

Salt Lake City Land Use Appeals Hearing Officer
Appeals Decision
PLNAPP2017-00954
Pilar and Chris Dechet
Building Permit Issuance Appeal
March 5, 2018

This is an appeal by Pilar and Chris Dechet (Appellants), neighboring property owners at 849 E. 18th Avenue, of the issuance of a building permit for expansion of the residence located next door to the Appellants at 835 E. 18th Avenue (the “Property”). The Property is currently owned by Samuel Cheshier and Darci Hebenstreit. The building permit applicant was the prior property owner, Scott Broussard (the “Applicant”).

A hearing on this matter was held before the Appeals Hearing Officer on February 15, 2018 9 (the “Hearing”). The Appellants appeared with their counsel, Craig Mariger, and the original applicant, Mr. Broussard appeared with his counsel, Kent Walling. Appearing on behalf of the City was Greg Mikolash, Planner.

Standard of Review

The standard of review for an administrative interpretation decision, in this case, the issuance of a building permit, is set forth in *Salt Lake City Code* (hereinafter “City Code”), Section 21A.16.030(E1), as follows:

The standard of review for an appeal, other than as provided in subsection E2 of this section [which does not apply here], shall be de novo. The appeals hearing officer shall review the matter appealed anew, based upon applicable procedures and standards for approval, and shall give no deference to the decision below.

Introduction

The question at issue here and the interpretive decision requested is to determine whether the Building Services Division’s calculation of the average front yard setback was consistent with City Code when they approved construction plans from the Applicant approving the remodel expansion of the existing residence on the Property.

Salt Lake City has recognized the need for a zoning administrator to interpret the Salt Lake City zoning ordinances. The authorizing code states: “The interpretation authority established by this chapter is intended to recognize that the provisions of this title, though detailed and extensive, cannot, as a practical matter, address every specific situation to which these provisions may have to be applied. Many of these situations can be resolved or clarified by interpreting the specific provisions of this title in light of the general and specific purposes for which those provisions were enacted” (21A.12.010). Thus, the task of the appeals hearing officer is to clarify and resolve the question stated above without deference to the previous interpretations provided by the zoning administrator.

The facts of the case are not in dispute and I therefore incorporate herein by this reference the facts set forth in the City’s Staff Report, dated February 8, 2018 (the “Staff Report”), including those facts set forth in the Appellant’s Appeal Application found as Attachment B to the Staff Report (hereinafter the “Appellant Brief”). The Staff Report lays out the context with respect to the issuance of the building permit at issue as follows:

Scott Broussard submitted building plans for a remodel/additions to the home in July 2016. The application included a calculation of the average front yard building set back prepared by the GML Group. This calculation was accepted and a building permit was issued with a 20'6" setback based on the average setback of 5 homes which included 785, 795, 805, 835, and 849 East 18th Avenue; or Lots 9, 10 11, 13, and 14 of the Northcrest Subdivision (Plat E). After construction was started, neighbors in the area complained that the required front yard setback was being violated and contended that the information submitted for the average front yard setback was erroneous and did not match survey information from a previous survey conducted at the Dechets' lot in 2008.

After several discussions with the Scott Broussard that there may be a problem with the manner in which setbacks were originally presented on the building permit site plan, and upon Scott Broussard confirming that the original averaging calculations were incorrect, Salt Lake Building Services issued a stop work order on November 14, 2016. This stop work order was specifically placed on framing and windows (along the front façade) pending resolution of the front yard setback issues. Mr. Broussard eventually submitted revised calculations based on a survey done by HA Entellus [“HA Survey”] that showed an average front yard setback of 28 feet; however, using 6 homes (adding 905 N. Little Valley Road - Lot 15 of the Northcrest Plat E Subdivision) for averaging. The Building Services Division accepted this new survey and the calculated average front yard setback of 28 feet. A revised permit, based on this calculation was issued on October 30, 2017 [“Permit”], allowing construction to continue, albeit with many changes to the front façade and retaining walls.

The Appellant alleged the following three potential errors in the Permit issuance by the City’s Building Services Division:

Error Claim No. 1

Appellants argue that the City erred in wrongly applying and interpreting the definition of “block face” used to calculate the average front yard setback as required under City Code.

Error Claim No. 2

Appellants argue that the City wrongly used data from the HA Survey which allegedly provided inaccurate data for Lots 10 and 11 in the Northcrest Subdivision which was used by the City to calculate the front yard setback for the Permit.

Error Claim No. 3

Appellants argue that the City erred in permitting the vertical additions for the Broussard remodel and expansion over the garage with an inaccurate front yard setback using inaccurate data submitted by the Applicant. Appellants claim the house is a non-complying structure and would be subject to the regulations in 21A38.050 of the City Code.

