

MEETING RECORD

NAME OF GROUP: CITY BOARD OF ZONING APPEALS and
COUNTY BOARD OF ZONING APPEALS

**DATE, TIME AND
PLACE OF MEETING:** Friday, April 12, 2013, 2:30 p.m., Conference Room
210, Second Floor, County-City Building, 555 S. 10th
Street, Lincoln, Nebraska

**MEMBERS IN
ATTENDANCE:** *City Board of Zoning Appeals:* Andrew Budell, George
Hancock, Scott Sandquist and Lynn Sunderman; (Tim
Francis absent).
County Board of Zoning Appeals: Jeff Frack, Tom
Thurber and Ed Woeppe; (Lynette Nelson and
Matthew Warner absent).
Tim Sieh of City Attorney; Brittany Behrens and John
Watson of County Attorney; Terry Kathe of Building
and Safety; Marvin Krout, Steve Henrichsen, Brian
Will, Sara Hartzell, Dave Pesnichak and Teresa
McKinstry of the Planning Department; Matt Olberding
from the Lincoln Journal Star and Annette McRoy.

**STATED PURPOSE
OF MEETING:** Special Meeting of City Board of Zoning Appeals and
County Board of Zoning Appeals

Brian Will opened the meeting and acknowledged the posting of the open meetings act posted in the room.

Marvin Krout thanked everyone for coming. He stated that Annette McRoy is present today. She will be the Mayor's candidate to replace George Hancock, who has elected not to be reappointed.

Will noted that today is informational only. Everyone introduced themselves. The bylaws will have public hearing before the respective boards at a later date.

DISCUSSION OF PROPOSED AMENDMENTS: CHAPTER 27.75, ARTICLE 19 AND BYLAWS

Krout stated his perspective on the proposed amendments. Every City is different and State statutes are different. It is remarkable how similar Boards of Zoning Appeals are. State statutes have a broader power and are more discretionary. The boards have been instructed by the City and County Attorneys very well. The reason that staff first started looking at Board of Zoning Appeals had nothing to do with specific appeals cases. The genesis of opening up the code and looking at these boards was his frustration that the process of taking in a variance seemed to be more cumbersome than necessary.

Thirty to forty years ago, everything got balled up with variances and appeals. Most of the time, the boards deal with variances. When you read the local zoning code, it kind of overlaps appeals and variances and treats variances like they are appeals. You have to file for a building permit with Building and Safety, pay a fee and get turned down. Then you get to appeal. The main purpose was to make the case for filing the variance easier. This will allow to file the application with the Planning Dept. We need to work carefully with Building and Safety. Walmart was not a variance, it was an appeal. Usually an appeal is where a property owner doesn't agree with Building and Safety and their interpretation of the zoning ordinance. Board of Zoning Appeals is the last stop before court. Walmart was a unique case, but not only the owner can apply for the appeal, it is very wide open. The neighbors appealed the decision of the building officials who issued a building permit for that business. The Board of Zoning Appeals decision on Walmart was not appealed to District Court. That was a sensitive case. There were attorneys on all sides. That was not a normal hearing. The notice to homeowners was modified. It had to be the attorneys on both sides calling witnesses. It was a completely different process. In the end, the city and county staff sat down and talked about the different process for appeals. The purpose was to do some streamlining.

Will stated that today, someone wanting to start a variance, starts with Building and Safety. Staff is recommending it start with the Planning Dept. It separates out variances and appeals, and establishes a process for appeals which were not previously addressed in the ordinance.

Tim Sieh explained the separate procedures for appeals and variances. Appeals are cases where there is believed to have been a mistake or there is a difference of opinion in the interpretation by an official in charge of enforcing the zoning code. The most common situation is where someone, often a neighbor, looked at another neighbor and disagreed whether it complies with what you can do on your property. They call Building and Safety to come and inspect and determine whether it is allowed or not. That is a typical case that might come up. There is some use of property that is contested. Then you have variances which is what the boards mostly deal with. The proposed Ordinances have been drafted with the changes. No longer would you need a denial from a building official. When the language addresses appeals, it speaks to someone applying for one and stating their reason for the appeal.

