

# GRAND JUNCTION BOARD OF APPEALS

September 9, 2009

12:00 p.m. to 1:00 p.m.

## I. CALL TO ORDER

The regularly scheduled Board of Appeals meeting was called to order at 12:00 p.m. by Chairman Roland Cole. The public hearing was held in the City Hall Auditorium.

In attendance, representing the Board of Appeals, were Roland Cole (Chairman), Travis Cox and Rob Burnett. Mark Williams (Vice-Chairman) arrived at 12:02 p.m.

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

Two citizens, including the applicants, were present.

## II. APPROVAL OF MINUTES

Available for consideration were the minutes of the June 10, 2009 hearing.

**MOTION: (Travis Cox) "I move to approve the minutes of June 10, 2009."**

The motion was seconded by Rob Burnett. A vote was called and the motion passed by a vote of 3-0.

## III. ANNOUNCEMENTS, PRESENTATIONS AND/OR VISITORS

There were no announcements, presentations and/or visitors.

## IV. FULL HEARING

### **MSC-2009-150 APPEAL – Cole Appeal**

**Request a hearing for appeal of the Director's interpretation of "porch or terrace" in Section 3.2.E.2 of the Zoning and Development Code.**

**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 appeal of the Director's interpretation of "porch or terrace" as stated in Section 3.2.E.2 of the Zoning and Development Code. Ms. Rice requested the staff reports and attachments be entered into the record.

Mr. 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 can 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 is five feet.

Section 3.2.E.2 described setback Exceptions and Permitted Encroachments. Section m of that section stated that uncovered, unenclosed terraces or porches may encroach not to exceed six feet, but in no case closer than three feet to any property line.

The Director defined porch from *The Latest Illustrated Book of Development Definitions, 2004* as a roofed open area, which may be screened, attached or part of a building and with direct access to or from it. The definition then asks the reader to see figure 9, which illustrated a porch that was less than three feet above grade. The definition of terrace was a level landscape and/or surfaced area, also referred to as a patio, directly adjacent to a principal building at or within three feet of the finished grade and not covered by a permanent roof.

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.

Mr. Cole provided an Improvements Location Certificate in order to locate his property lines in relationship to the neighbors' fences. According to the Location Certificate, 1129 Gunnison's east property boundary was in line with the neighbor's fence location. The building, including the second story deck, was constructed two feet from the property line.

The Director's interpretation of "porch and terrace" as referred to in the Zoning and Development Code Section 3.2.E.2.m was not applicable to the deck portion of the two story building.

After reviewing the Cole Appeal, Ms. Rice stated she supported the Director's interpretation of "porch and terrace" as they are referred to in Section 3.2.E.2.m of the Zoning and Development Code as appropriate and should be affirmed with the findings of fact and conclusions that are stated in the staff report.

### **QUESTIONS**

Board Member Williams asked to have the area in question clarified on the screen.

Ms. Rice pointed out the structure, deck and the 6.5 feet indicated in the site plan of the Planning Clearance.

Board Member Cox asked for the definition of “porch and terrace” again and asked if the structure was considered a porch or a terrace.

Ms. Rice stated it was neither a porch nor a terrace, it was a deck.

Board Member Cox asked if it was because it was more than three feet above grade.

Ms. Rice stated that was part of it along with other parts of the definitions. Ms. Rice read the definition of porch again and said she did not feel the structure illustrated what was in the figure 9 illustration.

Board Member Cox asked to have the definition of terrace read again.

Ms. Rice read the definition of terrace again.

Board Member Cox asked if she had the definition for a deck.

Ms. Rice stated she did not.

Chairman Cole stated that if the current structure was two feet from the property line, regardless of whether it was a porch, deck or terrace, three feet was the required minimum and that exceeded that by one foot.

Ms. Rice stated that was correct.

### **PETITIONER’S PRESENTATION**

Mr. Cole asked if he could pass out a hand out to the Zoning Board.

Ms. Beard requested City staff review the document before being passed out to the Zoning Board. Upon reviewing the document and hearing Ms. Beard’s instruction, it was determined by the Zoning Board the document could be handed out since the document did not contain any new information from the Appellant that the Director was not able to address.