Discussion of Error Claim No. 1

Appellants argue that the City erred in wrongly applying and interpreting the definition of “block face” used to calculate the average front yard setback as required under City Code.

The Property is located in the FR-3/12,000 Foothills Residential district. City Code includes the following standard for the minimum front yard requirement (21A.24.040E1):

Front Yard: The minimum depth of the front yard for all principal buildings shall be equal to the average of the front yards of existing buildings within the block face. Where there are no existing buildings within the block face, the minimum depth shall be twenty feet (20'). Where the minimum front yard is specified in the recorded subdivision plat, the requirement specified on the plat shall prevail. For buildings legally existing on April 12, 1995, the required front yard shall be no greater than the established setback line of the existing building.

The Zoning Ordinance includes the following definition of the term Block Face in 21A.62.040:

BLOCK FACE: All of the lots facing one side of a street between two (2) intersecting streets. Corner properties shall be considered part of two (2) block faces, one for each of the two (2) intersecting streets. In no case shall a block face exceed one thousand feet (1,000').

In determining the front yard setback the City used a shortened block face, rather than the more than 2,000 feet of length for 18th Avenue. The City argues that 18th Avenue appears to be broken up into a few sections which face different directions as you travel along 18th Avenue because of a curve on the street. The shortened block face in question extends along the north side of Eighteen Avenue from 905 E 18th Avenue at the corner of Little Valley Road west towards the lot at 747 E 18th Avenue. Even though there is a recorded subdivision plat for the lots along the northern block face extending from 905 E 18th Avenue at the corner of Little Valley Road west towards the lot at 747 E 18th Avenue, the subdivision plat does not provide for a minimum front yard setback. Thus, per the City Code, we must look to the average setback in the block face to determine the minimum front yard setback.

City staff explains the Building Services Division rationale for using a shortened block face for the front setback calculation:

Although this block face is less than 1,000 feet in length, Lots 7 and 8 at 747 E and 765 E 18th Avenue, were not included because the Building Services Division determined that the orientation of Lots 7 and 8, located beyond a curve in the alignment of 18th Avenue, did not impact the visual compatibility of the development of the homes on lots 9 through 15. This

consideration was made in part because of language in the Purpose Statement of the FR-3/12,000 district that the district "is to promote environmentally sensitive and visually compatible development of lots not less than 12,000 square feet in size ... " Additionally, the curve in the street is sufficient enough and the orientation of the lots change between Lots 8 and 9 as one travels west along 18th Avenue that Lots 7 and 8 at 747 E and 765 E 18th Avenue do not visually relate to the homes to the east. The setback of the homes on Lots 7 and 8 are not visually apparent until one travels past Lot 9 when heading in a westerly direction. (*Staff Report, page 4*)

City staff further reasoning for the shortened block face as follows:

The definition noted above defines Block Face, in part, to include properties between two intersecting streets with a qualifier that the block face shall not exceed 1,000 feet. The Zoning Ordinance does not define intersecting streets or address what the equivalent of an intersecting street is or how to address bending or winding streets where use of the 1,000 foot dimension would consider lots that would not be impacted. The 1,000 foot dimension is a maximum dimension, not a minimum standard. The 1,000 foot dimension reference has been, by policy, used as a base length for determining front yard setback averaging; however, as is apparent on this and many other curvilinear streets, it is up to interpretation as to when individual homes on a block face are no longer impacted visually. In this case, the Development Review Planner issued the building permit believing that the submitted front yard average calculation was reasonable and compliant based on the information provided, meeting the purpose and intent of the FR-3 zone. A Development Review Planner will not issue a permit if it is known that a setback, or any other zoning requirement is obviously or egregiously noncompliant with the Code. Also, permits are reviewed and issued on a case-by-case basis based on ordinance and policy at that time. (*Staff Report, page 5*)

Appellants only real argument is that the curve in the street is not an "intersecting street or the equivalent of an intersecting street (a bend of 90°)" (See Appellant Brief, page 6). In the Hearing, Mr. Mariger also argued that the City Council has the right to revise and create City Code. However, it does not appear that the City in this instance was trying to re-write or revise City Code, The City staff had to attempt to apply City Code as best they can in a reasonable way. City Code quoted previously is helpful in this context: "The interpretation authority established by this chapter is intended to recognize that the provisions of this title, though detailed and extensive, cannot, as a practical matter, address every specific situation to which these provisions may have to be applied. Many of these situations can be resolved or clarified by interpreting the specific provisions of this title in light of the general and specific purposes for which those provisions were enacted" (21A.12.010). Mr. Ken Brown, a Senior Development Review Planner in the City's Building Services Division stated the City's approach that numerous staff discussions have found "that it does not make sense, in every case where a street curves, to consider that the houses on one side of the curve have an impact on those on the other side of the curve." In this instance, the City staff "felt that the properties on the other side of the curve would not be impacted by this proposal." (*Email from Ken Brown to Michael Maloy, dated February 1, 2017, at 4:09pm, a copy of which was*

