



**BOARD OF ZONING APPEALS MINUTES
MONDAY, December 19, 2022, 6:00 P.M.
COMMISSION ROOM, CITY HALL
LEAVENWORTH, KANSAS**

CALL TO ORDER:

Board Members Present

Mike Bogner
Dick Gervasini
Jan Horvath
Kathy Kem
Ron Bates

Board Member(s) Absent

City Staff Present

Julie Hurley
Michelle Baragary

Chairman Bogner called the meeting to order at 6:00 p.m. and noted a quorum was present.

APPROVAL OF MINUTES: November 28, 2022

Chairman Bogner asked for comments, changes or a motion on the November 28, 2022 minutes presented for approval. Commissioner Gervasini moved to approve the minutes as presented, seconded by Commissioner Horvath and approved by a vote of 5-0.

OLD BUSINESS:

None

NEW BUSINESS:

1. 2022-35 BZA – 4600 LAKEVIEW DRIVE

Hold a public hearing for Case No. 2022-35 BZA – 4600 Lakeview Drive, wherein the applicant is requesting a variance from sections 4.04.B and 6.08.C of the adopted Development Regulations to allow more than two accessory structures on one lot, and to allow an electric fence on a property zoned R1-9, and to allow the installation of the electric fence without being installed behind an open fence separated by three feet.

Commissioner Bogner called for the staff report.

Planning Director Julie Hurley stated the applicant is requesting a variance to allow an electric fence on a property zoned R1-9, and to allow the installation of the electric fence without being installed behind an

open fence separated by three feet, and to allow more than two detached accessory structures on one lot.

The property located at 4600 Lakeview Drive, and is owned by Courtney Starnes. The property is 4.5 acres in size, and is occupied by a single family home. There is an existing storage shed and gazebo on the property. The property is surrounded by other large lot residential properties of a similar nature. The applicant recently purchased the home, and is proposing the installation of an electric fence for the safe-keeping of her horse on her property, as well as the construction of a shelter for the horse at a maximum size of 432 square feet. Horses are allowed on private residential property at a rate of one animal per two acres, per Article VI of the Municipal Code.

Section 6.08.C. of the Development Regulations states:

Electric fence prohibited. No person shall construct, keep or maintain an electrically charged fence within a residential area of the city except when permitted as a farm use or as a condition to a special use permit for those uses listed as a special use connected with farming or agricultural activities in the R1-25 single-family residential district of the Development Regulations of the City of Leavenworth, Kansas. These installations will then only be permitted when the electric fence is installed behind an open fence separated by three feet.

All other requirements of the Development Regulations in regards to fences would be met, to include setbacks, height, etc.

Section 4.04.B of the Development Regulations states:

No more than two detached accessory structures shall be allowed per building lot or parcel whichever is larger in area. For these purposes, "detached accessory structures" means any detached, garage, storage building, agriculture building, gazebo, or other such similar above-ground structure erected in conformance with these regulations.

All other requirements of the Development Regulations in regards to accessory structures would be met, to include size, setbacks, etc.

After notices were sent to property owners within 200' as required by State Statute, no inquiries or concerns were received by staff.

Ms. Hurley further stated this is for two separate variances; this first variance pertains to the fence and the second variance pertains to the detached accessory structure.

Chairman Bogner asked the commissioners for questions about the staff report.

Commissioner Kem stated there are two pictures of the horse shelter in the policy report, and asked if the applicant intends to install more than one of these detached structures or is it just two examples.

Ms. Hurley believes they are just examples of what the applicant intends to install.

Commissioner Kem asked if the variance is granted would it be for the addition of one additional accessory structure.

Ms. Hurley responded in the affirmative further stating the applicant included a site plan with her application. Viewing the site plan, the dashed area is where the applicant intends to install the fence, and the rectangular area in the pasture is where the horse shelter would be installed.

Commissioner Kem wanted clarification because the policy report states "...to allow more than two detached accessory structures on one lot".

