



Minutes of the Board of Adjustment REGULAR MEETING September 27, 2023

Minutes of the Regular Meeting of the Board of Adjustment, of the City of Tempe, which was held in Council Chambers
31 East Fifth Street, Tempe, Arizona

Present:

Staff:

Vice Chair John 'Jack' Confer	Jeff Tamulevich, Community Development Director
Board Member David Naugle	Ryan Levesque, Comm. Development Deputy Director
Board Member Raun Keagy	Michelle Dahlke, Principal Planner
Board Member Kaelee Palmer	Chris Jasper, Senior Planner
Board Member Rickey Lynn Gans	Jennifer Daniels, Administrative Assistant II
Board Member Robert Miller (Alt)	

Meeting convened at 6:00 p.m. and was called to order by Vice Chair Confer.

1) Voting of the Meeting Minutes:

Study Session & Formal Meeting Minutes from July 19, 2023.

Prior to meeting minor corrections were stated by Vice Chair Confer, Board Members Miller and Gans.

Motion by Board Member Miller to approve Meeting Minutes from Study Session and Regular Meeting July 19, 2023 with corrections; second by Board Member Palmer. Motion passed on **5-0** vote.

Ayes: Vice Chair Confer, Board Members Palmer, Gans, Keagy and Miller

Nays: None

Abstain: Board Member Naugle

Absent: Chair Watson, Board Members Morrow and Siegal

- Request for a variance to reduce the required side yard setback for an accessory building from seven (7) feet to zero (0) feet for **HESSWANY RESIDENCE**, located at 918 East Weber Drive. The applicant is Aiman Hesswany. **(PL230128)**

Applicant Presentation:

Mr. Aiman Hesswany, the homeowner, gave a presentation. Mr. Hesswany explained that the structure has been on the property since 2014 and that the previous owner of the home used it as a mechanic shop. Mr. Hesswany stated that he purchased the property in 2022 and that the subject structure was on the property at that time. He also stated that the structure was identified as an accessory structure on the Maricopa County Assessor's website at the time he purchased the property. Mr. Hesswany also explained that he purchased the property thinking the structure was a legitimate part of the property. He stated that some improvements were made to the structure and that it is a

very crucial part of the house. He stated that if he had to meet the setback required for the accessory structure, that it would cost a lot of money and it would lose the benefits of using the structure, because it would no longer fit the items inside. Mr. Hesswany stated that he is requesting to keep the structure as is. Mr. Hesswany also stated that someone complained that the structure is being used as a mechanic shop. He explained that that use of the structure was stopped the day the Hesswany's purchased the property. Mr. Hesswany stated that he believes the complaint is from someone who wants to hurt the family. He explained that due to the complaint, the inspector from the City of Tempe showed up and did not see the structure was being used as a mechanic shop but did find the structure did not have a building permit. Mr. Hesswany said that he went to the city and found that he would need to apply for a variance in order to keep the structure. Mr. Hesswany further stated that since the day he purchased the property and found that on Google, it shows that the structure was being used as a mechanic shop, he has attempted to contact Google several times to remove the advertisement, even before the complaint from the city. He indicated that the home is currently being used as an Airbnb. With the advertisements on Google, people wanting to rent the Airbnb were asking Mr. Hesswany if the business was on the property. Mr. Hesswany stated that the Google ads were hurting his business as well, which is why he was trying to attempt to contact Google. Mr. Hesswany stated that he was advised to get the records from the city. The city provided Mr. Hesswany with the same information that was given by the Maricopa County Assessor's office. Mr. Hesswany stated that when he sees the drawing issued by the city and that it has the structure on it, he believed it was a permitted structure. He said that if he would have known this structure was not legal, he would have negotiated the price or would have had the structure removed from the beginning.

Vice Chair Confer asked Mr. Hesswany if he has anything else to add as far as justification for the structure at this time? Mr. Hesswany stated that he may add something after the staff presentation.

