The work session began at approximately 6:07 p.m. Those members attending included Martha John, Philip Clithero, Fred Carroz, Dennis Hazelrigg, David Townsend, Elizabeth Peters (left at approximately 7:17 p.m.), Sean Flanagan, and Matt Reichert (arrived at approximately 6:18 p.m.). Also attending were the Deputy City Clerk, Megan Eldridge, City Clerk, Sheela Amin, Community Development Director, Tim Teddy, Building and Site Development Manager, Shane Creech, Senior Building Inspector, Doug Kenney, Senior Plan Reviewer, John Simon, and Assistant City Counselor, Ryan Moehlman.

Mr. Moehlman introduced himself and explained in his position as Assistant City Counselor he would be working with Community Development staff and the Planning and Zoning Commission on issues that fell under the Board of Adjustment. He noted he had several years of experience working with other boards in multiple jurisdictions.

Mr. Moehlman began his PowerPoint presentation regarding the Board of Adjustment and their authority, duties, meeting procedures, and variances, which is attached to the minutes.

Throughout the presentation board members and staff had discussion and asked questions.

The work session adjourned at 7:42 p.m.

Respectfully Submitted,

Megan Eldridge
Deputy City Clerk
City of Columbia
Board of Adjustment

Authority, Duties, Meeting Procedures, and Variances

Ryan A. Mochlman
Assistant City Counselor
(573) 817-6449

Who is the Board and what are they Adjusting?

Topics
- Authority, Duties, and Obligations of the Board
- Board Procedures
- Standards Court’s use in reviewing Board decisions
- Real Life Examples

Board of Adjustment Presentation
Presented by Ryan A. Mochlman
What can the Board do?

- Determine and vary the application of regulations and restrictions of City in harmony with their general purpose and intent and in accordance with general or specific rules therein contained

  § 89.040 R.S.Mo.

Section 29-31(g)(6) Jurisdiction

- To hear and decide appeals where it is alleged there is error in an order, requirement, decision or determination made by an administrative official in the administration or enforcement of this chapter.
- In passing upon appeals where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of this chapter, to vary or modify the application of any of the regulations or provisions of such chapter relating to the construction or alteration of buildings, so that the spirit of such chapter shall be observed, public safety and welfare secured, and substantial justice done.

Section 29-31(g)(6) Jurisdiction cont.

- To hear and decide all matters referred to it or upon which it is required to pass under the provisions of the laws and ordinances of the city.
- To grant a permit for a temporary building for commerce or industry in a dwelling district which is incidental to the dwelling development, such permit to be issued for a period of not more than two (2) years.
- To determine, in cases of uncertainty, the classification of any use not specifically enumerated in this chapter.
- "Use" Variances are outside Board jurisdiction in Columbia.
**89.100 R.S.Mo. Jurisdiction**

- Hear appeals of any decision of the administrative officer by:
  (a) "aggrieved" persons,
  (b) certain neighborhood associations, or
  (c) an officer, department, or board of the city

- All meetings must be open to the public.

**Authority**

Code Section 29-31:

- *reverse or affirm, wholly or partly; or modify the order, requirement, decision or determination appealed from*

- *make such order, requirement, decision or determination as ought to be made*

- *Has all powers of the officer from whom appeal is taken.*

**Powers of the Board**

- May *vary or modify "application" of regulation to avoid "practical difficulties or unnecessary hardship in ... carrying out the strict letter of such ordinance.)* §89.090 R.S.Mo.

