

**City of Leawood  
Board of Zoning Appeals Minutes  
July 28, 2021 – 5:30 p.m.  
Leawood City Hall Council Chambers  
4800 Town Center Drive  
Leawood, KS 66211**

**CALL TO ORDER/ROLL CALL:**

Chairman Clawson: I'd like to call to order the May 26, 2021 Board of Zoning Appeals Meeting. Could I have roll call, please?

**MEMBERS PRESENT:** Dr. Peppes, Clawson, Hawk, Farrington, Bussing

**MEMBERS ABSENT:** Munson, Dunn

**STAFF PRESENT:** Thompson, Tomasic

Chairman Clawson: We have several cases tonight. I would ask that applicants please limit their presentations to five minutes if possible so we can conclude the meeting at a reasonable time.

**APPROVAL OF MINUTES:** Approval of the minutes from the June 23, 2021 Board of Zoning Appeals meeting

**A motion to approve the minutes from the June 23, 2021 Board of Zoning Appeals meeting was made by Hawk; seconded by Dr. Peppes. Motion carried with a unanimous vote of 4-0. For: Dr. Peppes, Hawk, Farrington, Bussing.**

Chairman Clawson: Our first case tonight is in New Business.

**NEW BUSINESS:**

Case 33-2021 Greg Rothers/Builder, Steve Schafer & Jill Smith/Owners - Request for a Variance to the average front setback in accordance with the LDO, Section 16-2- 5.3(D) in an R-1 District for property commonly known as 9709 High Drive.

**Staff Presentation:**

Wade Thompson made the following presentation:

Mr. Thompson: The owners would like to construct a covered entry front porch on the existing structure. A variance for 11 feet, 3 inches is needed to construct the addition as shown on the plan.

Chairman Clawson: Are there questions? Wade, it appears that the front of this house has an area that is bumped out. Are they encroaching farther than the existing setback now?

Mr. Thompson: Yes, that is correct. The corner of the house already exceeds the front yard average.

Chairman Clawson: They are encroaching more, then.

Mr. Thompson: It would be a little bit but not much. They don't have that measurement. I would need the measurement from the existing corner. It says it is 41 feet, 9 inches for the new corner. It's a little bit less but not much.

Mr. Hawk: It's already encroaching.

Mr. Thompson: Yes, it is already built in front of the front yard average, but if it weren't on the curve, we only require 35 feet. This home was constructed in 1954.

Chairman Clawson: What are the adjacent houses?

Mr. Thompson: They're all about the same age.

Chairman Clawson: This house could have been built first and the adjacent houses, and then those two houses would control the setback, right?

Mr. Thompson: Back then, they wanted to keep them pretty much in line. As long as it met the 35' setback, it's all that mattered. They didn't use the front yard average like we do now.

Chairman Clawson: Are there other questions? Is the applicant online?

**Applicant Presentation:**

Greg Rothers, builder, appeared before the Board of Zoning Appeals via Zoom and made the following comments:

Mr. Rothers: I'm not sure what you want me to present. I would like to reiterate that the original setback line is 35 feet. Our proposed porch is 41 feet, 9 inches from the front property line. It is essentially lined up in front of the existing house. That is original to the house. We're just trying to build a little covered porch. The only reason I think we're in noncompliance is the two neighbors are farther back.

Chairman Clawson: In other words, the new addition will line up with existing front of the house.

Mr. Rothers: That is correct.

Chairman Clawson: Are there questions for the applicant?

Dr. Peppes: In other words, this is a legal, nonconforming situation where they are adding on to it along the same line as what was there originally.

Mr. Thompson: Correct.

Chairman Clawson: Are there other questions? This is a variance, so we have to evaluate the five factors. Could you address the factors of Uniqueness and Hardship? These are the ones we have trouble with many times. We have to vote on all five in the affirmative to support a motion for approval.

Mr. Rothers: The unique condition is that these people own a house that is in noncompliance because of a zoning requirement or statutory requirement of the city that put it in noncompliance after it was built. I suspect that's not what you're asking me to say, but it just seems a little bit unfair and arbitrary to not let somebody build on the front of their existing house with a very simple covered stoop. I feel like the zoning laws have changed, unbeknownst to the owners. Tell me if I answered your question.

Chairman Clawson: You covered it. I think the key thing for the board is that you're not proposing to make the situation any worse than it is. You're basically lining up with the existing front of the house.

Mr. Rothers: Absolutely. I feel like we're certainly within the spirit of the zoning guidelines. We're not building any closer to the street than the house already is, with the exception of the geometric anomaly that might put us a few inches closer because the house is not exactly parallel to the curb. For all practical purposes, we are not building any closer to the street.

Chairman Clawson: Are there other questions? Is there anyone here who wishes to speak for or against this application? In that case, as a board, we have to review the five factors. The first is Uniqueness of the Property.

Dr. Peppes: I believe it's met. It is legal, nonconforming now. The front of the house is bumped out. The part that is being added on is not closer. The problem is the average and the way they determine the build line now as opposed to what it was back then. If the house did not already have part of it in that area, I could see that, but it does. That's what I think makes it unique. It's tough when it's legal, nonconforming. It's been there since 1954. I think they've met it.

Mr. Hawk: It's so similar to many that we've seen where they're trying to add protection from the elements. The fact that they already have this makes it just a slight change, just adding to the protection from the elements.

**Uniqueness criterion satisfied with a unanimous vote of 4-0. For: Dr. Peppes, Hawk, Farrington, Bussing.**

Chairman Clawson: Rights of Adjacent Property Owners. Letters were mailed?

Mr. Thompson: Yes, and no calls or complaints have been received.

**Rights of Adjacent Property Owners criterion satisfied with a unanimous vote of 4-0. For: Dr. Peppes, Hawk, Farrington, Bussing.**

Chairman Clawson: Hardship.

