

MINUTES OF THE MEETING

Athens Board of Zoning Appeals

April 21, 2021

9:00 AM

City Council Chambers

ROLL CALL

MEMBERS PRESENT

Chairman Tom Hamilton
Wesley Kite
Kenny Charles

MEMBERS ABSENT

John Proffitt
Dick Pelley

OTHERS ATTENDING

Anthony Casteel
Gene McConkey
Hector Jaramillo
Brandon Ainsworth
Tim Schultz
Christian Medders
C. Seth Sumner
Justin Hicks (Virtual)

APPROVAL OF MINUTES

Approval of the February 17, 2021 Regular Meeting minutes

The minutes of the February 17, 2021, meeting were approved on motion by Kenny Charles; seconded by Wesley Kite; vote – unanimous

OLD BUSINESS

There was no old business to discuss.

NEW BUSINESS

1. **Use on Review request** by Hector Jaramillo for Patio homes on sixty (60) foot wide minimum lots located on 21.48-acre parcel shown as Tax Map 065J Group A Parcel 001.00 located on Housley Drive and Valley Drive and zoned R-1 Residential.

Mr. Casteel said they are asking for a Patio home use in the R-1 District. The density requirements will be two to four acres, so the proposed patio home preliminary concept meets that threshold and is in compliance with the land-use plan. He went over the data shown for all his lots. They are all are over the required 6000 square foot minimum required for a dwelling in the R-3 district. They vary in size, some are almost half an acre, others are a

little over an acre, and they go all the way down to less than a quarter of an acre, but once again they don't stipulate that all the lots have to be uniformed just as long as they meet the density requirements, so that's what he's done. The question was his stormwater management area and his mailbox area. It seems to him by scaling it, he meets the requirements for the conservation area for all those lots. So Staff recommends approval of the use as submitted.

Chairman Hamilton said the sewer easement is in the building setback on Lot #1, Lot #46, #33, #15.

Mr. Castel said, it is actually in the building envelope on Lot #1 and then it centers the property lines. There is nothing they can do about it because it is existing. In his opinion, he definitely could still get his mailboxes in there. (He pointed out some buildable area on the plat.) He said he thinks even triangle on the north end of lot 1 would be available building area.

Chairman Hamilton said should they not note on there that they cannot build on that sewer easement.

Mr. Casteel said they could probably do that in the platting process. They are only asking this Board to approve the Use on Review today.

MOTION: To approve the Patio Home Use on Review Request based on Staff's information.

MADE: Kenny Charles
SECOND: Wesley Kite
VOTE: Unanimous
MOTION PASSED

- Variance request** by Hector Jaramillo to change the side setback requirements from zero (0) and twenty (20) to five (5) and fifteen (15) feet respectfully under Section 4.20.D.2.e. for Patio homes on sixty (60) foot wide minimum lots located on 21.48-acre parcel shown as Tax Map 065J Group A Parcel 001.00 located on Housley Drive and Valley Drive and zoned R-1 Residential.

Mr. Casteel said they are asking for a variance for zero (0) side setback on the patio homes section. The patio homes section requires a 20-foot side setback and a zero (0) side setback as well. The issue that comes into play is that when they did the zoning code originally and when they revised the regulations in 2017, they tried to find everything that needed correcting. However, they missed the subdivision easement requirements and did not correct this issue. The subdivision regulations require the following when it comes to stormwater easements; it said 15-feet. Historically, they have never enforced that way in the Planning Commission. The language that is placed on plats is shown in the Staff Report. Public Works and Athens Utilities Board has signed off plats with these existing utilities, so obviously they are working just fine at this ratio here with only requiring a 10-foot along the front and also center on all interior lot lines as well. The existing language in these development codes does create an issue on zero-lot-line developments. In the downtown and other areas where you can build to the property line, you're basically building on to these easements, so they are not functional easements. They can't be. The issue downtown he does not know how they solve that but the patio homes, there is a way to solve that. He worked in other jurisdictions where they had a 3-foot and a 12-foot setback. Not only for the utility easement, but to address single family homes overhangs. If someone build to the line and when they are enforcing the setbacks, they don't enforce it from the overhang, they enforce it from the footings for the structure itself. Even though they do have homes that meet the setbacks, their overhangs could be encroaching into that setback, but they do not consider that illegal and don't enforce it. Once again, private property rights come into play where somebody wants to maintain this house, they could give them a maintenance easement, there is no doubt. However, he said he did not know how they could give them an easement for their overhang. That is his main issue. He wants to change the code to correct the overhang problem because people want to be able to build the type of houses they want to build.

