

CITY BOARD OF ADJUSTMENT

MINUTES: January 3, 2013

Approved by a motion on February 6, 2013

Name	Title	01/03/13	02/06/13	03/06/13	04/03/13	05/01/13	06/05/13	07/03/13	08/07/13	09/04/13	10/02/13	11/06/13	12/04/13
Jeff Bollman	Chairman	1											
Paul Cox	Boardmember	1											
Daniel Eggen	Boardmember	1											
Neil Kiner	Vice Chairman	A											
Barbara Walborn	Boardmember	1											
Marlene Walter	Boardmember	1											
James Olson	Boardmember	1											

TOTAL NUMBER OF APPLICATIONS 2012	01/03/13	02/06/13	03/06/13	04/03/13	05/01/13	06/05/13	07/03/13	08/07/13	09/04/13	10/02/13	11/06/13	12/04/13	TOTAL
Variance	3												3

Chairman Jeff Bollman called the meeting to order at 6:00 p.m. The City Board of Adjustment met in the City Council Chambers.

Chairman Bollman asked Zoning Coordinator Nicole Cromwell to introduce the City Board of Adjustment members and Planning Department staff. Attending Staff members are Nicole Cromwell, Planner; and Tammy Deines, Planning Clerk

Others in Attendance: Michael Page, Sentry Security; Nels Pearson, Auto Auction of Montana; Randy Straus, Staff Engineer, City of Billings Public Works Engineering Department; Brandon Reiter; Les Solheim; Kim Edinger; Brandon Reiter

Public Comment:

Chairman Bollman opened the public comment period and asked if there was anyone wishing to speak during the public comment portion of the meeting. There was none. Chairman Bollman closed the public comment period at 6:02 p.m.

Approval of the December 5, 2012 Meeting Minutes

Chairman Bollman called for the approval of the December 5, 2012 meeting minutes.

Motion

A motion was made by Jim Olson and seconded by Barbara Walborn to approve the December 5, 2012 meeting minutes with corrections.

The motion carried with a unanimous voice vote.

Disclosure of Conflict of Interest

Chairman Bollman asked for disclosures of conflict of interest. There was none.

Disclosure of Outside Communication

Nicole Cromwell explained there are times applicants communicate directly with Board members and this should be communicated to the Board members in a public forum. There were no disclosures of outside communication.

Public Hearing:

At 6:04 p.m., Chairman Bollman stated the public hearing will be opened and this Board will allow public comment this evening. Ms. Cromwell read the legal description and gave the Staff presentation which reviewed the request and recommendation below.

Item 1 Variance #1134 – Land Use Contrary to Zoning – Bitterroot Heights Park – Sewer Lift Station – A public forum to receive comment on the proposed use contrary to zoning of a portion of Bitterroot Heights Park for a new (replacement) sewer lift station in a R-70 and R-70-R zone on the Park Dedication lot of Bitterroot Heights Subdivision 1st Filing a 10.44 acre parcel of land. Tax ID: A33250. The Board of Adjustment has no ability to approve or deny this request but will conduct a public hearing to receive public comment.

REQUEST

This item is being brought to the Board of Adjustment for a Public Forum to allow the City of Billings to construct a new sewer lift station in a Residential 7,000 (R-70) and Residential 7,000-Restricted (R-70-R) zone. Public agencies may use public land contrary to zoning if a public hearing is held before the Board of Adjustment. This authority is shown on the attached copy of MCA 76-2-402. Specifically, this is a request from the City of Billings to allow the construction of a new sewer lift station on this unimproved parkland to replace the failing lift station currently located in the northeast corner of the park. Above ground utility stations and equipment are not an allowed use within the R-70 or R-70-R zoning districts.

Discussion

Chairman Bollman asked the members of the Board for questions and discussion. In response to a question by Dan Eggen, Nicole Cromwell pointed out the Holling Drain, which is City owned property.

Chairman Bollman called for presentation by the applicant.