Brittany Behrens stated that most of the changes on the County side are identical in substance. They are trying to create the same process for City and County. You might see some additional changes that wouldn't have been in the City code. She saw some language clarifying some details that seemed to be a good idea and probably should have been there in the first place. There are a few additional things that were added in Article 19. For all intents and purposes, they are clean-up items to clarify what has probably been done all along.

Sieh stated there has been a debate that in order to have a variance, you have to have a unique or special circumstance with relation to the property. That has always been required to approve a variance. In the code, there has always been language that seemed to conflict. As staff looked at it, it became somewhat apparent that things were getting balled up. They tried to clarify the steps and procedures. A variance is height, density and area. You may hear references to two different types of variances; use and area. You cannot grant a use variance to let someone use the property for a use that is not in the zoning code. Appeals are where someone believes a Building and Safety official has made a mistake with regard to what the property owner or neighbor believes. The most common one is a difference as to how someone characterizes a use. One case was siblings who owned adjacent property. They didn't get along. The sister decided she didn't like what the brother was doing. She challenged his use and appealed to the local board of adjustments. This ended up in front of Nebraska Court of Appeals.

Terry Kathe added that variances show hardship, where appeals do not. Sieh agreed.

Sieh continued that applications for variances are alleging that something is depriving that person of a reasonable use of their property, that is not common to other pieces of property in that area.

Behrens stated she has talked about this with Sieh and agrees that it is the responsibility of the board members to pull the testimony and information from the applicant that will justify the variance. There are probably situations where someone probably makes a lot of sense, but that is not a good enough reason to approve an application.

Will believes the proposed language goes a long way to add some clarity. He believes it is helpful that it talks about reaching a decision, making sure the findings are stated and are part of the record.

Sieh stated there was a case in Battle Creek, Nebraska. The property had three front yards. The applicant wanted a garage and needed a reduced setback. The local board said it was a good idea, but didn't make a good set of findings as to why it was appropriate. Eventually, it ended up in the Nebraska Supreme Court and the court said no. Now you have a board saying yes and the Supreme Court saying no. If the homeowner relied on the Board of Zoning Appeals decision, you have a sticky situation where the homeowner might have to tear down that garage.

Sandquist questioned if three front yards are unique. Sieh replied that is not considered unique. It came down that this house was going to jut out further. It would have made it difficult to develop the area when everyone else had to be further back.

Kathe noted that it is stated in the Ordinance what the third front yard is, because it is common in the city.

Hancock stated that to him, construction of the language has always been difficult to write. He believes the specific reasoning should be written by a lawyer. Sieh responded that the specific language needs to be included in the Resolution and done in seven days. It is crucial that the Commissioners' reasons be articulated into the record.

Behrens stated that the last County meeting was a variance. She needed to add language to the Resolution and adjust for testimony that was given. The applicant was given some flexibility on how the yard was adjusted. We have some ability to be flexible, but the record needs to clearly reflect what is needed.

Hancock wanted to know if background information that has always been provided by the applicant, can be relied on. Krout believes you don't always need the precision of a building permit. He thinks as staff reviews the application, it is important for staff to have enough facts without the applicant submitting a full building permit application. Everyone else seems to do it that way.

Kathe stated that the City has created a different situation for staff. Most government agencies are general fund. Taxpayers fund what we do. Building and Safety is a special revenue fund which is strictly fees from permits. Because they pay for the service that they want, it is not a burden to taxpayers. Some of it is when the review is done, some development can get complicated. He believes there is a more thorough review with a permit than a site plan.

Sandquist believes the decision needs to be extremely clear. Will stated there could be potentially more risk on the part of the applicant on being clear on what they ask for.

Sunderman questioned if an appeal is declined, can someone reapply? Will replied that language says it is one year before someone can reapply, or they can take it to District Court. Kathe noted that it could be held over at the board level before a final decision is made.

Krout stated that the Planning Dept. does a lot of things that are close to variances; waivers and other ways that the city has developed as a workaround. They are able to do a lot of these administratively without building permits or surveys. It works and it has worked in other communities.

Will added that it is the intent for the text amendments to go before Planning Commission next month. If those are approved, staff will be back with bylaw changes.

Hancock would like to talk about the cross examination of witnesses. Will replied we could probably schedule another work session to talk about that.

