

DECEMBER 13, 2016

**BOARD OF ZONING APPEALS
CITY OF MISHAWAKA, INDIANA**

A regular meeting of the Mishawaka Board of Zoning Appeals was held Tuesday, December 13, 2016, at 6:00 p.m. in the Council Chambers, City Hall, 600 East Third Street, Mishawaka, Indiana. Board members attending: Charles Krueger, Charles Trippel, Don McCampbell, and Marcia Wells. Absent: Ross Portolese. In addition to members of the public, the following were also in attendance: Ken Prince, Derek Spier, Christa Hill, and Kari Myers.

Charles Trippel moved to adopt the 2017 Rules of Procedure and 2017 meeting calendar. Marcia Wells seconded; motion carried with a vote of 4-0.

Mr. McCampbell explained the Rules of Procedure.

The Minutes of the November 15, 2016, meeting, were approved as distributed.

Conflict of Interest was not declared.

PUBLIC HEARING:

APPEAL #16-45

An appeal submitted by City of Mishawaka requesting a variance from the Flood Control Ordinance to permit a new comfort station and Castle Manor, **Merrifield Park, 1000 E. Mishawaka Avenue**, addition located within a Special Flood Hazard Area (SFHA) (Zone AE).

Ken Prince, City Planner, presented the Appeal. He said the variance is a little different in that we've not had a variance from the Flood Plain Ordinance. He said in order to participate in the flood plan, we need to have this variance.

Mr. Prince said the site is located within Merrifield Park and as part of the Riverwalk extension, it makes sense to replace the restroom; it's in dire need of replacement. He said it is below the required flood elevation and when they decided to build new, it triggered new standards and the flood plain is 6' higher than the floor of the structure. Mr. Prince said Troyer was asked how they can raise it and it would look like a restroom on a hill. He said another alternative was to provide flood protection for the building and that's possible. Mr. Prince said the building isn't habitable and would need to be cleaned if flooded.

Mr. Prince said one of the issues is the electrical needs to be above flood plain for protection. Utilities said the way the transformer works is that the shut-off is located below flood plain and the transformer will automatically be shut off if the park floods.

Mr. Prince said for those reasons, the variance is needed. He said the new building will be smaller than the existing, but will have a covered porch and kind of match the roof elevation at Castle Manor. He said there should be little damage to the building if it should flood.

Mr. Prince said another portion of the variance, and he isn't sure if it's even needed, was the addition to Castle Manor. He said the front of the building used to have a porch and they want to create a small addition on the back of the building to create storage and open up the porch that has long since been closed in. He said that portion of the building is below the flood elevation and isn't even sure if a variance is needed, but wanted to be safe.

Mr. Krueger asked if the new restroom will be elevated. Mr. Prince said only slightly above the existing restroom.

Mr. McCampbell closed the Public Hearing on Appeal #16-45.

Staff Recommendation

*Staff recommends **approval** of Appeal 16-45 requesting a variance from the Flood Control Ordinance requirement that a proposed new comfort station/rest room facility and building addition to a community lodge/banquet facility, both being non-residential structures located within a Special Flood Hazard Area (SFHA) / Zone AE in Merrifield Park (1000 E. Mishawaka Avenue), have either the lowest floor elevated to or above the Flood Protection Grade (FPG) or be flood proofed to or above the FPG. This recommendation is based upon the following criteria and conditions to be considered for variances from the City's Flood Plain Ordinance:*

- 1. The applicant has shown that there exists a good and sufficient cause for the requested variance. It is not practical or necessary from a design, public safety and fiscal perspective to elevate or flood proof the Castle Manor building addition or flood proof the electrical equipment on the addition and comfort station/restroom facility to or above the required flood protection grade (FPG). Both of these structures are non-residential public facilities. The new comfort station will replace an existing restroom in generally the same location. The Castle Manor addition will be constructed at the same finished floor elevation of the existing structure. Castle Manor was not designed to meet the provisions of the flood control ordinance as it pre-dates the existence of the ordinance. These two structures along with the other improvements in Merrifield Park represent the city's continual investment and interest in providing high quality parks and facilities for its residents.*
- 2. Failure to grant the variance, as requested, would result in exceptional hardship to the applicant. Requiring that the structures included within this petition be elevated or flood proofed would result in an unnecessary greater public expenditure while not providing a greater level of public safety. The structures are non-residential and will be closed to the public should they become inundated with flood waters. Furthermore, electric services to these structures will automatically be cut if flooding reaches an elevation of 696.5'. This is the elevation of the electrical transformer serving these structures, which is also 4 ft. below the base (100 year) flood elevation and 6 ft. below the FPG.*
- 3. Granting the variance, as requested, will not result in increased flood heights, additional threats to public safety, create nuisances, extraordinary public expense, cause fraud or victimization of the public, or conflict with existing laws or ordinances. The proposed structures will potentially decrease flood heights. The existing 1,580 sq. ft. restroom facility to be demolished and proposed 350 sq. ft. Castle Manor addition will result in a reduction of 1,230 sq. ft. in the structures not designed to resist the effects of the regulatory flood. The new 665 sq. ft. comfort station will let floodwaters into the structure. Additional threats to public safety or the creation of nuisances will not occur as the structures are non-residential and will be closed to*

