

City of Greeley, Colorado
ZONING BOARD OF APPEALS PROCEEDINGS

September 14, 2021

1. Call to Order

Chair Yeater called the virtual meeting to order at 1:15 p.m.

2. Roll Call

The hearing clerk called the roll.

PRESENT

Commissioner Jeff Carlson
Commissioner Brian Franzen
Commissioner Larry Modlin
Commissioner Chelsie Romulo
Commissioner Christian Schulte
Chair Justin Yeater

ABSENT

Commissioner Erik Briscoe

3. Approval of Agenda

There being no corrections or additions, the agenda was approved.

4. Approval of August 24, 2021 Minutes

Commissioner Romulo moved to approve the minutes dated August 24, 2021.
Commissioner Schulte seconded the motion. Motion carried 6-0.

5. Citizen Input

None

6. Public hearing to consider a variance request located at 2915 68th Avenue Court to reduce the rear setback from twenty feet to five feet in the Residential Low Density zone district (Project No. VAR2021-0006)

Mike Garrott addressed the Board, introduced the request, and stated that the request is for a variance to reduce the rear setback to allow for enclosure of an existing patio. He stated that the Development Code (Code) allows back patios to extend to within five feet of the real property line provided that they remain at least 65 percent open and are unobstructed on three sides. Mr. Garrott reported that the applicant requests to enclose the patio, primarily with windows, which would no longer be open and unobstructed. He presented an aerial photograph of the area and pointed out the location of the lot and the community trail. Mr. Garrott provided several photographs of the subject property, covered patio, neighboring

properties and the nearby open space area, adding the most common obstructions are trees and short fences. He noted that the current patio configuration and location is allowed under the Code. Mr. Garrott also presented a site plan depicting the proposed improvements.

Mr. Garrott presented the approval criteria and described the five consideration criteria and three mandatory criteria reviewed by staff. Regarding the mandatory criteria, Mr. Garrott explained that the request must meet number 1 and number 2 or 3 in order to be considered. He advised that, after review, staff did not feel the proposed request adequately met any of the criteria.

Notice letters were mailed to 77 property owners within 500 feet of the site and no concerns were reported. There was one question regarding visibility for pedestrians traveling on the trail. He added that a letter from the homeowner's association expressed support for the proposal. Mr. Garrott pointed out letters of support from neighbors that were included in the packet materials. Staff recommended denial of the request and Mr. Garrott offered to answer questions from the Board.

Upon question by Commissioner Schulte, Mr. Garrott advised that the "open and unobstructed" criterion is defined in the Code. Commissioner Schulte asked how it was defined in the Code. Mr. Garrott stated that the area must be 65 percent unobstructed, or open on three sides. Commissioner Schulte provided an example of an area with floor to ceiling glass panels all the way around and asked whether it was considered obstructed because a bird could not fly through it or unobstructed because a person could see through it. Mr. Garrott stated that the staff has interpreted an obstruction as any material that a person cannot walk through. He added that if the patio is enclosed it could then become additional living space that encroaches into the setback. Commissioner Schulte asked if that would be the case if glass panels were not permanent, but could be removed during warmer months and installed during colder months. Mr. Garrott stated that the issue had not been raised previously and would question whether a building permit might be required. Upon question by Commissioner Schulte, Mr. Garrott advised that curtains or blinds are not considered an obstruction since they are a common element, temporary in nature and do not require a building permit. Commissioner Schulte noted an option in the staff report that the owner could plant dense shrubbery to cover the patio and suggested that it would be as much or more visually obstructive than what is being proposed. Looking at the intent of the Code, Commissioner Schulte asked what would be gained by denying glass panels but allowing an impenetrable wall of foliage. Mr. Garrott agreed that landscaping was an option proposed to the applicant and advised that a permit is not required for landscaping and it does not become a structure in the setback. He added that it is common to see landscaping used for buffering and that it is important to make sure the proposal meets building and development code standards. He added that it would also be necessary to obtain permission from utility providers. Commissioner Schulte asked about the status of utility easements and Mr. Garrott reported that the applicant would be required to seek approval from utility providers if the variances is approved.

Chair Yeater noted that one of the hardships described by the applicant is the step and change in elevation between the home and patio and asked what would be required if the owners wanted to build a deck or additional concrete to support that level. Mr. Garrott advised that a building permit would be required. Chair Yeater confirmed that an accordion style door or door with panels on a rail would not require a permit and Mr. Garrott stated that was correct. Commissioner Romulo confirmed that a variance is not required to increase the level of the floor for a fall hazard and Mr. Garrott stated a variance is only for the enclosure.

