

**GRAND JUNCTION BOARD OF APPEALS
MINUTES
January 20, 2010
12:02 PM to 1:04 PM**

The regularly scheduled Board of Appeals meeting was called to order at 12:02 PM by Chairman Reggie Wall. The public hearing was held in the City Hall Auditorium.

In attendance, representing the Board of Appeals, were Reggie Wall (Chairman), Travis Cox, Lyn Benoit and Greg Williams.

In attendance, representing the Public Works and Planning Department, were Ivy Williams (Development Services Supervisor), Greg Moberg (Planning Services Supervisor), Justin Kopfman (Associate Planner) and Judith Rice (Associate Planner). Jamie Beard (Assistant City Attorney) was also present. The minutes were recorded and transcribed by Leslie Ankrum.

17 citizens, including the applicants, were present.

I. APPROVAL OF MINUTES

Available for consideration were the minutes of the September 9, 2009 hearing.

MOTION: (Board Member Cox) "I move that we accept the minutes for the September 9, 2009 Board of Appeals meeting."

The motion was seconded by Board Member Benoit. A vote was called and the motion passed by a vote of 4-0.

II. ANNOUNCEMENTS, PRESENTATIONS AND/OR VISITORS

There were no announcements, presentations and/or visitors.

III. FULL HEARING

**VAR-2009-215 VARIANCE – Cole Accessory Dwelling Unit
Request approval of a Variance to the Use Specific Standards for an
Accessory Dwelling Unit regarding the building setbacks on 0.17
acres in an R-8 (Residential 8 du/ac) zone district.
PETITIONER: Stanleigh Cole and Nancy Edgington (a.k.a. Nancy
Cole)
LOCATION: 1129 Gunnison Avenue
CITY STAFF: Judith Rice, Associate Planner**

STAFF PRESENTATION

Judith Rice, Public Works & Planning Department, gave a PowerPoint presentation regarding the request to consider a Variance to the Use-Specific Standard for an accessory dwelling unit located in a multiple story structure, specifically to Section 4.1.G.16.

Ms. Rice stated the site location was at 1129 Gunnison Avenue. The future land use was Residential Medium and the current zoning was Residential 8 du/acre. Section 4.1.G.16 stated accessory structure setbacks could be used for detached accessory dwelling units if single story. Multiple story structures used as accessory dwelling units must meet principal structure setbacks. The principal structure side yard setback of an R-8 zone was five feet.

Mr. and Mrs. Cole obtained a Planning Clearance in August 2008 to construct a two story structure containing a garage on the ground floor and an accessory dwelling unit on the second floor. The Planning Clearance described an eight foot wide deck to be constructed 6.5 feet from the property line.

After construction of the building and upon receiving a complaint from the neighbors regarding the closeness of the deck to the property line, Code Enforcement determined that Mr. Cole had constructed the deck portion of the building two feet from the property line or three feet into the allowed five foot setback.

Mr. Cole provided an Improvements Location Certificate (ILC) locating his property lines in relationship to the neighbors' fences. According to the Location Certificate, 1129 Gunnison's west property boundary was in line with the neighbor's fence location. The building included a ten foot wide second story deck constructed two feet from the property line, contrary to the approved Planning Clearance. The variance Mr. Cole had requested was two feet from the five feet required minimum setback. That would put the deck three feet from the west property line. As stated in Section 2.16.C.4, requests for Variances to Use-Specific Standards of the Code could only be approved when the applicant established that all eight criteria (A through H) had been met.

Ms. Rice explained each of the criteria as follows: **(A) Hardship Unique to Property, not Self-inflicted.** "There are exceptional conditions creating an undue hardship, applicable only to the property involved or the intended use thereof, which do not apply generally to the other land areas or uses within the same zone district, and, such exceptional conditions or undue hardship was not created by the action or inaction of the applicant or owner of the property." Ms. Rice stated there was nothing extraordinary concerning the width of the property that would have prevented the applicant from meeting the required setbacks. The position of the fence did not present an exceptional condition. The applicant chose to center the building without regard for the required setbacks. Additionally, the neighbor's fence was encroaching on the east property line, while the deck was on the west side of the building. The hardships described in the General Project Report had been determined to be self inflicted for the following reasons: The General Project Report stated that the applicant wanted to go ahead with the ten-foot deck during the contract negotiations with the builder and not with the eight foot deck located 6.5 feet from the west property line which was approved by Planning Clearance resulting from a Minor Site Plan Review. The Project Report further stated that prior to construction the builder informed the applicants that there was not enough space to build the unit as drawn. No attempt was made to submit a re-designed site plan to meet the required setbacks. Rather, the applicant chose to center the building and