the public when the park becomes inundated with floodwaters. Furthermore, the electrical services will be cut to these structure before floodwaters rise to the FPG. Public expenses as a result of granting the variances will not be extraordinary. Development costs will be reduced since the structures and electrical utilities will not have to be unnecessarily elevated above the FPG. Since the structures are non-residential, public resources will not have to be expended for rescue operations during flood events. The granting of the variance will not cause fraud or victimization to the public since the structures are publically owned by the City of Mishawaka. To the best of our knowledge, the granting of the variance will not conflict with the any existing local, state or federal laws.

- 4. If approved, the variance requested provides the minimum relief necessary to alleviate the hardship. Elevating the comfort station to where the electrical facilities would be at the FPG would require raising the grade 4.5', which is unnecessary. This structure, except for the attendant utilities, is designed to resist the effects of the regulatory flood. The Castle Manor addition would have to be elevated 4.76' for the structure to be at the FPG elevation. Elevating a small building addition is impractical if a majority of the existing structure is located below the FPG. Waterproofing the attendant electrical facilities on both the structures at or below the FPG is also unnecessary. Power will be automatically cut when floodwaters reach an elevation of 696.5' which is the elevation of the electrical transformer serving the structure. This elevation is below the base (100 year) flood elevation of 700.5'.*
- 5. The Flood Control Ordinance states that variances may be granted only when a new structure (or addition) is to be located on a lot of one-half acre or less in size. However, deviations from this limitation may be allowed. In this case, the structures are located on a 15.98 acre lot being the entirety of Merrifield Park. The location of the structures are functionally dependent based upon the proposed park improvements. The comfort station is located immediately adjacent to the multi-use path and playground area where it will best serve its purpose for park visitors. The comfort station will replace an aged facility in generally the same location. The Castle Manor addition cannot be located outside of the flood plain area due to the current location of the existing building.*

MOTION: Charles Trippel moved to approve Appeal #16-45. Charles Krueger seconded; motion carried with a vote of 4-0.

APPEAL #16-46 An appeal submitted by International Venture and Investments LLC requesting a Developmental Variance for **1655 East Twelfth Street** to permit a 6' fence with slats and landscaping where a 7' fence is required.

Debra Hughes, Marbach, Brady & Weaver, 3220 Southview Dr., Elkhart, appeared on behalf of the Appellant. She said the owner has an existing building where they store wheels and tires and are planning a 50,000 sqft addition.

Ms. Hughes said the site is adjacent to a mobile home park and the ordinance requires a 7' fence. She said there's an existing 6' fence and they would like to keep the fence and add slats instead of removing it and building new. Ms. Hughes said the fence is located on the far south side of site and along the east edge of the property. The fence is quite close to homes and if torn down it would be more disruptive to install a new fence than to add slats to the existing fence.

Mr. McCampbell said it looks like the 6' fence has been there a number of years. Ms. Hughes said yes, that is correct.

Mr. McCampbell closed the Public Hearing on Appeal #16-46.

Staff Recommendation

Staff recommends approval of Appeal 16-46 for a developmental variance from the screening required for a proposed building addition at 1655 E. 12th Street to allow a 6' high opaque fence instead of the required 7' high opaque fence along the property lines contiguous to residentially zoned property. This recommendation is based upon the following findings of fact:

- 1. Approval will not be injurious to the public health, safety, morals and general welfare of the community because adequate screening will be provided with the installation of slats into an existing 6' high chain link fence. Installing a new 7' high opaque fence would be more disruptive to the adjacent residents with the potential for noise and dust during fence removal and construction.*
- 2. The use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner because adequate screening will be provided with a 6' high opaque fence and an adjacent row of 7' high evergreen trees. The protection to the adjoining residences by a 7' high opaque fence is not substantially more than will be provided with a 6' high opaque fence.*
- 3. Strict application of the terms of this chapter will result in practical difficulties in the use of the property because it will not allow the existing 6' high fence to remain and be modified to an opaque fence without a variance.*

MOTION: Marcia Wells moved to approve Appeal #16-46. Charles Trippel seconded; motion carried with a vote of 4-0.