Board Member Gans asked Mr. Hesswany if he is currently living at this property or renting it out? Mr. Hesswany stated that he is renting it out.

Staff Presentation:

Mr. Chris Jasper gave a presentation on the Hesswany residence, located at 918 East Weber Drive. He explained that the building is compliant with the rear yard setback because it is adjacent to an alley. He stated that the setback requirements for accessory buildings in Tempe are determined by the height of the structure. He explained that this structure is 12.4 feet in height, so the setback is established at 7 feet from the side yard property line. Mr. Jasper stated that the building appears to have been built between 2013-2014 without permits. He states that there is variance approval criterion in City Code that states that special circumstances are applicable to the property, including shape, size, topography, location or surroundings. There are no unique conditions associated with the topography or layout of the lot. The lot is very similar to the others that surround it to the east and west. Mr. Jasper said that he believes there are no special circumstances present on the lot that would justify the need for a variance. He also stated that the applicant must also demonstrate that a strict application of the code would deprive the property of privileges enjoyed by other properties in the same classification in the same zoning district. Mr. Jasper stated that staff believes that the strict application of the Code would not deprive the property of rights or privileges enjoyed by other properties in the immediate vicinity. He explained that one property located at 1042 East Weber Drive was granted a variance in 1970 to reduce the side yard setback from 7 feet to 3 feet to accommodate the enclosure of a carport. Mr. Jasper stated that he was unable to identify any other variances granted that were similar in nature to the request. He said that a pattern of variance approvals for this development type within the same zoning district has not been established, and the denial of this request would not deprive the applicant of rights that are enjoyed by others. Mr. Jasper stated that staff believes the approval of this variance would grant special privilege to the property, as it would allow a detached accessory building to be placed in a location that would not be permitted for similar sized lots in the same zoning district and neighborhood. Although the current property owner is not responsible for the construction of the detached garage, Mr. Jasper stated that staff believes they are responsible for ensuring that all structures on the lot are compliant with city regulations. Mr. Jasper further stated that Staff believes there are alternative solutions to remedy the noncompliance which includes building modifications or demolition. He said that a neighborhood meeting was held on August 17, 2023 and was attended by two neighbors, and that both attendees were in support for the requested variance. Mr. Jasper stated that staff is recommending denying the variance request, but if the variance is approved, staff has listed conditions of approval in the Staff Report.

Board Member Miller asked that if the structure was built between 2013-2014, why did the city not notice this structure before? Mr. Jasper stated that a citizen complaint was received by the city Code Compliance Division related to the

specific structure and that is what prompted the Code Compliance Officer to evaluate that specific structure with respect to the home occupation that was alleged to be taking place there and during which they identified that it was built without permits. Board Member Miller asked when the complaint was received? Mr. Jasper stated that it was received in April of this year. Board Member Miller stated that roughly 10 years after the structure was built, it was noted that this is not a compliant building. Board Member Miller stated that technically, the homeowner did not impose the condition on himself, he did by purchasing the property with the building on it, assuming that since there was nothing in the public records to indicate that there was anything non-compliant with the site. He now inherits this idea that he is imposing this condition on himself by virtue of the fact that he had no idea of knowing was wrong. Is that what you are saying? Mr. Jasper stated that the sketched drawing from the Maricopa County Assessor website shows a disclaimer on the page that details the property's characteristics that specifically states that none of the information on the Maricopa County webpage is accurate, complete, or current. The disclaimer encourages any perspective home buyer to conduct their due diligence by contacting the city or by doing further research. Board Member Miller asked if it is the city's position that a buyer must assume that there are things wrong with a property and unless you have proven that there is nothing wrong with the property, you can not make that assumption that there is nothing wrong with the property. Mr. Jasper stated that he would not characterize it that way specifically. Mr. Jasper stated that any perspective home buyer should conduct their due diligence and identify compliant or noncompliant structures on a property. The public records request on this property was not submitted until July 2023, which was after the property owner purchased the property. Board Member Miller stated that if the potential buyer is not conversant with particular codes of the city, they might not know that they were supposed to do that. You are relying on them to have knowledge that they are probably not going to have and then holding them responsible for that lack of knowledge.