Randy Strauss, City of Billings Public Works Engineering Department

Mr. Strauss is the agent for the City of Billings. He commented this lot could be used for other purposes even though it is not an attractive lot for a residence. He stated they will demolish the existing lift station primarily due to the failure of the current station and to address the growth the Heights is experiencing. He said the Parks & Recreation Department has plans for future park improvements.

In response to a question by Jim Olson, Randy Strauss said the parcel will be about .5 acres and a similar structure to the existing building will be constructed. Bids for construction will be opened January 29, 2013 with construction projected to begin in early March. He clarified the location of 5 mile Creek per request of Barbara Walborn. Mr. Strauss said it will pose a similar risk as the current site but the pump capacity and fill times of the new lift station will prevent overflow into

5 Mile Creek. He noted the system will be sealed to prevent infiltration. In response to a question by Jim Olson, Mr. Strauss explained the parcel was chosen to meet the flood plain review criterion and take advantage of opportunities to build a minor arterial road and address storm water management.

Public Hearing

Chairman Bollman opened the public hearing and asked if there was anyone wishing to speak in favor or against City Variance #1134. There was none. Chairman Bollman closed the public hearing at 6:28 p.m.

** State statute allows public agencies to use land contrary to zoning after a Public Forum is held by the local Board of Adjustment. The Board shall have no power to deny the proposed use but shall act only to allow a public forum for comment on the proposed use.

Item 2. Variance #1135 – 102, 104, 106 and 108 Alderson Avenue – Lot Area for Duplexes – A variance from 27-308 requiring a minimum lot area of 9,600 for two dwelling units to allow a lot area of 7,000 square feet on Lots 43&44 (102/104 Alderson) and 45 & 46 (106/108 Alderson), Block 9 of West Side Addition Subdivision in a R-70 zone, each parcel containing 1 existing duplex and 7,000 square feet. Tax ID: A17820 and A17821, Robert and Mary McKinney, owners and Les Solheim & Kim Edinger, agents.

REQUEST

The applicant is requesting a variance from Section 27-308 requiring a minimum lot area of 9,600 square feet for existing duplexes to allow a lot area of 7,000 square feet in a Residential 7,000 (R-70) zone on Lots 43/44 and 45/46, Block 9, West Side Addition Subdivision. Robert and Mary McKinney are the owners and Les Solheim and Kim Edinger are the agents. Planning staff is recommending conditional approval of the proposed variance.

Staff is recommending the following conditions for the variance request:

1. The variance is to decrease the minimum lot size from 9,600 square feet to 7,000 square feet for an existing duplex dwelling. No other variance is intended or implied with this approval.
2. The variance is limited to Lots 43, 44, 45 & 46, Block 9, West Side Addition Subdivision generally located at 102/104 Alderson Avenue and 106/108 Alderson Avenue.
3. Any future rebuilds or remodel of the duplex dwellings will need to be done in compliance with the City's adopted building code and site development code. With the exception of the minimum lot size required all other zoning code requirements will apply.
4. These conditions of variance approval shall run with the land described in this authorization and shall apply to all current and subsequent owners, operators, managers, lease holders, heirs and assigns.

Discussion

Chairman Bollman called for questions and discussion by the members of the Board. In response to Jim Olson's query, Nicole Cromwell stated the building height, setbacks, and lot limitations would apply. Daniel Eggen asked regarding the Department of Revenue's property validation for these parcels. Nicole Cromwell noted 102-104 Alderson and 106-108 Alderson are listed as two family residences. Barbara Walborn asked if the setbacks are met, and Nicole Cromwell responded this was confirmed during application review.

Public Hearing

At 6:25 p.m., Chairman Bollman opened the public hearing and called for proponents or opponents of City Variance #1135-102,104,106, and 108 Alderson Avenue. There was none. Chairman Bollman closed the public hearing at 6:38 p.m.

Motion

A motion was made by Barbara Walborn and it was seconded by Jim Olson to approve City Variance #1135 with the conditions recommended by staff.

Discussion

Chairman Bollman called for discussion on the motion.

