

ZONING BOARD OF ADJUSTMENT
Meeting Minutes
Regular Meeting - October 15th, 2020

The Zoning Board of Adjustment met at a regularly scheduled meeting on Thursday, October 15th, 2020 at 2:30 p.m. in the Board Chambers at City Hall, Shawnee, Oklahoma, Pottawatomie County, pursuant to notice duly posted as prescribed by law.

AGENDA ITEM NO. 1: Roll Call

Upon roll call the following members were present:
Tim Burg, Mark Cannon, Holly Gordon, and Crystal Richardson
A quorum was declared present.

NOTE: Brandon Dyer was absent.

**AGENDA ITEM NO. 2: Consideration of approval of the minutes from the regular meeting of the
Zoning Board of Adjustment of September 17th, 2020.**

Planning Director Blaine stated the error in the minutes presented had been corrected and reflected the correct absent Board Member as Dyer, not Cannon.

Chairwoman Gordon asked for a motion.

Board member Burg made a motion to approve the minutes as corrected, which was seconded by Board member Cannon.

The motion passed 4-0-0.

AYE: Burg, Cannon, Gordon, Richardson

NAY: None

ABSTAIN: None

**AGENDA ITEM NO. 3: Case #ZBOA05-20 – Public hearing and consideration of approval of a variance
request for a 1.5' setback of an accessory structure located at 626 W. Wallace.
Applicant: Dream Housing, LLC**

Planning Director Rebecca Blaine presented the staff report. She stated the applicant was requesting a setback variance from a side yard property line for an attached garage. She explained that staff noticed the error when the applicant applied for a building permit. The side yard setback for an accessory structure is ten feet (10'). The plans indicated the structure would be attached to the principal structure with an interior door. As part of the residence, a five feet (5') setback from a side property line is required. The structure is located three and a half feet from the property line, so the request was for a variance of one and a half feet (1.5') setback from the west side property line. If granted, the subject property would obtain legal, nonconforming status. Director Blaine concluded by stating that staff recommended the approval of the one and a half feet (1.5") variance (**ZBOA05-20**) for the west side yard setback of 626 W. Wallace Street.

Chairwoman Gordon opened the public hearing for comments; with none, the public hearing was closed.

Board member Burg made a motion to approve the variance (**ZBOA05-20**) as requested, which was seconded by Board member Cannon.

The motion passed 4-0-0.

AYE: Burg, Cannon, Gordon, Richardson

NAY: None

ABSTAIN: None

AGENDA ITEM NO. 4:

**Case #ZBOA06-20 – Public hearing and consideration of approval of a variance request for use of a shipping container for the purpose of permanent restrooms located at 6-20 W MacArthur St
Applicant: GCR Sunset Enterprises, LLC**

Planning Director Rebecca Blaine presented the staff report. She stated the applicant was requesting a variance to allow a shipping container to be placed as a permanent structure for utilization as public restrooms at 6-20 W. MacArthur Street. She stated this concept had been presented to the Planning Commission. The current Zoning Code is approximately 30-years old, and shipping containers are not discussed in the document.

Currently, there was no site plan for this project as it's in a conceptual state. Director Blaine compared the proposed idea as similar to the *Blue Garden* located in Oklahoma City. The area would allow for food trucks to park and the public restrooms would be a permanent fixture at the location. She explained that the shipping container would have to be retrofitted to meet minimum engineering design criteria, which would include plans that are signed and sealed by a P.E. Additionally, landscaping requirements would be enforced. The applicant had proposed a black matte finish to the shipping container. Director Blaine stated that staff recommended approval of the variance request (**ZBOA06-20**) and encouraged some form of public art be included in the project plan. The 2040 Comprehensive Plan encouraged public art in new projects. Blaine stated that public art could be placed as a condition or it could be encouraged and established as an example.

Chairwoman Gordon opened the public hearing for comments; with none, the public hearing was closed.