Sieh stated that it is part of the due process. You have a right to cross-examine the witnesses. The purpose is to point out any inconsistencies. It goes back to a due process issue. It has not been done in the past, but has certainly been talked about.

Behrens believes it is good for the rules to give as much clarity as possible. Most of you would probably be comfortable in reigning someone in if they were getting off the scope, but the new language just clarifies things better.

Krout believes it is more challenging for the Chair. Hancock believes perhaps a little bit of guidance would be a good thing. Sieh noted that Commissioners want to make sure to ask legal staff any questions as they come up.

Krout noted that Rick Peo from City Attorney always attends Planning Commission meetings and lets Commissioners know when they run off the track.

Sieh stated these are quasi-judicial entities. Commissioners are acting more like a judge than a policy maker. Certain standards need to be met.

Behrens stated that on the County side, it is somewhat a different animal because County Board of Zoning Appeals decisions can be appealed to the County Board. Just because there is an additional step, it is still a quasi-judicial board.

Woeppel inquired who ultimately approves these applications. Behrens replied about one year ago, it was changed so that now, County Board of Zoning Appeals action is final action. It can be appealed to the County Board. Prior to that, it was a recommendation to the County Board and County Board had the final decision.

Woeppel asked who will be approving the proposed Ordinances. Behrens replied that the County Board will be the approving body for the Ordinances. The bylaws do not go to the County Board. Those are approved by the boards. Those are your rules as to how you operate.

FOCUS GROUP DISCUSSION

Sara Hartzell is trying to get some feedback on how the Planning Dept is doing. There is a lack of understanding on exactly what Planning is. Survey taking was done. Staff asked how important the issues were and how well staff is doing. The interesting thing is the gap between the two. There will be a full analysis of the demographics.

Woeppel wondered how this information will be used. Hartzell believes the gaps are good places for conversations. The main goal was to get people thinking about planning topics. About 175 people volunteered to get involved with focus groups.

Woeppel has had some great discussions. The county has been criticized. Some people have been critical of the County Board. People build in the county and then want no one else to do it. We need to make sure that the groups are well balanced.

Krout believes the focus groups will give a better idea about the spread of responses. There are different philosophies out there and we need to understand them and figure out how to use them.

Hartzell is also reaching out to other departments. Staff is looking to improve communication. We want to reach out to the boards that the Planning Dept. staffs. She wants to know what staff can do to help more. Dave Pesnichak will be taking notes. This is just a conversation. She has a few open ended questions.

Hartzell questioned how everyone thinks growth is progressing, if you think about it over the last couple of years.

Sandquist replied that we all know development is slow due to the great recession. Some would argue it is not over. Then, you could look around Lincoln and see there have never been so many cranes doing construction. Certainly, between the community and the powers that be, Lincoln is doing something right. Progress in general, is positive.

Hartzell asked members to describe their role on the Board of Zoning Appeals and how they view the purpose.

Sandquist believes the role is to grant or deny exceptions, exceptions to the rules as determined by authorities or jurisdictions.

Hartzell would like elaboration on why the boards feel this is important.

Woeppel believes it is important to provide fairness. We try to define fair.

Hancock stated that the board decides in a particular instance, if a particular rule needs to be enforced on this particular property.

Sunderman believes a lack of applications says the City is doing a good job.

Frack wonders if it is a good job or if the process is cumbersome.

Woeppel would say from personal experience, the work done in Building and Safety solves 95 percent of any problems. The work of all City personnel is exceptional.

Hancock believes people are better educated these days due to City staff.

Sunderman agrees. He believes staff is very good at helping someone with how something needs to happen.

Krout believes as a general rule, applications should be easy enough to handle without an attorney.

Kathe noted that you can't think of every circumstance, you can't write a rule for everything. Occasionally, you come across something different and that is where the Board of Zoning Appeals comes into play. That is where the Board is important.

Hartzell questioned how Planning staff is seen and what their role is.

Sandquist believes that board members certainly appreciate staff suggestions. Staff are people who have studied this more in depth and know the thinking. That can be a double edged sword.

Hartzell wanted to know what the board members think about staff being advisory, providing guidance and/or providing the facts.

Frack believes that providing guidance is very important.

Sandquist commented that he attended a County Board of Zoning Appeals meeting in the past. He thought it would be interesting to see the County side. After the information was presented, he didn't think it had a chance of being approved, but it was.

