

Board of Zoning Appeals
February 20, 2019
7:00 P.M.
County Administration Building
201 S. Pearl Street
Paola, KS

AGENDA

1. Call To Order

2. Pledge Of Allegiance

3. Roll Call

4. New Business

a. Oaths of Office – Ken Berg and Lloyd Peckman

b. Election of Officers

Article IV, Section 4 of the By-Laws states, “Term of office shall be one (1) year and officers may succeed themselves one time for a total term of two (2) years. A member may serve again as an officer after one year has passed from the expiration of the most recent term.”

➤ Larry Sumner has served two (2) terms as Chairman and is no longer eligible for re-election as Chairman.

➤ Lloyd Peckman has served one (1) term as Vice-Chairman and is eligible for re-election as Vice-Chairman.

c. Adoption of 2019-2020 BZA Calendar

d. Approval of Minutes – December 19, 2018

5. Old Business

6. Other Business

Any other business the Board may wish to discuss.

7. Planning Director Report

8. Adjourn

Public Hearing Procedure

1. Chairman announces agenda item.
2. Members describe what, if any, contacts they might have had with applicant or interested party regarding the case; indicating the nature of the communication and whom it was with.
3. Members describe what, if any, conflicts of interest they may have and dismiss themselves from the hearing room for the duration of the hearing.
4. Staff presents the application with staff's recommendations on the request.
5. Chairman opens the public hearing.
6. Applicant or agent of the applicant makes brief presentation of the case or request.
7. Members ask for any needed clarification of the applicant or agent.
8. Chairman solicits comments from the audience.
9. Members ask for any further clarification from the public, applicant or staff.
10. Chairman closes the public hearing.
11. Members deliberate on the request and take action if able to do so. Members should present findings to substantiate the action taken.

Board of Zoning Appeals Schedule

2019			2020		
Hearing Date	Application Deadline	Public Notice	Hearing Date	Application Deadline	Public Notice
16-Jan-19	03-Dec-18	17-Dec-18	15-Jan-20	02-Dec-19	16-Dec-19
20-Feb-19	07-Jan-19	21-Jan-19	19-Feb-20	06-Jan-20	20-Jan-20
20-Mar-19	04-Feb-19	18-Feb-19	18-Mar-20	03-Feb-20	17-Feb-20
17-Apr-19	04-Mar-19	18-Mar-19	15-Apr-20	02-Mar-20	16-Mar-20
15-May-19	01-Apr-19	15-Apr-19	20-May-20	06-Apr-20	20-Apr-20
19-Jun-19	06-May-19	20-May-19	17-Jun-20	04-May-20	18-May-20
17-Jul-19	03-Jun-19	17-Jun-19	15-Jul-20	01-Jun-20	15-Jun-20
21-Aug-19	08-Jul-19	22-Jul-19	19-Aug-20	06-Jul-20	20-Jul-20
18-Sep-19	05-Aug-19	19-Aug-19	16-Sep-20	03-Aug-20	17-Aug-20
16-Oct-19	02-Sep-19	16-Sep-19	21-Oct-20	07-Sep-20	21-Sep-20
20-Nov-19	07-Oct-19	21-Oct-19	18-Nov-20	05-Oct-20	19-Oct-20
18-Dec-19	04-Nov-19	18-Nov-19	16-Dec-20	02-Nov-20	16-Nov-20

If an application submittal deadline falls on a weekend or holiday, the deadline will automatically fall to the next business day.

The Miami County Board of Zoning Appeals meetings are held as needed on the 3rd Wednesday of the month at 7:00 p.m. in the County Commission Chambers, 201 South Pearl, Paola, KS 66071. Please note that the the annual business meeting is held in January and will be held whether or not an application has been received.

Per Article VIII, Section 2 of the By-Laws of the Miami County Board of Zoning Appeals, "Agenda items shall be approved by a vote of four (4) BZA members." The Board is comprised of seven (7) members and there may be instances where only four (4) or five (5) members are in attendance to consider a request. If this is the case the request can still only be approved if four (4) members vote for approval of the request. An appeal of a decision by the Board of Zoning Appeals to the District Court of Miami County, Kansas, must be filed within 30 days of the final decision of the Board.

