

**TOWN OF BLACK MOUNTAIN
ZONING BOARD OF ADJUSTMENT**

The Black Mountain Zoning Board of Adjustment held its regular meeting on Thursday, April 15, 2021, at 6:00 p.m. electronically via Zoom.

I. CALL TO ORDER

The meeting was called to order with the following members present:

Chair Cheryl Milton
Vice Chair John DeWitt
Janet McKimpson
Ted Mattson
Jillian Ballard, Alternate
Patrick Prosser, Alternate

Absent:

Greg Feightner

Staff:

Jennifer Tipton, Senior Admin
Jake Hair, Zoning Administrator
William Morgan, Attorney for the Board of Adjustment

The meeting was called to order at 6:07 p.m. and duly constituted and opened for business with a quorum of four (4) regular members and one (1) alternate. Alternate Patrick Prosser observed the meeting.

II. ADOPTION OF AGENDA

John DeWitt made a motion to adopt the agenda as presented. The motion was seconded by Cheryl Milton and approved by a vote of 5-0.

III. ADOPTION OF MINUTES

John DeWitt made a motion to adopt the minutes of December 17, 2020, as written. The motion was seconded by Cheryl Milton and approved by a vote of 5-0.

IV. OLD BUSINESS

None.

V. NEW BUSINESS

1. Variance Request for 101 Connally Street

Cheryl Milton began the meeting by citing several references that denied variance requests are to be appealed to Superior Court within thirty days of the decision being signed for and that they are not to come back to the Board of Adjustment to be heard again.

Attorney William Morgan said that the board did hear this matter in December of 2020 and the request was denied and no appeal was taken. Mr. Morgan said that this raises the issue of res judicata in that a variance application is precluded from being heard a second time unless there has been a significant material change in conditions. Mr. Morgan said that it appears to be the identical variance request but some of the wording is different. Mr. Morgan said that the ordinance is silent on staff having the ability to cut the application off at the pass and not allow the application to proceed to a hearing before the board. Mr. Morgan said that several attorney's

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take the stand that whether there is anything in the ordinance or not the better practice is to allow the board to make the decision on whether to hear the request again or not. The primary reason for this is that if the application is denied by the Zoning Administrator then the applicant could appeal to the board and it would be heard regardless. The board can decide if they want to hear the variance request and hear evidence or the board can decide to not hear the variance request. The discussion the board needs to have is there have been any material changes to the application or the ordinance that would make the request different from the one in December. Mr. Morgan said the board can hear evidence on just material changes or can open the whole case.

Brad Rachman, 109 First Street, said that the Land Use Code is confusing and that they were not sure what to put in the application to know what they were asking for. Mr. Rachman said that the original variance application is different than the one that is proposed in this request and that it is a different space and different building and that they did a terrible job presenting at the last meeting. Mr. Rachman said that they did not have input from the immediate neighbors, which they now have and letters were submitted. Mr. Rachman said that they are asking the board to consider something else in regards to the context of the use of the property. Mr. Rachman said that the accessory building in different section and is not sure how it could be considered if they were not looking at the section of the ordinance. Mr. Rachman said the clear intent is to convert to an Air B & B without having to build a second story. Mr. Rachman said the third page of the application shows the setbacks and how the required setbacks almost cut the building in half. They are looking for the highest use of the property and with the square footage they would have to go up. Mr. Rachman said that the building would be untouched from the outside and does not feel that the neighbors or the town would be impacted by leaving just the shell of the building and build out what already exists. Mr. Rachman said without the variance they would be forced to go to a second story.

The board said that cost does not factor into the decision and that they didn't neighbors would want a second story. The board said there has not been a change in evidence and they feel that neighbors will be impacted. The board said there were neighbors that testified at the December meeting who were not interested in this variance being granted. The board also mentioned that the letters submitted in support were not relevant because the people were not at the meeting to answer questions or testify. Chair Milton said that it was not the job of the board to decide on what is the most cost effective and they are to decide what is legal and should a variance be granted or not and how it is in good spirit and keeping within the neighborhood and ensuring the safety of the neighborhood is kept.

Chair Milton said that the front of the garage is already past the front of the house and that a variance cannot be granted on a building that is already noncompliant. Chair Milton said she does not feel that has been any different information given that in regards to the Land Use Code being confusing, that is why there is due diligence and an attorney can help. Chair Milton again spoke to the statement regarding the thirty days to appeal after the decision has been signed for and that it is in three different places where it states that the next step is to Superior Court and not back to the board.

Mr. Rachman said that the felt Chair Milton was making a statement of fact that could not be supported about the location of the garage in relation to the house because a survey had not been provided. Chair Milton said she read over the staff report and has been by the property many times. Janet McKimpson asked if the sight line is based on the domicile proper or if decks and porches are taken into account. Jake Hair explained that it is to the foundation of the home. Mr. Rachman reiterated that he felt statements were being made that could not be backed up.

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Attorney Morgan reminded the board to focus on what was requested in December and what is being requested now. Attorney Morgan said that the request was for a reduction in the rear setback down to five feet from fifteen feet and is the same request in this application.

John DeWitt said he wanted to make sure that the board was not setting precedent about hearing their own appeals.

John DeWitt made a motion to not accept the application for the variance request for 101 Connally Street. The motion was seconded by Janet McKimpson and approved by a vote of 5-0.