Ms. Farrington: It would create a hardship for the homeowners if they could not construct it because of where the setback line is.

**Hardship criterion satisfied with a unanimous vote of 4-0. For: Dr. Peppes, Hawk, Farrington, Bussing.**

Chairman Clawson: Public Safety and General Welfare. Staff notes that approval of this request would not affect this factor.

**Public Safety and General Welfare criterion satisfied with a unanimous vote of 4-0. For: Dr. Peppes, Hawk, Farrington, Bussing.**

Chairman Clawson: Spirit and Intent.

Dr. Peppes: I think that it has been met because, once again, the addition is running along the same portion that is legal, nonconforming and not getting any closer to the street than it already is. They're trying to keep what's there and not make it any different.

**Spirit and Intent criterion satisfied with a unanimous vote of 4-0. For: Dr. Peppes, Hawk, Farrington, Bussing.**

Chairman Clawson: We have voted in the affirmative on all five factors; therefore, we can support a motion for approval.

**A motion to approve Case 33-2021 Greg Rothers/Builder, Steve Schafer & Jill Smith/Owners - Request for a Variance to the average front setback in accordance with the LDO, Section 16-2- 5.3(D) in an R-1 District for property commonly known as 9709 High Drive – was made by Hawk; seconded by Farrington. Motion carried with a unanimous vote of 4-0. For: Dr. Peppes, Hawk, Farrington, Bussing.**

Case 34-2021 Katie Trenkle; David & Lauren Slocum/Owners \*CONTINUED\* - Request for a Variance to the rear build line in accordance with the LDO, Section 16-2-5.3(D) in an R-1 District for property commonly known as 3216 W. 83rd Terrace.

Case 35-2021 Seven Bartkoski/Owner - Request for a fence height exception in accordance with the LDO, Section 16-4-9.4 in an R-1 District for property commonly known as 8841 Ensley Lane.

**Staff Presentation:**

Wade Thompson made the following presentation:

Mr. Thompson: The applicant would like to enclose the rear yard with a 6' tall wooden fence. The new fence would connect to the neighbor's 6' tall fence to the north.

Chairman Clawson: You've pointed out where the fence is on the paperwork?

Mr. Thompson: Yes, it is the darkest lines.

Dr. Peppes: Just to be clear, the two black lines are what will be placed because the rest is already 6' tall?

Mr. Thompson: No, that is what he is asking for now. The neighbor to the north has a 6' fence, but the neighbor to the east does not have a 6' fence, so it will dead-end right there. They'll build a 6' tall fence at a later date to enclose the rest of the yard. We're only looking at the two black lines tonight.

Chairman Clawson: They'll have to come before us in the future?

Mr. Thompson: Correct.

Chairman Clawson: Other comments or questions for staff? Is the applicant here?

**Applicant Presentation:**

Steven Bartkoski, 8841 Ensley Lane, appeared before the Board of Zoning Appeals and made the following comments:

Mr. Bartkoski: We just basically want to match the rest of the houses in the neighborhood. In the forms I filled out, there were at least five houses with similar 6' fences. We have a split level with a grade change, so the normal-size fence would not match up as nicely. We also live on a corner, and it's a safety issue. We've had people cut through our back yard pretty often. Also, to build a 6' fence on the 89<sup>th</sup> Street side in the future would be more beneficial for sound. There is lots of hard sound that comes off there with cars, trucks, and construction. I apologize that I already built this part. I'm asking for leniency on that, and I hope you approve the exception.

Chairman Clawson: You're just asking for the two fences at this point, and in the future, you will come back before us to request the other?

Mr. Bartkoski: Would it be easier to just have it now and come in the future for another permit? I talked to Wade, and he said it stays with the house.

Mr. Thompson: You do have the power to grant the exception for the entire yard.

Chairman Clawson: I would suggest that it would be a good route here.

Mr. Bartkoski: I would appreciate that.

Chairman Clawson: Again, this request is being modified to include the two fences as indicated on the plan view plus the future fence on the back yard.

Mr. Bartkoski: Yes, to continue through the rest of the back yard and on the 89<sup>th</sup> Street side as well. The big reason is privacy and sound for my neighbors for the patio we have there, too.

Dr. Peppes: This remaining fence that we're going to discuss this evening will all be within the right setbacks?

Mr. Thompson: Yes, he is only asking for a fence height exception and not a variance for the placement of a fence on the corner lot.

Dr. Peppes: So, when the permit is pulled, it will be pulled for that exact spot?

Mr. Thompson: Yes, and it does actually state on the permit that all fences have to be behind the build line.

Chairman Clawson: Other questions? Thank you. Is there anyone who wishes to speak for or against this application? Do we have a motion?

**A motion to approve Case 35-2021 Seven Bartkoski/Owner - Request for a fence height exception in accordance with the LDO, Section 16-4-9.4 in an R-1 District for property commonly known as 8841 Ensley Lane - with the revision to include the entire back yard – was made by Farrington; seconded by Hawk. Motion carried with a unanimous vote of 4-0. For: Dr. Peppes, Hawk, Farrington, Bussing.**

Case 36-2021 Joseph Kern & Megan Jameson/Owners - Request for a Variance to the build line in accordance with the LDO, Section 16-4-1.2 (B) 6 in an R-1 District for property commonly known as 2813 W. 127th Street.

**Staff Presentation:**

Wade Thompson made the following presentation:

Mr. Thompson: The applicant would like to construct a new patio on the rear of the home that would include a pergola and a wood-burning fireplace. The plan shows the fireplace 7 feet from the southeast property line. To construct the project as shown on the plan, a variance for 8 feet is necessary.

Chairman Clawson: Are there questions for staff?

Mr. Thompson: I put some handouts I just received this morning at your station.

Dr. Peppes: This is the property that we're talking about here, so the back is where it will go. I wanted to see the adjoining property.