Ms. Hurley stated the applicant already has two detached accessory structures, and the variance would be to allow a third detached accessory structure.

Ms. Hurley further stated should the variance for the fence be approved, the applicant would still need to apply for a fence permit through our office, and have that approved.

Commissioner Horvath asked for clarification that the existing accessory structures are a shed in the southwest corner and a gazebo next to the in-ground pool.

Ms. Hurley responded in the affirmative.

Commissioner Gervasini asked why the property is zoned R1-9 if it is four and a half acres.

Ms. Hurley responded there are quite a few properties in town that are zoned that way, and staff cannot speak to why it was zoned a certain way when zoning was first assigned in the city. This property is completely surrounded by R1-9 zoned properties. There are several other properties larger than the subject property that are also zoned R1-9 in this area.

Commissioner Gervasini asked if staff knows how many properties in the city qualify for R1-25 zoning but are currently zoned R1-9.

Ms. Hurley responded in the negative.

Chairman Bogner asked if there are any plans to relook at the zoning throughout the city or in specific areas of the city.

Ms. Hurley responded in the negative stating it would be incumbent on the property owner to request a rezoning for their property.

Commissioner Gervasini asked if staff is aware of any tax differential between R1-9 and R1-25.

Ms. Hurley stated she is not aware of any, and that would all be at the county level.

Commissioner Gervasini asked if the property owner would be here tonight if her property was zoned R1-25.

Ms. Hurley stated in the R1-25 zoning district, you can have an electric fence if that is in conjunction with permitted uses in that zoning district, however, it still does require the installation of an electric fence behind another open fence separated by three feet, again for the purposes of keeping pedestrians or passerby's away from the electric fence. The applicant would also still need the variance for having more than two accessory buildings.

Commissioner Gervasini asked if he is correct in thinking that the electrical fence and surrounding open fence is normal business for staff to handle, and it is only the additional building that the variance would be for had the applicant applied for a rezoning.

Ms. Hurley responded in the negative stating the applicant would still need the variance because she does not intend to build an open fence three feet in front of the electrical fence. Therefore, even if it was zoned R1-25, the applicant would still need a variance because she does not want to install two separate fences.

Commissioner Gervasini said driving down Shrine Park Road from McDonald going north there is a lot opposite the old entrance to Shrine Park Golf Course that has what appears to be an electric fence without an exterior fence.

Ms. Hurley responded that no one has applied for an electric fence at that property. Again, any electric fence request that came through our office would have to follow the same regulations. Staff cannot make an assumption based on appearance of a fence. Furthermore, the applicant did not apply for a fence permit through our department. The reason this one got caught is that the utility companies sent notification to the city that work is being done for installation of an electric fence. At any other locations that appear to have electric fences, the city has not received notifications of those installations.

Chairman Bogner asked if the applicant submitted any information for the electric fence such as the type, height, etc.

Ms. Hurley responded in the negative stating she believes the applicant has already installed the electric fence.

Chairman Bogner stated there are posts that have been installed.

Courtney Starnes, applicant, stated she did not know there was a shed on the property because it is located in the corner of the property, and is covered by brush. The horse shelter is a 12' x 20' three-sided building and is portable.

Chairman Bogner asked if the shelter has two stalls for two horses.

Ms. Starnes responded it would potentially be for two horses or storage and tack.

Chairman Bogner asked the applicant for more information on the electric fence.

Ms. Starnes stated the posts are five feet high. The posts are in the ground but there is no wire running through the posts at this time. Her plan for the electric fence is to have three or four strings with the upper string being no higher than four feet, and signs would be installed. The electric fence would be 20' from the street.

Chairman Bogner asked if 20' would be on the property line.

Ms. Hurley responded staff has not received an application for a fence permit with a site plan at this time so staff is unable to say if the fence would be on the property line or not. However, in regards to the height of a fence, the maximum height for a fence in the front yard is four feet. The applicant did mention the posts are five feet in height. If the applicant wants to keep the five feet posts, then the Board might want to consider that as part of the variance.