Please refer to Article 23 of the Miami County Zoning Regulations for detailed information regarding the Board of Zoning Appeals.

**MINUTES OF THE
MIAMI COUNTY BOARD OF ZONING APPEALS
DECEMBER 19, 2018**

**MIAMI COUNTY ADMINISTRATION BUILDING
COMMISSION CHAMBERS
201 SOUTH PEARL STREET
PAOLA, KANSAS 66071**

ATTENDANCE:

CHAIR: Larry Sumner

VICE-CHAIR: Lloyd Peckman

MEMBERS PRESENT: Tom Bach, Chris Brown, Ken Patrick, and Mark Ross

MEMBERS ABSENT: Ken Berg

PLANNING DIRECTOR: Teresa Reeves

COUNTY COUNSELOR: David Heger

PLANNER: Kenneth Cook

SECRETARY: Angie Baumann

COUNTY COMMISSIONERS: None present

COUNTY CLERK: Not present

PRESS: Not present

MINUTES

DECEMBER 19, 2018

MIAMI COUNTY BOARD OF ZONING APPEALS

1. Call To Order:

Chairman Sumner called the meeting to order at 7:00 p.m.

2. Roll Call:

Six members were present for roll call, which constituted a quorum. Ken Berg was absent.

3. New Business

a. Approval of the August 15, 2018 Minutes

Ross moved to approve the August 15, 2018 minutes as presented, which was seconded by Patrick. The motion carried unanimously, 6-0.

b. 18004-VAR (Nolan)

Kenneth Cook presented the staff report for consideration of a request for a variance from the Floodplain Regulations, Section 12-6.02.1.b (Non-Residential Construction) of the Miami County, Kansas Zoning Regulations, requiring all non-residential structures to have the lowest floor elevated a minimum of one (1) foot above the base flood elevation, or be floodproofed to at least one foot above base flood elevation. The Applicants have constructed a 60-foot by 22-foot structure for agricultural use at the existing grade without a floodplain development permit or building permits. The subject property of approximately 91 acres is zoned Agricultural (AG) and addressed as 25910 Spring Valley Rd, which is located in the Southeast Quarter of Section 14, Township 16, Range 24, Wea Township, Miami County, Kansas. Submitted by Dale A. Staten of Thunderhead, on behalf of Ronald and Phyllis Nolan, property owners of record.

Cook noted that Miami County's floodplain maps were originally drawn in 1977, and noted that the county did not join the National Flood Insurance Program (NFIP) until 1995. He then covered the events leading up to the variance application, beginning with the Applicants' construction in 2015 of a 1,320 square foot addition on the south side of a previous addition without a building permit.

Cook highlighted provisions in the floodplain regulations for the consideration of variances for agricultural and accessory structures. He added that the Applicants' request is based on the fact that the structure is agricultural.

Cook added that most variances have to meet the five (5) standards for variances per State statute, and that this one must meet not only those five (5) standards, but also the requirements specifically addressed in the floodplain regulations. Cook pointed to the *Floodplain Management Bulletin: Variances and the National Flood Insurance Program, FEMA P-993 / July 2014* ("Bulletin P-993"), and read aloud the additional determinations that a community participating in the NFIP must make when considering a variance from floodplain ordinances:

- Good and sufficient cause and exceptional hardship exist;
- The variance will not result in additional threats to public safety, extraordinary public expense, or fraud or victimization of the public; and
- The variance is the minimum action necessary to afford relief.

Cook also read aloud the “Key Issues to Consider,” found on Page 4 of *Bulletin P-993*:

“A community should consider four important issues before granting a variance: (1) the community’s liability, (2) the cumulative impacts on the floodplain of granting multiple similar variances, (3) the variance decision will last for the life of the structure, and (4) whether granting a variance will jeopardize the community’s participation in the NFIP.”

Cook expressed that Consideration No. 4 is especially important, as FEMA will, from time to time, look at how a community is enforcing its regulations. He explained that FEMA may place a community on probation if it is not adequately enforcing the regulations, which would require every flood insurance policyholder in the community to pay a surcharge on their premiums for as long as the community is on probation. He added that in cases where FEMA has found that the regulations are not being enforced at all, the community may be removed from the NFIP, which would result in no flood insurance policies being issued through the NFIP.

