

**MINUTES**  
**BREVARD BOARD OF ADJUSTMENT REGULAR MEETING**  
**Tuesday, January 5, 2021 – 3:00 PM – Council Chambers**

The Brevard Board of Adjustment met for a regular meeting on Tuesday, January 5, 2021, at 3:00 PM in Council Chambers of City Hall.

Members Present: Judith A. Mathews, Chair  
Tom Tartt, Vice Chair  
Kevin Jones  
Allen Delzell

Members Absent: Tad Fogel

Staff Present: Paul Ray, Planning Director  
Leigh Huffman, Planner  
Brian Gulden, Board Attorney  
Janice H. Pinson, Board Clerk

Others Fred S. Petersen, Applicant  
Patricia B. Hawkins, Applicant  
Douglas Mertz, Applicant

**I. WELCOME**

Chair J. Mathews called the meeting to order at 3:00 PM and welcomed those present.

**II. INTRODUCTION OF BOARD MEMBERS**

Board members, Board Attorney and Staff, introduced themselves.

**III. CERTIFICATION OF QUORUM**

Chair J. Mathews certified a quorum of the Board was present.

**IV. APPROVAL OF AGENDA**

K. Jones made a motion, seconded by T. Tartt to approve the agenda as presented, carried unanimously.

**V. APPROVAL OF MINUTES**

K. Jones moved, seconded by A. Delzell that the March 3, 2020, meeting minutes be approved as presented. Motion carried unanimously.

## **VI. NEW BUSINESS**

**a. Request of Fred S. Petersen and Patricia B. Hawkins (Petersen) for a variance from UDO Chapter 12.3.C to allow for a total rear setback variance of 3' to complete an addition to the existing structure. The property is located in the Residential Mixed Use (RMX) zoning district with the address of 188 West Jordan Street within the corporate limits of the City of Brevard, further identified by PIN# 8586-41-0199-000.**

Chair, J. Mathews explained quasi-judicial procedures.

Chair J. Mathews asked the Board if they had any conflicts of interests.

K. Jones stated that he knew Mr. and Mrs. Petersen, but that it would not alter his being able to make a decision in the matter.

B. Gulden further questioned K. Jones as to his ability to listen to the testimony and apply the standards, and further if his relationship would prove to be a conflict in applying the standards.

K. Jones stated that he could apply the standards without any conflict.

B. Gulden determined that he had no problem with K. Jones hearing the case.

It was determined that the Board had no conflicts of interest.

The Applicant, Fred Petersen was asked if he had any conflicts with any of the board members and he responded that he did not.

The Board briefly discussed that they had visited the property, and had no exparte communications.

Brian Gulden, Board Attorney explained that a variance requires a vote of 4/5ths of the board and that because only 4 members of the board were in attendance that it would require a unanimous vote for the variance to be granted.

Mr. Petersen was given the option to postpone the hearing or continue. He stated that he wanted to proceed with hearing the application.

Fred Petersen, Applicant and Leigh Huffman, Planner were sworn by the Board Clerk.

Leigh Huffman, Planner stated that the matter was properly advertised, property posted and neighbors notified.

Leigh Huffman, Planner presented her staff report a portion of which follows:

### **Background**

Fred S. Petersen and Patricia B. Hawkins (Applicants) are requesting a total setback reduction of 3 feet. This setback reduction is intended to allow for an addition to the

existing primary structure. The property is located in the Residential Mixed Use (RMX) zoning district with the address of 188 West Jordan Street within the corporate limits of the City of Brevard, further identified by PIN# 8586-41-0199-000.

### **Discussion**

The City received a request from the Applicants on November 9, 2020 for a variance from the rear yard setback requirements (Attachment A). The lot is zoned RMX, and the rear property line borders the Downtown Mixed Use (DMX) zoning district (Attachment B).

**Section 2.3.C** outlines the City's side and rear yard setback requirements for primary structures per zoning district. RMX requires a minimum of 25 feet from the rear property line. DMX does not have a minimum rear yard setback. The Applicants' proposed addition would reduce the setback to 22 feet. The Applicants' would need a 3-foot variance.

Independent of this variance request, the Applicants agreed to convey 3-foot-wide strip of land on a separate, unrelated parcel for the purposes of an easement for the bike path. The Applicants mention this information in the submitted application (Attachment A). The Board's decision should *not* take this fact into consideration when voting upon this request.

In order to grant the variance *all* of the conditions below must be met:

1. Unnecessary hardship would result from the strict application of the regulations. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
2. The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.
3. The hardship did not result from actions taken by the Applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.
4. The requested variance is consistent with the spirit, purpose, and intent of the regulations, such that public safety is secured, and substantial justice achieved. Substantial justice is not achieved when granting the variance would be injurious to the neighborhood or to the general welfare.