Mr. Cole stated he understood the deck was in violation of building code. The neighbor’s fence on the deck side of the building was on the property line but the neighbor’s fence on the other side of the building was built 4.5 feet onto Mr. Cole’s property. When asked by his builder where he wanted the building placed, Mr. Cole said to center the building on the property. Mr. Cole understood he would have to reduce the deck but believed from the zoning interpretation he should only have to comply with the three foot setback instead of the five foot setback. Mr. Cole stated he was appealing the letter received from Planning Manager, Lisa Cox regarding the definitions of porch and terrace. Mr. Cole read the definition of porch and terrace verbatim from Planning Manager Cox’s letter. The letter went onto say that given these two definitions, it was her determination that a deck structure was neither a porch nor a terrace and, therefore, not eligible for the allowed encroachment into the side setback. Planning Manager Cox referred to *The Latest Illustrated Book of Development Definitions, 2004* which

Mr. Cole could not find in a book store or library. The Planning department provided the book to Mr. Cole and he said that was when he discovered the Planning Manager had fabricated the definition of porch. The definition of porch provided in the letter did not appear in the book. Planning Manager Cox added the words "at or within three feet of the finished grade." Mr. Cole said he was in violation according to her definition. Mr. Cole said her definitions were not the real ones and he had never said he thought a deck was a porch, but it was reasonable to interpret an uncovered and unenclosed porch as a deck structure.

The code specifically allowed encroachment of an uncovered and unenclosed porch, but an uncovered and unenclosed porch was actually not a porch because porch by the definition had a roof. It would probably be called a deck if you looked at the drawings in the book and took the roof off, it would look like a deck. In *The Latest Illustrated Book of Development Definitions, 2004*, there was a drawing showing what a porch looked like. Mr. Cole had taken off the roof in an additional drawing to show an uncovered and unenclosed porch, which looked like a deck. It also looked like an unroofed platform, either free standing or attached to a building. The definition of deck in the book was an unroofed platform either free standing or attached to a building. According to Webster's dictionary, a deck was defined as a flat, floored, roofless area adjoining a house. Given a picture of a porch in *The Latest Illustrated Book of Development Definitions, 2004* and the definition of a deck in the same book and Webster's dictionary, an uncovered and unenclosed porch was basically a deck.

According to the Zoning and Development Code, the Zoning Board of Appeals would determine whether the Director's interpretation of the Code was in accordance with the intent and requirements of the Code. The Director had falsified the requirements of the Code. Planning Manager Cox's decision was made on this falsified definition. She could not interpret the Code in accordance with the intent and requirements of the Code when she had changed what the Code said. Based on those facts, he asked the Zoning Board of Appeals to reverse the decision of the Director and allow the deck be rebuilt no closer than three feet to the property line.

### **QUESTIONS**

Chairman Cole asked Mr. Cole if the plan in his hand was the one he presented and was approved.

Mr. Cole agreed it was.

Chairman Cole asked why he did not follow the approved plan.

Mr. Cole said the biggest reason was the location of the building. There was a lot of room on the entry side and he made a mistake. If he had moved the entry over to where he could have put it, the neighbor's fence would have been in the way. He probably should have gotten a survey so he would have known for sure because he had the room to satisfy the setbacks on both sides had the neighbor's fence been moved over 4.5 feet.

Chairman Cole asked if it had been determined that the fence was 4.5 feet on Mr. Cole's property.

Mr. Cole stated the fence on the deck side was on the property line but the fence on the other side was 4.5 feet on his property. It was his error and he was willing to re-do his deck and take off a foot, which would make it no closer than three feet to the property line.

Chairman Cole asked if the deck was part of the permanent structure of the house.

Mr. Cole said the deck was attached to the house.

Board Member Cox asked what the date was of the letter from Lisa Cox that he had alleged had the fabricated definitions.

Mr. Cole stated June 8, 2009.

Board Member Cox asked which paragraph was fabricated.

Mr. Cole read the first few words of the paragraph and also read the portion that was added by Planning Manager Cox, "at or within three feet of the finished grade".

Board Member Cox said Planning Manager Cox didn't cite the definition as coming directly from that book.

Mr. Cole said it was later when he asked her where she obtained the definitions that she told him where she had gotten them.

Board Member Cox asked how far away the piers on the deck were from the fence.

Mr. Cole replied they were roughly four feet from the fence. At three foot setback he would take a foot off the deck. At five foot setback he would have to tear the whole thing down and start over.

