

To: The Rollingwood City Council

From: Brook Brown

Re: Agenda item 9- City Council meeting of Jan.18, 2023

I. BACKGROUND FOR THIS ITEM

a. Introduction

Two weeks ago, on Jan. 5, I was reviewing building permit files at City Hall, to understand how the city's height restrictions were being applied. In two of the files, I found memos from the Mayor, referred to by him as "executive directive", dated August 28, 2022, directing that two building permits be approved. The memos were issued after a determination by the City's engineering firm declining to issue these building permits because they were not in compliance with the building code. The specific issue was that the two applicants sought to reduce side setbacks on corner lots from the required 30' to 20'. This specific issue, and one of these two permits, had previously been addressed at the February 22, 2022 City Council meeting, with the advice given by the City Attorney that an applicant must seek a variance from the Board of Adjustment for such a side setback reduction and could not do so by plat amendment, as these two building applications sought.

I did not know about this action until I read the memos. To my knowledge, the issuance of these permits by "executive direction" had not been previously brought to the Council's attention.

I bring this item to the Council not out of any animus toward the Mayor - whom I believe to be doing a good job in his leadership of the City, and I assume he thought the action reflected in the memos to be appropriate.

However, it has been my understanding that neither a city council member nor the Mayor alone can bind the city; that neither the city council nor the Mayor can issue a building permit - only the city's building official, who's decision is then subject to appeal only to the Board of Adjustment and not the Council or Mayor - so that politics is taken out of the zoning decisions; and that this matter does not fit into the limited "discretionary action" permitted under Code Section 2-401 (f)

for reasons explained below; and if it did, then the Mayor was obligated to post his action in issuing these building permits by "executive directive" for consideration by the full Council at its next meeting. Also, it is my understanding that neither the Mayor nor any council member can settle existing or threatened litigation without council approval.

I don't take issue with the Mayor but with his action in issuing these executive directives that, in my understanding, are at odds with our zoning processes, in the following particulars. I believe a mistake has been made in issuing these permits by "executive direction". Mistakes can be corrected. That's why I present this item -it asks our City Attorney to determine if there has been a mistake, and if a mistake has been made, how we might correct it and move forward.

It seems to me that issuing these permits by "executive direction" is:

- (i) contrary to advice of the City Attorney that the Council received at last the February 2022 council meeting with respect to the particular zoning requirement at issue;

- (ii) undermines the building official and processes in the Code for referral of disputes as to the building official's determinations to the Board of Adjustment,

- (iii) does not fit within the Mayor's express authority under the code or his discretionary authority under Code Section 2-401(f);

- (iv) that issuing a building permit to settle litigation is contrary to uniform application and enforcement of our code by our city building officials as it varies the processes and requirements for applicants who threaten litigation, and is unlikely to reduce litigation but would instead lead to more contention regarding code requirements and ultimately more litigation; and

- (v) neither the Mayor nor any council member acting alone can settle threatened litigation, or bind the City to any settlement - such action being valid only by action approved by the Council as a whole.

Community concerns:

Our ordinances and resolutions are adopted and made public so that we all live by the same rules. Uniform rules promote harmony and mitigate disharmony in our community. Ordinances provide notice of what rules we as residents can expect

to live by for ourselves and each other. These ordinances provide processes to be followed if an applicant believes there are special circumstances that justify an exception to these rules. For zoning, if an applicant disagrees with a determination of the building official, the process for presenting those special circumstances is by appeal to the Board of Adjustment. That appeal process is public. Because it is public, every resident has the ability to understand when, how and why a special exception or variance is granted, and notions that any one person has been given special treatment, or has been treated arbitrarily, is reduced, thereby promoting harmony. Just as within a household, there are "rules" that promote harmony, so too are there "rules" within the community that promote harmony.

II. Timeline and action on the two building applications at issue

a. The building applications.

The two permits concern corner lot properties, one at 304 Vale and the other at 400 Farley Trail (previously 2500 Bettis). On corner lot properties, the zoning code requires a 30' setback along both sides of the lot adjacent to the two streets that intersect at the corner. The two permit applications sought to reduce the side street setback from 30' to 20'.