Mr. Thompson: It will mainly affect the property to the east. I have pictures of both on there. His address is 2813, and the patio would be replaced by a pergola. The packet shows the design.

Mr. Bussing: It appears there is a big tree in the spot where this would be. Is that tree coming down?

Mr. Thompson: I don't think any trees are being removed, but the applicant could answer. That is one of our concerns, as you can tell.

Chairman Clawson: It appears that there is vegetation in that area.

Mr. Thompson: Yes, you can see a considerable amount on both sides of the property line.

Chairman Clawson: Any other questions? Is the applicant here?

**Applicant Presentation:**

Joe Kern, 2813 127<sup>th</sup> Street, appeared before the Board of Zoning Appeals and made the following comments:

Mr. Kern: We're looking to build a pergola with a fireplace and a new stamped concrete patio. The reason for the variance request is the corner of our home is 23 feet from the property line. Due to the uniqueness of the location they built the home, we are automatically in violation of the setback. There is no tree to be removed. I'm not quite sure what tree you're referencing. We're not removing a tree, so I'd have to see which one you're talking about. There is a small pine shrub that I could remove this afternoon if that was needed. The goal would be to put in a new patio to improve the value and use of the home. The uniqueness of the house is the way it's situated. We're trying to improve the back yard. It's a generally large front yard with a decent side yard; it's just a very small back yard. We're trying to create a usable back yard, given the situation we have with the house. We're replacing the concrete that is already in place. We would like a stamped concrete to give it a more unique design. That's basically the exact same footprint that is already there. The two unique changes would be the pergola and the fireplace, although, we would be redoing the stamped concrete.

Chairman Clawson: Are there questions for the applicant?

Mr. Bussing: Do I understand there is a patio there now that you're going to remove and replace with a patio that's the same size?

Mr. Kern: Somewhat, yes. There are two poured concrete pads that are slightly different shapes. We're going to make one uniform concrete pad. One is about 1 foot shorter on one side. We have to rip them all out to make the design aesthetically pleasing and also to create a uniform look. In doing so, we're also going to need to rip out both concrete pads

because there is a drain from the gutters that we're going to need to bury so it doesn't cause additional water backup going to the house.

Mr. Bussing: What is immediately to the left of the house? I thought it was a tree.

Mr. Kern: That is a tree, but we're not building anywhere close to that.

Mr. Bussing: I was looking in the wrong place.

Mr. Kern: It's all situated in a very unique position.

Mr. Bussing: So, the neighbor on that side has his driveway there?

Mr. Thompson: Correct.

Mr. Bussing: It's his back yard opposite the proposed patio?

Mr. Kern: I guess the back yard would be where my finger is now (*referring to map*).

Chairman Clawson: Do we have any photographs of your neighbor's back yard that will be opposite your proposed patio?

Mr. Kern: Somewhat. We look into their back yard, which has an entire back patio area. We're trying to create some privacy and not look directly into their back yard. Right now, we look directly into their yard from our home.

Ms. Farrington: Wade, can you put up the 2809 AIMS Map up and draw where the patio situates?

Mr. Thompson: (*displays map on monitor*) The small square is about where the fireplace would be.

Ms. Farrington: So, is there a fence?

Mr. Kern: They have a metal fence.

Ms. Farrington: So, there's yard between your proposed fireplace and the metal fence. On the other side of the neighbor's fence is yard or woods?

Mr. Kern: There is one small tree. It's the trees that just have leaves, so it is more like a bush. They're about 6' tall. They grow flowers right around this time. They only grow maybe 10' tall. The leaves only come off what looks like the trunks, and then they bloom flowers. There are no trees right behind the fence.

Ms. Farrington: So, it's 7 feet from the top corner to the property line?

Mr. Kern: Yes.

Ms. Farrington: And then we have the recommendation of the Fire Department.

Mr. Thompson: Yes, ma'am.

Ms. Farrington: So, how many feet on the other side of the fence is the clearance before there is some sort of structure that would be on the neighbor's property?

Mr. Thompson: On the 2809 side, it is way more than that. The closest structure would be a pergola, and I don't know the distance. A rough guess would be probably 20 feet from the property line.

Ms. Farrington: So, it would be roughly 20 feet plus the 7 feet?

Mr. Thompson: Yes.

Mr. Kern: For another reference, the distance between their fireplace and their home is closer than our fireplace would be to their home. The exact fireplace they built is actually closer than ours would be.

Ms. Farrington: It's a concern of how close a structure in general is to the new fireplace you're proposing.

Mr. Kern: Our home would be the closest structure to the fireplace.

Ms. Farrington: A structure could be a pergola or what's in their yard. I'm not clear as to what's on the other side of that fence.

Mr. Kern: There is a pergola, but it's probably 15-20 feet from their fence line.

Chairman Clawson: Mr. Kern, have you seen this letter from the Fire Department?

Mr. Kern: I have not. No one has contacted me since I submitted the request.

Mr. Thompson: He was actually planning on being here, but he had something come up. That's why he sent the letter this morning.

Mr. Kern: I left the Fire Marshall two voicemails to get his consult, and he didn't return the call. He was on vacation. I was trying to do my due diligence but did not get in contact with him.

Chairman Clawson: Wade, could you quickly summarize the letter?

Mr. Thompson: Mainly, the two points are that, due to the 2018 International Fire Code, they would prefer that the structure be redesigned to contain the fireplace and possibly

put it on the other side of the pergola. Then, there is a fireplace insert in accordance with the fire code.

Mr. Kern: We were trying to build this in accordance with his recommendation and design before submitting. We've had significant trouble getting in contact with anyone to help us do that.