2. Variance Request for 14 Pearl Street

Jake Hair summarized the case. The applicant is looking to build a detached garage with a loft and would like a variance from the side setback from ten feet to five feet and variance from the rear setback from fifteen feet to five feet. There is currently a carport in the location that is grandfathered in and a new structure would have to conform to the current setbacks. The property is currently zoned UR-8. The applicant has stated that he cannot move the structure due to the location of the house and the side yard. Secondary dwellings are permitted in UR-8 so the applicant is allowed to have the loft but does not feel that he has enough space to fit what he wants to do in the yard.

Kell Cleeland, 14 Pearl Street, said that Mr. Hair explained the application pretty sufficiently. Mr. Cleeland said that the existing carport is rotting and he has renovated his house and would now like to have a garage with a workshop space but would also like a loft for future use. Mr. Cleeland said his house is currently one thousand square feet with two bedrooms and two bathrooms and would like the additional space for future use. Mr. Cleeland said that he does own the vacant parcel next to his house.

Janet McKimpson asked why the garage could not move towards the street and then a variance might only be needed for the side yard. Mr. Cleeland said that there is just dead space behind his house and would rather have five more feet of driveway rather than five more feet of nothing behind the house. Mrs. McKimpson said that the lots in the area are small that setbacks are there for safety and spoke to the Fire Inspector and that while there are no ordinances for private property for putting structures closer to neighbors than the carport and could potentially cause problems in the future. Mr. Cleeland said that he has approximately twenty-five to thirty-five feet behind his house if he had to guess. Mr. Cleeland said that he understands the concerns and was not aware of future use of other property. Mr. Cleeland said that with the way his house sits, the front of the new garage would be flush with the rear deck. Mr. Cleeland said that ten feet in the back is optimal to help prevent crowding but whatever the board decides will be suitable. Mr. Cleeland said he will be within the thirty-five foot height limit. Mr. Cleeland said that he does have the right to build the garage five feet from both the side and rear property lines if he does not include the loft. Mr. Hair explained that accessory structures are allowed to be five feet from the side and rear property lines but that if living space is going to be added, then it has to meet the ten foot side and fifteen foot rear setbacks.

Michael and Martha Baldwin, 300 New Bern Avenue, said that they own 209 Ruby Avenue since 1993 and seen quite a few garage apartments in the area and are in favor of the use. Mr. Baldwin said he could not comment on the legality of garage apartments as a layman but feels they are a good use and good infill of property and is not sure of any negative long-term impacts. Mr. Baldwin said he did notice a couple of years ago that the right-of-way behind Mr. Cleeland's house was closed. Mr. Cleeland said that he did close the right-of-way behind his property along with his neighbor and he gained about five extra feet of property.

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The board discussed recessing the meeting to allow Mr. Cleeland to look at the documents from the attorney to see if he would even need a variance from the rear setback since the right-of-way has been closed and additional property has been gained. The board did acknowledge that this would only relate to the rear setback and not the side setback.

Mr. Cleeland said that the carport is currently about fourteen inches from the side property line and he would be moving it towards his house to be five feet exactly. Mr. Cleeland said that he has talked to Sanders Surveying to provide a survey showing the new property lines after the right-of-way closure and the variance request is from the new property line.

Jennifer Tipton listed all of the exhibits presented:

Exhibit 1: Staff Report

Exhibit 2: Variance Application

Exhibit 3: Signed Owner Consent Form for Electronic Meeting

Exhibit 4: Applicant Summary of Variance Request

Exhibit 5: Plans for New Garage Structure

Exhibit 6: Buffer Map

Exhibit 7: List of Property Owners

Exhibit 8: Notice of Variance Request

Exhibit 9: Aerial Map

Exhibit 10: Picture of Property Posting

Exhibit 11: Legal Notice

Janet McKimpson made a motion to go into recess. The motion was seconded by John Dewitt and approved by a vote of 5-0.

The board discussed that the applicant had not really proven any hardship and that there was room to move the garage to be compliant with the setbacks. John DeWitt made a motion to reconvene. The motion was seconded by Janet McKimpson and approved by a vote of 5-0. John DeWitt made a motion to close the evidentiary hearing. The motion was seconded by Janet McKimpson and approved by a vote of 5-0.

The board found the following facts:

1. That unnecessary hardships would not result from the strict application of the Ordinance in that the applicant failed to prove that there was a hardship.
2. That the hardship does not result from conditions that are peculiar to the property, such as location, size, or topography because the applicant failed to prove that there is a hardship.
3. That the hardship does not result from actions taken by the applicant or the property owner because the applicant failed to prove that there was a hardship.
4. The variance request would be consistent with the spirit and intent of the ordinance as garages with apartments are allowed and public safety and substantial justice would be achieved in that the garage would not be abutting another structure.

Jillian Ballard made a motion to deny the variance request for 14 Pearl Street. The motion was seconded by John DeWitt and approved by a vote of 5-0.

VI. COMMUNICATION FROM ZBA

None.

VII. COMMUNICATION FROM STAFF

None.

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VIII. ADJOURNMENT

Cheryl Milton made a motion to adjourn the meeting at 7:16 p.m. The motion was approved by consensus.

Prepared by:

Cheryl Milton, Chair

Jennifer Tipton, Senior Admin

Janet McKimpson, Secretary

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