Mr. Casteel said he needs to go a little deeper because he knows the Building Inspector Mr. McConkey filled his out and recommended denial based on it not being a lot of record and he is correct because that is the way the law reads. The law states, "upon a lot of record" one that existed when you passed your zoning code. These are new platted lots; they are not lots of record, so it does not fall under that aspect of the law. But, other portions of the law, where it talks about undue hardship, there is no doubt it's causing undue hardship on developing these lots and on the landowners because their overhangs are on somebody else's property and their neighbor's overhangs is on their property. It is an issue for all of them and that is why he believes that the Board can pass the variance. In addition the Board can recommend that the Planning Commission study this and change the codes. There is no reason to hold this development up for two months to do a code change or maybe longer because the Planning Commission has to recommend to City Council, which usually takes 2 months to complete the legislative process of changing the regulations.

Mr. Charles asked Mr. Casteel what he seen in other jurisdictions.

Mr. Casteel said in Cleveland, their patio homes/cluster homes, had a three-foot side setback and a 10-foot side setback on the other side but he would have to go back and make sure. They also had regulations on the 3-foot setback side that they could not have any openings, but he thought that was outdated because he thought the *International Building Code* said, as long as the house is three or three- and one-half feet from another, it can have openings. If it is closer than that, it can't still have openings (i.e. doors or windows).

Mr. Charles asked if he was talking about windows.

Mr. Casteel said yes, doors, windows. That is the way Cleveland's regulations are written but he did not want to get into that where they tell people they cannot have a window at the side of their house. He is comfortable with either one. Probably five-foot does make more sense because it matches the existing utility easements and there would not be any problems at that point.

Chairman Hamilton asked if what they are talking about doing was moving those building envelopes from their property line. For example, looking at lot #23, they would move the building envelope to the right five feet.

Mr. Casteel said they would shift them all five foot off the zero-lot-line side. There are four lots there that are not zero-lot-line, they are corner lots, but they are still patio homes.

Chairman Hamilton asked why they do not measure the setback from eave instead of the wall. In other words, take out the issue of the overhang.

Mr. Casteel said he thinks it makes it harder on him being able to transpose it to the ground and do it.

Mr. McConkey said when he first looks, he looks at footings and he has to establish that distance at.

Mr. Casteel said there is no overhang there.

Chairman Hamilton said so he is measuring where the footers are poured.

Mr. McConkey said yes.

Mr. Casteel said they also do not require residential building plans, so they do not know what that overhang is. They are not required to submit a plan. That overhang could be whatever, and they would not even know it because they are not required to show them that.

Mr. Medders said the same thing if he was staking the house.

Mr. Kite asked if the 60-foot was the minimum and not the requirement.

Mr. Casteel said right. He did not think he has a 60-foot on their; most of Mr. Jaramillo's are sixty-one feet in width.

Mr. Kite said it is a choice that they have been drawn to be a minimum that these gentlemen have made. He asked if architectural style dictates when variances are granted. There are lots of architectural styles that can no longer be built because of codes, like Italianate Homes. Those cannot be built because of hand rail regulations, but you do not give variances for handrail distances on Italianate homes. There are lots of home that do not have overhangs, so he understands what Mr. McConkey is saying about the zero-foot setback that could be a home with no overhang. To build your house with an overhang, that is a choice, and he would think the minimum measurements of everything, can be met and created as long as all the codes and ordinances can be followed. If you cannot follow the codes and ordinances, can you use the minimum?

