

**AGENDA ITEM SUMMARY SHEET**

**CITY OF ROLLINGWOOD, TEXAS**

**MEETING DATE: February 15, 2023**

**Agenda Item \_\_:** Request for legal advice and discussion and possible action with regard to building permit applications, and purported issuance of building permits, where the Building Official has determined that the applications do not conform to the setback requirements of the zoning code and zoning variances for the non-conformities have not been sought from the Board of Adjustment; determination of appropriate action with regard to such applications; and identification of any other similar issues in connection with any other Rollingwood permit applications, if any, in progress at this time.

Note: This agenda item was posted for consideration at the January 18, 2023, City Council meeting, and postponed for consideration to the Council's February meeting.

**Submitted by: Brook Brown**

**Proposed action: Seek advice of counsel, in executive session, and discussion and possible action in open session on the following issues:**

**Legal issues on which advice of counsel is sought:**

**[REDACTED PER ADVICE OF CITY ATTORNEY]**

**Discussion and possible action on the following items:**

**[REDACTED PER ADVICE OF CITY ATTORNEY]**

**BACKGROUND:**

At the Feb. 2, 2022, Planning and Zoning Commission (P&Z) meeting, the owners of 304 Vale sought approval of a replat of their property. The replat showed a 20' side street setback lines that did not conform to the 30' setback required by the Rollingwood Zoning Code. Questions were raised at the P&Z meeting whether approval of the plat (which records "subdivision" requirements such as public utility easements and city rights of way) also included approval of the zoning code setback lines. That issue was not resolved at the P&Z meeting, but the P&Z Commission did approve the replat for "subdivision" requirements.

Council Member Hutson placed the unresolved issue on the agenda for consideration at the Feb. 16, 2022, City Council meeting. At the Feb. 16, 2022, City Council meeting, the City Attorney advised that a building permit applicant seeking to establish different setbacks than permitted under the Rollingwood Zoning Code cannot do so by plat approval from the P&Z Commission, but must seek a variance from the Board of Adjustment ("BOA"). The Minutes of this meeting state: "City Attorney Charles Zech discussed this matter and what happened in this instance, explaining that a 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." Following the City Attorney's statement regarding this advice, the Mayor then stated "the next step is to send this to the BOA and notice appropriately."

At the time of the Feb. 16, 2022, City Council meeting, the owners of 304 Vale had a pending building under review by the city building official. The owner of 400 Farley had received City Council permission in 2021 to change the address of his property from 2514 Bettis to 400 Farley, but had yet to file a building permit application. The 400 Farley building permit application was filed with the City several months later, in May, 2022, and like the Vale application, sought to reduce the side street setback from the required 30' to 20'.

Despite the direction from the Feb. 16 City Council meeting that "the next step is to send this to the BOA", the applications were not sent to the Board of Adjustment for hearing, and neither applicant sought a variance from the Board of Adjustment. The building official denied their building permits because the 20' side street setbacks did not comply with the zoning code.

In August, 2022, the Mayor placed a memo in the building permit file directing that the permits be issued "despite the setbacks not complying with the zoning code" due to threat of litigation. (Memo, Gavin Massingill, dated August 28, 2022) This matter was brought to the attention of the City Council at its January 18, 2023, meeting, Agenda Item 9, and postponed for consideration until the February Council meeting.

#### **RELATED MATERIALS:**

**Mayor's memos attached.**

#### **ROLLINGWOOD CITY ORDINANCES:**

##### **AUTHORITY OF THE MAYOR AND COUNCIL**

##### **Sec. 2-23. Status; members; compensation and expenses.**

The city council shall be the governing body of the city. The city council shall consist of a mayor and five aldermen. ....

##### **Sec. 2-26. - City administrator to act as liaison between council and city staff.**

The city council shall work through the city administrator in dealing with the city officers and employees who are under the direction of the city. City staff shall respond to direction from the council as a whole, and not to direction from individual members of the city council.

##### **Sec. 2-57. Presiding officer; mayor pro tempore; council liaisons.**

(a) The mayor shall be the presiding officer of the city council and shall conduct all meetings of the city council to permit full and free discussion by the members of the council and the public in accordance with the rules established by this article. ...

(c) The mayor shall not have the power to negate any action of the city council except as otherwise authorized by V.T.C.A., Local Government Code ch. 53. The mayor may not bind or obligate the city in any way without prior authorization from the city council. The mayor may not vote on any motion considered by the council, unless necessary to break a tie.

**Sec. 2-401. - Discretionary action by city agents.**

(a) No document that purports to bind or obligate the city may be executed by the mayor, any other officer of the city, any agent of the city, or any city employee unless such execution has been duly authorized by the city council.

(b) When any city council action contemplates creation or amendment of a document that purports to bind or obligate the city, no document or amended document may be signed or become effective until the document has been presented to and duly approved by the city council, except as otherwise authorized in an action of the city council expressly providing for limited discretion to be conferred on the agent authorized to execute a document. ...

(e) City policy is established by action of the city council in this Code and other ordinances and resolutions adopted by the city council, subject to variances therefrom only on the terms and conditions provided by applicable law and by action of the authorized body (e.g., the board of adjustment may grant variances from zoning regulations). No agent of the city shall take, authorize, or approve any action in conflict with city policy as stated in this Code and other ordinances and resolutions adopted by the city council.

(f) If an application or other request for approval is controlled by this Code but presents an issue that is not clearly addressed in the applicable regulations, or if there are inconsistent applicable regulations, the matter shall be presented to the city council for interpretation of the applicable regulations. If timely action on the application or request for approval does not allow for the issue to be first presented to the city council, an agent authorized to act on the application or request for approval shall act in a manner that most closely follows the express provisions of the applicable regulations, and shall present the issue and the action taken to the city council at its next regularly scheduled meeting for which there is adequate time to post the matter in compliance with the Texas Open Meetings Act, V.T.C.A., Government Code ch. 551.