- Must act only to carry out the "spirit" of the ordinance, and

- May not grant a variance without "competent and substantial evidence."
**Procedural Duties**

- The Board of Adjustment shall:
  - Fix a reasonable time for the hearing of appeal
  - Give "public notice"
  - Give "due notice" to the parties in interest, and
  - Make a decision within a reasonable time
  - Keep minutes showing the vote (or abstention) of each member
  - Keep records of its examinations and other official actions, immediately filed in office of board as a public record
  - Have a court reporter "take down" all testimony, objections there to and rulings thereon
- These functions are generally carried out by the office of the City Clerk

*Code Section 29-31*

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**Procedural Duties**

- Columbia Zoning Code sets requirements & procedures
  - Need concurring vote of 4 members to decide in favor of the applicant
  - Board cannot meet with less than 4 members (quorum)
  - Chairman or Vice Chairman may administer oaths and compel attendance of witnesses

*Code Section 29-31*

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**Conducting Hearings**

- It's just like a trial
  - Evidence entered into records as exhibits
  - Witnesses give sworn testimony
  - Transcript of proceedings taken
- Common Sense Rules
  - Frame the issue
  - Discussion through the Chair
  - Stick to the facts
  - Speak to the issue
  - Try not to stray into hypotheticals

*Remember: You Are Making a Record!*

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Board of Adjustment Presentation

Presented by Ryan A. Moehlman
Motions

- Be specific as possible
  - Identify standard to be varied and what will be allowed by variance
  - Example: Motion to grant a variance to [identify standard] to allow [identify what will be allowed by variance]
- Take the time to get it right:
  - Can ask for motion to be written out and repeated, if needed
  - Can ask for assistance from City Attorney/Clerk in formulating motion.

Motions

- Always move to “grant”
  - Remember, affirmative vote of 4 members needed to grant a variance
    - 3 to 2 vote to grant means variance is denied
  - Reduces potential number of votes that need to be taken by Board
  - Example: 2 to 3 vote on motion to deny
    - Result: Ineffective to deny variance; another vote on motion to grant is needed.
  - Over time, this reduces uncertainty in voting
    - “Yes” always means grant
    - “No” always means deny

Procedure - Sunshine Law

- OPEN MEETINGS:
  - Posting - 24 hours in advance
  - Notice - of time, place and purpose of meeting (agenda)
  - Public bodies - all entities - formal/informal subsets
  - Exception - social or "ministerial" meetings
  - Closed votes - Not allowed
  - Quorum Rule - constitutes a meeting subject to Sunshine requirements.
  - Polling - possible violation if done in lieu of a noticed public meeting

Board of Adjustment Presentation

Presented by Ryan A. Moehlman
Sunshine Law - Penalty

- Fines of up to:
  - $1,000 - for "knowing" violation
  - $5,000 - for "purposeful" violation
- Plus attorneys fees.
- Fines can be assessed against members personally.

Challenges to Decisions of Board of Adjustment

- Appeal to Circuit Court
  - Potential Challengers:
    - Persons aggrieved by Board decision
    - Any taxpayer
    - Any officer, department, board or bureau of the City
    - Court defers to Board if there is "substantial and competent" evidence supporting decision
    - Court generally will not second-guess decision, but will rather ensure that there is substantial evidence to justify a decision and did not abuse discretion
      - That is why making a clear record is important.

Ex Parte Communications

- Board is a quasi-judicial decision-maker
  - Members cannot discuss cases with applicants, proponents, or opponents
    - "I cannot discuss cases that are before the Board outside the public hearing." CLICK.
- What if a Ex Parte Communications happens?
  - Member should disclose communication
  - Member must recuse themselves
    - Preferably before hearing so attendance of an alternate can be secured.
  - If not disclosed and recused, ex parte communications can be challenged as a violation of Due Process constitutional rights
Site Visits

- Group Site Visits
  - Don't do it
    - Likely a violation of Sunshine Law as an unposted meeting
- Individual Site Visits
  - Discouraged
    - Decisions must be based on substantial evidence contained in the record – the record is built at the public hearing
  - If you make a Individual Site Visit:
    - Disclose at public hearing
    - Describe conditions observed at Site Visit and how those observations affect your decision
    - Give Applicants/opponents opportunity to respond/rebut.