Board Member Gans stated that in some cities they have 0-foot lot line buildings, and asked if this one of those? How does that work? Mr. Jasper stated that the lot line or setbacks that an accessory structure is measured against is established in the development standards of our Zoning and Development Code. For this zoning district, the requirement for a principal structure (the house) must be located 10 feet from the side yard property line. For accessory structures of this height would be 7 feet. If the applicant were to reduce the height of structure, they could reduce the side yard setback down to 3 feet. Based on zoning district a 0-foot side yard setback is only allowed when the accessory structure is under 200 square feet and 8 feet in height.

Board Member Keagy stated that the purpose of the Maricopa County Assessor's Office is to assess structures for taxation purposes. Relying on a site plan or drawing does not have any bearing on what the local jurisdiction is for setbacks. That is not the go-to place for determining whether you are in compliance or not. Board Member Keagy stated that his understanding of setbacks is for several purposes. One being esthetics so that there is some uniformity. The main reason being for separation from other structures for building and safety purposes. You don't want structures up against each other for fire reasons. Do you have any sense to how far away the accessory structure in question is from the adjacent property owner's primary residence? Looking at the ariel photograph, I am guessing about 30 feet. Mr. Jasper stated that he does not know, we could look at it. Board Member Keagy stated that he believes it is safe to say it is at least 20 feet possibly closer to 30 feet or more feet away. Mr. Jasper stated that if the variance was approved, the applicant would need to get the appropriate building permits with the Building and Safety Department. Any structural concerns would need to be addressed through that process.

Board Member Palmer stated that she struggles because most people do not even know that the County Assessor has those maps. They need to make that disclaimer larger and bright red. If the board were to deny the variance how does the timing work for bringing the structure into compliance and is that something we could discuss? Is it instantly or can we say within 6 months? Is there understanding that it is an unfortunate circumstance? Vice Chair Confer asked what time frame would the residents/owner be given to cure the code violation? Mr. Jasper stated that he knows there is an active code compliance violation case associated with the property. Board Member Palmer asked if the board has a say in that or any sort of contribution? Mr. Jasper stated it would be a denial with timeliness with remediation of the violation. Vice Chair Confer stated that the applicant would have appeal rights, based upon the board's decision the applicant could appeal to the appropriate jurisdiction if they sought to. That could affect the timeline being discussed. As far as the timeframe for enforcement I am not sure if that is set in City Code but will defer to staff to respond. Mr. Jeff Tamulevich, Community Development Director, stated that it does exist as a violation. Although the structure appears to be structurally sound it has never received building permits. In a situation like this we would recommend 30 days to bring it into compliance. Staff can offer extensions, but we would not like to see the board extending any longer than that.

Vice Chair Confer asked in the one instance where a variance was granted several years ago, do you have more details on that as far as the reason the variance was granted? Mr. Jasper stated that the request was regarding an enclosure of an existing carport to a livable space. At that time, variances were evaluated on different criteria than today. Vice Chair Confer asked if this structure could have been built today? Does this property have enough room? Would they have to have built over the house to put it in place right now? Mr. Jasper asked if Board Member Confer was asking if they meet the lot coverage requirements of the site with the structure as proposed? Mr. Jasper stated that other than the side yard setback the detached structure would be complaint with lot coverage requirements.

Board Member Naugle stated that a setback in his mind is a safety issue and Mr. Jasper has addressed that by saying the structure is 30 feet away from the structure immediately to the west. Is that correct? Mr. Jasper stated that a neighboring structure is to the west. Board Member Naugle asked if the board was to approve the variance, would the city still require a building inspection. Mr. Jasper stated that is correct. Building permits would be required and then an inspection would occur. Board Member Naugle asked if there is plumbing and electricity to this structure? Mr. Jasper stated he did not know. The applicant would need to answer that question.