APPEAL #16-47 An appeal submitted by Marc and Kathryn Snyder requesting a Developmental Variance for **2238 Miller Court** to allow 12' X 36' overhang on an existing oversized garage.

Marc Snyder, 2238 Miller Court, said he's been married for 34 years and has lived in the house for 23 years and wants to add an overhang on to his oversized garage. He said in 2014 he received approval for an oversized garage as he has converted his attached garage into living space.

Mr. Snyder said at the request of the neighbors, he redesigned the original garage request as they were concerned about the size and he hired an architect to do so. He said the original design showed the overhang, but was not included in the sqft of the overall request. He said the overhang will protect his hot tub. Mr. Snyder said in the 2 years since the approval, they have made some practical changes to the design in regards to doors and windows. The garage has one door instead of 2 and he decided to eliminate 2 lower windows on the east side due to the chance of break ins. He said on the north side they eliminated 3 windows on the lower level and on the south end he replaced a window with a 2nd service door so there would be one on both ends to make it easier for him.

Mr. Snyder said on the south side, he replaced a center window with a door. He said he envisioned the worst possible winter and since the roof is practically flat, he can remove snow from the roof easily instead of having to climb a ladder.

Mr. Snyder said the framing crew started work a month ago and were behind in getting a permit and that's when he was told the sqft was wrong and he told the builder to stop work on the overhang. He said he can't finish the building until he gets approval and now has mold due to being wrapped in tie vek.

Mr. Krueger asked if the gutters he was putting in were larger than normal. Mr. Snyder said they're big enough to handle what is there. He said he has a good outfit and has taken him 2 years to nail down a contractor; they're out of Nappanee.

Opposition

Marsha Moraschi, 2304 York Road, said her house butts up to the side of his house. She said her concern is this is an oversized building on a city lot. In a subdivision, they have small lots and if this is permitted, she has enough room on the side of her house to build the same size building.

Ms. Moraschi said another concern she has is according to the graphic explaining what he has done, she has photos of what it looks like now. She still says, as do the neighbors, that he is planning on having the garage as an apartment. You don't put a door on the second story; you could look directly into her house. Ms. Moraschi said you have the right to look anywhere you want, but she should be able to sit in her house without someone looking in. She said others have the same concerns.

Ms. Moraschi said she isn't a contractor, but she recently had a house fire and she had to pull permits and have the work inspected. She said what is being used is decking wood and she wants to know how things have been changed since the original approval. Ms. Moraschi said it's his property and money and she's had property line issues with him. She said he put a fence on the property line and she can't get a lawn mower through.

Ms. Moraschi asked why these things are being permitted in a subdivision and she doesn't feel it's fair to those in the community.

Mr. Krueger asked Ms. Moraschi if she had concerns with water run-off. She said yes, but probably more on the other side.

Mrs. Wells asked if run-off could be managed on site. Mr. Prince said it's being built to the previously approved plan. By law, he can't cause an impact on the adjacent property. He said in residential areas you can let water go where it goes, but if it impacts a neighbor, he has to control it.

Jim Kowalik, 2236 Miller Court, showed a picture of his back yard before the garage was built and after. He said the building went up quickly without a permit so they could get a variance. Mr. Kowalik said he believes it's going to be an apartment with a deck. He said the structure can be built with the original approved size with a hip roof.

Mr. Kowalik said the way it was set up 2 years ago, they said they needed the storage. He contends that's more than storage space. He said what is shown is not what was approved; the whole structure was changed. He said he guesses it's easier to ask for forgiveness than permission.

Mr. Kowalik said he also has concerns about the driveway. He said he has water run-off and the day we had 10" of rain he had damp walls. He said he will re-grade his yard to put more water away from his house that used to be absorbed in the yard.

Mr. Kowalik said when Mr. Snyder put up his fence, he hit a gas line and there have been other things that have impacted his life. He said once this is approved, it's a precedent. He said he knows it's going to look like the west side of South Bend. Now everyone will want one and that's his concern.

Mr. Prince read a Letter of Remonstrance from Linda Lemere, 2314 York Road.

Rebuttal

Mr. Snyder said regarding alleged plans of the garage being living quarters, he would have to apply for a Use Variance for that. He didn't rough plumb the building and has no plans to live there.