Board Member Cox wanted to clarify that Mr. Cole was saying the structure was a deck and not a porch or a terrace.

Mr. Cole said he was saying it was an uncovered and unenclosed porch. He never said it was a porch. The actual part of the code with the encroachment language didn't refer to just a porch, it referred to an uncovered or unenclosed porch or terrace. When it was uncovered and unenclosed, it was not a porch anymore by the definition of the word porch. His contention was when it was uncovered and unenclosed, most reasonable people would call it a deck. Therefore, he thinks he was in error and his deck was in violation, but he does think he qualifies for the encroachment which would allow him to take one foot off his deck, which would be three feet from the property line.

Board Member Williams read from Mr. Cole's September 9, 2009 letter, "Ms. Cox has added these words in an attempt to change the definition of porch and

fraudulently exclude our deck from the three foot encroachment allowed by the Zoning and Development Code.”

Mr. Cole confirmed that was from his letter.

Board Member Williams asked if the improper conduct was the insertion of the words in the second paragraph on the June 8, 2009 letter.

Mr. Cole replied affirmatively and stated the words added were “at or within three feet of the finished grade.” When those words were added, clearly, his deck could not comply with having an encroachment. If those words had been left out, it would have been a different situation.

Board Member Williams asked Mr. Cole to explain that to him.

Mr. Cole stated his deck was more than three feet from the ground. It said a porch was defined as a roofed open area which may be screened, attached to or part of a building. Even this definition wasn't directly applicable because the language in the encroachment part of the Zoning Code said that it was an unenclosed, unroofed porch.

Board Member Cox asked where that unenclosed, unroofed part came from.

Mr. Cole said it was in 3.2.E.2 Exceptions and Permitted Encroachments.

Ms. Beard stated she could read specifically from that section. It said “uncovered comma, unenclosed terraces or porches not to exceed six feet but in no case closer than three feet to any property line.” It could be read that the uncovered and the unenclosed applied to terraces and not to porches.

Board Member Williams asked if Ms. Beard could read that section again.

Ms. Beard read the section again, adding that in the definitions, it included porches specifically being roofed and terraces were not, they were unenclosed and uncovered.

Mr. Cole said it could also be read as unenclosed or unroofed porches or terraces. It was definitely a little bit vague.

Ms. Beard stated other than if you go to the definitions, with what the Code specifically said in chapter one, to go to the latest illustrated definitions unless it's included within the Zoning and Development Code. Our Zoning and Development Code did not have a specific definition for terrace, for deck or for porch. The first step it directed us to was *The Latest Illustrated Book of Development Definitions, 2004* and all three of those were defined within that book. Within that book it specifically said that a porch was roofed and a terrace was not.

Mr. Cole stated that was the main reason he was appealing. The Director did not use the definition out of that book. She made up her own definition.

Chairman Cole stated we were dealing with interpretations, not fabrications and lies. No one intentionally made any fabrications or any lies. Chairman Cole stated interpretations were what we were talking about. He asked Mr. Cole if he would agree with him.

Mr. Cole stated he had no idea what was in Planning Manager Cox's mind. If it were an honest mistake, or if she planned to do it.

Chairman Cole stated that would be for them to determine. The terms fabrications and lies troubled him.

Mr. Cole agreed that was a little strong and apologized. He said it wasn't the same definition that was in the book and said he was certainly not there to call somebody a liar.

Board Member Williams asked to whom he was apologizing.

Mr. Cole stated to Lisa Cox.

Board Member Williams asked why the inclusion of that language impacted his argument.

Mr. Cole stated it impacted his argument because his deck was more than three feet above grade. If those words were inserted, his deck could not possibly qualify for an encroachment.

Board Member Williams stated that was a definition of a porch.

Mr. Cole agreed and said he never claimed his deck was a porch and that Planning Manager Cox assumed he was calling his deck a porch. He stated he never said it was a porch, he said his deck was an unenclosed and unroofed porch.

Board Member Williams asked what the setback was for a deck and asked Mr. Cole if he agreed it was a deck.

Mr. Cole agreed and said there was nothing in the Code with the words deck that specified what the setback for a deck was.

Board Member Williams asked if the City of Grand Junction had classified the structure.