Mr. Medders said the hardship is not really the eave, well it is the eave, but they are asking for the variance not because of the eave. They are asking for the variance because the utility easement that is there is actually a 20 and five there now. So, they are actually increasing the setback because of the utility easement itself. Its hardship is because of easement not necessarily because of the eave itself. They are asking the variance to go from five to fifteen which is essentially what the spirit of the code is for the houses to be twenty-foot apart. They are still being twenty-foot apart but shifting them into the lot because of the five-foot easement itself, which what they are asking for.

Mr. Kite said his question is the hardship. Mr. McConkey said, "lots of record", lots that existed before codes were put in place. So, if you have a 40-foot lot you obviously have an undue hardship, but these are not lots of records, so he has trouble understanding how these are hardship when these are just drawn. He could have made them one hundred foot or two hundred foot.

Chairman Hamilton said even if they were a hundred foot wide, if they were zero lot line, they would still have the same problem.

Mr. Kite asked is that still not like a choice.

Mr. Medders said not in this case because the choice of having a zero-lot line and put it on that lot line is taken away from them because of the five-foot easement.

Mr. Kite said that is also being taken away because the lots are only 61-feet wide.

Chairman Hamilton said he thinks Mr. Kite's point is, they do not have to go zero-lot line.

Mr. Kite said that is a choice; they don't have to build a zero-lot line. They are choosing to.

Chairman Hamilton said they could build a conventional subdivision.

Mr. Kite said his question is based on the codes and ordinances in place. He has the manual for property examples and explanations of the legal terminology, and he looked up something and read it aloud, "undue or unnecessary hardships or conditions of the lot such that the owner cannot make effective use or make a reasonable profit from owing the lot put to a reasonable unless a variance is granted. The use required must be a reasonable use not necessarily the most profitable use for the landowner. In the event the hardship suffered must go the use of the land a mere decrease in value of the property does not justify a variance. Not all hardships qualify. A hardship per example, will not be considered undue or unnecessary if it has been self-created or meaning self-imposed. In other words, a hardship cannot be the result of actions by the landowner or predecessors of interests know the zoning ordinance beforehand. He said based on that he did not think they have to build on that; he asked if they create the minimum and if they have to build on a zero/.0 (point zero) lot line.

Mr. Casteel said they don't have to, but they want to be in harmony with the code, that is the way it was written so that they can maximize the other side yard. He said maybe they used the hardship term a little too much because State Law also states the BZA can grant relief if the code "resulted in particular and exceptional practical difficulties". He believes without a doubt, building over an easement that is required in another code creates an exceptional practical difficulty, not only for the landowner, but also for the utility company. He said he talked with Eric Newberry (Athens Utilities) about this, and he said it was definitely a problem. They have not even started talking about downtown because all the utilities downtown have to be in the right-of-way. People build to the property line in the Central Business District.

Chairman Hamilton said he totally agrees there is a problem because on one hand you have regulation that says you can and other a regulation that says you can't. Something has to be resolved between the two. He said he thinks Wesley brings up a very good point, they chose

to build zero-lot-line houses here. They are creating their own issue with this particular development. That is different than two ordinances that say diametrically opposed issues. That is a situation they have to change.

Mr. Casteel said he thinks since City Council and the Planning Commission have adopted these regulations (Subdivision and Zoning), and the way they are written makes it pretty much impossible to what you are supposed to do, then the City of Athens, has some liability in it as well not just because they chose to do it. The city's regulations as written has made it harder on developers in the first place or they would not be standing there.

Mr. Kite asked if Mr. Casteel was saying is regardless of whether they approve this or not he (Mr. Casteel) is going to make this recommendation to the Planning Commission, and should they approve it, and it will go to the Council to be approved then this will be a non-issue. That would be three months from now. Rather than keep them from starting immediately or waiting three months. He cannot see in the future where the Council or Planning Commission will approve it, but he also cannot see that they would not approve it from what Mr. Casteel is saying. They are most likely, by not recognizing the conflict placed in each ordinance that cannot be followed and meet utilities so that is the hardship. He understands they do not have to build this type of home, but they have this type of home in their codes that can be built. He asked if they can be built anywhere.