Chairman Bogner informed the applicant the fence may not be installed in the right-of-way.

Ms. Hurley stated a fence is allowed to be installed on the property line. The problem with the electric fence is that it needs to be surrounded by an open fence separated by three feet.

Ms. Starnes stated access to the fence by people walking-by would be limited because most of her property on Lakeview Drive is surrounded by brush, plus the fence would be 20' from the street.

Commissioner Kem stated her concern is for potential development in the area, for example, the 29.99 acres that is for sale across the street from the subject property. If this property were to be developed, sidewalks would be installed, which may increase foot traffic.

Ms. Starnes stated she will hang flags on the wire and install signs.

Steve Flanagan, 4700 Lakeview Drive, stated the electric fence would be 20' to 25' inside the property line, and the buffer between the proposed electric fence and the neighbor's barbed wire fence is all brush. Additionally the accessory structure for the horse would be portable.

Commissioner Gervasini asked if the property owner intends to demolish the existing shed.

Ms. Starnes responded in the affirmative stating the plan is to demolish the shed this coming spring.

Commissioner Gervasini asked if that would eliminate the need for a variance for the horse shelter.

Ms. Hurley responded in the negative stating if the applicant installs the horse shelter prior to removing the existing shed, then the variance is required.

With no other questions about the staff report, Chairman Bogner opened the public hearing.

With no one else wishing to speak, Chairman Bogner closed the public hearing and opened it up for discussion amongst the commissioners.

Commissioner Gervasini requested clarification on the fence variance.

Ms. Hurley responded the variance is to allow an electric fence without an exterior fence, and allow 5' tall posts.

Commissioner Gervasini stated the fence cannot be more than 48" tall, and asked if that included the posts.

Ms. Hurley responded in the affirmative.

Commissioner Kem's concern is potential development across the street. Needs to have that exterior open fence around the electric fence to prevent anybody from potentially wandering over there and touching the electric fence.

Ms. Starnes asked if the exterior fence had to go around the entire electric fence or just that portion near her driveway that is accessible to passerbys.

Ms. Hurley responded by stating the Development Regulations read that an electric fence may only be permitted when the electric fence is installed behind an open fence separated by three feet. The regulations does not reference adjacent to the ROW or anything like that.

Commissioner Kem would like to see a condition that the exterior fence run along Lakeview Drive because of the potential for development across the street. She is not concerned with installing the exterior fence along Muncie due to the excessive overgrowth and brush.

Commissioner Kem asked staff if there is a minimum height for the open exterior fence.

Ms. Hurley stated the regulations do not specify a minimum height; but the open fence would need to meet all the regulations for an open fence.

Ms. Starnes stated she would cut the posts down to four feet. She asked if it would still be an issue if it were a three or four line, smooth wire, non-electrified fence. Ms. Starnes further stated right now there is no power or charge to the fence.

Ms. Hurley responded if it is just the wires and not electric, then the variance would not be needed for the fence so long as all other regulations are met.

With no further discussion, Chairman Bogner read the following criteria regarding the Board's authority and reviewed each item.

The first vote is for a variance to allow the installation of an electric fence in the R1-9 zoning district, and without being installed behind an open fence separated by a three feet.

BOARD OF ZONING APPEALS AUTHORITY:

The Board's authority in this matter is contained in Article 11 (Board of Zoning Appeals), Section 11.03.B (Powers and Jurisdictions – Variances)

Variances: To authorize in specific cases a variance from the specific terms of these Development Regulations which will not be contrary to the public interest and where, owing the special conditions, a literal enforcement of the provisions of these Development Regulations will, in an individual case, result in unnecessary hardship, provided the spirit of these Development Regulations shall be observed, public safety and welfare secured, and substantial justice done. Such variance shall not permit any use not permitted by the Development Regulations of the City of Leavenworth, Kansas in such district. Rather, variances shall only be granted for the detailed requirements of the district such as area, bulk, yard, parking or screening requirements.