Travis Torres, Director of Building and Code Enforcement, appeared via Zoom and made the following comments:

Mr. Torres: We asked Justin to be here at the meeting in case there were questions since public safety is one of the five factors. He was unable to be here, so he wrote a memo summarizing his comments. Basically, he's saying that we enforce 10 feet to someone's house. Since we can't control what's on the other side of the property line, his recommendation from a public safety standpoint was at least 10 feet from the property line, which would still be a variance to the ordinance. It would require a 15' setback. There is nothing in our codes that explicitly addresses the matter. Our zoning ordinance has always taken care of it. We haven't had any variance request to that, so there hasn't been a need to address it in our code. It's probably something we'll look at going forward. He recommended either 10 feet, or there are inserts that would have less of a clearance requirement to the property line. We see those types of fireplaces go in all the time when they can't meet clearance to the house or to the property line.

Mr. Kern: I want to make two key points. In my voicemail, I asked if there was something we could do with the fireplace to be able to reduce the ash. I requested to make that part of the proposal and got no response back. We have no problem with that. Obviously, we'd rather build it correctly the first time. Secondly, there is no code or regulation saying we can't have an open fire pit. The one issue with moving the fireplace from the current proposed location is removing the privacy we're trying to create with this proposed build, and we could have a fire pit where the fireplace is anyway. The fire and ash could go literally anywhere with that. With the fireplace, especially with the insert, it would reduce the ashes from going anywhere as they would with an open fire pit, which is legally allowed. We'd like to keep the fireplace at that location because it's right near the door and is the community entertainment area versus putting the fireplace farther from the home and just dislocating the overall feel we're going for. We're happy to do the insert; we just would have liked to have been notified. We also find it strange that we can do an open fire pit that lets ashes go everywhere, but we're not allowed to do a fireplace with an insert because of the regulation.

Chairman Clawson: The suggestion the Fire Marshall had was to provide a 10' separation between any residential structure as well as the lot line. Could you meet that requirement?

Mr. Kern: Not with the proposal we have. We'd have to go back and have them redraw what we're proposing to do. I'm not quite sure where we'd put the fireplace because it would be off-center. Currently, it is centered and creates a small environment. We'd have

to move it, and then it would 10 feet from any property line, but again, it is really not what we're going for. To be honest, I don't see how it being there versus where we have it proposed would really be a hazard.

Chairman Clawson: This is a variance, so we have to evaluate the five factors. Public Safety and General Welfare is one that usually doesn't apply, but it could apply in this case. We would have to have a proposal that would be essentially approved by the Fire Marshall.

Mr. Kern: Again, in all fairness, the thing that is confusing to me is we are legally allowed to have an open fire pit that would contain the exact same size fire in that location. To not allow the fireplace is very confusing. In this case, we are actually building a chimney that we could put the insert in and would be happy to do to contain it as well as put the fire past the pergola, which is the ideal case. This would control the ash with an insert. Yet, if you refuse that and we say we want a fire pit around what we build for a seating area, the ashes would go straight up into the pergola, uncontrolled. Again, I do understand the safety argument and the reasoning for it; it's just in this case, I have a hard time understanding the logic behind the open fire pit versus the fireplace.

Chairman Clawson: It looks like you're going to have a chimney, and that comes up to the outside edge of the pergola.

Mr. Kern: It's 2 feet above the pergola.

Chairman Clawson: The pergola is made of wood, right?

Mr. Kern: Yes.

Chairman Clawson: Which is combustible.

Mr. Torres: That part is compliant. We worked with the applicant to have it be 2 feet above any portion of the pergola. That part meets building code.

Ms. Farrington: We're looking at public safety as an issue, and we have this memorandum from the Fire Marshall. I understand there was a lack of communication early on. You, as a homeowner, say that there is a possibility you could put an insert in versus having an open wood fireplace. If that's a solution to the problem, can this be shelved and reconsidered by the Fire Marshall to see if it meets it? I know there's a variance that has to be voted on regardless, but that possibility of going with a premanufactured insert may solve the safety issue.

Mr. Kern: What do you mean by premanufactured insert?

Ms. Farrington: There are premanufactured units, but there are also inserts that change the fire box part of an actual fireplace. I don't know if that's been explored.

Mr. Kern: I'm very confused. My understanding of an insert would be within the chimney flue. It would basically reduce the amount of ash or any potential combustible spark that could be released, not that we would put in an insert that would stop us from having a wood-burning fireplace.

Ms. Farrington: I don't know if there's a different solution. The Fire Marshall is not here to say that it is a possibility. I'm just saying that it could be looked at. Otherwise, if we just look at this as an open fireplace, we have the public safety concern. If there is an alternative where you don't have to move the fireplace but it meets the code, it could be considered.

Mr. Kern: Are you suggesting it would still be a wood-burning fireplace, or is this an insert that makes it look like one?

Ms. Farrington: There are various products like that. That's why I don't know if you're set on an open fireplace.

Mr. Kern: We are. The goal is to have a fire in the fireplace, so the insert I was referencing would be something at the top of the chimney to reduce the amount of ash.

Ms. Farrington: That is something to propose to the Fire Marshall to see if that covers it. I'm just giving suggestions because I think we're going down a path.

Mr. Thompson: I think you could definitely consider it on that factor, but I would also suggest going through the other four. If it passes all of those, maybe we could talk about that.

Chairman Clawson: I'd also like to talk about Uniqueness because in your discussion, you mentioned that, given the location of the house on the property, you have a small back yard. I looked on the AIMS Map, and there are a few in that area that have exactly the same situation. One is right across the street.

Mr. Kern: Did you measure the back yards? I have measured over 50 of the back yards. There are many that have corner back yards but none that are situated as identically as ours.

Chairman Clawson: The one I looked at was similar.

Mr. Kern: There are some that are similar but none that are close to the property line issue that we have.

Chairman Clawson: Any other questions?

Mr. Bussing: What subdivision is this?

Mr. Kern: Royce.