Economic hardship or the fact that property may be utilized more profitably with a variance shall not constitute an unnecessary hardship. In its motion, the Board should include Findings of Fact to support each of the items listed above.

### **Summary**

Application VAR-20-002 is for the reduction of the required 25-foot side yard setback for the property located at 188 West Jordan Street, Brevard, NC 28712. This request is intended to allow for an addition to the existing primary structure.

Leigh Huffman, Planner read two (2) statements received by neighbors who were not in attendance but cautioned the board that these statements were hearsay and could not be considered in their decision. The statements are attached hereto and labeled, Exhibits “A” and “B”.

Fred Petersen, Applicant testified that he purchased the property and obtained a permit for the remodel before being able to obtain a survey. Because of the COVID pandemic, he found it difficult to find a surveyor that could perform the survey prior to the purchase. Only after the permit was obtained, and the survey completed did he realize that he could not meet the rear yard setback to complete his project of adding a closet off the rear of the residential structure.

He further explained that his goal is to have a positive impact on the property for the neighborhood and respectfully requested that the board consider granting the variance.

There being no further questions for either party. Chair J. Mathews closed the hearing for deliberation.

After a brief discussion, K. Jones made the following motion.

With regard to variance request #**VAR-20-002**, the application of Fred S. Petersen and Patricia B. Hawkins for a three foot (3’) variance from the rear yard setback, as set forth in UDO Section 2.3.C to allow for an addition to the existing primary structure. The property is located in the Residential Mixed Use (RMX) zoning district with the address of 188 West Jordan Street within the corporate limits of the City of Brevard, further identified by PIN# 8586-41-0199-000. I move the Board to **GRANT** the application based upon the following findings of fact:

- a) that unnecessary hardship would result from the strict application of the regulations;

The 2’ X 3’ closet addition is necessary to upgrade the house to conform to current standards for marketability.

- b) the hardship results from conditions that are peculiar to the property such as location size or topography;

The size of the lot would make it impossible to add to the rear of the structure of meet the current rear setback requirements.

- c) the hardship did not result from actions taken by the Applicant or the property owner;

The Applicant did not subdivide the lot and could not obtain a survey prior to the purchase of the property or prior to the permit application due to the current pandemic.

- d) the requested variance is consistent with the spirit purpose and intent of the regulations such that Public Safety is secured and substantial Justice achieved.

The variance of 3' making the rear setback 22' does provide adequate separation between adjoining property owners and uses.

Second by A. Delzell, the motion unanimously carried. The variance was granted for a 3 foot reduction in the rear yard setback requirement.

**b. Request of Douglas and Karen Mertz for a variance from Unified Development Ordinance Chapter 4.3.F. & G.; 2.3.E and 2.3.E.2 to allow for the subdivision of land into two (2) lots. The property is located in the General Residential (GR8) zoning district with the address of Neely Road within the corporate limits of the City of Brevard, further identified by PIN# 8586-93-0878-000.**

Chair, J. Mathews explained quasi-judicial procedures.

Chair J. Mathews asked the Board if they had any conflicts of interests, there were none.

The Applicant, Douglas Mertz was asked if he had any conflicts with any of the board members and he responded that he did not.

The Board briefly discussed that they had visited the property, and had no ex parte communications.

Brian Gulden, Board Attorney explained that a variance requires a vote of 4/5ths of the board and that because only 4 members of the board were in attendance that it would require a unanimous vote for the variance to be granted.

Mr. Mertz was given the option to postpone the hearing or continue. He stated that he wanted to proceed with hearing the application.

Douglas Mertz, Applicant. Paul Ray, Planning Director were sworn by the Board Clerk. Leigh Huffman, Planner was previously sworn and still under oath.

Leigh Huffman, Planner stated that the matter was properly advertised, property posted and neighbors notified.

B. Gulden advised the board that they should not give an advisory opinion on the matter until it is before them under some appeal process.

Leigh Huffman, Planner presented her staff report a portion of which follows

### **Background**

Douglas and Karen Mertz (Applicant) submitted an application for a variance to allow the subdivision of land into two parcels. The current lot configuration, shape and size, is not conducive to subdividing without creating nonconformities. The property is located in the General Residential 8 (GR8) zoning district with the address of Neely Road within the corporate limits of the City of Brevard, further identified by PIN# 8586-93-0878-000.

### **Discussion**

**Section 2.3.E** outlines the City's dimensional requirements for newly created lots per zoning district. GR8 requires a minimum of 30 feet of street frontage at the right-of-way. The Applicant's parcel has approximately 48 feet of street frontage. The Applicant is proposing a subdivision of land to give parcel A 30 feet of street frontage while parcel B would have 18 feet of frontage. Parcel B would need a 12-foot variance.