Board Member Miller asked, on the west side of the property is there a wall there? Is it block or fence? Mr. Jasper stated that there is a wall, he believes it is CMU (concrete masonry units) block. The applicant will need to confirm that.

Public Comment:

None

Applicant Response:

Mr. Hesswany stated that there is no water in the garage only electricity. There is a block wall between the Hesswany Residence and the neighbors. Mr. Hesswany stated that when he requested the public records request, the city sent him the same plans as Maricopa County. Mr. Hesswany went back to the title company asking for compensation on the violation. The title company stated that there was no violation on the property at the time of closing.

Commission Discussion:

Board Member Keagy stated that the property owners bought in good faith and did their due diligence to the best of their abilities with the information that they had. This is a technical violation and that is why the ordinances are in place. The strict application of the ordinance in this case may not be the right direction to go. The homeowner has been at this property for 10 plus years, and there have been no complaint until now. The complaint was not about the structure itself; it was about alleged activity that was determined not to be occurring there. The distance from the adjacent residence can be eased in my mind with putting faith in the building permit process and the building code that would be in place. Based on all of that I am going to support the request for the variance.

Board Member Gans stated that there is a legal precedence called open and notorious where if you have occupied a piece of land in an open and notorious fashion, where you have made no attempt to hide anything, under the law after 5 years you can legally claim that you are properly on that piece of property. In the pictures we have the structure appears to be nicely made and looks like a playroom on the inside. I think the problem will be with the building permits. I am in support of the applicant at this point.

Board Member Palmer stated she did her own due diligence to see if there was something unique to the property. She said that State statute is very clear with the 4-part test for the granting of a variance. Aside from the potential financial burden, I don't see how this case meets the 4-part test. I tried my hardest to find a reason and I can't find it. I think granting this variance would set a precedence in the neighborhood. I will not be supporting the request.

Board Member Miller stated he would support the variance. I am looking at the good faith efforts of the homeowner. I think of it as in the absence of a complaint from someone after 10 years of this structure being there, the city inspector comes out and the complaint is not upheld and notes that the building is not compliant. If that complaint doesn't happen, we are not here. I think in terms of the 4-part test, I have to disagree on the fact that this is a self-imposed on the part of the owner.

Board Member Miller stated that Vice Chair Confer pointed out the fact that there is a short board tonight. Vice Chair Confer stated that it could be a close vote. Board Member Miller stated that the applicant could ask for a continuance. Vice Chair Confer stated that he could, he had a discussion with staff, and we do have a quorum, there is no reason we can not review this and make a decision on it.

Motion by Board Member Keagy to approve request for a variance to reduce the required side yard setback for an accessory building from seven (7) to zero (0) feet for the Hesswany Residence: second by Board Member Gans. Motion passed on **5-1** vote.

Ayes: Vice Chair Confer, Board Members Naugle, Gans, Keagy and Miller

Nays: Board Member Palmer

Abstain: None

Absent: Chair Watson, Board Member Morrow and Board Member Siegal

3) **Staff Announcements**

Vice Chair Has no updates.

Mr. Levesque stated that there are no schedule agenda items for the next meeting date. We will let the board know when the next meeting will be.

4) **Adjourn**

Motion by Board Member Miller to adjourn meeting; second by Board Member Gans. Motion passed on **6-0** vote.

Ayes: Vice Chair Confer, Board Members Keagy, Morrow, Palmer, Gans and Miller

Nays: None

Abstain: None

Absent: Chair Watson, Board Member Morrow and Board Member Siegal

Hearing adjourned at 6:44 p.m.

Prepared by: Jennifer Daniels, Administrative Assistant II

Reviewed by: Michelle Dahlke, Principal Planner