Bach asked Cook if everyone who builds in a floodplain is required to have federal flood insurance or private flood insurance; and, if they can opt out or opt in. Cook answered that the federal requirement is that you must have flood insurance if you have a federally backed mortgage and your structure(s) is located in a Special Flood Hazard Area. He explained that if the mortgage is paid off, the owner may choose not to have flood insurance.

Bach asked if, in the event an owner’s property is destroyed by a flood, the owner may seek relief from FEMA, whether or not they have flood insurance. Cook answered that he thinks some federal funding may come into play in the event of a federally declared disaster or possibly a State disaster declaration. He added that even if a property is not in a floodplain an owner can obtain a preferred risk policy, which is less expensive.

Bach asked if a property owner may still obtain flood insurance in the event FEMA were to disallow the county to participate in the NFIP. Cook answered that it is his understanding that there are very few insurance companies that provide private flood insurance.

Patrick noted that in his experience, flood insurance policies are obtained through a regular agent, but the policies are issued through the federal flood insurance program. He added that he believes flood insurance is available only for older buildings, and that a building permit cannot be obtained if newer buildings are proposed to go in a floodplain.

With regard to whether “good and sufficient cause” exists, Cook noted that it appears the main issue is that the structure was constructed without building permits. Patrick asked if it was the Applicants’ contractor, who did not obtain the building permits. Cook confirmed.

Ross asked when the original structure was built. Cook explained that the 1,320 structure is on the south end and that two other structures were built there: one in 1991, which was prior

to any adopted regulations, and the other in 1999, for which a building permit was issued. He added that staff believes the floodplain should have been considered as part of that permit application; however, staff can find no record of a floodplain development permit being issued. Cook stated that staff contacted the State to seek advice on how to proceed with this request, considering that the previous structure was possibly not built in compliance with the floodplain regulations. He noted that the direction staff received from the State was that the statute of limitations for enforcing the floodplain regulations for the previous structure has passed. Cook noted that the structure that is the subject of this application was built in 2015.

Cook reminded the Board that the Applicants' agent is in attendance this evening and will be making a presentation, and suggested that the Board delay its deliberation until the Applicants' agent has had the opportunity to speak.

Cook then addressed Section 12-7.06 of the Zoning Regulations: "Conditions for Approving Variances for Agricultural Structures" as well as Section 23-6.04 of the Zoning Regulations: "Standards for Variances", and provided staff's input regarding each.

Sumner asked Cook to confirm that the most recently constructed building is the subject of this variance request as well as the subject of staff's recommendations. Cook confirmed.

Sumner invited the Applicants' representative to speak.

Architect Dale Staten, of Thunderhead, approached the podium and introduced himself as the architect for Ron and Phyllis Nolan. He then highlighted details of the Applicants' narrative. Staten explained that a licensed contractor, whom the Applicants hired based on referrals, and whom they believed to be reputable, built this shed addition. He stated that this issue did not come to light until the electrician, whom they later hired to install security lighting on the shed addition, could not obtain a permit for such. Staten explained that the electrician was told that the building itself had not been permitted and was also in a floodplain, requiring a floodplain permit. Staten noted that this issue had laid dormant until the Applicants purchased from their neighbor approximately five (5) acres adjacent to their driveway to finish the fence on the other side of their property and discovered, while attempting to record the deed, that the deed could not be recorded in their names due to this issue. He stated that the Applicants have already paid their neighbor for the five (5) acres and have engaged a civil engineer, a structural engineer, a surveyor and Staten himself. He explained that the State's solution is to have holes cut in the side of the shed, a trench dug the length of the building, and the dirt trucked off. He added that because the building was not inspected, the structural engineer cannot verify the integrity without digging up the foundation. Staten stated that the Applicants have gotten into a tar-baby and feel they are experiencing an exceptional hardship.

Staten noted that the buildings are uninsured. Alluding to *Bulletin P-993*, Staten stated that the county abides by this document, which has been provided by the county's insurer, but that it this document is not part of the county's regulations.