The matching 30' setbacks are required to ensure that buildings on corner lots have the same setback from both the front and side streets so as to match the setbacks of the other homes along both the front street and the side street - thereby assuring uniform setbacks along the length of a block. The one exception to this requirement is where a block consists of two lots whose rear lot lines abut, where a 20' side setback is allowed, because the two lots do then create differing street-side setback lines within a block. In both cases the applicants' rear lot line abutted the adjacent lot's side lot line.

b. City directs the Vale applicant to seek a variance from the BOA.

The Vale property applicant sought approval from the P&Z commission of a plat showing the side setback reduced from 30' to 20'. On Feb. 2, 2022, the P & Z approved the request. However, two weeks later, at the Feb. 16, 2022, city council meeting, the City Attorney advised that the P & Z could not revise the

required setbacks by approval of a replat, that a replat is a "subdivision variance" and that the applicant would need to seek a zoning variance from the Board of Adjustment to obtain approval of the reduced setbacks even though the replat was approved by the P&Z. The minutes of that meeting state:

"City Attorney Charles Zech discussed this matter and what happened in this instance, *explaining that zoning variance was necessary because the zoning setback was more restrictive based on the way that houses were facing, and that the applicants will need to seek a zoning variance even though a subdivision variance was approved.* Mayor Gavin Massingill stated that in this instance, the city made a call, it was not correct and that *the next step is to send this to the BOA and notice appropriately.*"

c. The Vale applicant does not seek a variance from the BOA and the Building official declines to issue the permit.

The Vale applicant did not file an appeal with the Board of Adjustment but instead filed the plat with the reduced setbacks with Travis County on March 22, 2022, and continued to seek approval of the reduced setbacks from the city building official. The city building official - in this instance, the City's engineering firm K. Friese, declined to approve the building permit on the grounds that the side setback did not meet zoning code requirements.

d. The Mayor directs the Vale permit to be issued by "executive directive".

On August 28, 2022, the Mayor issued his memo stating "I took action to approve this permit issuance to avoid the legal entanglement that would have pursued" and states that he put an item on the next Council agenda to "so that no future confusion would exist...". Any confusion as to whether a zoning variance or replat was required had already been clarified by the City Attorney six months earlier at the Feb. 22 Council meeting, with his determination that a plat was not effective to change the setback and a variance would be needed. The Mayor's memo does not address this prior advice and direction that the applicant must seek a variance to change the lot's side setbacks. Also, any reliance by the applicant on the P&Z's incorrect approval of the replat as grounds for issuing the permit seems misplaced as the permit file shows that the applicant's replat was filed with Travis County March 22, 2022, more than a month until *after* the Feb. 2022, City council

meeting at which meeting the City Attorney advised that the P&Z approval of the plat did not supersede zoning requirements and a variance must be sought.

e. The Mayor's action in issuing the permit was not presented to the Council, as required for discretionary action.

The Council was not given the Mayor's memo, was not advised of the Mayor's directive to issue the building permit, nor was the Council asked to consider or approve any settlement of pending litigation by issuance of a building permit contrary to otherwise applicable zoning requirements. The subsequent action brought to the Council by the Mayor was to seek approval of an ordinance removing the requirement that a plat contain building setback lines. That action did not advise of or seek approval of the issuance of these two building permits over the objection of the building official and with the non-compliant setback lines.

e. The Farley change of address request and subsequent permit application.

The timeline and treatment of the Farley property is similar but not identical to the Vale property. On August 25, 2021, the Farley applicant sought approval from the city council for an address change for the lot at the corner of Bettis and Farley, from a Bettis address to a Farley address. This was a simple address change and did not mention or seek a variance to reduce the Bettis setback to 20'. On May 4, 2022, well after the City attorney's Feb. 16 advice, this applicant filed a building permit application with a 20' setback on Bettis, which the city building official, again K. Friese, declined to approve, by letter dated July 20, 2022.

f. The building official's denial of the Farley permit and the Mayor's subsequent "executive direction" to issue the permit in reliance on the Vale "executive direction".