**Section 2.3.E.2** allows the approving authority to authorize the establishment of lots in GR that do not meet the minimum width requirements set forth above, but with the following standards: (a) Such lots shall have frontage upon a public street; (b) Off-street parking shall be provided in the rear of the principal structure and shall not be located in the side yard or front yard of the lot; and (c) Off-street parking shall be accessed by a commercial service street, alley, or rear lane. "Provided that all lots meet minimum public street frontage requirements of this ordinance." Staff believes the language in this subsection is poorly written and confusing, and is requesting the BOA make a determination if minimum lot width can be varied by Staff if the developer provides off street parking from a rear lane.

**Section 4.3.F** adjusts the setbacks on irregularly shaped lots in order to capture the spirit and intent of spacing between buildings on individual lots that do not have an obvious visual relationship with the fronting street, like flag lots. In such case, the irregularly shaped lot shall be evaluated on the basis of having one setback from neighboring properties, which shall be equal to the minimum rear setback for the district. In this case, the rear setback is 25 feet. The Applicant is requesting relief from this section by proposing typical setbacks for GR8 which is 15-foot front, 6-foot side and 25-foot rear. In this case, the 15-foot front setback is requested for all easternmost property lines.

**Section 4.3.G** states in part that no new flag lots shall be permitted if the "pole of the flag" extends longer than 100 feet and the "pole of the flag" shall meet minimum street frontage requirements of the district. In this case, the pole of the flag of parcel B is approximately 112 feet before bending to a 30-degree angle. Additionally, the Applicant is proposing 18 feet of road frontage instead of 30 feet.

In order to grant the variance *all* of the conditions below must be met:

1. Unnecessary hardship would result from the strict application of the regulations. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
2. The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.
3. The hardship did not result from actions taken by the Applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.
4. The requested variance is consistent with the spirit, purpose, and intent of the regulations, such that public safety is secured, and substantial justice achieved. Substantial justice is not achieved when granting the variance would be injurious to the neighborhood or to the general welfare.

Economic hardship or the fact that property may be utilized more profitably with a variance shall not constitute an unnecessary hardship. In its motion, the Board should include Findings of Fact to support each of the items listed above.

### **Summary**

Douglas and Karen Mertz applied for a variance from UDO Sections 2.3.E (Requesting a 12-foot street frontage reduction), 2.3.E.2 (Allowing administrator to reduce minimum street frontage requirements), 4.3.F (Requesting typical GR setbacks), and 4.3.G (Increase flag pole by 12 feet) to allow for the subdivision of land into two lots for the purpose of building single family homes.

Doug Mertz testified that he disagreed with the Planning Staff's decision that he needed a variance. He handed out to the board and read the highlighted information obtained from UDO Chapter 2.3.E.2. (Attached and labeled Exhibit "C").

Other Structure and Lot Dimensional Requirements as follows:

2. The approving authority may authorize the establishment of lots in GR, RMX, and NMX districts that do not meet the minimum width requirements set forth above. However, the following standards shall apply:

(a) Such lots shall have frontage upon a public street.

(b) Off-street parking shall be provided in the rear of the principal structure and shall not be located in the side yard or front yard of the lot.

(c) Off-street parking shall be accessed by a commercial service street, alley, or rear lane. Provided that all lots meet minimum public street frontage requirements of this ordinance. Such travel lane may be situated upon a private easement or right-of-way.

K. Jones asked if Staff had a recommendation for the Board.

Paul Ray, Planning Director stated that he did not have a recommendation at this time.

K. Jones stated that he felt like the decision was above the Board's purview and that it should be handled on at the Staff level.

Brian Gulden, Board Attorney stated that an appeal of Staff's decision after application was made could have been one way to handle the matter.

After further discussion the Applicant, Douglas Mertz requested that the Board table the hearing until a date uncertain.

Motion by K. Jones to grant Mr. Mertz's request to table the matter to allow for legislative process to take place or for Mr. Mertz to modify his application to present more evidence, second by T. Tartt, unanimously carried.

J. Mathews closed the hearing.

B. Gulden advised Mr. Mertz that the City will talk to him and notify him when the hearing is rescheduled.

### **c. Election of Officers**

K. Jones nominated Judy Mathews, Chair and Tom Tartt, Vice Chair, second by A. Delzell, unanimously carried.

### **d. Meeting Schedule 2021**

The Board unanimously approved the 2021 meeting schedule as presented.

## **VIII. REMARKS – None**

**IX. ADJOURN**

K. Jones moved, seconded T. Tartt, the meeting be adjourned. Motion carried. Meeting adjourned at 4:55 PM.

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Janice H. Pinson Board Clerk

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Judith A. Mathews, Chair