found in Attachment E of the Staff Report). I am persuaded from visits to the site in question and from the evidence presented that the City was well within its limits to interpret that the curve in alignment before lots 7 and 8 was large enough to not affect the visual compatibility of the development of homes on lots 9 through 15. Thus, the City was doing its best to reasonably apply and interpret the City Code definition of “block face” and determined that a curve in the street created a different enough block face to justify using a shortened block face for purposes of the average front yard setback calculation. Based on all of the evidence presented, I find that the City appropriately applied City Code in using the lots along the shortened block face to determine the average front yard setback.

Discussion of Error Claim No. 2

Appellants argue that the City wrongly used data from the HA Survey which allegedly provided inaccurate data for Lots 10 and 11 in the Northcrest Subdivision which was used by the City to calculate the front yard setback for the Permit.

Because of my finding that the City appropriately used the shortened block face for its calculations of the front yard setback, we now turn to the actual calculations of the average front yard setback. Everyone acknowledges that the original survey data provided by the original applicant from the GML Group (not a licensed land surveyor) was significantly inaccurate with respect to the various setbacks of the lots found in the shortened block face, finding an average block face of only 20.5 feet. When neighbors complained to the City, the City required a licensed land surveyor to provide updated setback calculations. When Mr. Broussard did not provide licensed survey numbers, a stop work order was issued in November 2016.

Later Mr. Broussard provided the setback numbers provided by his surveyor, HA Entellus, which found an average block face of approximately 28 feet. In the meantime, the Appellants, concerned by what they had learned about the block face calculations of 28 feet commissioned their own survey by Diamond Land Surveying, who found an average block face calculation of approximately 32 feet. The Appellants provided this new information to the City, which the City apparently and inexplicably ignored when it issued a permit for Mr. Broussard’s revised construction plans in November 2017. The Appellants then promptly and timely filed their appeals of the City’s issuance of the revised building permit based on the 28 foot average front yard setback.

In spite of the appeal that was filed in November 2017, Mr. Broussard chose to move forward to continue with the remodel and expansion and did so at his own risk knowing that the building permit decision of the City was under appeal. I should mention here that the original applicant’s attorney, Mr. Kent Wallin, raised the issue of “zoning estoppel” suggesting that since the City already decided the issue of the front yard setback calculation of 28 feet, and Mr. Broussard relied upon that decision and proceeded to complete the remodel/expansion, that the City should be prevented from modifying the setback further. Such an argument is erroneous, as Appellants’ counsel pointed out in the Hearing, since the appeal is related to an administrative decision and interpretation by the City and not the actions of the original applicant. Furthermore, I was unable to

find any instance of statutory or case law that recognizes this idea of a “zoning estoppel,” especially where the City gave Mr. Broussard notice that he could only proceed with the remodel/expansion at his own risk. Mr. Broussard chose to proceed notwithstanding said risk.

It is helpful to see the summary of all of the survey information available to the City which was found in Exhibit 5 of the Appellant Brief, Attachment A to the Staff Report:

II. SHORTENED BLOCK FACE

Lot No.	Address	McNeil Group 9-19-08	GML Group 2016 ¹	L&H Associates 11-11-16	Diamond Land Surveying 5-26-17
9	785 18 th Ave.	48 feet	41 feet	46.6 feet	46.1 feet
10	795 18 th Ave.	35 feet	25 feet	25.2 feet	34.2 feet
11	805 18 th Ave.	32 feet	20.5 feet	20.3 feet	30.7 feet
12	Vacant Lot	NA	NA	NA	NA
13	835 18 th Ave.	21 feet	20.5 feet	20.8 feet	20.6 feet
14	849 18 th Ave.	48 feet ²	25 feet	35.9 feet	40.7 feet
15	905 Little Valley Rd.	21 feet	16 feet	19.4 feet	19.4 feet
Average Setback ³		34.1 feet	24.7 feet ⁴	28 feet	32 feet

While the City made no arguments that questioned the validity of the new survey data provided by the Appellants from the Diamond Land Survey, the Appellants bolstered their claim that the survey data upon which the City based its decision was erroneous with additional and updated survey data. The City’s only argument against challenging the inaccurate survey information was unpersuasive by claiming that they accept information from applicants in good faith. They argue as follows:

... [B]uilding permits are reviewed and issued on a case-by-case basis based on ordinance and policy at that time. Zoning reviews for setbacks are conducted on good-faith that the information being provided is correct and truthful, where permit information on other properties (such as surveys) are not reviewed to determine conflicts. It is the responsibility of Scott Broussard, and his representatives (architect, surveyor, contractor) to prove that the scope of work as being conducted is code compliant as per the permitted plans, where inspections later confirm such compliance. The contesting of information can generally be remedied through the inspection process, where permits can be updated to bring a noncompliance back to within code.