Mr. Snyder said it may seem like a lot of storage, but he lacks some things his neighbors have like a snow blower and also has a power washer stored in the house due to lack of storage space. He said he can assure everyone there are no plans to live in the building.

Mr. Snyder said he hasn't heard anything about run-off as the water gathers at the street where his driveway is.

Mr. Krueger said the fence looks like it's in a state of disrepair. Mr. Snyder said it's a construction fence for the neighbor.

Mr. Snyder said his storage shed is full and doesn't appreciate his neighbor calling him a liar.

Mr. Snyder said he won't argue that it looks like a deck, but it won't be used as such.

Mr. McCampbell closed the Public Hearing on Appeal #16-47.

Staff Recommendation

*The Staff recommends **approval** of Appeal #16-47 to construct a 12' X 36' overhang on to a 960 sqft detached garage. This recommendation is based upon the following findings of fact:*

- 1. Approval will not be injurious to the public health, safety, morals and general welfare of the community because all state and local building codes will be adhered to during construction;*
- 2. The use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner because the new construction constitutes an investment to the neighborhood; and*
- 3. Strict application of the terms of this chapter will result in practical difficulties in the use of the property because the Appellant had planned the overhang and was originally included in plans.*

MOTION: Charles Krueger moved to approve Appeal #16-47. Marcia Wells seconded; motion failed with a vote of 1-3.

APPEAL #16-48 An appeal submitted by Twin Branch Retail Center LLC and Michelle Hilbert requesting a Use Variance for **2826 Lincolnway East** to permit a tattoo and body piercing studio.

Michelle Hilbert, 507 Loveland Pass Court, Osceola, presented the appeal. She said the building is vacant and has been for several years and wants to put up to three businesses in the building. Ms. Hilbert said she needs the Use Variance in order for a tattoo and piercing studio to be located in the building.

Mr. Trippel asked Mrs. Hilbert if she understood conditions recommended by staff. Mrs. Hilbert said yes.

Mr. McCampbell closed the Public Hearing on Appeal #16-48.

Staff Recommendation

*The Staff recommends **approval** of Appeal 16-48 for a use variance to allow a tattoo and body piercing establishment within a vacant commercial building at 2826 Lincoln Way East in Twin Branch Plaza subject to the following conditions:*

- 1. The tattoo and body piercing studio must comply with all regulations and permitting requirements per Chapter 18-Business Regulations, Article X-Tattoo and Body Piercing Establishments of the City of Mishawaka.*
- 2. There shall be no loitering or disruptive behavior in or around the business. If problems are encountered as identified by the Mishawaka Police Department, and those problems are not corrected, the variance shall be revoked by default.*
- 3. No one under the age of 18 shall be permitted to have art work done to their body unless accompanied by their parent or legal guardian and proof of identification is shown. Identification must include a certified birth certificate.*

This recommendation is based on the following findings of fact:

- 1. The approval will not be injurious to the public health, safety, morals, and general welfare of the community because the tattoo studio will be located within a building in an existing commercial plaza and be permitted, operated and managed according to all applicable regulatory codes. Additionally, tattoos have experienced resurgence in popularity and acceptance in recent decades and coupled with advancements in tattoo pigments and ongoing refinement of the equipment used, has led to an improvement in the quality of tattoos being produced.*
- 2. The use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner because the studio will be located in a building that is surrounded by commercial and office development on three sides with vacant undeveloped property on the fourth side. Although the number of parking spaces provided in the plaza is less than what is required per code, adequate parking is available on the Appellant's property for the proposed uses of the building.*
- 3. The need for the variance arises from some condition peculiar to the property involved in that the location, size and the open nature of the plaza provides an inherent separation between residential and commercial uses.*

4. *The strict application of the terms of this chapter will result in practical difficulties in the use of the property because tattoo establishments are permitted in C-1 General Commercial zoned properties and only with approval of a conditional use permit. The location of properties zoned C-1 General Commercial that would meet the strict requirements of the code for a tattoo business within the City is almost nonexistent.*
5. *The approval will not interfere substantially with the Mishawaka 2000 Comprehensive Plan which indicates General Commercial.*

MOTION: Charles Trippel moved to forward Appeal #16-48 to the Common Council with a favorable recommendation. Marcia Wells seconded; motion carried with a vote of 4-0.

ADJOURNMENT: 6:40 p.m.

Kenneth B. Prince, City Planner

Kari Myers, Administrative Planner