**Sec. 101-30. - Third-party inspections.**

If the city contracts with a person to perform the inspections required by the city building code, an inspection performed by such person shall be considered an inspection by the building official; provided, however, that building permits and certificates of occupancy shall be issued only by the city building official. If the city has not contracted with a licensed plumbing inspector to conduct inspections within the city, a nonresidential property owner must secure the services of a licensed plumbing inspector for the city and pay all costs incurred by the city for such inspection services.

**Sec. 107-27. - Minimum regulations.**

The regulations established by this article for each zoning district shall be minimum regulations and shall apply uniformly and particularly to each class or kind of land, building or structure, except as otherwise provided.

**Sec. 107-483. - Creation.**

(a)The city has created a board of adjustment consisting of five members who are residents of the city.

...

**Sec. 107-490. - Powers of the board.**

The board shall, pursuant to the provisions provided for herein, have the power to:

(1)Hear and decide an appeal where it is alleged that there is an error in any order, requirement, decision or determination made by the building official in the enforcement of this chapter; ...

(3)Authorize a variance to the regulations as provided for in this chapter; ...

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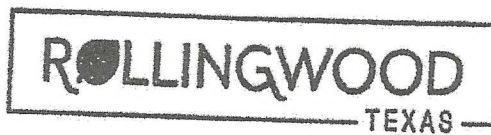
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Council Member Hutson placed the unresolved issue on the agenda for consideration at the Feb. 16, 2022, City Council meeting. At the Feb. 16, 2022, City Council meeting, the City Attorney advised that a building permit applicant seeking to establish different setbacks than permitted under the Rollingwood Zoning Code cannot do so by plat approval from the P&Z Commission, but must seek a variance from the Board of Adjustment ("BOA"). The Minutes of this meeting state: "City Attorney Charles Zech discussed this matter and what happened in this instance, explaining that a zoning variance was necessary because the zoning setback was



Memorandum

**From:** Gavin Massingill, Mayor  
**Date:** August 28, 2022  
**Subject:** 400 Farley Trail Zoning Approval and Permit Issuance

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The property owner of 400 Farley Trail, Buck Shapiro, originally applied for a replat of his property, originally addressed 2500 Bettis, in May 2021. This replat included the address change to 400 Farley Trail. In August 2021 the City Council approved the address change from 2500 Bettis to 400 Farley Trail. Mr. Shapiro worked with staff through multiple revisions and a resubmission of his replat, and in May of 2022 the replat was approved through the administrative approval process based on the precedent set by previous action by the Planning and Zoning Commission to approve the plat for 304 Vale Street. (See Executive Memorandum for 304 Vale Street dated August 28, 2022.)

In May of 2022, Mr. Shapiro applied for a new residential permit with the office of development services. He had moved forward with the development and submittal of plans based on the setback lines that were shown on the property's approved plat. It was discovered that the plat that was filed with the city and approved for this property had building setbacks shown on it that did not conform to the city's zoning requirements with respect to required depths of yards.

A plat is a legal document governing the division of land described by its metes and bounds and how the land is represented. Zoning regulations should not be recorded on a plat; however, the city's subdivision ordinance, which governs what is to be shown on a plat, had a requirement that building lines be shown.

The city's zoning regulations would generally prevail in most situations, however, due to the threat of costly litigation based on the actions already taken, advice given by former staff, potential inconsistency of previous application, and a perceived conflict because of what was required on plats, I made the decision to order the permits issued despite the setbacks not complying with the zoning code to avoid a potential legal dispute by the owner related to setbacks in the zoning code and those recorded on the officially approved plat.

It should also be noted that there was support of all surrounding neighbors of this property to allow the building yard lines as proposed and shown on the approved plat.

I took the action to approve this permit issuance to avoid the legal entanglement that would have pursued, and then immediately put an item on the next City Council agenda for the Council to consider removing the requirement that building lines be required on plats so no future confusion would exist and so that the city would not be put in this situation again. The City Council did approve this code amendment at the August 17 City Council Meeting.



Memorandum

**From:** Gavin Massingill, Mayor  
**Date:** August 28, 2022  
**Subject:** 304 Vale St. Zoning Approval and Permit Issuance

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The property owners of 304 Vale Street, Walt and Kendra Roloson, as well as their engineer and architect, had been working with City Staff since September 2021 on a new residence application. In November 2021, a replat application and associated documentation was filed for this address with the office of development services. In December, the replat review was completed and denied, with the explanation that the owners would need a variance to obtain the building setbacks that were shown on the plat. A variance was brought before the Planning and Zoning Commission in February 2022 and both the variance and the plat were approved, but it was determined shortly thereafter that the variance should have been heard by the Board of Adjustment, not the Planning and Zoning Commission.

The reason the owners were told they needed a variance was that the building setbacks that were shown on the plat did not conform to the city's zoning requirements with respect to required depths of yards. The building plans that were submitted and had gone through various iterations of review also did not conform with the yard requirements in the residential zoning code, however, the owners had an approved plat showing the building lines as they were requesting. Further, a plat is a legal document governing the division of land described by its metes and bounds and how the land is represented. Zoning regulations should not be recorded on a plat; however, the city's subdivision ordinance, which governs what is to be shown on a plat, had a requirement that building lines be shown.

The city's zoning regulations would generally prevail in most situations, however, due to the threat of costly litigation based on the actions already taken, advice given by former staff, potential inconsistency of previous application, and a perceived conflict because of what was required on plats, I made the decision to order the permits issued despite the setbacks not complying with the zoning code to avoid a potential legal dispute by the owner related to setbacks in the zoning code and those recorded on the officially approved plat.

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