1. The applicant must show that his property was acquired in good faith and where by reason of exceptional narrowness, shallowness or shape of this specific piece of property at the time of the effective date of the Zoning Ordinance, or where by reason of exceptional topographical conditions or other extra-ordinary or exceptional circumstances that the strict application of the terms of the Development Regulations of the City of Leavenworth, Kansas actually prohibits the use of his property in the manner similar to that of other property in the zoning district where it is located.
2. A request for a variance may be granted, upon a finding of the Board that all of the following conditions have been met. The Board shall make a determination on each condition, and the finding shall be entered in the record.

- a) *The Board shall make a determination on each condition, and the finding shall be entered in the record.*
- b) *That the variance requested arises from such condition which is unique to the property in question and 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.*

Vote 2-3

Commissioners Horvath and Gervasini voted in the affirmative.

Commissioners Kem, Bogner and Bates voted in the negative. Commissioner Kem stated perhaps there are some unique things to this property but it is created by the action/actions of the property owner.

No further condition was voted on as the variance failed by the first condition not passing.

- c) *That the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents.*

No action taken.

- d) *That the strict application of the provisions of the Development Regulations from which the variance is requested will constitute unnecessary hardship upon the property owner represented in the application.*

No action taken.

- e) *That the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare.*

No action taken.

- f) *That granting of the variance desired will not be opposed to the general spirit and intent of the Development Regulations.*

No action taken.

- 3. In granting a variance, the Board may impose such conditions, safeguards, and restrictions upon the premises benefited by the variance as may be necessary to reduce or minimize any potentially injurious effect of such variance upon other property in the neighborhood, and to carry out the general purpose and intent of the Development Regulations.

Chairman Bogner stated the variance request for the fence has been denied.

The second vote is for a variance to allow for more than two accessory structures at 4600 Lakeview Drive.

BOARD OF ZONING APPEALS AUTHORITY:

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Variances: To authorize in specific cases a variance from the specific terms of these Development Regulations which will not be contrary to the public interest and where, owing the special conditions, a literal enforcement of the provisions of these Development Regulations will, in an individual case, result

in unnecessary hardship, provided the spirit of these Development Regulations shall be observed, public safety and welfare secured, and substantial justice done. Such variance shall not permit any use not permitted by the Development Regulations of the City of Leavenworth, Kansas in such district. Rather, variances shall only be granted for the detailed requirements of the district such as area, bulk, yard, parking or screening requirements.

1. The applicant must show that his property was acquired in good faith and where by reason of exceptional narrowness, shallowness or shape of this specific piece of property at the time of the effective date of the Zoning Ordinance, or where by reason of exceptional topographical conditions or other extra-ordinary or exceptional circumstances that the strict application of the terms of the Development Regulations of the City of Leavenworth, Kansas actually prohibits the use of his property in the manner similar to that of other property in the zoning district where it is located.
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a) *The Board shall make a determination on each condition, and the finding shall be entered in the record.*

b) *That the variance requested arises from such condition which is unique to the property in question and 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.*

Vote 5-0

All board members voted in the affirmative.

Commissioner Kem stated she does agree with this because it is such a large property in the R1-9 zoning district, which does make it unique.

c) *That the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents.*

Vote 5-0

All board members voted in the affirmative.

d) *That the strict application of the provisions of the Development Regulations from which the variance is requested will constitute unnecessary hardship upon the property owner represented in the application.*

Vote 5-0

All board members voted in the affirmative.

e) *That the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare.*

Vote 5-0

All board members voted in the affirmative.

f) *That granting of the variance desired will not be opposed to the general spirit and intent of the Development Regulations.*

Vote 5-0

All board members voted in the affirmative.