On August 28, 2022, on the same date as the Mayor's Vale property memo, the Mayor issued a memo for the Farley property, stating he had taken "executive direction" to direct the issuance of the building permit despite a determination by the City's building official that the permit application was not in compliance with the building code. The memo states the executive direction was taken because of "precedent set by previous action by the Planning and Zoning Commission to approve the plat for 304 Vale Street" (without mentioning the City Attorney's

subsequent Feb. 22, 2022 advice that the P&Z's action did not supersede the requirement to seek a variance for the reduction of the setback) and threatened litigation by the permit applicant.

The Mayor's memo also refers to the filing of a plat with the City "and approved for this property" showing the 20' setback. Review of the plat in the Farley permit file indicates that the City (in April 2022) approved the plat only as to "subdivision" requirements and not zoning requirements, and that the plat was filed with Travis County on May 5, 2022, well after the Feb. 22, 2022, city council meeting clarifying that the filing of a plat with incorrect setback lines did not supersede zoning setback requirements. A prior plat had been filed by the Farley applicant in January 2022, but that plat was approved by the City only as to subdivision requirements and not zoning requirements, and was amended by the subsequent plat filed in May 2022.

g. The Mayor's memo does not mention any "vested rights" claims as grounds for the "executive direction" and no zoning code change occurred here that might support such a claim.

It would also seem that neither applicant could assert any vested interest claim, in that the code requirement that a variance be sought to reduce a side setback as this requirement did not arise from any change to the code. The code has for some years required this 30' setback. Also, as to the Farley property, it seems the building plans were not filed until mid-summer 2022, well after this question was clarified by the City Attorney in an open meeting of the City Council.

h. The Code permits the city to correct errors in the issuance of a building permit.

Section 101-96 of the Rollingwood Code states: "The issuance of a permit upon approval of plans and specifications does not prevent the building official from thereafter requiring the correction of errors in the plans and specifications found to be in violation of the code or any other ordinance of the city." As to the existing status of these sites, it appears that the Vale property is at the stage that the foundation has been poured and the Farley property has been demo'ed but has not yet broken ground.

ACTION ITEMS - So, what does the Council do from here?

1. I recommend that we affirm the guidance of the City Attorney as reflected in the minutes of the Feb. 16 Council meeting. See Motion A below.

2. I recommend we ask the city administrator and building official to advise the Council of any other pending applications, if any, that the building official has been directed to approve despite non-compliance with the zoning code requirements, if any. See Motion B below.

3. To resolve the status of the Vale and Farley building applications, I recommend we seek a formal written opinion of Counsel within a time certain, as outlined in attached motion c, to determine the status of these applications, and what options do the applicants and the City have to straighten out this situation. See Motion C below.

4. To do these tasks in a timely fashion, I recommend we set a date several days after the date of receipt of the City Attorney's opinion for a special council meeting to take action based on advice of counsel. See Motion D below.

MOTIONS

A. Move that the City Council direct the building official to advise all pending building applicants having a corner lot seeking a reduction in the 30' side setback, and not meeting the exception in Code Section 107-76 (c) (3), that such setback reduction requires the approval of the Board of Adjustment and cannot be accomplished based on purported prior precedent, by an address change, a new plat, replat, or amending plat, or other means.

B. Move that the City Council direct the Building official to advise the Council of any other pending building applications which the building official has been directed to approve despite non-compliance with the zoning code requirements, if any.

C. Move that the Council seek the advice of the City Attorney on four questions, to be provided in writing to the Council within _ days:

1. What is the legal status of the building applications in question given that the building official has determined the applications do not conform to the setback requirements of the zoning code and no appeal has been filed seeking a variance of that decision with the BOA?

2. Does the Mayor's memo "to approve this permit issuance" result in the issuance of a valid building permit for these two properties?

3. In the event that there is no valid permit for these properties, what options do the applicants have to obtain a valid building permit - for example, stop work and start over with a new application, file an amended application, seek a variance on the prior application, etc.? Also, if the building permit is not valid, can an occupancy permit be issued for either home?

4. What options are available to the Council regarding these two applications in the event that no valid building permit exists? See particularly Code Section 107-96 stating: "The issuance of a permit upon approval of plans and specifications does not prevent the building official from thereafter requiring the correction of errors in the plans and specifications found to be in violation of the code or any other ordinance of the city."

D. Move that the Council set a special called meeting on Jan.

_____, to consider the advice of counsel on the questions in Paragraph C.