Commissioner Franzen asked for clarification as to whether the current patio would be allowed under the new Code. Mr. Garrott replied that the existing patio would be allowed under the new Code. Upon question by Commissioner Franzen, Mr. Garrott advised that the Zoning Board is the deciding entity for this request and that the matter is not heard by City Council unless a decision is appealed.

Anthea Carrasco, an attorney at Grant and Hoffman, addressed the Board on behalf of her clients, Richard and Shirley Hirsch, and thanked staff and the Zoning Board members for evaluating the request and hearing the issue.

Commissioner Briscoe joined the meeting at 1:35 p.m.

Ms. Carrasco expressed that some of the conclusions reached by staff may have been made without detailed analysis and asked the Board to critically review the criteria and analyses. She noted that the lot configuration is particularly atypical as none of the other lots has a walking path in such proximity to a patio or deck. She stated that the Zoning Board is trusted with the authority to determine if staff recommendations correlate to the Code.

Ms. Carrasco also addressed the determination that no difficulty or hardship has been created and asked the Board to consider whether that is the case. She agreed that Mr. and Mrs. Hirsch had a choice about purchasing the property, adding that their life circumstances have changed since the time of purchase. Referring to Commissioner Schulte's question as to whether "open and unobstructed" is defined in the Code, Ms. Carrasco stated that it is not. She asked the Board to have more critical discussion about the purpose of the Code and whether a dense wall of shrubbery is the intent of the Code in preserving an open and unobstructed area. Ms. Carrasco added that a critical examination of the issue would lead to the conclusion that there is no good reason to deny the request, adding that requiring the owners to explore some of the suggested alternatives does not relieve the hardship that they find themselves in and defeats the purpose of the Code.

With regard to the mandatory criteria, Ms. Carrasco clarified that criteria 1 must be present and then either criteria 2 or 3. She noted that the staff comments indicated that the proposed variance would be a detriment to the public interest and adjacent property by creating a rear setback that is inconsistent with the adopted plans. Ms. Carrasco asked the Board to review the comments recommending denial and consider whether the variance created a detriment to the public interest and adjacent property owners. She noted that several neighbors submitted letters in support of the variance request.

Ms. Carrasco noted the approval criteria of whether strict application of the provisions of the Code would result in practical difficulties or unnecessary hardship. She quoted from Section 24-2(1) which states that the Code is intended to promote the health, safety and general welfare of the citizens of Greeley. Ms. Carrasco stated that staff found this criteria had not been met and asked the Board to challenge that conclusion. She indicated that the applicants are residents of the City of Greeley and that allowing them to construct the sunroom and enclosure would promote their health, safety and general welfare, particularly in light of recent health issues experienced by Mr. Hirsch.

Ms. Carrasco pointed out another criteria evaluated by staff as to whether there are exceptional and extraordinary circumstances as they relate to the applicants' property that do not apply generally to other properties in the area. Ms. Carrasco agreed that there was a walking path near other properties, but noted that none of those properties is situated like the applicants' lot with the path so near the patio. She respectfully disagreed with conclusions made by staff and called upon the Board to consider the issue critically and ask whether approval is to anyone's detriment. Ms. Carrasco summarized by requesting the Board to grant the request.

Upon question by Commissioner Schulte, Ms. Carrasco reported that the applicants were not contemplating a floor to ceiling glass enclosure, adding that they would be open to the possibility. She stated that the plans presently include a short wall with glass above. Commissioner Schulte expressed that he did not think the Board was in a position to decide what constitutes open and unobstructed. He asked Ms. Carrasco to read the relevant text regarding mandatory criteria. Ms. Carrasco read the text and stated that her interpretation is that criteria 1 must be met and that either criteria 2 or 3 must be met.

Commissioner Romulo asked for an update on the process for applying for approval by utility companies. Ms. Carrasco stated that her paralegal has been in communication with the utility companies and is still in the process of communicating and getting companies to sign off on the plan.

Chair Yeater pointed out a statement in the applicants' narrative indicating that under other circumstances, the backyard patio would be a perfect place for Mr. Hirsch to spend time and get sun exposure, but has been made problematic by a potential fall risk from the steps leading to the patio. Mr. Yeater indicated that the safety issue is not a matter for determination by the Board. He noted that, according to the applicants' narrative, when the home was purchased, it was perfect, but now privacy is needed. He asked Ms. Carrasco to provide some perspective as to why a variance is needed to allow for privacy. Ms. Carrasco indicated that it is part of analyzing the overall circumstances, adding that if Mr. Hirsch's health had not deteriorated, the applicants would not be making a variance request. She stated that because Mr. Hirsch can no longer access the basement area, full access to the home is unavailable to him. Chair Yeater referenced the statement in the applicants' narrative that the patio as presently constructed does not provide Mr. Hirsch with any real privacy and far less privacy than almost all other similar homeowners. He again asked what had changed to create a lack of privacy and to define the hardship that has been created resulting in a variance request.