Board member Burg made a motion to approve the variance (**ZBOA06-20**) as requested with the encouragement of a mural on the shipping container, which was seconded by Board member Cannon.

The motion passed 4-0-0.

AYE: Burg, Cannon, Gordon, Richardson

NAY: None

ABSTAIN: None

AGENDA ITEM NO. 5:

**Case #ZBOA07-20 -- Public hearing and consideration of approval of a variance to allow a medical marijuana dispensary to operate in C-1 (Neighborhood Commercial) Zoning District instead of C-3 (Highway Commercial) Zoning District as required by ordinance.
Applicant: Michael San Padro, Roots Dispensary, LLC**

Planning Director Rebecca Blaine presented the staff report. She stated the applicant was requesting a variance to allow an existing medical marijuana dispensary to continue operating in a C-1 (Neighborhood Commercial) Zoning District located at 420 N. Kickapoo Avenue. She explained that staff was unaware that the dispensary

was in operation until a request to sign-off for OMMA. (Oklahoma Medical Marijuana Authority) OMMA oversees that medical marijuana (MMJ) facilities are in compliance with City codes and regulations. This is year two of operation for this business, and the City of Shawnee has yet to sign off on their OMMA form.

By ordinance, medical marijuana dispensaries are permitted in the C-3 (Highway Commercial) Zoning District and heavier commercial and industrial zoning classifications. The request to rezone to the applicant's C-3 zoned lot (412 N Kickapoo Ave.) does NOT align with the 2040 Comprehensive Plan as it indicated this area with a Mixed Use land designation. C-3 lots also require a 100' lot width and 100' of street frontage; but this lot has only 85' frontage. Staff recommended denial of the variance request. **(ZBOA07-20)**

Director Blaine advised the Board that staff had received six (6) letters from citizens who have concerns about customers of the dispensary engaging with children in the fenced play yard of a day care, which is located across the street. (Kickapoo) Blaine further stated that although MMJ dispensaries are required to be located a minimum of 1000' feet from *schools*, day care operations were not included in the definition of *school*.

City Attorney Joe Vorndran stated that the City is restricted from having more strict distancing requirements, such as including day care facilities in the 1,000' distance from MMJ operations. He continued by stating that if the MMJ dispensary (Roots Dispensary, LLC) remains, it is not in violation of state code despite the concerns voice in the letters from citizens.

Chairwoman Gordon opened the public hearing for comments.

Attorney Craig Brackeen, representing the owner was present. He stated the company (Roots Dispensary, LLC) was working to obtain compliance for OMMA. Last year the company paid a hefty fine, and compliance is the goal. Brackeen acknowledged staff's report and disagreed with the interpretation of the Mixed Use land designation of the 2040 Comprehensive Plan and its applicability to the subject property's business. Further, Brackeen explained that the lot width requirements for the subject property's zoning district were the issue. A rezoning was not the request. The applicant wants a variance to operate the current business in the C-1 zoning district.

The subject property owner also owns much of the property on the block. A lot split was one solution that had been discussed, but requesting a variance was the easier route. Brackeen referenced a 28-page document that explained the proposed development of the entire block. Director Blaine explained that the document was not included in the agenda as it arrived after the previous day's 2:30pm deadline for posting the agenda online. Copies of the document were provided.

Brackeen also addressed the letters from citizens regarding the daycare across the street. Although the concerns were understood, a privacy fence erected when the daycare open many years ago would have solved the problem. He suggested the daycare work with community partners to install a fence as the traffic on Kickapoo will increase with the future expansion.

The packet provided included an updated survey with setbacks. Brackeen restated that the variance was to continue business in the C-1 zoning district (420 Kickapoo). The 420 building in C-1 is larger and in better condition than the building located to the south with the C-3 zoning district (412 Kickapoo). The Board members were asked to approve a variance, a "reasonable accommodation" to allow the business to operate at its current location. Brackeen stated that the future development would include the demolition of the four wooden structures located at 412, 420, 422, and 430 Kickapoo and replace them with new and better development. The owner, Mr. Michael San Padro, doesn't want to spend thousands of dollars on the 412 building to tear it down in a couple of years.