cantilever the deck. The City was not contacted regarding encroachment of the deck using cantilever construction. It would have been discovered that the encroachment was not allowed. Therefore, because prior to construction, the applicants were aware that the building would not be constructed according to the approved site plan and that the deck would be positioned inside the required setback, that an alternative site plan was not presented to the City and the applicants were aware of setback requirements having participated in the Minor Site Plan Review process and having signed the Planning Clearance, the hardship of the construction effort and inevitable costs to re-position the deck to meet the standards for the accessory dwelling unit had been determined to be self-inflicted and could have been avoided by building according to the approved Planning Clearance. **(B) Special Privilege.** “The variance shall not confer on the applicant any special privilege that is denied to other lands or structures in the same zoning district.” Ms. Rice stated that if the variance were to be granted, the applicant would receive a special privilege because constructing a permanent structure within the required R-8 zone setbacks was contrary to Code requirements and all other properties in the R-8 zone must meet the requirements of the Code. **(C) Literal Interpretation.** “The literal interpretation of the provisions of the regulations would deprive the applicant of the rights commonly enjoyed by other properties in the same zoning district and would work unnecessary and undue hardship on the applicant.” Ms. Rice stated a literal interpretation of the code would not deprive the applicants of the enjoyment of a deck nor would it deprive the applicants of any rights enjoyed by other properties in the same R-8 zone district. Adhering to the five foot minimum setback would reduce the size of the deck or re-locate it, not eliminate it. A literal interpretation of the code was necessary to accommodate the expectations of the neighbors for the quiet, privacy and visual value of their property as well as maximize the distance from structures and property lines for fire protection safety. The requirement of the R-8 zone side yard setback of a minimum of five feet was made clear during the applicants’ Minor Site Plan Review process. Approval of the Planning Clearance and the accompanying site plan was based on the standard for a two-story building used as an accessory dwelling unit in an R-8 zone. The inevitable costs, which the applicants described as the undue hardship of a literal interpretation, could have been avoided, had the building been constructed according to the approved plans or had a site plan been resubmitted with the deck location redesigned to meet minimum setback requirements. For example, placing the deck on the north side of the unit would have been an acceptable solution. **(D) Reasonable Use.** “The applicant and the owner of the property cannot derive a reasonable use of the property without the requested variance.” Ms. Rice stated reasonable use of the property could be derived without any deck at all, and, certainly, reasonable use could be derived if the width of the deck was reduced or the deck was relocated in order to meet required minimum setbacks. **(E) Minimum Necessary.** “The variance is the minimum necessary to make possible the reasonable use of land or structures.” Ms. Rice stated no variance was necessary to make possible the reasonable use of the land or the structure. **(F) Compatible with Adjacent Properties.** “The variance will not be injurious to, or reduce the value of, the adjacent properties or improvements or be detrimental to the public health, safety or welfare.” Ms. Rice stated the variance would be injurious to and may reduce the value of the adjacent properties. Maintaining the five foot minimum required setback for the two story structure, of which the deck was a part, would assist the