He noted that the regulations point out that most buildings are preferably built one (1) foot above base flood elevation; but, there is an exception for agricultural buildings. Staten further noted that agricultural buildings may be wet-floodproofed and should resist hydrostatic pressure and buoyancy. He asserted that this building certainly accomplishes this, especially once the additional concrete is poured in it and considering that the building is steel and concrete with a gravel floor. He asserted that the Applicants have definitely met the technical criteria.

Staten explained that when he met with staff, staff directed them to first obtain approval from the State. Staten noted that they had already been in contact with the State and that the civil engineer already knew the three options the State would offer. He explained that the Applicants therefore chose to dig the trench and remove the ballast area. He explained that the State likes to see volume removed in an amount equal to the volume being added. He added that what staff is asking the Applicants to do—put more fill underneath an agricultural building and raise it one (1) foot above base flood elevation, and add a ramp up to it, thus adding more volume—is counterintuitive to the direction provided by the State.

Staten noted that the county's floodplain regulations have been adopted, more or less in whole, from the State and have likely been slightly modified. He added that whenever there is a question about how to regulate the floodplain regulations staff calls the State for their interpretation.

Staten noted that the Applicants already have a high bar for technical justification because they are digging an open trench parallel to the thread of the creek. He stated that his team feels, and the seven State agencies that approved them agree, that the technical justification has been met. With regard to meeting the minimum justification for the variance, Staten expressed that his team also feels that they have met the NFIP suggestions. He added that although the document is not one that the county regulates by, it serves to clearly lay out what a minimum threshold is. Staten explained that the Applicants are not asking for anything other than an agricultural building on-grade.

Staten noted that the NFIP points out what is *not* an exceptional hardship. He stated that the Applicants have lived on the property for 50 years and want to take care of it. He further stated that the building is a shed, which was built in good faith. He suggested that the financial hardship to the Applicants is exceptional in that the Applicants are at a different point in their earning potential than in years past, and will ultimately pay possibly \$20,000 in professional fees, in addition to the cost of digging a channel and trucking the dirt offsite.

Staten noted that the site is unique as most of the property is in the floodplain; and, what is not in the floodplain is up on a bench and is over 50 feet above the floodplain. Staten went on to describe the length, pitch, grade, and curvature of the driveway. He stated that it is not feasible to take large equipment, a concrete truck, or long sheets of metal up the driveway and that is not where the work bench, the utilities or the other buildings are located.

Staten added that the building is structurally self-supporting and does not connect with the other buildings. He reiterated that this is a unique situation.

Sumner asked Staten if the Applicants have followed some or all of the recommendations deemed to be acceptable by the various State agencies they have been in communication with. Staten answered that previous to his involvement the Applicants were provided with a pamphlet for floodproofing, which they took to an engineer, who instructed them to cut holes for flood vents. He stated that the Applicants had this done, but were told by Reeves that they needed to do more in order to get the permit.

Reeves interjected, stating that the Applicants should not have cut the holes ahead of time, that staff needed a diagram, and that a simple letter from the State was not sufficient. Reeves then clarified that when the State sends out a request for comments regarding floodplain development permits the request goes to seven agencies, each one of which views it through a different lens and reviews it for compliance with their specific regulations. She added that

just because a State agency makes suggestions of what should be done does not mean it is granting compliance with our local regulations. She further explained that the State is basically saying that if approved, there are certain things the applicant must do to comply with that particular agency's regulations.

Sumner asked if a list of all the requirements provided by all of the State agencies is available. Reeves clarified that the State agencies' responses are with regard to compliance with their regulations and do not constitute a variance approval. She added that before a floodplain development permit may be issued, staff must ensure that each one of those agencies has been contacted and has had an opportunity to review regarding endangered species, historical structures, etc.

Bach commented that his biggest concern is how the granting of this variance will affect the other property owners in Miami County with regard to the cost of their flood insurance, their liabilities and their ability to obtain flood insurance.

Sumner asked Staten if the five (5) acres recently purchased by the Applicants are located in the floodplain. Staten confirmed.

The Board proceeded to review the Site Plan and discuss with Staten those features of the property that Staten described as unique physical and topographical conditions.

Ross asked for confirmation that in the event the Board votes not to approve the variance request that the other two buildings will *not* be affected, and that the other two buildings are not the subject of the variance application. Reeves and Staten confirmed.

