

Minutes of the Board of Adjustment and Appeals of the City of Cherry Hills Village held on

Thursday, September 4, 2014 at 6:30 p.m.

At the Village Center

CALL TO ORDER

Chair Sullivan called the meeting to order at 6:31 p.m.

ROLL CALL

Present at the meeting were the following members of the Board of Adjustment and Appeals: Chair Kerry Sullivan, Vice Chair Susan Struna, Board Member Earl Hoellen, Board Member Jennifer Allen and Board Member Bill Rapson.

Present at the meeting were the following staff members: Robert Zuccaro, Community Development Director, City Attorney Linda Michow and Cesarina Dancy, Community Development Clerk.

Absent from the meeting was Councilor Mark Griffin.

APPROVAL OF MINUTES

Chair Sullivan made a motion, which was seconded by Board Member Hoellen, to accept the August 7, 2014 minutes as written.

The motion passed unanimously.

AGENDA ITEMS

- a. *A request by William D. and Louise C. Atkinson of 66 Glenmoor Drive for a Variance to Municipal Code Section 16-7-30 to allow Construction of a Patio that Encroaches Approximately 13 feet into the 25-foot Minimum Side-Yard Setback for the R-3 Zone District.*

Mr. Zuccaro stated that staff is presenting a request from William D. and Louise C. Atkinson of 66 Glenmoor Drive for approval of a variance from Municipal Code Section 16-7-30 to allow an encroachment of approximately 13 feet in to the 25-foot side yard setback for the construction of a patio. He stated that the patio has already been constructed in the proposed location.

Mr. Zuccaro stated that on October 1, 2013, the applicant emailed the City to inquire about property setbacks. The City responded in an email that informed the applicants of the 25-foot setback requirement for patios. A permit application submitted on October 29, 2013 by Phase One Landscapes on behalf of the applicants, proposed the patio structure encroaching into the setback. This original request was not approved by the City due to this encroachment. The revised plan provided by Phase One which showed the patio removed from the setbacks was approved, and issued on November 6, 2013. Mr. Zuccaro continued to say that despite communication by the City to both the applicant and Phase One Landscapes, the patio was constructed in the setback.

Mr. Zuccaro stated that on April 21, 2014, the City was called to the property for a final zoning inspection on the permit. The City noted that the patio encroached into the setback and failed the inspection. Mr. Zuccaro stated that the applicant was asked to remove the patio from the

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setbacks in order to comply with both zoning guidelines and the approved plans. He continued to say that the applicant failed to comply and was issued a Notice of Violation by the City's Code Enforcement Officer on April 24, 2014. Once the applicant was issued the Notice of Violation, the applicant applied for a variance and code enforcement action is being deferred pending the outcome of this hearing.

Board Member Hoellen asked why it took the applicant from April until August to apply for a variance.

Mr. Zuccaro replied that the applicant could respond to that.

Mr. Zuccaro stated that staff's findings regarding the variance criteria were located in Table One of the staff memo. He continued to say that all criteria were found to be in the negative; specifically criteria 2, which discusses design alternatives, and criteria 4, which discusses the fact that the need for the variance is the result of a direct violation of zoning and building codes. He stated that Staff is recommending denial of the variance request.

Mr. Zuccaro stated that the comment letter which was provided to the board on behalf of the applicant stated that a similar permit was issued in 2005. Mr. Zuccaro stated that after researching the property, staff determined that a permit was never issued for the project, and the fireplace is encroaching approximately 10 feet into the setback. He continued to say that since a permit was never issued, there was no way to enforce the setback requirement.

Board Member Struna asked if the letter that was submitted was factual.

Mr. Zuccaro replied that based on City records it appears a permit for that project at the address was never issued.

Board Member Hoellen asked how many patios in the City have been constructed in setbacks without obtaining a variance.

Mr. Zuccaro replied that a review such as that has not been completed.

Board Member Struna asked if a wall was allowed as part of a patio.

Mr. Zuccaro replied that walls and fences are allowed in setbacks but patios are not.

Board Member Struna asked if gravel was allowed in setbacks.

Mr. Zuccaro replied that gravel is allowed as landscaping but a stone patio is not allowed in the setbacks.

Board Member Struna asked if the patio was set in sand.

Mr. Zuccaro replied yes.

Chair Sullivan asked Mr. Zuccaro to display the image which details the approved versus the built plans.

Mr. Zuccaro displayed the graphic, indicating that the red line showed the property setback in both images. He continued to say that fences, landscaping, driveways, and walls are all allowed in setbacks.

Board Member Rapson asked why the applicant chose to ignore the City.

Mr. Zuccaro replied that the applicant could respond to that question.

Board Member Hoellen asked what restrictions the rear setbacks placed on the property in regards to the golf course.