Brackeen continued discussing the packet which provided information on sales tax paid by the company and opined that the funds were evidence of a positive relationship with the City of Shawnee, which is a relationship that can continue. Also, in the packet, were examples of preliminary design work for the area that included Roots as an anchor store.

Brackeen discussed the four factors of variances and reminded the Board that they had the authority to grant the request. He summarized the situation as being allowed to remain in operation at the current location or spend thousands of dollars to work out of the 412 building. Brackeen expressed that the owner/applicant would be open to a time restriction on the variance in order to properly apply for and begin redevelopment of the area. The condition was offered to reassure the Board that the use variance would not continue into perpetuity. The ultimate goal is the redevelopment project. Brackeen stated he was available for questions.

Board member ____ asked if the applicant was open to a lot split.

Brackeen responded that it was an option and that it (lot split) had been thoroughly discussed but it was determined a lot split would not resolve the issue.

Chairwoman Gordon stated she sympathized with small business owners. She commented that San Padro opened a business without performing due diligence. He chose to open a business in residential zoning area. Brackeen advised the subject property was zoned commercial-just not the proper commercial zone. Gordon continued by stating that this was the company's second year in business, and she understood that the City had not signed off on the OMMA form. She then asked for confirmation.

City Attorney Vorndran stated that the understanding was correct. The City could not sign the form as a particular segment required confirmation of zoning compliance. Chairwoman Gordon voiced concern that approval sets a precedent whereby an individual could open any business in any zone and ask for the proper zoning later. Brackeen stated that someone could try that, but the owner had paid a twenty-thousand dollar fine for doing business that way. Gordon asserted that it had been his choice and that the fine was unfortunate. She opined that granting the variance sets a precedent in a community. Brackeen asked that the Board not focus on the mistake made and fine paid, but that San Padro would be here today with the same problem if he was wanting to start operations tomorrow. Gordon asked why the company continued to push on knowing the problems with this location when there are many properties in this area in which this business could be placed?

Michael San Padro stated the business had chosen its current location because they had to move quickly from their original location on Main Street. He discussed the iconic number of 420 in the MMJ business and that it (the number) had helped the business to grow, so a large amount of money had been spent at that location. With half of a million dollars invested at this location and the responsibility he felt to his customers, his employees, and himself he needed to stay at the current location. San Padro stated that the City's downtown area was not a profitable location. He finished by stating that there had been no intention of backing into the business and thanked the Board. Chairwoman Gordon thanked him for his passion.

Board member _____ stated he had some questions for Vorndran or Blaine. He asked Director Blaine if this business occupied this space prior to her and Code Enforcement arrivals. He further asked if it was correct to say she (Blaine) was picking up something left behind. Blaine confirmed he was correct. He then asked if all the regulations of the OMMA and the related City-related ordinances for MMJ were established and understood.

City Attorney Vorndran addressed the Board by stressing the importance of applying criteria for the framework in decision-making at this meeting, as well as the importance of history. He continued by suggesting that if this request were made tomorrow, the Board would look at the question the same. He stated that background