3. In granting a variance, the Board may impose such conditions, safeguards, and restrictions upon the premises benefited by the variance as may be necessary to reduce or minimize any potentially injurious effect of such variance upon other property in the neighborhood, and to carry out the general purpose and intent of the Development Regulations.

The variance is granted with the condition that the number of detached accessory structures is limited to a total of three on the property. (This discussion for the condition is below).

Commissioner Kem asked staff if in the future the applicant demolishes the smaller shed, she could install another accessory structure since this variance has already been approved.

Ms. Hurley responded in the affirmative because there is already a variance in place to allow more than two accessory structures. The Board could put a condition stating there can only be a maximum of three detached accessory structures since that is what is being proposed now.

Commissioner Kem thinks adding a condition for a maximum of three detached accessory structures is reasonable.

Ms. Hurley stated the accessory structures would still need to meet all of the other regulations in terms of size, setbacks, etc.

Commissioner Bates would like to add a condition that regardless if the applicant removes the existing shed or not, if she wants to put another accessory structure on her property she would have to ask for another variance for that. Commissioner Bates feels the variance today is for the horse shelter and any additional accessory structure should require another variance, even if she does tear down the collapsing shed.

After discussion about the existing shed and the potential to build another accessory structure after the shed is demolished, the board members agree to add a condition that this variance limits the number of accessory structures to a total of three detached accessory structures on the property.

Commissioner Gervasini wants to readdress the fence because the size of the property makes this a unique situation. Wants to know why the board cannot approve the conditions, or agree to approve the conditions, before they begin to vote.

Ms. Hurley stated the board already took a vote on the fence so that item would need to be opened up again.

Commissioner Kem stated her opposition to the first condition has nothing to do with the proposed condition of adding the open fencing. It has to do with the part that states "...and is not created by an action or actions of the property owner or the applicant". While it is a large property, installing the electric fence is not unique; that is just installing an electric fence because she has a horse.

Commissioner Gervasini asked how someone could even consider buying a property this size if variances are not allowed, and that is why this Board exists.

The commissioners discussed when this, and surrounding properties were used as farmland approximately 40-50 years ago.

Chairman Bogner stated having a horse is a condition caused by the property owner, and the electric fence is not common in practically any other circumstances within that same zoning area, which is why he voted no.

Commissioner Kem stated to her the lot size does not matter because the variance requested is created by the action(s) of the property owner.

Commissioner Gervasini stated that first condition the board votes on has always caused problems.

Commissioner Kem agreed stating it's in every state statute in the United States, and that is part of the reason applicants have to come to the BZA is because they do have to show exceptional circumstances to be granted a variance.

Mr. Flanagan asked if this is appealable.

Ms. Hurley responded BZA actions have to go to District Court to be appealed and that is set by state statute. Ms. Hurley suggested going back through all five of the conditions and taking a vote on each of those for the fence for the record.

Chairman Bogner stated the Board will go through all the conditions for a variance to allow the installation of an electric fence in the R1-9 zoning district without the concurrent installation of an open fence separated by a three feet.

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Variances: To authorize in specific cases a variance from the specific terms of these Development Regulations which will not be contrary to the public interest and where, owing the special conditions, a literal enforcement of the provisions of these Development Regulations will, in an individual case, result in unnecessary hardship, provided the spirit of these Development Regulations shall be observed, public safety and welfare secured, and substantial justice done. Such variance shall not permit any use not permitted by the Development Regulations of the City of Leavenworth, Kansas in such district. Rather, variances shall only be granted for the detailed requirements of the district such as area, bulk, yard, parking or screening requirements.