Peckman read aloud the following from Page 5 of the staff report:

“If a community is placed on probation from the NFIP a surcharge is added to the premium for each policy sold or renewed in the community.” He expressed that this would be a hardship for everyone in the community who needs insurance.”

Patrick asked Staten if he has anything further to add.

Staten suggested that if insurance is the sticking point the Board could notify FEMA that they are considering granting the variance, noting that the only issue is the insurance, and could ask FEMA in the event the variance is approved, if the rates would go up as a result.

Patrick responded that this is not how it works and that FEMA would instead do a comprehensive audit and would make its decision based on that audit.

Staten added that prior to tonight's meeting he asked staff how many such variances have been approved and how long they have been administrating this. Staten noted that this has been since 2014 and that staff told him there have been none granted.

Several Board members expressed their agreement with this fact.

Peckman commented that the property will surely be sold within the next ten years, and that he believes a bulldozer may be the best way to solve the problem.

Patrick commented that the next owner may not understand what they can or cannot do with the structure.

Sumner asked for any additional staff comments. Reeves then read aloud the following from Article 23-6.04.1 of the Zoning Regulations:

“The Board of Zoning Appeals shall not grant a variance unless it shall, in each case, make specific written findings of fact, based upon the particular evidence presented to it, that all of the following standards have been met.”

Reeves reminded the Board that even if only one of the standards has not been met the Board is forced by State statute and by the county’s regulations to deny the application. Reeves also stated that as members of the NFIP the county is required to uphold those regulations. Reeves then read aloud the following from Page 22 of the Kansas Department of Agriculture (“KDA”) *Floodplain Management in Kansas Quick Guide* (“*KDA Quick Guide*”):

“A community shall notify the applicant in writing over the signature of a community official that: (i) the issuance of a variance to construct a structure below the BFE will result in increased premium rates for flood insurance up to amounts as high as \$25.00 for \$100.00 of insurance coverage and (ii) such construction below the BFE increases risks to life and property.”

Reeves added that the rates have increased substantially. She continued reading from Page 22 of the *KDA Quick Guide*:

“Think carefully about issuing a variance to build below the Base Flood Elevation. Not only will the property be more likely to get damaged, but insurance will be very costly . . . If your community has a pattern of granting variances inconsistent with the local ordinance, sanctions can be imposed—costing even more!”

Bach asked that Article 23-6.04.1 of the Zoning Regulations be read aloud again. Patrick read it aloud.

Reeves added that the State cautions everyone not to issue floodplain variances; but, in a unique circumstance—which should be few and far between—these are the guidelines to follow. Reeves also noted that the 2017 flood caught many by surprise and did shocking damage in the Hillsdale area due to the velocity of the floodwaters.

Sumner asked how many floodplain variances have been granted. Reeves answered that she cannot recall any that have been granted. Patrick agreed.

With regard to the State's approval, Cook added that the State had specifically noted as a condition of approval on their permit that the project must fully comply with local floodplain regulations. Cook noted that the project complies with the State's requirements, but it must still comply with the local floodplain regulations. He then read the following from *Bulletin P-993*:

“A variance granted based solely on the applicant obtaining a permit or funding grant from a federal or state does not meet the NFIP requirements for CFR 44 § 60.6.”

Cook stated that even though the State of Kansas has approved this project, it does not meet that standard. Cook then read the following segment from Section 3.2 of *Bulletin P-993*:

“A properly issued variance is granted for a parcel of property with “physical characteristics” so unusual that complying with the floodplain management ordinance would create an exceptional hardship to the applicant or to surrounding property owners. Those characteristics must be unique to that specific parcel or property and not be common to or shared with adjacent parcels. The unique characteristics must pertain to the land itself and the intended function of the structure, not to its inhabitants or the property owners. Therefore, financial hardship or the health condition of the property owner is never a sufficient cause for granting a variance.”

The Board then took a brief recess at 8:56 p.m. The hearing resumed at 9:01 p.m.

Cook invited questions from the Board.

Sumner commented that his main concern with granting the variance is the possible consequences with FEMA. He asked staff if they had contacted FEMA to obtain guidance in this particular case. Reeves answered that it is not really necessary to contact FEMA because FEMA has provided documents for guidance.