informs discretion. Vorndran stated the legalization of medical marijuana in Oklahoma passed by an initiative petition, which meant people voted on it. It was not a construct of this municipality or a concept of the legislature. The language of that law, which became law when the majority of Oklahomans voted to approve it, set forth the requirement for the formation of the Oklahoma Medical Marijuana Authority (OMMA). OMMA must propound certain regulations within a certain time frame, but it did not set out what those regulations would look like. He continued by stating that Mr. San Padro very quickly had established his business. The law required the OMMA, which did not exist at that time, to approve applications within a set time period. There were no criteria for approval. There were no municipal compliance forms. There was no requirement to have compliance forms. The State could issue an MMJ license without seeking approval from a municipality or county who determines if it's appropriate to operate within their corporate limits. They (Roots Dispensary, LLC) received a dispensary license from the State of Oklahoma but not through the City of Shawnee. While the State was scrambling, the City of Shawnee contemporaneously tried to put in minimum requirements to allow for an orderly transition into this industry. He continued that part of that transition was putting in zoning regulations that established C-3, C-4, and Industrial zoning districts as appropriate for the industry. Vorndran stated there are long-standing ordinances on the books pertaining to obtaining business permits; however, they're not specialized to the cannabis industry. He advised that those regulations were not followed either. Had they been followed it would not have caused a red flag because the company's original location was on Main Street which is in the Central Business District. Additionally, the move of the business would not have necessarily been regulated at that point - now it's in a grey area. He posed the question if the company have a duty to come to the city and answered, yes. He then asked if they were aware of that duty and answered, no.

Vorndran stated he was careful to discuss that the company did seek counsel prior to Mr. Bracken, and that it was not Mr. Brackeen. He stated the company may or may not have received appropriate advice at the time. He finished by stating the difficulty in a situation to try to undo some things that are very clearly not appropriate under the City of Shawnee ordinances and Zoning Code.

Board member Burg spoke about the effects of rebuilding Kickapoo. The daycare and the dispensary, as well as many businesses and property owners will be impacted. He stated it is his understanding that the preferred order of work on the Kickapoo widening project would begin on the north and move south. Burg stated he wanted to address the question of precedent. Board member Burg indicated that the current staff were not in place (employed) when the dispensary began operations. He opined that precedent was not likely to occur with the City's current staff. He continued by stating he was a proud capitalist and a small business owner, and he supported small business owners in the City.

He expressed his desire to reach a compromise as he appreciates when someone acknowledges a mistake and tries to get in compliance. Burg asked if the City would consider a temporary permit to allow the business to legally operate at its current location. He suggested a timeline of proposed development not just an open-ended temporary permit. He suggested that constraints could be in place with checks on improvements, so if the agreed upon activity had not occurred, the permit is revoked. Burg asked what the best way was to assist someone who has made a capital investment in our community.

City Attorney Vorndran stated he had some bullet points he wanted to cover, which included some explanation to concerns raised by Attorney Brackeen.

- 2040 comp plan and the idea of Mixed Use land use designation. The language of the comp plan explains it further. Mixed use was appropriate for this area.
- This area has spot zoning. A major goal of the comp plan was to systematically eradicate spot zoning to avoid such precedential situations. This Board is familiar with that need.

- This is an area that is primarily residential – then on the western side of Kickapoo, it's truly mixed use, especially that far south. Director Blaine had discussed Mixed Use relevant to the setting.
- The language is not specific but it's important to understand the context behind the comments and understand why staff, with the little discretion they have under comp plan, have taken that approach on this particular location.
 - C1 -- office spaces -- more residential-friendly commercial enterprises
 - C-3 structures that look practically identical right next door
- Questions about lot splits - these issues have been entertained including parking and shared driveway issues -- Shawnee does not have a system where these issues can be addressed administratively.
- Mr. San Pedro has made a significant investment and that entire block – there are solutions, but are they cost prohibited – what are the effects of those solutions on money made for the City.
- That is the task that this Board has been asked to undertake.
- The daycare issue has been addressed -- no ordinance that prevents 420 or 412 Kickapoo to operate as an MMJ dispensary within the distance to the daycare. The board must listen to those public comments and letters and they must listen to Mr. San Pedro as he discusses his vision for the corner when making their decision. This does not preclude any decision it's simply informs the board of the public's thought.
- Guidance in applying the law to this situation - trying to give background – proposed new development and what level of consideration the Board should be given to that idea.
- Precedent -- the planning and legal departments' biggest concerns when in one of those situations - pleased this Board has understood and accepted that challenge in the deliberation - it is a very sticky situation.
- About the new development – most concerned with the precedent, that the discussions could lead to a precedent being set - people asking for variance – telling staff what they are going to do.
- Many ideas brought to the planning department without coming to fruition, and many ideas come to the Zoning Board of Adjustment that do not come to fruition.
- Making a concession only for a promise for something that may be done in the future – that creates bad precedent.
- No question that Mr. San Pedro is taking steps to initiate that process -- but no dirt has moved - no permits have been pulled - just have rough drawings.
- Attorney Brackeen has tied that up by offering a deadline, which mitigates a great deal - the question is about the deadline - have been dealing with this circumstance for a long time -- a resolution is needed, and this Board needs to consider that as well - if that time frame is considered, it needs to be fair but short -- we need to come to a resolution.