Boardmember	Yes	No	Abstain	Not Present
Jeff Bollman	1			
Paul Cox	1			
Daniel Eggen	1			
Barbara Walborn	1			
Marlene Walter	1			
James Olson	1			
Neil Kiner				1

The motion carried, 6-0. City Variance #1134 is conditionally approved.

Item 3. Variance #1136 – An Appeal of an Administrative Decision – Electric Fence at 4432 S Frontage Road – Billings Auto Auction – An Appeal of the Zoning Coordinator’s determination that an electrified security control device meets the definition of a fence as stated in Section 27-201 and is prohibited within the Billings city limits as specified in Section 27-604(g). The property is zoned Planned Development – Entryway General Commercial (PD- EGC), Lot 4 Block 1 of Willowbrook Subdivision, a 21.94 acre parcel of land. Tax ID: A30055, Griffin Automotive Enterprises, owner and Electric Guard Dog, agent.

REQUEST: Appellants Electric Guard Dog of Columbia, South Carolina, have appealed the notice of violation sent by Code Enforcement Officer Dave Green and affirmed by Zoning Coordinator Nicole Cromwell that the electrical perimeter security barrier in place at the Auto Auction of Montana at 4432 South Frontage Road is in fact a fence and cannot be electrified. Since 1972, the zoning regulations for the City of Billings have prohibited the installation of electrical fencing. The perimeter security barrier is located along the property boundary that encloses the vehicle storage area at 4432 South Frontage Road. The southern 20 acres of this property is not yet annexed into the city and is not subject to the prohibition of electrical fencing. The subject property within the city limits is approximately 22 acres and is described as Lot 4, Block 1, Willowbrook Subdivision, Tax ID: A30055 and is owned by Griffin Automotive Enterprises, Incorporated.

In a letter to the appellants dated November 27, 2012, Dave Green, Commercial Code Enforcement Officer, stated the security barrier is a violation of Section 27-604(g) of the Billings, Montana City Code (BMCC) and they owner was required to disconnect and discontinue use of the electrical fence (Attachment A). The site inspection and investigation were prompted by a complaint to our office. The notice of violation letter stated the owner had 10 days to comply with the city code. The owner contacted the contract service provider of the electrical fence, Electric Guard Dog. The company

installs and maintains these types of security systems nationwide. Representatives of Electric Guard Dog contacted Dave Green to argue the notice of violation. The representatives specifically disagree with the Zoning Coordinator's interpretation that the security barrier is a fence as defined within Section 27-200 of the BMCC. I advised the representatives they could, on behalf of the property owner, appeal my determination and interpretation of the code definition of a fence to the Board of Adjustment. On November 30, 2012, Electric Guard Dog filed a letter of appeal with the Planning Division. (Attachment B).

The receipt of an appeal stays all enforcement proceedings related to the zoning violation at issue. Pursuant to Section 27-1505, BMCC, the City Board of Adjustment must hear the appeal within a reasonable time, not to exceed 30 days. The appeal stays all proceedings of any action, which includes the code enforcement action. The Board may reverse or affirm, wholly or partly, or modify the order, requirement, decision or determination.

RECOMMENDATION

Staff recommends the Board of Adjustment affirm the Zoning Coordinator's determination that the security barrier at the Auto Auction of Montana location at 4432 South Frontage Road is in fact a fence as defined by 27-200 BMCC and cannot be an electrical fence as prohibited in Section 27-604(g).

Discussion

Chairman Bollman asked the Board for questions and discussion.

In response to Paul Cox's question, Nicole Cromwell said the electric fence is supported by fiberglass poles.

Barbara Walborn asked if electric dog fences apply. Nicole Cromwell said this has never come up as an issue, and it is not connected by posts with wires.

Marleen Walter asked if the electric fencing is on at all times. Nicole Cromwell deferred to the owner and agent who are attending. She said this was a result of a code enforcement complaint and a notice of violation. The complaint was based on an injury incident involving a person who was attending an auction and inadvertently touched the fence.