Chairman Clawson: Is there anyone who wishes to speak for or against this application? I suggest we go through the five factors, and we can determine where to go from there. We'll see if there is one that is going to be sticky. If there is, we could actually table this until the next meeting and address it in the future. Would that be acceptable?

Ms. Tomasic: I think it's the applicant who has to request a continuance. You vote on the factors, and if it is denied because there is a certain factor you don't believe is met, he can reapply and work on the issues with that factor. Once you vote, unless the applicant requests a continuance, you're voting and deciding.

Chairman Clawson: If we're voting on the five factors and there is one or more that we agree isn't met, at that point, before we vote on a motion, could the applicant request a continuance?

Ms. Tomasic: As long as you haven't voted on the case, he could request to continue it at that point or table the rest of the vote.

Mr. Kern: Out of curiosity, would I have to submit another \$150 fee as well as mail the letters in the event that I had to do this again? One of the issues would be that it seems like the input of the Fire Department, who didn't reply to my letter, is the key thing that is going to hold up the public safety issue, which was not my fault. It would therefore be a fee assessed to me because of non-response by the city.

Ms. Tomasic: If the variance is denied, a new application would be required for any future variance request.

Chairman Clawson: If you requested a continuance to the next meeting, you would not have to pay a fee.

Ms. Tomasic: Correct, but if you vote on approval or denial of the variance itself, any future action would require a new application.

Chairman Clawson: Of course. We'll evaluate the five factors. The first is Uniqueness.

Mr. Bussing: I believe it is unique in the way the home is located. While there may be others similar, I don't read it as completely one-off. I think this is a unique situation from the broader Royce Subdivision sense. The way it is position with odd angles makes it unique.

**Uniqueness criterion satisfied with a unanimous vote of 4-0. For: Dr. Peppes, Hawk, Farrington, Bussing.**

Chairman Clawson: Rights of Adjacent Property Owners. No complaints?

Mr. Thompson: Correct.

Chairman Clawson: And no letters in the packet.

**Rights of Adjacent Property Owners criterion satisfied with a unanimous vote of 4-0. For: Dr. Peppes, Hawk, Farrington, Bussing.**

Chairman Clawson: Hardship.

Mr. Bussing: I'm particularly disturbed with the lack of response this citizen received from the Fire Department, which seems to be one of the major issues we're struggling with. It concerns me that the lack of communication has now created a hardship for this applicant. I don't find the staff's recommendation of simply moving the fireplace to the west side as an adequate solution because it completely disrupts the balance of the proposal. I think it has been satisfied.

**Hardship criterion satisfied with a unanimous vote of 4-0. For: Dr. Peppes, Hawk, Farrington, Bussing.**

Chairman Clawson: Public Safety and General Welfare.

Mr. Bussing: I'll take a stab again. I think the issue has to do with this memorandum from the Fire Department and the availability or applicability of some kind of insert to reduce the fire hazard. If the applicant would guarantee, if you will, that any fireplace he constructs will contain an insert adequate to and with the approval of the Leawood Fire Department to address the fire concerns, then I would think the criterion would be met. We'll need feedback from the applicant on that, and I don't know how we get that.

Mr. Kern: Am I allowed to speak at this point?

Chairman Clawson: At this point, it is discussion between the board members. This appears to be an open item.

Dr. Peppes: I feel the same way. From what I read, if installing an insert may reduce the setback requirements, I think it satisfies everything we're looking at. I don't know what that means. I don't know what an insert is.

Ms. Farrington: They have fire brick and fire inserts that are available for open woodburning fireplaces. I don't have the expertise to know what would be approved by the Fire Marshall, but my recommendation would be that should be a caveat or looked into if we are looking at approving this.

Chairman Clawson: We're obligated to vote on this factor as presented in the proposal. If we don't think sufficient information is provided for compliance with the Fire Department recommendations, we're obligated to vote against this. That would be my opinion.

Mr. Bussing: My concern is the homeowner reached out to the Fire Department and got no response. We have a memorandum from the Fire Department with nobody here to explain it. Ms. Farrington has some expertise in this area, and she doesn't have recommendations. I'm reluctant to punish the citizen here for the lack of response from the city government. I just don't think it's right. He's done everything he's been asked to do, and the Fire Department and Planning Department thus far has failed to come along. I don't see how requiring him to wait or go through additional hoops is appropriate.

Chairman Clawson: I don't know what the problem was with the communication. Was he on vacation or something?

Mr. Thompson: The applicant stated that at one time, he was on vacation. I don't know what came up today.

Dr. Peppes: The problem I have now is from the information I have here, I can't say yes. I don't think that's fair because I would say yes if these things were met. You're right; these things aren't met, and if they aren't met, it means no.

Ms. Farrington: I'm struggling with this as well. You can talk all you want about nonresponse or timely manner, but we do have something in front of us. The recommendation is that it should be 10 feet of separation. If not, it says to consider installing a fireplace insert, which may reduce setback requirements. There is a solution there, but I have a hard time approving it as is if that solution is not looked at because it comes down to public safety.

Chairman Clawson: Frankly, I think it could be a relatively simple solution, but we can't address that right here. I don't have the expertise, and apparently, nobody else on the board does, either.

Ms. Farrington: If we vote in the negative and it does not get approved, the applicant will have to submit a whole new proposal? That's one option, or is the other that they can elect to have a continuance before we finish voting, and therefore, it would be moved to the next month, and we would review the same application with more information?

Chairman Clawson: If we go through all the five factors and the only one that we don't agree that has been met is Public Safety and General Welfare, then before we have a motion for denial, the applicant can request a continuance. In the meantime, we can get this thing settled and come back next month and re-address this.