Ms. Carrasco stated that the reference to the home being situated differently than others in the neighborhood was due to the proximity of the patio to the walking path. She added that if Mr. Hirsch's health had not deteriorated to a point where other areas of the home were inaccessible, privacy on the patio would not be an issue. Ms. Carrasco stated that creating the additional space would allow Mr. Hirsch to have audible conversations that were private from neighbors and others walking by on the path.

Commissioner Franzen noted that one of the drawings showed plans to extend heat and air to the enclosed patio area. Ms. Carrasco confirmed that was the applicants' intent, but that they were willing to explore other accommodations if that is determined in the Board's analysis. Commissioner Franzen noted that it would increase the finished square footage of the home. Ms. Carrasco advised that the applicants would be willing not to extend heat and air to the enclosed area if that were determinative to the Board's decision.

Chair Yeater opened the public hearing at 1:57 p.m. There being no public comment, the public hearing was closed at 1:57 p.m.

Chair Yeater opened the matter for discussion by Board members. Commissioner Schulte offered that when there is flexibility in the Code, he would prefer to exercise it in favor of a property owner's right with regard to their property. He added that in this situation, neighbors have not expressed any objections. Commissioner Schulte stated that the proposal does not sound any more obstructive than the existing fence and he felt that the Board was given discretion to determine broadly worded criteria. He also noted the fact that the homeowner's association had no objections may not be binding upon the Board, but was persuasive. Commissioner Schulte expressed that he believed mandatory criteria number 1 had been met. He also felt the Board could articulate that the property was situated sufficiently differently from the neighboring properties and that the proximity of the walking path to the patio seemed to present an exception that is not present in neighboring properties. With regard to mandatory criteria number 2, Commissioner Schulte felt that the written materials and presentation indicate that there are practical difficulties not foreseen when the property was acquired and that denial of the request would result in an unnecessary hardship. He stated that he would support a motion that mandatory criteria 1 and 2 had been met and that the Board would be legally justified in allowing the variance. Assistant City Attorney, Michael Axelrad, addressed the Board and agreed with Commissioner Schulte that the standard was whether mandatory criteria 1 had been met and either mandatory criteria 2 or 3 had been met.

Commissioner Franzen stated that if approval were based on declining health alone, the Board could see similar variance requests in the future. He went on to state that he believed the lot configuration is atypical due to placement of the patio so close to the path. Commissioner Franzen added that with approval of the homeowner's association and overwhelming support of the neighbors, he was inclined to support the request.

Chair Yeater expressed that there are other ways to meet the intent as defined in the packet and struggled with the idea of privacy pertaining to the ability to make a telephone call. He added that Commissioner Schulte had explored what type of material would create an obstruction or privacy. Chair Yeater stated that if the homeowner's association or neighbors would not have supported the variance, he would not be in support. After hearing testimony and understanding the components, Chair Yeater indicated that he would support the request.

Commissioner Romulo observed that there seemed to be agreement that mandatory criteria number 1 had been met and that the Board would need to come up with a new motion for approval regarding whether mandatory criteria 2 or 3 had been met. There was general discussion among the Board members, Assistant City Attorney and staff as to how to draft a motion for approval.

Commissioner Schulte stated that if the Board voted to approve the request, it was not a repudiation of the hard work of staff whose role is to adhere to the Code. He added that the Board has the wider discretion to decide from a public perspective what that means in a given case. He expressed appreciation for the hard work of staff even if the Board reaches a different conclusion.

A motion was put on the table by Commissioner Franzen and there was additional discussion among Board members, staff and the Assistant City Attorney. Commissioner Franzen re-stated the motion and there was additional discussion. The motion failed due to lack of a second.

Commissioner Schulte moved that based on the application received and the presentation of the applicant, the Zoning Board of Appeals, having considered the criteria in Section 24-516(f) and finding that items 1 and either 2 or 3 of Section 24-516(g) do apply, the Zoning Board Appeals approves the requested variance. Commissioner Franzen seconded the motion. Motion carried 6-0 with Commissioner Briscoe abstaining.

7. Adjournment

With no further business before the Board, Chair Yeater adjourned the meeting at 2:18 p.m.

Justin Yeater, Chair

Becky Safarik, Secretary