

BOARD OF ZONING APPEALS MINUTES
CITY OF ROELAND PARK
4600 W 51st Street, Roeland Park, KS 66205
October 20, 2016, 6:00 P.M.

MEMBERS PRESENT:

Tom Madigan Paula Gleason John Christensen Mike Baugher

OTHERS PRESENT:

Anna Krstulic, City Attorney
John Jacobson, Building Inspector
Jennifer Jones-Lacy, Finance Director

I. Election of Chairperson

MOTION: MR. CHRISTENSEN NOMINATED, MS. GLEASON SECONDED TO ELECT TOM MADIGAN AS THE BOARD OF ZONING APPEALS CHAIRPERSON. (THE MOTION PASSED 4-0).

ROLL CALL

Ms. Jones-Lacy called the roll.

II. Approval of the July 12, 2016 BZA Minutes

MOTION: MR. CHRISTENSEN MOVED AND MS. GLEASON SECONDED TO APPROVE THE JULY 12, 2016 BOARD OF ZONING APPEALS MINUTES. (THE MOTION PASSED 4-0).

III. RECESS INTO EXECUTIVE SESSION

MOTION: MR. MADIGAN MOVED AND MS. GLEASON SECONDED FOR THE BZA RECESS INTO EXECUTIVE SESSION UNDER THE ATTORNEY-CLIENT EXCEPTION TO THE OPEN MEETINGS ACT IN ORDER TO RECEIVE LEGAL ADVICE CONCERNING THE VARIANCE REQUEST WITH THE OPEN MEETING TO RESUME AT 6:15 P.M.

IV. BZA 2016-10 – 5105 El Monte

A. Open Hearing – Staff Report, Applicant Presentation, Open Public Comments

Mr. Madigan resumed the meeting and opened the public hearing on the variance request.

Staff Report

In the staff report, Ms. Jones-Lacy said that resident George Martin (5105 El Monte) is the applicant who received a permit from the City to build a wooden fence July 22, 2016. She clarified that the permit was issued when Roeland Park was between building officials and they were utilizing the building official from the City of Westwood on an interim basis to process permits. Due to a faulty administrative procedure, the permit was issued before it was properly

reviewed. A copy of the permit was provided to the board. A map drawing was submitted with the application.

Mr. Jacobson said typically when a homeowner hires a contractor to install a fence, the site plan is included with the application.

Applicant Presentation

George Martin (5105 El Monte) - Mr. Martin said he wanted to add a privacy fence along the north perimeter of his property. His contractor said he did not need a permit to build the fence, but Mr. Martin obtained one in any event. Subsequently, he received a notice from the City that he was in violation of the City code. In speaking to his neighbors to notify them of the variance request hearing, they all expressed their support of the fence and want it to stay.

Public Comment:

Aaron Carriker (5100 Delmar) Mr. Carriker lives behind Mr. Martin and spoke in support of the fence and added that Mr. Martin's presence in the neighborhood is a definite improvement to the area.

Mr. Madigan asked if Mr. Carriker experienced any problems backing out of his driveway and he said no.

William Johns (5115 El Monte) Mr. Johns spoke in support of the fence and asked the board to approve the variance. He added that he has lived in Roeland Park since 1958 at has been at his present address since 1962.

Ms. Jones-Lacy reiterated that Mr. Martin did apply for the permit and a permit was issued, but after the installation it was brought to the attention of the City that the height exceeds the front line of the home directly behind it. The code states that fences on corner lots shall be restricted to 42 inches high once it passes the front building line of the house on the rear adjacent lot.

Side yard fences or walls may be constructed in the side yard or up to the side property line, except that no fence shall be closer than 15 feet to any collector or a local street right-of-way with the exception of a 42-inch high fence permitted to be placed up to the right-of-way line and it does not encroach on the site distance triangle.

Staff has found that the fence does not create a site distance triangle issue and there are no concerns about being able to see around the fence. Any concerns would pertain to right-of-way issues and they would not be known unless a survey is completed or they use a metal detector to determine where the property corners are located. It is staff's position that they cannot approve something in the right-of-way as it is not theirs to approve. If the variance would be approved and if the fence is in the right-of-way, and if a utility company would need to move the fence, then it would not be at a cost to the City or to the utility company.