Ms. Ivy Williams stated that the encroachment section of the Code allows for defined segments of a building to encroach into a setback. Being absent of that, it was considered part of the principal structure and would have to meet the setback for the principal structure. The deck, as part of the principal structure, would be part of the principal. The City would call the structure a deck.

Ms. Beard stated that as a deck, it would have to have met the principal structure setbacks. It did not qualify under the exemption section which Mr. Cole was

trying to get qualified under because there wasn't a specific exemption for a deck.

Board Member Williams asked if both parties agreed it was a deck. He also stated the Appellant thought there were no setbacks for a deck and Ms. Beard said there were setback requirements.

Ms. Beard stated that she thought Mr. Cole knew there was a setback for a deck but even though there was a setback for a deck, he wanted to try and come in under one of the exemptions. The only exemption she was aware of was either under an unenclosed, uncovered terrace or as a porch. It was the Director's interpretation that it does not qualify for either one of those exemptions.

Mr. Cole stated it was his contention it was an unenclosed or unroofed porch based on common sense and having looked at the drawing of a porch with the roof removed. It looked like a deck. Also, if you used the two definitions that are applicable from the Grand Junction Code, they would have described what was sitting there without the roof on. A normal, reasonable person would say that was a deck, but it was actually a porch that had its roof taken off.

Chairman Cole asked Mr. Cole if he agreed that it was part of the structure.

Mr. Cole stated it was attached to the house and was part of the structure. But it did qualify for a three foot encroachment as a porch would be a part of the permanent structure.

Board Member Williams asked what the setback was for a permanent structure.

Mr. Cole stated that for his house it was five feet.

Board Member Williams asked if it was five feet, would the entire structure have to be moved.

Mr. Cole stated he would have to remove the entire deck.

Board Member Williams asked him what he wanted.

Mr. Cole stated he thought it should qualify for an encroachment, which would mean, only one foot of deck would have to be removed.

Board Member Williams asked what distance that would be from the property line.

Mr. Cole stated it would be three feet from the property line.

Ms. Beard stated a decision would not be made today whether or not that deck should be allowed as it was built or how it should be allowed. The only real decision today was whether the Director's interpretation, specifically in regards to a definition of porch and terrace, was the appropriate interpretation based on our codes and the direction our code gives as far as relying on *The Latest Illustrated Book of Development Definitions, 2004*.



Board Member Cox stated according to due process, they could not discuss variance to the setback.

Ms. Beard affirmed and added they were not dealing with that certain project only the interpretation.

Board Member Cox stated he had some questions for Ms. Rice. He asked her if she could address the letter from Planning Manager Cox and where the three foot above grade came in.

Ms. Rice stated the three foot above grade resulted in relying on the illustration when it said to see figure 9. Rather than saying in the letter, "see figure 9", she was saying what the definition was, she wasn't quoting the book. Using the illustration to interpret the definition, she saw it was less than three feet from grade and used that as a point of reference.

Board Member Cox asked if it could be less than two feet, maybe 18 inches.

Ms. Rice agreed that it could.

Chairman Cole said it was less than three feet.

Ms. Rice concurred.

Board Member Cox asked about Section 3.2.E.2 that referenced "not to exceed six feet, but in no case closer than three." If it stated "no case closer than three", why even say "not to exceed six"?

Ms. Rice stated there could be a situation where there was a 20 foot setback on the front of the property; it would be restricted to six feet.

Board Member Cox gave the example, if there were a 10 foot side yard setback and we went seven feet in, which would be three feet from the property line, that would be over six feet and that would be in violation.

Ms. Rice agreed with that assessment. Ms. Rice added that she would like to read the definition of deck from *The Latest Illustrated Book of Development Definitions, 2004*. An unroofed platform, either free standing or attached to a building, that is supported by pillars or posts.

Chairman Cole asked Ms. Beard to advise the Board of the decision that was theirs to make.

Ms. Beard stated their decision was whether or not the Director had appropriately interpreted the Code. In this instance, the Director had appointed Lisa Cox, as the Planning Manager, to be the one to make that specific decision. Her decision was the June 8, 2009 letter that was sent to Mr. Cole and the other appellant. It would be the Zoning Board's review of that and whether Ms. Cox made an appropriate interpretation based on what our Zoning and Development Code is and the definitions found in *The Latest Illustrated Book of Development*

*Definitions, 2004.* The information you are to rely on are the staff report with Planning Manager Cox's letter and the written statements that were originally cited by Mr. Cole and anything else he may have added here today that you've felt fits within those original written statements. The options you have are to either affirm the interpretation of the Director, reverse it, or remand it back with direction to the Director. Our advice in an appeal situation would be rather than reverse it, since you don't have a specific definition to say what a porch or terrace is, remand it back to the Director to make a new interpretation based on the direction that you provide to her.