Attorney Vorndran addressed the Board and asked they consider the nature of the proceeding. If there is a finding made that sufficient hardship exists and to grant a variance, that the finding be enumerated within the construct of the four factors. Vorndran further explained that if the Board can flush out a decision, to explain which factors are believed to mitigate for a variance so there is a clear decision for anyone who might review this.

Board member ____ asked for a review of the four factors.

City Attorney Vorndran stated he would be reading from the Code of Ordinances for the City of Shawnee.

Sec. 22-571. - Variances.

A variance from the terms of the code may be granted, as provided in this section, only upon finding by the board of adjustment that:

- (1) The application of the code to the particular piece of property would create an unnecessary hardship;
- (2) Such conditions are peculiar to the particular piece of property involved;

(3) Relief, if granted, would not cause substantial detriment to the public good, or impair the purposes and intent of the code or the comprehensive plan; and

(4) The variance, if granted, would be the minimum necessary to alleviate the unnecessary hardship.

Sec. 22-572. - Burden of proof.

Applicant for variance has the burden of showing that granting of a variance will not be contrary to public interest, that literal enforcement of the zoning code will result in unnecessary hardship, that by granting the variance the spirit of the code will be observed, and that by granting the variance, substantial justice will be done. The board of adjustment shall have the right to establish conditions on any granted variance.

Attorney Brackeen asked to speak again to review the four factors discussed earlier.

- 1) The unnecessary hardship is being forced to shut down the business or move into the sliver of land zoned C-3 - Spent tens of thousands if not hundreds of thousands (of dollars) to operate out of building 420.
- 2) It is unique to this piece of property as Mr. San Padro owns the entire city block.
- 3) as for not being a detriment to the public good – it's a net gain one way or another – he either loses the business or it's moved over to building 412
- 4) minimum necessary to alleviate the hardship - Vorndran mentioned a timeframe. Two-years seems like a reasonable time - Granted or not. 2 years to "put up or shut up" seemed reasonable.

Director Blaine asked for clarification of what would be accomplished in the two-year time frame.

Brackeen replied that the idea is to get the project finished or close to being finished while Working with the city to get the development done and not be finished or close to finished in two-years. He stated he would not have to worry about OMMA and the certificate of compliance because we are now compliant and operating out of 420 building.

Board member ____ asked if the desire was to operate at 420, where you are now, and to tear down in the other direction coming back the other way and tear down 420. He sought confirmation of the correct sequence.

Director Blaine stated the need for residential housing. She asked if the applicant willing to commit a portion of the development to housing.

Mr. San Padro confirmed he was 100% committed.

Attorney Vorndran advised the Board that if a variance is granted it must have an established expiration date. He continued that if the Board wanted to make the variance temporary, a due date for reexamination by the Board should be established as leaving it open-ended could create a litany of problems.

Chairwoman Gordon stated that there were six letters with legitimate concerns about the daycare. She asked if a six-foot privacy fence could be built in the front yard. Director Blaine advised no, only 3 feet tall fences were allowed in a front yard. Discussion about the position of the structure on the property indicated that the "problem" yard was on the side of the structure, in the rear yard. A 6' (six feet) privacy fence was allowed.