Mr. Kern: I would like the ability to request a continuance rather than to have to reapply. If I had been notified earlier of the proposal, you would have been able to vote on would have included the insert, which would have satisfied it. Rather than having to pay the fee and send the letters again, I'd rather request the continuance and get approval from the city for the insert so it can be included in the proposal. It would be just a simple document confirming this insert would be in there, which would have been in the proposal originally if it had been requested by the city.

Chairman Clawson: You can meet with the Fire Marshall and agree on a solution. When we reconvene next month, you would indicate the solution, or maybe the Fire Marshall will provide documentation on what is acceptable. We would reconvene and vote on it. If we do not agree that one of these factors has been met, our only recourse is to vote for denial. If that's the case, you have to reapply and do the whole thing all over again.

Mr. Kern: I understand where you guys are coming from, from a procedural standpoint you can't approve something that is overtly in the opposition of public safety. I understand. Do you have to readdress all of the factors?

Ms. Tomasic: To be safe, if it's continued, it wouldn't hurt to go back through all of the factors. When you have more information, the ones you have already done could be quick, but if he's going to request a continuance, he needs to officially say it. We continue it to next month, and then you can reconsider any additional information to see if it would change any of your votes on any of these. For a clean record, it would make sense to re-vote on all of them.

Chairman Clawson: We need to vote on all of them?

Ms. Tomasic: You don't need to vote on them if it's being continued.

Mr. Kern: Should I request a continuance at this moment?

Ms. Tomasic: We can't give you legal advice.

Mr. Kern: I'll request a continuance at this moment. I would like to request additionally that the board reach out to the Fire Marshall personally.

Ms. Tomasic: You can reach out. The board cannot reach out.

Chairman Clawson: You can work with Wade, and between you and the Fire Marshall, you can get this settled.

Mr. Kern: I've just had difficulty with getting responses in terms of the correct procedure. I believe I actually sent an email to the entire board at one point because I couldn't get a hold of anyone.

Chairman Clawson: Wade can assist you with that.

Mr. Kern: Okay; I'm just trying to make sure that I'm following the procedures as you request to meet the five factors.

Chairman Clawson: The applicant has requested that we continue this to the next meeting.

**Case 36-2021 Joseph Kern & Megan Jameson/Owners - Request for a Variance to the build line in accordance with the LDO, Section 16-4-1.2 (B) 6 in an R-1 District for property commonly known as 2813 W. 127th Street – Continued to the next Board of Zoning Appeals meeting carried with a unanimous vote of 4-0. For: Dr. Peppes, Hawk, Farrington, Bussing.**

Mr. Torres: I did want to add that we didn't want to hijack the ordeal with public safety. It's a zoning variance request with all the criteria involved. The plan was just to have Justin be present in case you had questions about it. At the last minute, he had an engagement with his daughter. That's why there was a memo at the last minute. I can't speak to any phone calls that the applicant had or messages he left as far as that goes. As far as this, Justin was just responding, and we thought he would be here, but at the last minute, he wasn't able to be here. I just wanted to explain that.

Case 37-2021 John Stafford/Owner - Request for a Variance to the rear yard in accordance with the LDO, Section 16-4-1.3 (B) 6 c in an R-1 District for property commonly known as 3209 W. 91st Street.

**Staff Presentation:**

Wade Thompson made the following presentation:

Mr. Thompson: The applicant would like

**Staff Presentation:**

Wade Thompson made the following presentation:

Mr. Thompson: The applicant has started construction of a 957-sq.-ft. putting green/sport court that extends to the rear property line. For the putting green to remain in its current location, a variance of 10 feet is needed.

Chairman Clawson: Can you show me where in the LDO the requirement is?

Mr. Thompson: On the last page of the Staff Report, it says, "Courts shall not be constructed within a required front yard and shall be located at a minimum of 10 feet from any rear or side lot line."

Mr. Hawk: Is this different from a patio? It seems like a patio can be extended maybe from the house and has to be from the house. This, to me, is nothing more than just concrete on grass.

Mr. Thompson: It is different. Unfortunately, it falls under the definition of a sport court, which is required to have a 10-foot separation from a side or rear property line.

Mr. Hawk: What makes this a sport court?

Ms. Tomasic: I worked with Mark Klein, the Director of Planning, on this interpretation. Sports Courts are defined as paved areas and other surfaces designed for sports or similar recreational uses. Even though we typically think of a basketball or tennis court, other surfaces designed for sports are included. I interpreted this to mean that a putting green would fall under the definition of a sport court. It was my interpretation that a putting green would fall under this definition even though it is not what is traditionally understood to be a sport court.

Chairman Clawson: So, if it was grass, it wouldn't be a sports court.

Mr. Hawk: A putting green would be a sport court?

Ms. Tomasic: A putting green would be a sport court because it is designed for sports or similar recreational uses. If it was just regular grass, then it's just regular grass. It is a surface that is specifically put in and designed for sports or recreational uses.

Chairman Clawson: The proposed surface is astroturf or something?

Mr. Thompson: Correct.

Mr. Hawk: You're talking about the intended usage rather than what it looks like?

Mr. Thompson: I think what it mainly comes down to is that it's a synthetic surface and not grass.

Ms. Tomasic: I think the type of surface that it is could probably change the drainage. I don't know the specifics of how this one is being built. I have experience of putting greens being installed in back yards, and there are different things that go into it. It's not just putting a hole in the back yard; it is putting synthetic turf or something else and changing the makeup of the yard. The way that we have the sport court definition is general and broad enough that the synthetic turf makes it fall within the definition.

Ms. Farrington: Can you put up the picture with the slope on it?

Mr. Thompson: *(displays picture)*

Ms. Farrington: I think it's a good representation of what you're trying to explain. If it's just a grass putting green, there is sod. In this situation, there is a sub base of rock with a slope. Something like this is required with a patio or concrete court. Then the artificial grass is put on top, and it's used for athletic endeavors. I think the sub base explains a little more.