neighbors in conserving the privacy and visual value of their property as would maintaining that distance for a non-deck portion of the two-story building, would allow the neighbors to enjoy as much natural light as possible onto their property and would provide protection from fire for the accessory dwelling unit occupant and the neighbors by maximizing the separation of structures and distance from property lines. **(G) Conformance with the Purposes of this Code.** “The granting of a variance shall not conflict with the purposes and intents expressed or implied in this Code.” Ms. Rice stated granting this variance would be in conflict with the purpose of the Code which was to enable the City to uniformly and consistently evaluate development and to promote the health, safety and general welfare of the citizens and residents of the City. Consistent evaluation of development in R-8 zone districts required that all lands and structures in an R-8 zone district be held to the requirements of the Code. Granting this variance would allow a special privilege. The health, safety and welfare of the neighbors in the form of quiet, privacy, natural light, visual value and safety, would be served by the building being brought into compliance with the original approved Planning Clearance. The Code also stated that not all situations would fall into easily identifiable processes and requirements. This Code provided flexibility in dealing with situations in general, and especially those which do not fit well with typical processes and standard requirements. This situation did fall easily into the Minor Site Plan Review and Planning Clearance processes, and the easily identifiable requirements of the Use Specific Standards for Accessory Dwelling Units and the Dimensional Standards for R-8 zone districts. **(H) Conformance with the Growth Plan.** “The granting of a variance shall not conflict with the goals and principles in the City’s Growth Plan.” Ms. Rice stated granting this variance would be inconsistent with stated Goal #1 of the Growth Plan which was to achieve a balance of the rights of the private property owner with the integrity of the neighborhood. Without the variance, the applicants could achieve their goal of enjoying a deck while at the same time supporting their neighbors’ right to privacy, view, light and safety. Goal #10 asked the City to retain valued characteristics of different neighborhoods within the community. This requested variance to the very standards that support the valued characteristics of this neighborhood, that is, privacy, view, natural light and safety, would be in conflict with Goal #10. Goal #11 promoted stable neighborhoods and land use compatibility between adjacent properties by addressing traffic, noise, lighting, height and bulk differences and other sources of incompatibility, like privacy and safety, through the use of physical separation, buffering, screening and other techniques. The requested variance would reduce the physical separation provided by the Code through the Use Specific Standard of a five foot required minimum set back.

Based on the finding and conclusion that the Criteria for an approval of a variance had not been met, Ms. Rice recommended the Zoning Board of Appeals deny the requested variance per Section 2.16.C and Section 4.1.G of the Zoning and Development Code.

QUESTIONS

Chairman Wall asked if it was built two or three feet away from the fence.

Ms. Rice stated it was built two feet away from the fence and the setback was five feet.

PETITIONER'S PRESENTATION

Ms. Nancy Cole stated she was one of the owner's of the property. She stated they did not intentionally build into the setback and she realized total responsibility of any structure placed in the setback falls on them. The lot measured 45 feet instead of 50 feet and instead of having a survey performed on the property they went ahead with the building. They learned later that the east side fence was on their property five feet and the west side fence was located on the property line. They had built their deck on the west side of the property. She requested the Board look at Exhibit 2 labeled Neighbor's Complaint. She said she would be more than happy to move their deck in compliance with a three foot setback. The neighbors thought there only had to be a three foot setback. She also asked the Board to look at the last paragraph of Section F regarding 1125 Gunnison Avenue. She stated the neighbor to the west of them had a garage converted into a rental unit that was three feet from their shared property line. The neighbor to the east had a two story building that was three feet from that property line. The setback of three feet for a second story deck was less invasive to back yard privacy than their west neighbor's windows and air conditioner facing their back yard at eye level. She asked the Board to be directed to the last sentence of section G. She stated that as far as their neighbors' privacy was concerned, they had more to do with their time than to view their neighbors' activities. People looking on Google Earth or from the Alpine Bank building could see more than they could as far as their neighbors' yards. The only views blocked for their neighbors were power lines and the alley. Natural light was not affected by their structure. She stated she could not identify any safety or welfare issues caused by their structure that would affect their neighbors. Access was available for fire and ambulance. She asked the Board to reference the recommended Board of Appeals motion and asked if there was any reason that motion could not be made. She said the motion had stated for it to be approved.

Chairman Wall stated the motion was always made in the positive.

QUESTIONS

Board Member Cox stated that in order to grant a variance, all criteria must be met. He asked if she would like to address any of them in person.

Ms. Cole said she would address any criteria he had questions about.

Board Member Cox inquired about the first criteria, Hardship, not self-inflicted. In the response from the applicant, it was mentioned that it was not self-inflicted because it was the builder's fault.

Ms. Cole stated that technically it was their fault because they were responsible for where that building ended up and they should have had it surveyed to start with. The hardship part would be if they could bring it back to three feet from the setback, even four feet from the setback, then they wouldn't have to move the supports. If they had to bring it back five feet from the setback, they would have to tear up the supports and totally reconstruct the deck. They could not move the deck to the north side because the west side had the sliding glass door.

Board Member Cox stated his question wasn't whether it was a hardship but rather if she thought it was self-inflicted.

Ms. Cole stated it was self-inflicted.

Board Member Benoit stated it looked to him that the supports were within the five feet.