### **PUBLIC COMMENT**

There was no public comment.

### **REBUTTAL**

There was no rebuttal.

### **DISCUSSION**

Board Member Cox stated this was difficult because what made sense and what they had to decide on are two separate things. The question before us was where this deck should be relative to that property line. He didn't believe this was a porch or a terrace by definition. The section about uncovered, unenclosed terraces was slightly vague and there were two ways to read it. The Appellant was not going by Section 3.2.E.2 when he was building his deck and the vagueness of this section didn't cause the problem. The problem was caused by not knowing where the property line was. Trying to call it something else rather than a deck was not fair to the process or the Code. He stated he would have to vote that it was a deck and the Director's interpretation was correct.

Board Member Williams stated he knew Ms. Cole quite well, had known her forever and they were very good friends. She taught his son how to swim. Board Member Williams wrote an employment letter of recommendation for her. He had the highest regard for her but didn't think it would impact his decision. Board Member Williams asked if any action needed to be taken regarding this matter.

Ms. Beard stated to Chairman Cole that it would be up the Board at this time. In the future if there are any questions of there being some type of conflict, they should be addressed at the beginning of the hearing. If it was determined that there was a conflict, it would be asked that you leave the hearing and not sit in at all. As described, it does not appear to rise to the level of being a conflict. There was no information of any financial gain to you (Board Member Williams) one way or the other based on your relationship with one of the Appellants. Based on the information provided, including the belief you could rule on this without allowing that to effect you, Ms. Beard believed it didn't rise to the level of a conflict. It was up to the rest of the Board to make the determination of whether Board Member Williams stayed or was dismissed.

Board Member Williams stated he was sorry and should have talked earlier but didn't say anything.

Chairman Cole asked the other Board members how they felt about allowing him to participate in the decision.

Board Member Cox stated that it seemed in one out of three or one out of two hearings they have, Board Member Williams knew the petitioner. He stated it had been his experience, over the past five or six years, he hadn't seen anything that seemed like he changed his vote based on knowing the people. He was comfortable with him staying.

Chairman Cole asked Board Member Burnett if he was comfortable with Board Member Williams staying and affirmed he was.

Chairman Cole stated he didn't have a problem with Board Member Williams staying because in a small community, it was highly likely they all knew several people who may come before the Board.

Board Member Williams stated, "Ms. Cox we're all really upset with government right now, you know, the abuses and...."

Chairman Cole and Board Member Cox stated Planning Manager Cox was not present.

Board Member Williams stated he was sorry and said whoever wrote the letter.

Chairman Cole stated that Lisa Cox wrote the letter but was not present.

Board Member Williams continued and said we were all upset and would respectfully ask the staff to be more careful in the future. He didn't see how this met the definition of either a porch or a terrace.

Board Member Williams asked if the Appellant's request was approved, did it mean he had to get rid of the deck or did it mean he didn't qualify under these two exceptions.

Ms. Beard stated at this point in time he would be in violation based on submitting an application to us for approval for a Planning Clearance.

Board Member Williams asked if there would be an area where they could work something out.

Board Member Cox stated the next step would be to request a Variance.

Ms. Beard stated he would have to look at those options that were available to him under the Code.

**MOTION: (Board Member Cox) "I move to affirm the Director's interpretation based on a recommendation that the Zoning Board of Appeals affirm the Director's interpretation of porch and terrace and her conclusion that the Appellant's deck is not a porch or a terrace under Section 3.2.E.2.M of the Zoning and Development Code with respect to file #MSC-2009-150 with the findings and conclusions listed above.**

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

Chairman Cole stated that the integrity of anything mentioned here, whether it was the applicant or whether it was staff was not in question. It was merely interpretations on the part of both of them. We were looking at interpretations not integrity and he emphasized that to the Appellant.

**V. ADJOURNMENT**

With no further business to discuss, the meeting was adjourned at 1:00 p.m.