Ross stated that aside from the NFIP, the Board must still look at the five (5) variance standards. He commented that if the Board were to base their decision on just those five (5) standards that he does not see how the Board can approve this.

Ross moved to deny the variance based on the five (5) findings as presented in the staff report.

Bach asked to amend the motion by adding that the Board “concur with staff’s recommendation of denial of points A, B, C, D, and E” (the five Standards for Variances found in Article 23-6.04.1 of the Zoning Regulations), “and additionally, with concern of the FEMA requirements for floodplain insurance considerations.”

Ross stated that he will accept this proposed amendment to the motion.

Peckman seconded the amended motion. The motion passed unanimously, 6-0.

Reeves announced for the record that the Applicants have the right to appeal this decision to District Court within thirty (30) days.

Findings

1. The variance requested arises from conditions that are not unique to the property, including conditions that were created by the actions of the property owners.
 2. Granting the variance will not adversely affect the rights of adjacent property owners.
 3. Strict application of the floodplain regulations does not constitute an unnecessary hardship to the property owners.
 4. The variance will not adversely affect the public's health, safety and general welfare.
 5. The granting of the variance does not match the general spirit and intent of the regulations.
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5. Old Business. None.

6. Other Business.

Bach approached the podium and noted that this Board has no precedence and that each case is born individually on its own merits. He stated that the Board should not consider any previous cases when contemplating a new request. Bach expressed that he is concerned that this Board is trying to set a precedent, and that he is concerned about the language in Article 23 of the Zoning Regulations. He then read aloud the following:

“23-6.04 Standards for Variances.

1. The Board of Zoning Appeals shall not grant a variance unless it shall, in each case, make specific written findings of fact, based upon the particular evidence presented to it, that all of the following standards have been met:”.

He noted that his concern is with the use of the words “shall not” as opposed to “may not”. He added that he cannot find this terminology in the State statute and that it is not accurate according to State statute.

Bach then read aloud the following from K.S.A. 12-759(e):

“(e) When deemed necessary by the board of zoning appeals, the board may grant variances and exceptions from the zoning regulations on the basis and in the manner hereinafter provided: (1) To authorize in specific cases a variance from the specific terms of the regulations which will not be contrary to the public interest and where, due to special conditions, a literal enforcement of the provisions of the regulations, in an individual case, results in unnecessary hardship, and provided that the spirit of the regulations shall be observed, public safety and welfare secured, and substantial justice done. Such variance

shall not permit any use not permitted by the zoning regulations in such district. A request for a variance may be granted in such case, upon a finding by the board that all of the following conditions have been met: (A) That the variance requested arises from such condition which is unique to the property in question and which is not ordinarily found in the same zone or district; and is not created by an action or actions of the property owner or the applicant . . .”

Bach pointed out that State statute uses the terminology “A request for variance *may be granted* . . .”. He then read aloud the following from K.S.A. 12-759(f):

“(f) Any person, official or governmental agency dissatisfied with any order or determination of the board may bring an action in the district court of the county to determine the reasonableness of any such order or determination. Such appeal shall be filed within 30 days of the final decision of the board.”

Bach noted that the District Court will determine the *reasonableness* of the Board’s actions. He added that what is considered to be reasonable by one person may not be considered reasonable by another.

He expressed that he is concerned that the language in Article 23-6.04 of the Zoning Regulations does not match the language in the State statute and that he would like to see this changed. Bach added that it is incumbent upon the current and future members of this Board to protect the reasonableness of the Board’s decisions.

The Board members discussed, and Sumner thanked Bach.

7. Planning Director Report

Reeves reminded the Board of the annual meeting scheduled for January 16, 2019. Reeves asked that any Board members who are up for reappointment notify her if they are not interested in being reappointed so that she may notify the Board of County Commissioners.

8. Adjourn

Bach moved to adjourn and Patrick seconded. The motion carried unanimously, 6-0.

The meeting was adjourned at 9:31 p.m.

Approved this _____ day of _____, 2019.

Angie Baumann, Secretary

Chair, Larry Sumner

Minutes written by Angie Baumann.