Vorndran stated that the Board may not require the applicant erect a privacy fence on the daycare's property, but it was a suggestion that could be encouraged.

Attorney Bracken stated Mr. San Padro was offering to place a privacy fence on the west side of the daycare property where the playground is located if it is suitable and code appropriate.

Discussion followed regarding the reality of a 2-year time frame, the necessary rezoning, and concern of the new development. Director Blaine explained that a rezoning for a Planned Unit Development (PUD) would be required as there was not a "mixed-use" zoning district. Ongoing discussion followed for conceptual site plan, an appropriate time to examine the project, and would anyone entertain a variance.

Director Blaine advised submittal of a PUD application would be necessary within in 6-months. That application would go before the Planning Commission and the City Commission. Following approval, a submittal for building permit to start construction would be required within a reasonable amount of time. Discussion continued about a deadline of 9-months for PUD application submittal, with a follow-up every nine-months until the project was complete. Director Blaine advised the regularly scheduled ZBOA meeting in nine-months was July 15, 2021 and agreed to nine-months for the PUD application submittal.

Chairwoman Gordon asked if anyone else chose to speak.

Rob Morrison addressed the board and stated the case seemed simple. He stated a lot of people use the dispensary. He added that the 2040 Comprehensive Plan does not have to be followed exactly.

With no one else choosing to speak, the public hearing was closed.

Attempts to wrangle all applicable language resulting from the discussions into an appropriate motion were voiced. Attorney Vorndran offered the following motion at the request of Board member Burg:

A motion to approve of variance as requested to allow Roots Dispensary to operate in a C-1 zoning classification at 420 North Kickapoo with the following restrictions. Time restriction is on the variance-at this time it is granted at least until July 15th, 2021. It will then be reviewed, and it is expected at that time a PUD application will be completed and on file with the City. Roots Dispensary and its representatives continue to work with staff. Installation of a privacy fence at daycare across the street as coordinated by the Planning Department. Finding all four factors are required for the variance be granted and the burden of proof is set forth in the Code of Ordinances have been found.

Board member Burg made a motion to approve the variance (**ZBOA07-20**) with the restrictions as provided by City Attorney Vorndran, which was seconded by Board member Cannon.

The motion passed 4-0-0.

AYE: Burg, Cannon, Gordon, Richardson

NAY: None

ABSTAIN: None

AGENDA ITEM NO. 6:

Case #ZBOA09-20 – Public hearing and consideration of approval of a variance to allow a mobile home on a one-acre property instead of a minimum five-acre property located at 2124 W. Benedict Street. (Applicant requested deferment to a future meeting date.)

Applicant: Executive Home Rentals, LLC

Planning Director Rebecca Blaine advised that the applicant had requested a deferment to a future date. Mobile home intended for this property was sold before he could buy it, so there is not a specific mobile home to review. Staff recommend a motion to defer this item to a future meeting date.

Board member Burg made a motion defer case (ZBOA09-20) as requested, which was seconded by Board member Cannon.

The motion passed 4-0-0.

AYE: Burg, Cannon, Gordon, Richardson

NAY: None

ABSTAIN: None

AGENDA ITEM NO. 7:

New Business

Board member Burg acknowledged staff's time and effort in working on the variance request ZBOA07-20. He further acknowledged that current staff had inherited the case and all efforts were appreciated.

AGENDA ITEM NO. 5:

Board Members' Comments

Chairwoman Gordon expressed her comfort in the meeting's conversations and anticipated projects moving forward with the community's best intent in mind.

AGENDA ITEM NO. 6:

Adjournment

The meeting was adjourned at 3:54 p.m.

Approved 11/19/2020
Chairwoman/Vice-Chairman

Rebecca Blaine
Planning Director