Ms. Cole stated the outside of the supports were at about four feet.

Chairman Wall asked if the deck had been approved for eight feet, then why was it built to ten feet without asking questions.

Ms. Cole stated she didn't know and said it should have been resubmitted.

PUBLIC COMMENT

Tim O'Brien stated his mother owned the property to the west of the proposed variance. He stated his mother was not the one that filed the complaint. She was concerned about any kind of retaliation. They learned of the problem when they filed a permit to build a deck behind her house. They looked at the site plan of the house next door and realized they had filed to build an eight foot deck and they had built a ten foot deck. Privacy was a concern but the biggest concern was the fire hazard. Their wooden fence was very close to the deck and if the fence were to catch on fire, it would definitely catch the deck on fire and cause a safety hazard.

Josefa Stephan stated she lived four houses down to the west of the applicants. She was concerned about the structure towering over the other houses.

Chairman Wall stated that the issue they were concerned about was the setback of the deck.

Ms. Stephan agreed that was not the issue. She stated she didn't want that trend to continue in Grand Junction. She stated the Cole's wanted to be in good terms with the neighborhood but they were not because they were not full time residents.

Chairman Wall asked if she had anything specific to the variance in question.

Ms. Stephan stated if they approved the setback at only three feet, they were setting a bad precedence because they were telling people if they break the code and claim a hardship to remove the deck, they would only need ask for a special variance. People would then do what they wanted. She stated she did not like the direction the Planning Commission was headed with the City.

Board Member Cox asked Chairman Wall when the Comprehensive Plan would be reviewed.

Chairman Wall stated on February 17, 2010 it would go to the City Council.

Ivy Williams stated the Comprehensive Plan was currently under way and was about to be accepted. She directed Ms. Stephan to schedule with the City Clerk's office to be put on an agenda to speak with the City Council regarding her concerns with the Zoning and Development Code.

Loran Dake stated he lived at 1022 Gunnison and he thought staff summarized it very well. He stated the Cole's made a mistake and they needed to fix it, it was not that difficult.

David Pilkinton stated he lived at 625 North 11th, the adjoining block to the west of the Cole's. They could see the structure from their home and they had talked with some of the neighbors and with Judith Rice. He asked the Board to look at Exhibit H in the report. The applicant stated that she did not want to take the entire deck down and he believed she would not have to. He calculated the distance between the supports and the fence to be five to six feet. The deck could be reduced to eight feet and all parties would approve.

REBUTTAL

Stan Cole stated he was the applicant for the variance and addressed the fire hazard. He stated the National Fire Code required all buildings to be three feet from the property line and that was why the minimum setback for anything was three feet. They had a couple of neighbors that had buildings that were three feet from their property line. He stated he did measure things today and it was 4'3" from the property line to the outside of the supports. He stated he would be willing to move the deck back to the support and would be requesting a 9" variance. The deck would then be an eight foot deck.

Chairman Wall asked if he was talking about the beam or the cement when he talked about the support.

Mr. Cole stated he was talking about the beam and the uprights underneath it. He said if he could have the 9" variance the cost to rebuild the deck would be \$3,000, which would be much less than taking the entire deck down and starting over.

Board Member Cox asked where Mr. Cole had measured his deck.

Mr. Cole stated he measured from the outside of the cantilevered deck to the fence, which was 2'3".

Board Member Cox asked if Mr. Cole measured from the west of the southernmost post to the fence.

Mr. Cole stated he measured from the post to the edge of the deck because the fence was not directly on the property line.

Board Member Cox clarified that he measured from the post to the edge of the deck and the distance was 2'3". He stated that the ILC stated the distance was two feet plus or minus.

Mr. Cole stated he also measured from the fence and it was 4'3" to the post.

Board Member Cox stated that the drawing on the survey didn't seem to show the fence directly on the property line. It seemed to be half a foot or so off the property line which brought the question of the edge of the concrete being on his property also.

Mr. Cole stated a licensed surveyor had signed the Certificate of Improvement and he had to stand behind the certificate which stated the edge of the deck was two feet from the property line.

Board Member Cox stated that the surveyor was standing behind the fact that it was two feet plus or minus, not 2.0.

Mr. Cole stated that he was willing to bring the deck back and he would need approximately a 9" variance.

Board Member Benoit asked if the minimum three foot setback, according to the fire code, included inhabited structures.