Variance

- The most common and challenging function that a Board of Adjustment performs

- Primary function: To prevent “takings” of property through otherwise normal function of zoning code
  - “A variance contemplates a departure to preclude confiscation of property.” Taylor v. BZA of Blue Springs, (Mo. App. 1989)
  - Appropriate only where Code constitutes a severe interference with landowner’s ability to use property
  - “[T]he authority to grant a variance should be exercised sparingly and only under exceptional circumstances.” Doorack v. Bd. of Adj. of City of Town & Country (Mo. App. 1986)

Variance

- Variance generally not appropriate to:
  - Alleviate “mere inconveniences”
    - Example: alleviating inconveniences related to ice or snow not enough
  - Make valuable or useful property more valuable or useful
  - Effectuate policy differing from ordinance
    - Variance must observe “spirit of ordinance”
  - Allow “wants” vs. “needs”
    - Pools, tennis courts, oversized garages, etc.
  - Provide an easier process or allow applicant to avoid other available processes.
**General Rules**

- **Applicant** (not Board) must prove that he/she would suffer a *practical difficulty or an unnecessary hardship* without variance.
- Burden of proof is on Applicant.
- Hardship or practical difficulty must be unique to property and different from that suffered throughout zone or neighborhood.
  - Question to ask in deciding every variance application: "What is unique about this particular piece of property?"
  - If that cannot be clearly answered, then there is likely not substantial evidence to support a variance.

**Area Variances**

- Variance to a *restriction* on a use that is otherwise permitted (i.e., reducing a setback restriction).

  - "*Practical difficulties*" standard:
    - "Property cannot be used for a permitted use without coming into conflict" with ordinance
    - "Severe interference" with ability to use land

**Area Variances – Factors of Practical Difficulties**

- How substantial is variation vs. requirement?
- Effect on available governmental facilities (fire, water, garbage) caused by increased density?
- Substantial change in character of neighborhood?
- Substantial detriment to adjoining properties?
- Any alternative other than variance?
- Will interest of justice be served by allowing variance, considering above factors and the manner in which "difficulty" arose?
Other Permissible Considerations

- Economic hardships (but generally must pertain to nature of the property rather than the character of the owner)
  - i.e., Unique features of land would make complying with ordinance unduly expensive for any property owner.

- Would denial amount to a denial of any permitted use of the property?

- Did the property owner cause the difficulty or hardship?

Self-Created Difficulties

- Generally not appropriate to grant variance to address or correct self-created difficulties.
- Two common types of self-created difficulties:
  - Purchase of property knowing variance is needed
    - A variance should not issue when the applicant caused the difficulty or hardship or when the difficulty predates the applicant’s purchase of the property. J.R. Green Props., Inc. v. City of Bridgeton (Mo. App. 1992)
    - “One who purchases realty with the intention of applying for a variance cannot contend that restrictions caused him such peculiar hardship that he is entitled to special privileges.”

Self-Created Difficulties

- Making illegal work legal
  - See Hutchens v. St. Louis County (Mo.App. 1993): No substantial evidence to support variance to setback for carport even though carport already built
  - Conditions personal to landowner not relevant to whether variance should be granted.
  - Claimed economical hardship:
    - Lost investment of $8,300 to build carport
    - $5,000 cost to tear down carport
Precedent?

- precedent:
  - An act or instance that may be used as an example in dealing with subsequent similar instances
  - Law: A judicial decision that may be used as a standard in subsequent similar cases; a landmark decision that set a legal precedent
  - If it's unique, there is no precedential effect.
  - Relevant facts are everything!

- Convention or custom arising from long practice: The President followed historical precedent in forming the Cabinet
  - If Board consistently grants a variance to a particular ordinance, regardless of unique facts or circumstances, then grants of variances could constitute an abuse of discretion.

- Effect on community
  - If Board can be consistently relied upon to grant variances to Zoning Code, then why should community bother trying to comply with Zoning Code?

Examples

Cases

- Swimming pool

  - The lot "is shaped ... like an anteater's snout"
"The land is useable, and is being used, for the use permitted by the zoning ordinances as a single family residence." Mc Morrow

Failed to show that swimming pool was "a necessity" or "that they will suffer undue financial burdens if one is not built, or that their satisfactory residential use of the property is impossible without a pool." Mc Morrow
Board kept asking "why the absence of a pool constituted a 'practical difficulty'... No explanation was advanced other than that the configuration and topography made construction of a pool impossible without the variances."