Mr. Zuccaro replied that the rear setbacks for the zone district are 25 feet, but there is an open space easement on the rear of most lots in Glenmoor for the golf course.

Board Member Struna asked if the pavers were permanently in place.

Mr. Zuccaro replied that they are set in sand and could be lifted.

Board Member Struna asked if pavers separated with grass is allowed.

Mr. Zuccaro replied that pavers separated with grass are allowed in the setbacks, but would need to be at least 50 percent grass or landscaping material in order to not be considered a patio.

Mr. Zuccaro stated that stone paver patios are very common in the City. He continued to say that the City is 100 percent consistent in considering stones which are butted together to be a patio.

Board Member Struna asked if the relocation of the patio was a safety issue as the applicant indicated in his application.

Mr. Zuccaro replied that the safety of a new location was not evaluated. He continued to say that even if safety were an issue it has no bearing on the other criteria that are not met.

Bill Atkinson, of 66 Glenmoor Drive, stated that he and his wife purchased the property in May of 2000. He continued to say that in 2010, they began a landscape upgrade, and completed projects in the front yard first. The back yard project was begun in 2013, and Phase One Landscaping was hired to complete all projects.

Mr. Atkinson stated that he submitted an application to the HOA/AAC of Glenmoor, who advised him of the setback requirements of the City. He continued to say that he contacted Phase One, who was not aware of the setback requirements.

Mr. Atkinson stated that an alternative design was proposed; however, it encroached into the golf course easement and Glenmoor denied the request.

Mr. Atkinson stated that Phase One Landscapes met with Mr. Zuccaro, and submitted a revised drawing in October 2013, and was issued a permit to begin work.

Mr. Atkinson stated in April of 2014 he received a letter from the City stating that the permit was going to expire. He contacted Phase One Landscapes, and Mr. Zuccaro came to inspect the property. At this time, Mr. Zuccaro informed him that his patio was in the setbacks.

Mr. Atkinson stated that the patio is made of stone which can be purchased anywhere and that it is not a structure.

Mr. Atkinson stated that he asked Mr. Zuccaro what his options would be to rectify this situation. Mr. Zuccaro advised him to either remove the portion of the patio which was encroaching into the setbacks or to request a variance.

Mr. Atkinson stated that he has a unique and restrictive property in Glenmoor and that there are no design alternatives.

Mr. Atkinson stated that he never saw the landscape design which was approved by the City.

Dave Graham, of Phase One Landscaping, stated that the original plans which were submitted had both the fire pit and the patio in the setback. He stated that City Code states a permanent structure could not be in the setback, and that he has never known of a patio to be classified as a permanent structure.

Mr. Graham stated that Scott Kleski of Phase One Landscapes was the project manager for this project. He continued to say that during the time of the plans being revised, Mr. Kleski was on vacation and was not aware of the revisions which were approved.

Mr. Graham stated that Phase One Landscaping takes responsibility for miscommunications with the City.

Chair Sullivan asked if approval was granted for the gas line for the fire pit.

Mr. Graham replied yes and that it was inspected for safety and pressure.

Chair Sullivan asked if the gas line was inspected after the patio was in place.

Mr. Graham replied that it was inspected prior to the patio was constructed.

Chair Sullivan asked to see the photos indicating the layout of the patio.

Mr. Atkinson directed to Board to photos on pages 4, 5, and 10 of his submittal.

Board Member Allen stated that the email from Mr. Kleski dated October 3, 2013 shows the revised design and indicated where the setback was located.

Mr. Atkinson replied that he was told setbacks only applied to permanent and accessory structures.

Board Member Allen stated that the email dated October 1, 2013 states that patios are not allowed in the setbacks.

Mr. Atkinson replied that Phase One told him that a patio is landscaping and it is not a permanent structure.

Board Member Allen asked when the permit application was submitted.

Mr. Zuccaro replied that it was submitted on October 29, 2013.

Mr. Atkinson stated that he was unaware which design was submitted on October 29, 2013.

Mr. Zuccaro stated that the permit which was submitted on October 29, 2013 was issued on November 6, 2013. He continued to say that the City did not keep records of the previous design which was not approved.

Board Member Struna asked Mr. Atkinson if he ever saw the new design.

Mr. Atkinson replied that he did not see it until April. He continued to say that he worked in good faith with the City, Phase One Landscapes, and the Glenmoor Country Club. He stated that the mistake was not intentional.

Board Member Struna asked if Glenmoor would approve the plans with the encroachment.

Mr. Atkinson replied that Glenmoor approves of the design which was built.

Board Member Rapson asked if Mr. Atkinson accepted the City's definition of a permanent structure, and if denied the variance would he challenge the definition of a patio.

Mr. Atkinson replied that the patio would stay as is during the appeal process. He continued that he requested the meeting be moved so that he could have supporters in attendance, which explains the delay from April to August.