Chairman Clawson: The fact that it is designated as a sport court makes it require the variance because it is up against the rear property line.

Ms. Tomasic: Correct.

Chairman Clawson: Are there other questions for staff? Is the applicant online?

**Applicant Presentation:**

John Stafford, 3209 W. 91<sup>st</sup> Street, appeared before the Board of Zoning Appeals via Zoom and made the following presentation:

Mr. Stafford: First off, I'd like to apologize again. My contractor was one day away from finishing this job when Public Works came by and saw some rocks out front. They went around back and informed the contractor that we needed to pull a permit for the putting green, which I was not aware of. He claimed he was not aware of it, either. Going through the process, we found out about the setback requirement. My yard slopes pretty decently off the back of my house to the property where you see the putting green. This is just the most logical and feasible place to put it because of the slope and because of the general appearance. A putting green is an ancillary backyard use; it's not the main focal point. You wouldn't want it in the middle of your back yard, which is where it would be if it met the setback. I don't think my neighbors would like that. I don't think it would help property values or anybody. One of the issues that I really didn't understand is the use of artificial turf and this also being constituted as a sport court. It is not a hard surface sport court. Some putting greens are poured on a concrete pad. This is not. There are three layers of rock and sand that allow water to drain, and then there's artificial grass on top that matches the color of the rest of the yard. It's not concrete or hard plastic surface. I'm asking for some leniency on the way that artificial grass is used. In looking around Leewood, I see artificial grass used for a variety of applications. People put them under their trampolines, under swing sets, batting cages, and pitching tunnels. These are all right up against the property line, and they're lined with artificial turf, but those aren't sport courts, so they don't have to follow these guidelines, or maybe they do and they don't. If you've got a trampoline or swing set, these protrude 8 feet or more in the air. I'm talking about artificial grass that is flush with the ground. It is not very visible at all. This particular location in my back yard is a screened location. I made sure none of my adjacent neighbors had any issues. I got individual letters from all three of them. I guess that's about everything I've got to present. I can talk through the criteria if you'd like.

Chairman Clawson: Go ahead.

Mr. Stafford: Just to elaborate, the main issue is the setback. If I were to move this 10 feet into the yard, it would put it right in the middle of the back yard, where it slopes down. I don't even know if it's feasible at all to put a retaining wall in and rework the drainage. Frankly, it would be a big eyesore. I don't get any credit for this, but if this was denied, I'd have to have somebody come back out and rip it all out and redo it. That wouldn't be a fun process to go through. I wish I had known this all upfront. I would have gone through the right procedures, but I did not have any knowledge. I have one question. If you don't poke holes in the artificial turf, is it still a sport court? I guess I'm unclear on how you can and can't use artificial turf, but that might be for a later discussion. Frankly, I'm better off just continuing to have the artificial turf laid down,

leave it like that, and not poke any holes in it than to have to rip it all out. I'm curious if that makes a difference.

Ms. Farrington: I'd like to speak on this a bit further. To answer your question, when we're looking at our Leawood Development Ordinance, it has a statement as to what sport courts are, which includes paved or other surfaces designed for sports or similar recreational uses. They're subject to administrative approval by the Director of Planning for the location and design. What we're voting on here is the setback. The purpose is defined as being used for sports. There is no other reason to build this, so we have to view it according to how our ordinance reads and then consider the five factors and vote on them. With that said, you did provide a letter from an engineer, dated June 25<sup>th</sup>, talking about drainage, about the artificial turf that allows rainwater to drain through it and the sub base. We have to look at that as well. The one thing this tells us is that the proposed putting green area would not be graded to alter existing drainage patterns or divert runoff from the predevelopment conditions and that there would be no increase in stormwater runoff compared to the existing grass as well as no increase in runoff to the downstream storm sewer system. That lets us look at the things that would affect why we typically don't approve a court to be within 10 feet of the setback. It usually alters the landscape and the neighbors' properties with runoff. That factor needs to be taken into consideration. You did provide review of the situation.

Chairman Clawson: There could be other factors besides that. Obviously, you don't want to have a situation with a concrete surface that could affect drainage. Given the engineer's discussion and the fact that it's porous, it alleviates that concern.

Ms. Farrington: I'd also like to point out that this is not your traditional sport court. It's gravel with artificial turf that could be removed at a future point. It's not a concrete structure that has to be jackhammered and removed. It falls under the definition of a sport court, but it's a different thing to look at.

Chairman Clawson: Are there other questions for the applicant? You talked about the five factors. If the request is denied, you could construct a putting green but not in this location. That would be a hardship, I presume. Do you have any other comments about the five factors?

Mr. Stafford: I think we touched on the uniqueness. The topography of my yard is unique, and the landscaping makes this the most logical place for this. Obviously, my neighbors are in favor of it. I think I touched on the hardship. I touched on everything.

Chairman Clawson: Other questions for the applicant? Is there anyone who wishes to speak for or against this application? In that case, we'll evaluate the five factors. We will vote on each one, and if we agree that all factors are met, we can support a motion for approval. The first is Uniqueness of the Property.

Dr. Peppes: As I look at the pictures and the neighborhood that's there, I don't see anything in this back yard that is any different than what we see anywhere else other than this is the best place for it. I don't feel this has been met.

Chairman Clawson: Other comments?

**Uniqueness criterion not satisfied with a unanimous vote of 0-4. Opposed: Dr. Peppes, Hawk, Farrington, Bussing.**

Chairman Clawson: Rights of Adjacent Property Owners. All letters were mailed, no complaints. Letters were provided in support.

Mr. Thompson: That is correct.

**Rights of Adjacent Property Owners criterion satisfied with a unanimous vote of 4-0. For: Dr. Peppes, Hawk, Farrington, Bussing.**

Chairman Clawson: Hardship.