Mr. Cole stated that it was for inhabited structures.

Board Member Benoit asked if the minimum three foot setback included a two story structure inhabited on the second floor. He stated he was concerned about the proximity of the deck to the neighbor's fence.

Mr. Cole stated technically the setback should have been five feet and that they would be willing to settle for a 9" variance.

Board Member Benoit asked if the deck would have to be completely torn down to be in compliance.

Mr. Cole stated he would have to remove it temporarily and redo foundations for the supports.

Board Member Benoit asked if installing temporary supports would work.

Mr. Cole stated he could use temporary supports but he would have to do a foundation and redo a beam.

Board Member Benoit stated that his question was would he have to tear the entire structure down to accommodate the five foot setback.

Mr. Cole stated that most of it would have to be torn down, including railings. He stated that his living residence was only 480 square feet and they liked to get outside as much as possible.

Board Member Cox stated he would like to speak with Judith Rice again. He asked if most of what they had been going on was based off the ILC.

Ms. Rice stated it was based on the Code Enforcement officer and Judith's visual observation and measurements.

Board Member Cox asked if she had any documentation of her measurements. Specifically, any verification of the position of the posts.

Ms. Rice stated she did not.

Board Member Cox asked if she measured from the edge of the deck.

Ms. Rice stated that was correct.

Board Member Cox asked if there was anything else she measured.

Ms. Rice stated there was not. She stated that Code Enforcement could confirm the measurements. The Code Enforcement Officer did go back to the property and take some measurements and she may be able to confirm that but she was not in the building today.

Board Member Cox asked if she took any measurements from the cantilever to the posts.

Ms. Rice stated she did not.

Chairman Wall asked if the measurements were from the deck to some specific point or to the fence.

Ms. Rice stated it was to the wooden fence.

Chairman Wall stated he was asking because when he looked at the picture he was trying to find out where the property line was because the fence sat off of the concrete pad at one point and near the end of the concrete pad it started to touch the concrete.

Ms. Rice stated she measured to the fence.

Board Member Cox asked how far the fence was to the corner of the concrete pad.

Ms. Rice stated she did not have a specific measurement.

Board Member Cox stated it had to be big enough to put a form in there, so it had to be 1 ½" to 2".

Ms. Rice concurred.

DISCUSSION

Chairman Wall stated he had a question for legal. He asked what flexibility they had if they were talking 4'3" or if they were talking five feet.

Jamie Beard stated it depended on if they felt all the criteria had been met for the 4'3" when it had not been met for the other. To grant a variance, it would have to

be determined that each of the criteria had been met and if the self-inflicted portion, as had been discussed earlier, was part of the concern, then there may still be a problem.

Chairman Wall asked if anyone on the Board had any comments.

Board Member Cox stated he had a hard time getting over that this was self inflicted. On the Planning Clearance, the applicants were aware that their lot was 50 feet wide. When the contractor approached them and told them that their lot was only 45 feet, the applicants should have inquired to the discrepancy. The applicants did not meet Criteria A.

Board Member Benoit stated he believed the applicants had the opportunity not to let this happen. He did not see where there was an exception, from their statements more than anything else. He stated he was surprised the applicants measured this recently and found that it was two feet from the fence. That should have been a red flag months ago.

Board Member Cox also added that he would be wary of any compromise variance with the criteria not having been met. He stated they were not sure where to measure from because of not being sure where the property line was.

Board Member Williams stated not knowing the accurate measurements had raised doubts for him and also the fact that the applicants had not met Criteria A.

Chairman Wall stated he felt the structure complimented the neighborhood, but he had trouble with the self inflicted portion. He stated he agreed with his fellow Board Members that a compromise was something they could not legally do. He suggested the applicants get some true measurements before commencing. He requested that a motion be entertained.

Jamie Beard suggested a change to the last part of the motion to read, "with the information presented by the applicants."

MOTION: (Board Member Cox) "On Variance number Var-2009-215, I move we approve the request for a variance to the Use Specific Standards of Section 4.1.G of the Zoning and Development Code, to allow the deck of a two story accessory dwelling unit to be two feet into the required five foot setback with the information presented by the applicants."

Board Member Benoit seconded the motion. A vote was called and the motion failed by a vote of 0-4.

With no further business to discuss, the meeting was adjourned at 1:04 PM.