Mr. Jacobson said whenever a temporary structure is built into a permanent easement the authorizing entity holds the maintenance rights to that particular property and can take down or destroy a structure within that easement and be within their rights not to re-erect it or repair it.

Staff has not taken a position that they do not want the fence, they just do not have the authority to approve it in its current format. The fence appears to be constructed within the road right-of-way and is about three feet off the curb.

Mr. Jacobson added it appears it is several feet within the road right-of-way. If this was brought to staff, it could not be approved at its current height without the 15-foot setback. He also said staff thinks it looks great.

Mr. Madigan asked Mr. Martin if he was aware that if a utility company needs to take down the fence, it would be at his expense to replace it. Mr. Martin said he was aware of that.

Ms. Jones-Lacy wanted to speak to the five criteria that the board considers for a variance. Mr. Madigan said that was the directive of the board to determine. Ms. Jones-Lacy asked to give a staff perspective on the items from their educated experience, but said that as a board they have the authority to make their own decisions and own determinations. Staff would like to speak in terms of how they interpret the code and how it applies to the various criteria of the variance.

Mr. Madigan asked the board if they were in favor of Ms. Jones-Lacy addressing the board with regards to the criteria for a variance.

Mr. Christensen said he was indifferent, but that it would probably be better than not to have it in the record. He then asked Mr. Martin if he had spoken with his contractor about a cost to move the fence.

Mr. Martin said he had not spoken with his contractor in regards to that. Mr. Christensen asked about the structure of the fence. Mr. Martin said the posts are cemented into the ground, with three cross braces and alternating vertical slats.

Mr. Jacobson clarified that the action of the board is not whether the fence can stay in the location in the right-of-way, but if the fence can go on the edge of the right-of-way. As he understands it, it is not within the board's power to allow the fence to stay in the road right-of-way as it is currently constructed. He said the purpose of the meeting is to allow Mr. Martin to put the fence directly on the road right-of-way of line which will have to be verified.

(Off Record Discussion among the BZA)

Ms. Krstulic said there would have to be a condition that if there is an issue the property owner is required to remove the fence at his expense.

Ms. Jones-Lacy said there are structures in the City that are in the road right-of-way and they are not making everyone who has something in the right-of-way move their property. Likewise, they will not do a survey of everything they believe is encroaching in the road right-of-way.

Ms. Krstulic said the BZA is to decide what is to be done with the fence, whether it stays where it is, if it has to be moved, or to approve it with conditions.

Mr. Madigan said he is hearing that they cannot legally approve it to be there. Ms. Krstulic said they can, but they need to make sure in doing so it is at the owner's risk. She responded to Mr. Madigan that they could have him sign a document to be on file with the City that he is aware of that and they make that a condition.

Mr. Madigan said his concern is if he moves and what would the next person do. Ms. Gleason said Mr. Martin would be required to state that he has an encroachment on his seller's disclosure. A purchaser can come to the City and to see what is filed on that encroachment and they can decide whether they want to take the risk, or they request to have the encroachment removed.

Ms. Krstulic said when it comes time to replace the fence, they have to come back for another variance and at that time the situation could be reassessed.

Ms. Jones-Lacy said a permit needs to be issued if they are replacing 50 percent or more of the total linear foot of the fence.

Mr. Martin wanted to stress that he did get a permit from the City and built exactly what was approved.

Mr. Madigan agreed with Mr. Martin and said he did what he was supposed to do.

Mr. Christensen apologized to Mr. Martin on behalf of the board. Mr. Madigan said he was new at the job, but would take the blame.

Mr. Madigan then closed the public hearing.

C. Board Deliberation

Ms. Gleason said Mr. Martin did what he was supposed to do and the fence was built. At this point it is not fair to say the City made a mistake and make Mr. Martin pay more to prove the fence is where it should not be. She said they should approve the variance and if it becomes a right-of-way issue in the future, they could have a survey. Mr. Martin admits he knows he will have to move it at his expense, but there should not be a survey now if there is no issue now.