Jeff Bollman asked if the planned development agreement could be amended to allow electric fencing. Nicole Cromwell said the agreement doesn't have any specifications to allow fencing other than what is in the general zone; an amendment would be one option for the owner.

Paul Cox asked if there have been instances of attempts to cut the fence. Nicole Cromwell said there was no evidence of this but there is a considerable amount of wind drift. The property is not posted "no trespassing" but there are yellow warning signs. In response to Daniel Eggen and Marleen Walter, Nicole Cromwell stated the chain link fence and electrical fence are separated by approximately one foot and the warning sites are approximately 100-150 feet apart. She stated there have been two vehicle thefts reported stolen in this area.

Chairman Bollman asked for presentation by the appellant.

Michael Pate, Sentry Security, 121 Executive Center Drive, Columbia, South Carolina

Mr. Pate is the agent for Griffin Automotive Enterprises, Billings, Montana. Mr. Pate stated this system is operated with a twelve volt battery which is completely separate from the electrical system and is charged with solar batteries. He said an electrical permit is not needed for a twelve volt battery; the current is amplified to 7,000 volts and it is released down the line.

Mr. Pate said they are a security system with an alarm and a deterrent. He explained four pulses are needed to set the alarm off; which will return a classic alarm and an alarm to their company. He emphasized this does not enclose the space and they are a security system. There are warning signs every 60 feet. It is constructed with poles every 30 feet with 15'4" steel poles at the corner points. Mr. Pate said both thefts have occurred outside the fence in a holding area outside the perimeter and there has never been a theft inside the property. The gates and the chain link are not electrified but the apparatus behind it is. It is a continuous circuit and when broken, the power goes down. Mr. Page said emergency access is not a big deal and it saves time for police departments. He asked this Board to find in their favor to keep the apparatus up. He said his company has been working for this owner since 2000 and nothing has been stolen in almost 13 years from this particular business.

Jeff Bollman asked for questions or discussion.

In response to Jim Olson's query, Mr. Pate stated Fire or Police Departments could cut the lock and enter for emergency access. He said at that point, the circuit would be broken and the alarm would go off. Paul Cox asked about the system voltage. Mr. Pate explained this is a 12 volt system with a high amp load of 4 and 7 amps. They are under the amp load that could cause harm. It is a direct current system and is not connected to the infrastructure.

Paul Cox asked regarding instances of burns or shocks in the history of the company. Mr. Pate explained the difference between direct and alternating pulse currents. He stated the alternating current will not burn, spark, or contract muscles due to the actual pulse. He said they have received reports of people being shocked but no burns or injuries. He suggested the Board members visit the company's website, <http://electricguarddog.com>. Mr. Pate said Auto Auction's system runs in the evening but shuts off during retail hours. It is a 22-acre yard with high value equipment.

Daniel Eggen asked how the system's hours of operation are controlled. Mr. Pate said Nels Pearson's system is a manual operation but it can be run by a smart phone. He noted the Auto Auction only has a retail operation one day a week.

Jim Olson stated the City code states a fence separates parcels and asked for clarification of Mr. Pate's testimony. Mr. Pate replied this does not enclose parcels. Jim Olson asked Mr. Pate how he would define the remaining materials if the if chain link fence was not in place. Mr. Pate said he would not be up, as International Safety Standards require a perimeter fence up for this to exist.

Jeff Bollman asked Mr. Pate if he would call the electric guard dog barrier a fence, and Mr. Pate responded he calls this a security system. Jeff Bollman pointed out the company's website calls this a fence. Mr. Pate said he agrees, as this is the easiest way to sell what he does. He stated this is a security system. He clarified and said he is considered "an alarm" in a lot of places, including Arizona. Mr. Pate reiterated this is considered an alarm and not a fence; there is already a fence up

serving the purpose of a fence. Jeff Bollman said the website defines Electric Guard Dog as “an electric fence within a fence”.

Barbara Walborn asked Mr. Pate if he has information on the injured person who filed the complaint. Mr. Pearson said he was unaware of the incident until he received the report and no claim was filed.