**Cases**

- **New Home**
  *Wolfner v. Board of Adjustment of City of Warson Woods,* (Mo. App. 2003) (affirmed denial of variance)

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**Cases - Wolfner**

- Principal Lot
  - Too small to build single-family house under zoning code
- Side Lot
  - 45' front lot line
  - 7500 sq. ft. total area
  - (8750 sq. ft. needed)

Used together by Trover family for 50+ years

Board of Adjustment Presentation

Presented by Ryan A. Moehlman
Cases - Wolfner

- New Home - Wolfner
  - Denial of variance was supported by substantial evidence
  - Wolfners bought property with full knowledge that variance would be needed to construct a single family home
    - $80,000 purchase price was not evidence of economic hardship
  - No evidence that Side Lot could not be used for other appropriate use
    - Was used as side yard/open space for 50+ years
  - No evidence that Side Lot had no value if no house was built on it.
Cases

  (affirmed denial of area variance; slope of yard and having to park on the street, was not unique to their property but was common to the residents on their street.)

  Also - Hutchens v. St. Louis County (Mo.App. 1993)
  (affirmed denial of area variance even though carport already built)

Cases

- Carport


Cases

- Carport II
- Bd. of Aldermen of Cassville v. Bd. of Adjustment (Mo. App. 2013)
- Board of Aldermen appealed Board of Adjustment's grant of the variance as unsupported by the evidence
- Substantial evidence in support of variance did not show exceptional topographic or other circumstances other than those created by applicant.
- Hardship does not include rain and snow, which constitute only an occasional inconvenience and is not a condition affecting that property greater than another property of the neighborhood.
- Applicant was forced to tear down illegal carport.
- Privacy fence
  Behrens v. Ebenech, (Mo.App. 1990)
  - Noise and litter from busy road was not "difficulty different from that suffered throughout the zone or neighborhood."
  - Alternatives existed
    - Legal fence on building line
    - Shrubbery on property line

- Proposed fencing for completion

- Existing fence needing variance

Cases
- Additional driveway
  Dornack v. Board of Adjustment of the City of Town and Country, (Mo.App. 1986) (affirmed denial of variance)
  - Implicated traffic safety
  - Build house despite 2nd driveway being originally denied as part of subdivision process

Board of Adjustment Presentation

Presented by Ryan A. Moehlman
"But, everybody else has one!!!"

Cases

• Storage structure

*Slate v. Boone County Board of Adjustment,*
(Mo.App. 1991) (affirmed denial of area variance)
- That storage structure increased efficiency of auto salvage business was not a "practical difficulty"
- Applicant had to remove illegal addition

Cases

• Storage structure

*State ex rel. Klawuhn v. BZA of City of St. Joseph,*
(Mo. App. 1997)
(reversed Board's grant of an area variance)
"Size of the storage building was not dictated by the shape or topography of the lot but rather by the [Applicant]'s desire to store their numerous vehicles and equipment inside."

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Board of Adjustment Presentation

Presented by Ryan A. Moehlman
Cases

- State ex rel. Branum v. BZA of City of Kansas City, (Mo.App. 2002) (affirmed denial of area variance)
- Construction of a garage that exceeded setback requirements and rear lot coverage limitations because width of lot was not peculiar to property.
- Personal conditions such as expense of building and assert that garage would raise property value not relevant.
- City not estopped by informal comments by City inspectors.

Example Case: Tennis Court

Zwick v. Board of Adjustment of the City of Ladue, 857 S.W.2d 325 (Mo.App. 1993)
- Board denied variance
- Denial upheld on procedural grounds

Relevant Factors?
- Pratical difficulties?
  - Is use as single family residence impaired by lack of tennis court?
  - Is ability to use land "severely impaired" by lack of tennis court?
- Self created?
  - Built without obtaining permit in violation of setback
  - Lost investment of $50,000? Economic Hardship?
- Other Factors?
Questions

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