Woepfel believes that before County Board of Zoning Appeals was final action, it was always in the Commissioners' thoughts and minds that the application went on to the County Board for a final decision.

Hartzell questioned if there is anything that board members would like to see different in the meetings.

Hancock commented that there have always been wonderful people involved in these meetings, members and staff.

Sandquist thinks it is about as streamlined as it can get.

Hartzell encouraged everyone to please let staff know any suggestions they might have.

NEW MEMBER ORIENTATION

Will stated this portion of the meeting is to give members an idea of what goes on behind the scenes, what the process is. Keep in mind the process may change in the next few months with the proposed text amendments. City Board of Zoning Appeals meets the last Friday of every month. Application deadlines are set back from that date. Those dates are set by regulations. County Board of Zoning Appeals meets the second Friday of every month. The time line is essentially the same. Applications will come in and still meet the same time lines. Understand that the applicant has been working with staff for the better part of a month by the time they appear before the board. A flowchart was provided to board members for general information on how the process works with the City. There is a fair amount of staff involved. Currently, applications are initiated at Building and Safety. There is a difference in staff reports for Planning Commission and Board of Zoning Appeals. Reports for Planning Commission are very different, they are more subjective. Staff adds conditions that perhaps mitigate things and give recommendations. For Board of Zoning Appeals, those are different. They are much more condensed and brief. It is a listing of the facts of the case. Staff does not get subjective for the most part. We try to keep it to facts that are relevant and don't make recommendations to the board.

Kathe stated that Building and Safety tries to work with someone on what is all involved for a Board of Zoning Appeals application. There has to be a hardship and a pretty good reason. We let the applicant know that they are going to be asked to speak in front of a board and explain the reason why. We try to let them know it is a meeting where they have to provide facts. For a few years, a lot of people asked for things that were 'feel good' items without any facts. People were making comments that things should be approved because everyone should have one. Evidence needs to be provided. Staff tries to keep people informed on what meets the criteria.

Hartzell stated that when she writes the reports, she looks at these as not giving a recommendation. They are already asking for something that breaks the rules. She provides the evidence that can be used to make a judgement.

Will also notes if there is anything in the statutes or zoning regulations that need to be emphasized.

Krout stated that there are also two issues that Planning Commissioners deal with, conflicts of interest and ex parte. Board of Zoning Appeals members need to keep these issues in mind.

Sieh stated that this came up in the Walmart case. The approach Planning Commission takes is a good one for Board of Zoning Appeals purposes. It probably should be added in the board's bylaws. Board members should be asked if there has been any contact

with the applicant or someone who expresses any interest in an application. A member should be excused from the hearing if there is any conflict. Staff would make a Planning report exhibit if this happens. If a Commissioner has some kind of personal interest that will be promoted by making a decision in this case, there is nothing wrong with asking to be excused from the hearing.

Behrens believes it is important to state it for the record. Often times, they are harmless communications that may in fact be deemed harmless by the board, but it is best to lay it out at the beginning of the hearing and put it on the record up front.

Hancock has never received anything in writing, but has gotten a few phone calls from a lawyer or applicant. He has always told them that he doesn't pay any attention to any testimony that is not given at a meeting under oath. Sieh believes that is a good approach. It would still be best to state the ex parte communication at the beginning of the meeting.

Krout noted that all communication to the Planning Commission is forwarded to all parties, staff and commissioners.

Sunderman inquired if that would be the best approach. Sieh stated that he would suggest if anyone receives a comment, that they submit their comments to the board in writing. The real issue is that it is ex-parte communication outside the other commissioners.

Sieh further stated that there is the Nebraska Accountability and Disclosure Commission. A question can be submitted to them to determine any possible conflict and they will issue an opinion. Behrens also noted that if there is a situation that is not legally a conflict, a member can always excuse themselves for something that can be perceived as an appearance of impropriety, if they are uncomfortable.

Hancock shared a summary from four years ago. 47 percent of applications were approved, 43 percent were denied and 10 percent were given conditions. He believes a lot fewer applications are seen these days due to the efforts of staff working with potential applicants on finding solutions to their issues. He thanked everyone for his time on the board.

There being no further business, the meeting was adjourned at 4:30 p.m.