By the time that the Dechets raised issues about the survey discrepancies, the original building permit had already been issued and construction was well underway. The Building Services division informed the Dechets that the discrepancies could be addressed through the appeal process; however, by the time the Dechets originally complained to the City about the front yard

setback issue in October of 2016, the appeal period for contesting the original permit issued in July of 2016 had expired. Dechets have 10 days upon a determination (this being issuance of the permit itself) to file an appeal. In several meetings and telephone conversations with Building Services and Planning Division staff, it was discussed that an appeal *would* be able to be filed with respect to the issuance of an updated permit once this occurred. As mentioned previously, the updated permit was issued on October 30, 2017, where subsequently an appeal was filed on November 14, 2017.

It almost appears that the City is also making an estoppel claim inferring that the project was too far along to change it at this point. I am puzzled by the City's apparent ignorance of the survey information provided by the Appellants. The City should have had a heightened awareness and sensitivity to the survey information provided by the Applicant, especially since the previous survey numbers were clearly erroneous. They should have taken the data submitted by the Appellants and required the owner to further revise the construction plans or to at least dig deeper and require the surveyors to re-evaluate their data and make further submissions. Not only did the Appellants provide new survey data, but they provided historical survey data that they had provided to the City almost 10 years previously which supported the current data provided by the Appellants.

I find that the City erred in its calculation of the average front yard setback based on erroneous survey data on front yard setback calculations on Lots 10 and 11 which clearly and significantly differed from multiple surveys provided by the Appellants which the City should have considered. While I do not find that the City had an affirmative obligation to have had their own survey performed, but they could have and should have addressed the significant deviations in data when it was brought to their attention.

Discussion of Error Claim No. 3

Appellants argue that the City erred in permitting the vertical additions for the Broussard remodel and expansion over the garage with an inaccurate front yard setback using inaccurate data submitted by the Applicant. Appellants claim the house is a non-complying structure and would be subject to the regulations in 21A38.050 of the City Code.

The existing residence at the Property that is being remodeled/expanded was originally constructed with a 30 front yard setback. Because I have found that the average front yard setback should have been calculated by the City to be 32 feet, the Property is a "non-complying structure" with the meaning of Sections 21A.38.010A2 and 21A.62.040 which applicable definition states that "[n]oncomplying structures and improvements include legally constructed principal and accessory buildings, structures and property improvements, that do not comply with the applicable bulk and/or yard area regulations and design standards of this title *such as setbacks* and parking in the zoning districts in which the buildings or structures are located" (City Code 21A.38.010A2, *italics mine*).

Since the existing residence is a non-complying structure according to City Code, any alterations to the non-complying structure must meet the guidelines in the City Code related to noncomplying structures. Specifically, City Code states that the alteration (remodel) of a noncomplying structure cannot "create any new noncompliance or increase the degree of the existing noncompliance of all

or any part of such structure” (City Code, 21A.38.050A). Furthermore, City Code specifically states that “[v]ertical in line additions or extensions to existing noncomplying building portions are considered creating a new nonconformance and are not permitted” (Ibid., B). Because the in-line additions to the building on the Property extend into the required front yard setback (32 feet), it is an expansion and vertical extension to an existing noncomplying building, and thus cannot be approved.

Interpretive Ruling – Conclusion

Based on my review of the Code, case law, and the testimony and evidence presented in the Hearing and the Staff Report, and in a de novo review, I find that (1) the city appropriately used a shortened block face of Lots 9-15 for the calculation of the average front yard setback, but (2) erred by ignoring competing survey information of front yard setback calculations with respect to Lots 10 and 11, and consequently approved an erroneous average front yard setback of 28 feet that should have been 32 feet, and (3) further erred in approving any additions to the remodel that expanded the noncomplying structure. Therefore, the City’s administrative decision to issue the building permit for Mr. Broussard’s revised construction plans is overturned and the City must require that new building plans comply with this decision and modify the current residence to comply with this decision.

Thank you.



Matthew T. Wirthlin, Appeals Hearing Officer