Marleen Walter asked if it is standard policy not to get a building permit when a security system is installed. Mr. Pate digressed and said they bought the company in 2009, and found they had compliance issues. He said he and his support staff have worked to obtain permits and variances, and amend codes. He said no permit was obtained here; and the state definition of the system will determine the type of permit needed. Marleen Walter asked how this is defined in Montana law, and Mr. Pate said it is whatever the local municipality wants it to be. He added there are two trucking companies interested in this system and he will return to this Board either to amend the code or obtain a decision to ensure they are in compliance.

Jeff Bollman asked for clarification and noted the chain link fence is 8 feet tall and the barrier is 10 feet tall. Mr. Pate explained the reasoning for this set up is they are trying to push an assailant down. He stated hardening the site makes entry difficult. Jeff Bollman reiterated the zoning code’s definition of a fence, and asked for Mr. Pate’s rebuttal of the Zoning Coordinator’s interpretation. Mr. Pate said they are not there to enclose the property as the perimeter chain link encloses and delineates the space. Jeff Bollman asked for Mr. Pate’s interpretation of an instance wherein two or three fences are enclosing one another. Mr. Pate said it would be determined by the composition of the fence. He said in one instance they are trying to keep people in and he is trying to keep people out. Jeff Bollman pointed out Merriam Webster’s definition of a fence is to keep persons in or out, and he feels Mr. Pate’s system meets the definition. Mr. Pate replied he is not trying to enclose the property but act as a deterrent.

Marleen Walter commented it seems the issue is this is electrified; any electrical barrier is prohibited within the City. She stated no one disputes an owner’s need to protect their property but it is the fact it is electrified which makes this a violation. Mr. Pate contended this not a fence but a security system. He stated he has protected this owner for thirteen years and defended his property and business. He said they have had no complaints from the neighborhood.

Nels Pearson, Auto Auction of Montana, 4432 South Frontage Road, Billings, Montana

Mr. Pearson stated his was surprised to hear of a report by an injured party. Regarding the inability of the Fire Department to access the facility, Mr. Pearson said they have done annual inspections on the facility since 2005. There was no mention of anything about the electric fencing around the perimeter of the property. Mr. Pearson said the Electric Guard Dog system is very important to the Auto Auction, as even after attempts to protect the previous property in Lockwood, there were many stolen cars. Mr. Pearson said they never had a car stolen as this is a very intimidating presence. He said the instances of stolen cars in the last six months were outside the Electric Guard Dog and outside the perimeter. He said the electric fence is manually powered down at 8:00 a.m. and powered up at 5:00 p.m. when staff leaves the facility.

Discussion

Jeff Bollman called for discussion.

Jim Olson asked Nicole Cromwell for Montana's definition of an electric fence. Nicole Cromwell explained there is no Montana definition of an electric fence. Fences can be electrified but are typically used to contain livestock. She said the state of Montana adopts the building code; local jurisdictions may enforce the code but cannot amend the state code. The building code and regulations are enumerated in Section 6 of the local code, stating the state building code was adopted and will be administered locally.

Nicole Cromwell said she spoke with City Electrical Inspector Tom Weisgerber concerning this matter. His opinion at that time was an electrical permit is needed whether solar powered or not as it is a commercial application, and solar power on commercial property in the state of Montana requires a permit. She noted the City has never issued a permit for an electrical fence, as they are not allowed.

Paul Cox commented direct current systems require a different permit and licensing structure in his business. He said this system is really a low voltage system; secondary to the primary electrical system of the facility; and a master electrician would not be required to install this type of system. Nicole Cromwell stated this hearing is to address the definition of a fence in the code. She said these issues could be resolved through the building inspectors if it comes to a point of permitting.

Barbara Walborn asked about permitting electrical security systems on the interior of a commercial building, and Nicole Cromwell replied this application is outside her realm of her position.