Dr. Peppes: Even though this is a hardship in the fact that it's not in the right position, there are other areas it could be in. There might need to be more construction to make it happen, but just because this is the only place that is the most level doesn't mean that it's the only place it could be. I think it has been brought on by the applicant.

**Hardship criterion not satisfied with a unanimous vote of 0-4. Opposed: Dr. Peppes, Hawk, Farrington, Bussing.**

Chairman Clawson: Public Safety and General Welfare.

Dr. Peppes: Let's talk about general welfare for a second. Even though Mr. Stafford currently has neighbors that say it's okay, it's right up against the fence, and it doesn't mean that the ones who come in next won't appreciate it. It's hard for me to say that it's been met.

**Public Safety and General Welfare criterion not satisfied with a unanimous vote of 0-4. Opposed: Dr. Peppes, Hawk, Farrington, Bussing.**

Chairman Clawson: Spirit and Intent.

Ms. Farrington: The intent of the ordinance is to protect the separation of properties and ensure the privacy of the neighborhood. Looking at having this sport court abutted right up against the fence does not go along with the spirit and intent of the LDO. That's why we have setbacks in place.

**Spirit and Intent criterion not satisfied with a unanimous vote of 0-4. Opposed: Dr. Peppes, Hawk, Farrington, Bussing.**

Chairman Clawson: As a board, we have felt that four of the five factors have not been met; therefore, we must support a motion for denial.

**A motion to deny Case 37-2021 John Stafford/Owner - Request for a Variance to the rear yard in accordance with the LDO, Section 16-4-1.3 (B) 6 c in an R-1 District for property commonly known as 3209 W. 91st Street - was made by Dr. Peppes; seconded by Hawk. Motion carried with a unanimous vote of 4-0. For: Dr. Peppes, Hawk, Farrington, Bussing.**

Mr. Stafford: Could I ask a question?

Chairman Clawson: You may.

Mr. Stafford: I know I applied for a zero-setback variance on the lot line. Could it be reduced from 10 feet to something less than 10 feet? That would be my Plan B.

Chairman Clawson: I'm afraid we can't answer that question, really.

Mr. Tomasic: I think the problem at this point is, since you've already voted and denied it as is, it would have to be a new application with a specific measurement. It's too late to modify the application at this point.

Mr. Hawk: I don't think he's asking just about this application; I think he's asking if a new application were submitted and it was over 10 feet away from the property line, would it be something that could be reviewed.

Mr. Stafford: I'm sorry; I wasn't asking about that. I was asking about if I submit again for a reduction to the setback, I wouldn't know what to submit. Is it 1, 2, 3 feet? The current submission was problematic for the reasons we discussed, and respectfully, I think it's a little excessive. If I moved it, I could put in some landscaping, and it doesn't get into the portion of my yard that would be problematic.

Chairman Clawson: It would still be a variance if it's less than 10 feet. Whether or not the board would accept it, you would have to submit a new application, and we would have to evaluate that application based on its merits.

Mr. Thompson: Even if it were 9 feet away, he would still have to meet the five criteria, which he will fail at least four of them again. He could build a sport court now without board action.

Chairman Clawson: The last case was for landscaping requirements.

Mr. Stafford: I do have another question, and I don't know if this is the right place to answer it. I've got a real problem on my hands, and I'd rather just have them lay down the artificial turf on top of all the work that's been done. I don't need to constitute that as

sports use; I could have it be artificial turf in my back yard. I just really don't want to have to dig this thing out and go through all of that. Maybe this is a question for Travis.

Ms. Tomasic: I think that probably is a question for Travis and Mark Klein and if there is anything else that would prohibit that. I think you're getting into a bit of semantics.

Mr. Stafford: I totally agree with you. I'm just trying to weigh my options on what to do. That's a question for Mark and Travis?

Ms. Tomasic: Yes.

Chairman Clawson: The next case is tied to the previous case.

Mr. Thompson: It's my belief that, even if he moves it 20 feet away, he will still have to have the landscape screening. It would be up to the applicant whether he would want to withdraw this case and go forward and have this case heard. If he decides to keep the putting green and move it, he would still have to have the landscape screening.

Ms. Tomasic: Another option would be to continue this one to a future meeting so he can decide what he wants to do. If he wants to bring back a new application for a variance less than 10 feet or to move the putting green somewhere else, he could decide if he wants to move forward with the variance. He could withdraw or continue while he sorts it out.

Chairman Clawson: There are three options. We could act on this today, or you could continue it, or you could withdraw it.

Mr. Stafford: I don't think it would make sense to continue it because if I submit a different application, it would be for a different project and it wouldn't be applicable. I'm not sure it would make sense to continue it. You certainly don't need to vote on it right now. It's the exact same set of rationale.

Chairman Clawson: Either we continue it, we vote on it, or you withdraw it.

Ms. Tomasic: As a side note, if you withdraw and resubmit a new application for a sport court elsewhere, if you still do not want the landscaping, you'll have to submit a new application to get a variance. The landscaping will follow wherever it is in the yard.

Mr. Stafford: I guess there's no downside to continuing it.

Ms. Tomasic: You could always ultimately withdraw it.

Chairman Clawson: It might make sense at this point to continue it, and during the next month, you can decide what actions you want to take.

Mr. Stafford: That's fine.

Chairman Clawson: So, go ahead and request to continue it, and we'll act on that request.

Mr. Stafford: I would like to request a continuance.

**Case 38-2021 John Stafford/Owner - Request for a Variance to the landscaping requirement for a sports court in accordance with the LDO, Section 16-4-1.3 (B) 6 h in an R-1 District for property commonly known as 3209 W. 91st – continue to the next Board of Zoning Appeals meeting – carried with a unanimous vote of 4-0. For: Dr. Peppes, Hawk, Farrington, Bussing.**

*MEETING ADJOURNED.*