably had over twenty owners, and there is no telling how many different ways the house has been utilized over the years.
2. Mrs. Gamble told the Board that since her and her husband purchased the house in 1999 it has been used as a 4-unit. She said that before they bought the house it was actually being used as a 5-unit. However, the disclosure statement had it listed as a 4-unit, and Northwest Bank researched the property and approved the loan by virtue of it being a 4-unit.
3. The appellants purchased the house as a 4-unit, believing that it would provide enough income to support upkeep of the building and make the venture profitable. If they had to rent the house as a 3-unit, they would not generate enough income to cover the mortgage, taxes, maintenance, etc... Mrs. Gamble said that they would not have purchased the house as a 3-unit. She added that today they would not be able to rent out or sell the house as a 3-unit dwelling.
4. Mrs. Gamble said that in the fifteen years that they owned the house, they never tried to hide the fact that it was being used as a 4-unit dwelling, and added that the City never objected to the 4-unit status at prior inspections. She said that they received four licenses, based on previous City inspections, that permitted the appellants to use it as a 4-unit dwelling. Mrs. Gamble said that the house can be adapted to add a fifth unit in the attic (and that it may have been used as such at some time in the past). However, she added that they have no plans to convert the house at this point, and the attic will not be rented out again. She said that if anything they will use it as an access or limited storage area for the other units.
5. According to the appellants, the continued use of the dwelling as a 4-unit will not negatively affect the neighborhood. Being in an R-2 District, Mrs. Gamble said, multi-unit houses are the most common type of structures. Keeping it as a 4-unit will not negatively impact or devalue neighboring properties, she said.

Conclusions

1. According to Section 305.24(a) of the Erie City Zoning Ordinance, four-family dwellings are a permitted use in a R-2 Zoning District, provided that each unit has at least two thousand square feet of lot area per family.
2. The appellant's house provides only 1,250 square feet of lot area per unit.
3. The appellants purchased the house as a 4-unit dwelling, and have operated it as a 4-unit for the past fifteen years.
4. If they knew that they had to operate the dwelling as a 3-unit, the appellants said that they would not have purchased the house. They said that they would not generate enough income as a 3-unit to cover the mortgage, taxes and upkeep; and probably would not be able to sell the house as a 3-unit today.
5. The (4-unit) structure does not negatively affect the character of the neighborhood. The house is well-maintained, and being in a R-2 District, there are many multi-unit houses in the same neighborhood.

Decision

By a unanimous decision, the Board voted to approve the appellant's request for a dimensional variance. Board chairman Richard Wagner said that he is willing to permit the appellant's continued use as a 4-unit dwelling based on their fifteen year history of good rental, and because they believed that the house was properly zoned as a 4-unit when they purchased it. For the same reasons, Board members Lisa Austin, Mike Hornyak and Patty Szchowski also voted to approve the variance request.

It is So Ordered.