There was board discussion on who what their options would be. They decided they needed to look at it as though a mistake has been made and what should be done next.

Ms. Krstulic suggested coming back at a future meeting.

Mr. Madigan said his concern was to come to a decision that was best for the City and the resident and did not believe that they were the ones to decide this.

Ms. Jones-Lacy said the BZA is the appeals authority and operates independently from the City Council.

Mr. Madigan said this appeal is after the fact and that the BZA is set up to appeal before the fact.

D. Vote of the Board

Mr. Madigan began the discussion of the five criteria to issue a variance adding that it takes three votes in favor for approval.

BZA 2016-10	Madigan	Christensen	Gleason	Baughner
Uniqueness	N	N	Y	Y
Effect adjacent property				
Would it create a hardship to applicant?				
Public interest				
Spirit and intent of the law				

Ms. Krstulic said that all five conditions must be met and therefore the motion failed.

Mr. Martin said he did not understand how it could not be unique as the situation has never been presented before.

Mr. Christensen said the uniqueness requirement states, “Which are not caused by the action of the property owner or applicant.”

(Inaudible; everyone talking over one another.)

Mr. Madigan called the meeting back to order and said the decision has been made and they apologized. He said once a decision is made, then the applicant can appeal to the next higher authority. He added that it is a beautiful fence.

Mr. Jacobson said in his opinion the board does not have the ability to allow a fence to stay in the road right-of-way and would offer as a caveat verification of the property line and allow them to construct the fence on the property line, which would still require a variance as it is taller than the 42 inches.

Mr. Madigan asked Mr. Martin if the variance is issued with the condition to move it to the property line off the right-of-way would be of interest to him. Mr. Martin replied yes.

Ms. Krstulic said the board can withdraw their vote.

Mr. Baugher asked if they approve the variance, which requires Mr. Martin to move the fence, does he have the option to appeal that decision. Ms. Krstulic said yes and they can continue the meeting until it is determined where the property and right-of-way lines are in order to obtain that information.

Ms. Jones-Lacy said if the item is ignored, then it will become a City enforcement issue.

Mr. Jacobson said the code addresses that if a permit is issued in error it is a void building permit.

Mr. Madigan asked for Ms. Krstulic’s opinion of what uniqueness would mean to her. She said typically is has to do with the lot itself, its shape, location, if there are other lots like it in the area, or if there is something special about the lot. The uniqueness applies to the real estate itself not the situation.

Mr. Martin said he had an approval from the City and does not want to pay to move the fence.

An unidentified speaker said Mr. Martin is a big promoter of Roeland Park and is a member of the community who is trying to improve his property and can’t believe this happening.

Mr. Madigan applauded Mr. Martin for being an active citizen, but said the board’s influence cannot be influenced by that.

MOTION: MR. BAUGHER MOVED MR. CHRISTENSEN SECONDED TO WITHDRAW THE VOTE. (MOTION PASSED 4-0).

BZA 2016-10	Madigan	Christensen	Gleason	Baugher
Uniqueness	Y	Y	Y	Y
Effect adjacent property	Y	Y	Y	Y
Would it create a hardship to applicant?	Y	Y	Y	Y
Public interest	Y	Y	Y	Y
Spirit and intent of the law	Y	Y	Y	Y

The board then discussed whether there should be any conditions on the variance. Mr. Christensen said that any condition they set will have no impact. His recommendation would be that if the fence were to be rebuilt, then it is rebuilt to code. Everyone agreed to that.

The board also agreed that if it is an encroachment and it needs to be removed, then it is the landowner's responsibility to do that and then come back and get another variance.

Mr. Madigan closed discussion on this issue.

Mr. Martin thanked everyone for their time. He added that he thinks the City should come up with something in case this happens again.

Mr. Jacobson said any decision they make will always be subjective.

V. Adjournment

Mr. Madigan welcomed Mr. Jacobson to the City.

MOTION: MS. GLEASON MOVED AND MR. BAUGHER SECONDED TO ADJOURN THE ROELAND PARK BOARD OF ZONING APPEALS MEETING. (MOTION PASSED 4-0)