Daniel Eggen asked for criterion to overturn the determination. Nicole Cromwell clarified and said there are no conditions if a determination is made the barrier is not considered a fence. Jeff Bollman said the decision is to affirm the administration or not. Nicole Cromwell said the code requires a building permit for any fence or barrier over six feet tall. The Code Enforcement process stopped pending this hearing and the Board's decision.

At 7:37 p.m. Jeff Bollman closed the hearing.

Motion

Paul Cox made a motion and it was seconded by Barbara Walborn to overturn the Zoning Coordinator's determination that the security barrier at the Auto Auction of Montana location at 4432 South Frontage Road is in fact a fence as defined by 27-200 BMCC and cannot be an electrical fence as prohibited in Section 27-604(g).

Discussion

Chairman Bollman called for discussion on the motion.

Paul Cox said this decision should return to the intent of the fence, being the separation of properties. He said his interpretation is the chain link fence separates the properties while the 10-foot wire security strands are for security issues only. In the event the 8-foot fence fell down, the 10-foot wire security system becomes the fence. He continued and said he feels they are two different animals as they do different jobs. The low voltage security wire is more of a deterrent and the step up transformer is no different than a window neon sign. He commented it would be very dangerous if they were selling a system with 7000 volts of alternating current. He said the intent is his primary consideration.

Daniel Eggen asked how the public would be assured this would not be a higher voltage system. Jim Olson said it would seem this question would be answered during the permit process.

Jeff Bollman noted this determination will also apply to other properties, and it may or may not look the same. He said he thinks while the definition of a fence in the zoning code may leave something to be desired; the electrified barrier would become the primary fence should the primary fence be taken down. Marleen Walter said the applicant refers to this as a fence. Jeff Bollman stated he tends to agree with the determination and suggested amending the planned development for the parcel. He suggested if an amendment of the code is needed, it should be considered to promote uniformity.

Barbara Walborn said she feels this is a security barrier and the code may have been written during a different time than it is now. She stated within reason, property owners have a right to protect themselves. She said she sees this system as a deterrent and more businesses may do this as police protection is limited. She said in the instance the chain link fence goes down, this will go away and would not be a barrier.

Motion

Barbara Walborn made a motion and it was seconded by Daniel Eggen would amend the original motion to say any required permits and inspections will be obtained within thirty days.

Discussion

Paul Cox said he supports the amendment. He commented on the wiring requirements for signage and pointed out this is a secondary system. Daniel Eggen stated he agrees with the need for property rights and protection of property. He said he can see the intent and the need for having security for inventory.

Jeff Bollman called for a vote on the amended motion.

Boardmember	Yes	No	Abstain	Not Present
Jeff Bollman		1		
Paul Cox	1			
Daniel Eggen	1			
Barbara Walborn	1			
Marlene Walter		1		
James Olson	1			
Neil Kiner				1

The amended motion carries, 4-2.

Jeff Bollman called for a vote on the original motion to reverse the determination.

Boardmember	Yes	No	Abstain	Not Present
Jeff Bollman		1		
Paul Cox	1			
Daniel Eggen	1			
Barbara Walborn	1			
Marlene Walter		1		
James Olson	1			
Neil Kiner				1

The original motion carries, 4-2.

Other Business/Announcements:

A. Election of Officers

Motion

Daniel Eggen made a motion and it was seconded by Jim Olson, Paul Cox serves as City Board of Adjustment Vice Chairman for the 2013 term.

The motion carried with a unanimous voice vote.

Motion

Paul Cox made a motion and it was seconded by Jim Olson, Jeff Bollman serves as City Board of Adjustment Chairman for the 2013 term.

The motion carried with a unanimous voice vote.

B. Announcement: The next City Board of Adjustment meeting will be held on Wednesday, February 6, 2013.

Adjournment:

At 6:44 p.m. Daniel Eggen made a motion and it was seconded by Marleen Walter to adjourn. The motion carried with a unanimous voice vote.

ATTEST: Approved by a motion on February 6, 2013

Chairman Jeff Bollman

Tamara L. Deines, Planning Clerk