Mr. Atkinson stated that he would like to address the variance criteria. He stated that in reference to Criterion one, his property is located in a restrictive neighborhood in which 100 of 102 properties have easements. He stated that he has observed 17 other properties which have structures in the setbacks.

Mr. Atkinson stated that Criterion number two for a design alternative cannot be met as the location of the patio anywhere else would be a safety issue in regards to golf balls being hit.

Board Member Hoellen stated that the entire patio could have been shifted to the opposite side of the yard.

Mr. Atkinson replied that that design would have eliminated almost all of the grass in his yard.

Mr. Atkinson stated of the 17 properties he mentioned, he was able to find variances listed for two of them.

Chair Sullivan stated that the Board could not use violations of the rules to justify granting the variance.

Mr. Atkinson stated that he was being picked on. He continued to say that his immediate neighbors have no issues with the improvements and that Glenmoor has very strict covenants.

Board Member Hoellen stated that HOA rules do not overrule City requirements.

Mr. Atkinson stated that there was no design alternative.

Board Member Sullivan stated that the approved design was an alternative.

Mr. Atkinson stated that the approved design was not functional as it would not allow seating all around the fire pit. He continued to say that he has spent \$6,000 on patio furniture and \$50,000 on the project construction.

Mr. Atkinson stated that 15-17% of the other homeowners in his subdivision enjoy a similar patio, and that he was meeting the requirements of Criterion three. He continued to say that one of the variances granted in Glenmoor was for the president of the HOA.

Board Member Hoellen stated that there was no language in the minutes regarding a vote in relation to that particular request.

Board Member Rapson asked if the circumstances were the same as the applicant's.

Mr. Atkinson stated that the property in question also had restrictions due to easements. He continued to say that he had questions regarding the City's consistency.

Board Member Rapson stated that there was a point in time which the City changed the ways variances were granted. He continued to say that it is problematic to compare past variances to present, as changes have occurred over time.

Mr. Atkinson stated that City Code was revised in 1999 and the two variances were approved after this date.

Board Member Rapson stated that setbacks and easements are known at the time of purchase.

Mr. Atkinson replied that he did know about the easements but did not know of any setback issues at the time of purchase.

Mr. Atkinson stated that in reference to Criterion four, he was acting with integrity and not trying to manipulate the system.

Mr. Atkinson stated that in reference to Criterion five, the improvements made on his property actually enhance and provide a buffer for his neighbors. He continued to say that he asked and got approval from his neighbors before making the improvements.

Chair Sullivan stated that the City is not limited by the Glenmoor HOA or ACC, and the fact that Glenmoor approved of the plans does not change the view of the City.

Mr. Atkinson stated that in reference to Criterion six, the enhancements are an upgrade as the previously existing juniper bushes were places for snakes and rodents to hide. He stated that the improvements added value to the whole neighborhood.

Mr. Atkinson stated that in reference to Criterion seven, the approved design was not functional for their needs, and that the fire pit is located outside of the setback.

Mr. Atkinson stated that in reference to Criterion eight and nine, he has demonstrated the uniqueness of his situation.

Mr. Zuccaro stated that the variance which was referenced by Mr. Atkinson on 26 Glenmoor Drive was not a variance approved by the BOAA but rather approved as a replacement of an existing non-conforming patio. He continued to say that non-conforming structures can be replaced in the exact same footprint as the original structure.

Brian Shelton, of 67 Glenmoor Drive, stated that he has had four broken windows in two years from golf balls, and he understood that a patio in the wrong location could be dangerous. He stated that he was happy to support his neighbors and their improvements. He continued to say that nothing was harmed in allowing the variance.

Patches Caskey, of 45 Glenmoor Drive, stated that she is the president of the Glenmoor HOA and co-chair of the ACC. She stated that the HOA always encourages homeowners to check with the City in regards to any building projects, and the Mr. Zuccaro has always worked well with the HOA. She stated that she was granted a variance on her patio at her personal residence, which Phase One Landscaping was the contractor on. She stated the project in question was the result of miscommunication between Phase one Landscaping and Mr. Atkinson.

Kevin Fallon, of 100 Glenmoor Lane, stated that the Atkinsons are pillars of the community. He stated that Glenmoor is an 18 hole golf course which was constructed in an area which should only accommodate 15 holes. He stated that it is hard in those circumstances to maintain property values while meeting the needs of both the homeowners and the City.

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Board Member Rapson stated that the neighbors have compelling arguments; however, there is nothing unique about the Atkinson lot that is not the same as all other lots in the subdivision.

Board Member Hoellen stated if the majority of properties are having issues they might want to consider a rezoning of the subdivision. He continued to say that a variance request is an extreme remedy to a situation which is not routine. He stated that the Board cannot take money spent nor the opinions of neighbors into consideration.