1. The applicant must show that his property was acquired in good faith and where by reason of exceptional narrowness, shallowness or shape of this specific piece of property at the time of the effective date of the Zoning Ordinance, or where by reason of exceptional topographical conditions or other extra-ordinary or exceptional circumstances that the strict application of the terms of the Development Regulations of the City of Leavenworth, Kansas actually prohibits the use of his property in the manner similar to that of other property in the zoning district where it is located.
2. A request for a variance may be granted, upon a finding of the Board that all of the following conditions have been met. The Board shall make a determination on each condition, and the finding shall be entered in the record.
 - a) *The Board shall make a determination on each condition, and the finding shall be entered in the record.*

- b) *That the variance requested arises from such condition which is unique to the property in question and 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.*

Vote 2-3

Commissioners Horvath and Gervasini voted in the affirmative.

Commissioners Kem, Bogner and Bates voted in the negative.

- c) *That the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents.*

Vote 3-2

Commissioners Horvath, Gervasini and Kem voted in the affirmative.

Commissioners Bogner and Bates voted in the negative.

- d) *That the strict application of the provisions of the Development Regulations from which the variance is requested will constitute unnecessary hardship upon the property owner represented in the application.*

Vote 2-3

Commissioners Horvath and Gervasini voted in the affirmative.

Commissioners Kem, Bogner and Bates voted in the negative.

- e) *That the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare.*

Vote 2-3

Commissioners Horvath and Gervasini voted in the affirmative.

Commissioners Kem, Bogner and Bates voted in the negative.

Commissioner Kem stated she disagrees based on safety as part of that.

- f) *That granting of the variance desired will not be opposed to the general spirit and intent of the Development Regulations.*

Vote 2-3

Commissioners Horvath and Gervasini voted in the affirmative.

Commissioners Kem, Bogner and Bates voted in the negative.

3. In granting a variance, the Board may impose such conditions, safeguards, and restrictions upon the premises benefited by the variance as may be necessary to reduce or minimize any potentially injurious effect of such variance upon other property in the neighborhood, and to carry out the general purpose and intent of the Development Regulations.

Ms. Hurley stated that variance request fails.

Ms. Hurley further stated the variance request for the third accessory structure passed with the condition that it is limited to three detached accessory structures on the property.

Commissioner Gervasini asked if it would be allowed if the applicant decided to install the exterior fence and the interior electric fence in accordance with the Development Regulations.

Ms. Hurley responded in the negative stating the property is not zoned R1-25. Further stating she can have a wire (non-electrified) fence but if she wants an electric fence at all, they are only allowed in the R1-25 zoning district, and at that only with the separate open fence separated by three feet.

Commissioner Gervasini asked if she would rezone the property.

Ms. Hurley stated she can submit a rezoning application to the Planning Commission. If the property were rezoned to R1-25, she could request a fence application to install the electric fence per all the requirements of the Development Regulations. There are criteria in state statute that would be considered for a rezoning application, and staff would not be able to say tonight if they would support a rezoning or not.

Mr. Flanagan stated for a fence permit, there should be nothing that prohibits an open wire with three, four, or five strand fence without a barrier fence along the subject property line.

Ms. Hurley responded in the affirmative.

Mr. Flanagan asked how high the posts can be.

Ms. Hurley responded the maximum height of any part of the fence structure is four feet.

Mr. Flanagan stated all the way down Muncie are six-foot privacy fences.

Commissioner Kem stated those are typically in the side yard or rear yard.

Ms. Hurley suggests if the applicant has questions about what type of fence is allowed that she speak with our department. Staff gave the applicant options but she wanted to pursue this variance. It is difficult for staff to speak about specifics at this meeting when going off speculation from someone other than the property owner; therefore, it is suggested the applicant come into the office to talk with staff.

Ms. Starnes stated she was told by staff that if it is an electric fence that could be electrified that she would need a variance approval.

Chairman Bogner responded in the affirmative, and Commissioner Kem followed by saying it just cannot be electrified.

Ms. Hurley strongly suggests the property owner come to our department if she wants to do something else now since the electric fence was not approved.

Commissioner Bates moves to adjourn the meeting, seconded by Commissioner Kem and passed 5-0.

The meeting adjourned at 7:15 p.m.

Minutes taken by Administrative Assistant Michelle Baragary.