Mr. Casteel said patio homes are allowed in R-1, R-2, and R-3 zones. It does affect three different zones.

Mr. Kite said the question is, would this type of home built anywhere it is legal to build, have to request a variance or just this situation.

Mr. Casteel said other developments probably should request a variance as well. The structures being built right now on Tellico that already have this problem and they did not come and ask for a variance. They already have a problem with their overhang issue and that is a problem they are going to have to solve on their own because they did not come and ask for it.

Mr. Kite asked if the utility easement is a state requirement.

Mr. Casteel said no, it is in their subdivision regulations for stormwater drainage and utility installation. He said another thing he talked about with Ben Burchfield, is it is not like that is the only place they can put stormwater. You have to understand that the lay of the land sometimes dictates the best way to put drainage. It's not that they go right down these property lines with everything, they may come back and ask for additional easement and that

is what they would have done in this instance if something would have come up. They would have asked for additional easement to the other side. It is the same thing with utilities, there is nothing that says you have to run gas on this side and water on that, they may put them all together on this side.

Chairman Hamilton said it seems to him, they have subdivision regulations that say one thing, zoning code that says different, that situation has to change. By granting this variance, they are letting him do something that he would be able to anyway once the opposition part of the regulation and the code changes. He assumes if they do something to change it.

Mr. Casteel said right. They may get into the code change after they talk to the utilities and everything else and come up with something totally different than what they are asking to be granted here.

Mr. Kite asked if the subdivision code supersede utility easements and rights-of-way and if it does not, is it not negligible anyway. Does it not even matter.

Mr. Casteel said he does not know what AUB's, or Public Works policies are for their easements; TVA's is, you are not developing anything in their easements.

Mr. Kite said hypothetically, just because that code says it, you can do it. If he did that, does that code supersede utility right of ways and easements. That was his understanding.

Mr. Casteel said they do not tell people they cannot build in a TVA easement; TVA does. AUB would be the one to ask that question. Just like there is nothing to stop you from building that fence but AUB could come in tear that fence down if need to access the utiklites laocted in the easement.

Chairman Hamilton said they have had fences, outbuildings, swimming pools built across the easement. A fence you tear down, a swimming pool is a differ situation. It seems to him that utility easement should be free of anything.

Mr. Casteel said he thinks what Mr. Kite is saying is that their subdivision regulations and easements should supersede their zoning code and that is exactly what they are trying to do right there. They are trying to say the subdivision regulations do supersede their zoning code, that is why they are asking the Board to allow them to change that setback to five feet and fifteen so they can meet that requirement.

Mr. Kite asked if they could meet if they don't give them a variance. Will the house be on point zero.

Mr. Casteel said they can meet if they tell they cannot maximize their building envelop. He said he did not think they have the legal right to tell them that. If they established the building envelop by the setbacks that they cannot utilize the whole thing. He thinks that is basically what he (Mr. Kite) is saying, and he feels they do not have the legal right to say that. They have established in their regulations what you can build and how much area you can build in and then to tell them that they cannot do it would not be enforceable in his opinion.

Mr. Kite with codes where do you stop. You cannot just do whatever you want. The choices of the overhang are architectural choices to build that on someone else property.

Mr. Casteel said it is to a certain extent. Very few people building single-family homes with no overhangs. He said even after they change this, they are still probably going to run into problems in the future they never even thought of but, he thinks without a doubt there is enough evidence that he can recommend to this Board that if they want to pass the variance today, it is a legal variance.

Chairman Hamilton said the only problem he sees with granting a variance is they are asking for five and fifteen. If Planning Commission comes back and says three and seventeen then they are within the ordinance anyway.

Mr. Casteel said they are always going to because if the Board approves this today, it will create their own specific regulations for only this specific property.

MOTION: To approve the variance as requested.

MADE: Chairman Hamilton

SECOND: Wesley Kite

VOTE: Unanimous

MOTION PASSED

Kenny Charles, Secretary