City Attorney Michow stated that the applicant could respond to the public comments.

Mr. Atkinson stated that it was a challenge to police all of the enhancements going on in the City. He continued to say that 98% of the enhancements in Glenmoor were not approved by the ACC or the City.

Chair Sullivan closed the public comment portion of the meeting.

Board Member Struna asked what the legal ramifications to the City would be if the request was denied.

City Attorney Michow stated that that would not be a concern of the Board; it is up to the applicant to carry the burden of proof.

Board Member Struna asked if the material of the patio were changed could it remain in the same area.

Mr. Zuccaro replied that there are approved alternative surfaces, such as gravel.

Board Member Hoellen stated that aesthetics could not influence the decisions made by the Board.

Chair Sullivan stated that he empathized with the applicant but there was not enough evidence to grant a variance. He continued to say that if everyone built all the way to the edges of their setbacks it would turn a golf course setting into an urban setting. He continued to say that setbacks apply to everyone, and previous permits do not justify the bending of rules.

Board Member Hoellen stated that there is empathy for a homeowner who was misled by a contractor. He continued to say that the other properties which the applicant mentioned that were in violation were a larger issue, but that there was no way to know which did and did not require a variance.

Board Member Allen stated that the applicant had called her husband. She asked if she should recuse herself from voting.

Chair Sullivan asked if the conversation between the applicant and her husband had any impact on her ability to be impartial.

Board Member Allen replied no, and did not recuse herself.

Board Member Hoellen made a motion, which was seconded by Board Member Rapson, to deny the request by William D. and Louise C. Atkinson for a variance from Municipal Code Section 16-7-30 to allow an encroachment of approximately 13 feet in to the 25-foot side yard setback for the construction of a patio based on adoption of the findings in Table One of the September 4, 2014 Staff Memorandum.

The motion passed unanimously.

- b. *A Request by Abbas and Sami Rajabi of 5801 Piedmont Drive for a Variance to Municipal Code Section 16-5-30(c) to allow Enclosure of an Existing Deck that Encroaches Approximately 1.8 Feet into the 75-foot Minimum Front-Yard Setback for the R-1 Zone District.*

Mr. Zuccaro stated that Staff is presenting a request for approval of a variance from Municipal Code Section 16-5-30(c) to allow enclosure of an existing deck that encroaches approximately 1.8 feet into the 75-foot front-yard setback for the R-1 Zone District.

Mr. Zuccaro displayed an aerial photo of the property, as well as a vicinity map of the surrounding area.

Mr. Zuccaro stated that the original house was built in 1967, and was built with the existing encroachment. There is no record of an original variance.

Mr. Zuccaro stated that all approval criteria for the variance were found to be in the affirmative, and that Staff is recommending approval of the variance request.

Mr. Zuccaro stated that the impact of the variance is minimal. He continued to say that letters of approval from adjacent neighbors were included in the Board Members' packets.

Board Member Hoellen asked if the driveway was new.

Mr. Zuccaro stated he was not certain of the date of the construction of the driveway, but that driveways are allowed in the setbacks.

Board Member Allen asked if the addition was due to a hardship.

Mr. Zuccaro replied that it is considered a legal nonconforming structure, and there was no expectation that the applicant would go any further into the setback.

Abbas Rajabi, of 5801 Piedmont Drive, thanked Mr. Zuccaro for all of his hard work. He stated that the deck was added on the house in 1974 and they were requesting approval to enclose it.

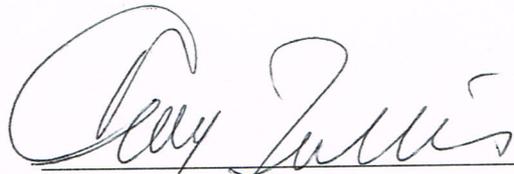
Chair Sullivan closed the public comment portion of the meeting.

Chair Sullivan made a motion, which was seconded by Board Member Hoellen to approve the request for a variance from Municipal Code Section 16-5-30(c) to allow enclosure of an existing deck that encroaches approximately 1.8 feet into the 75-foot front-yard setback for the R-1 Zone District based on adoption of the findings in Table One of the September 4, 2014 Staff Memorandum.

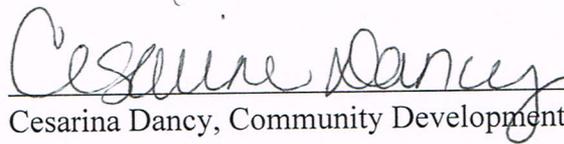
The motion passed unanimously.

ADJOURNMENT

The meeting was adjourned at 8:30 p.m.



Kerry Sullivan, Chairman



Cesarina Dancy, Community Development Clerk