

Greenfield Board of Zoning Appeals  
March 16, 2010

President, Digby Terry, called the Greenfield Board of Zoning Appeals meeting to order. Members present:

Digby Terry  
Mike Terry  
Paulette Richardson  
Duane Knecht

Absent: Leo Davis

Also present:

Joan Fitzwater, Zoning Administrator  
Terri Sharrer, Secretary  
Gregg Morelock, Legal Counsel

Roll call was taken. Mr. Leo Davis was absent.

First on the agenda was the approval of the January 18<sup>th</sup>, 2010 minutes. A motion was made by Mike Terry and seconded by Paulette Richardson for approval. The vote was unanimous for approval.

There was no old business before the board.

In new business, BZA 2010-01 came before the board. Mr. Terry read the request into the record. 375 Shadow creek Pass, Ken Merlau requests development standards variances to provide for the location of a portion of a stone wall and patio within a drainage easement. Ms. Fitzwater read the staff report. Mike Terry asked if this petition was denied, what would be the next step required by the city? Ms. Fitzwater stated that Mr. Merlau would probably be required to take down the portion of the patio and the stone column and wall that was encroaching into the easement.. Mr. Morelock stated that Mr. Merlau could go back to the Board of Works as one, or possibly a last, effort to get an approval for an encroachment agreement. If the BOW still denied it and Mr. Merlau did not comply, a citation would be issued. After one or two citations, it would be sent to Mr. Morelock's office to begin action. Ms. Richardson asked what happens if an emergency arises and the city would need to get equipment into the easement area. Ms. Fitzwater stated that either equipment would be used to knock the patio corner down unless they could find equipment small enough to get into the easement without damage. She also stated they considered whether it would be feasible to move the easement but due to the hill on the other side, there would be a lot of work regarding work and it would be a major move. Ms. Richardson stated also there are houses and structures to the south in the bank. Mr. Knecht asked how much water flows through the area. Ms. Fitzwater stated that Dan Miller, Stormwater Coordinator for the city, believes there to be a lot of water going through there. Mr. Knecht asked if the water from the golf course across the street runs under the street and to that drain. Digby Terry stated the water appears to run northwest from there. Mr. John Merlau, attorney for Mr. Ken Merlau and Mr. Ken Meralu appeared before the board. Mr. John Merlau stated he did not receive any objections from any of the neighbors they were required to notify about this petition. He stated that Dan Miller told his client that if access was needed to the easement, the city could go through an area near the lift station and take down a few trees. Mr. Merlau stated there had been no intention on his client's part to put the patio in the easement. It happened because the house did not fit on the lot correctly, it had to be shifted on the lot. The builder filed bankruptcy and left town half way through the project. The contractor who built the patio was unaware that the house shifted and so did not shift the deck. That contractor also has gone out of business since this project began. Mr. Merlau stated that his client will agree to hold the city harmless if it needs to get into the easement and take out the patio corner. He will also agree to make a condition that the encroachment will not transfer to a new owner if he sells the house. He would take the corner of the deck out of the easement before selling it. Mr. Merlau stated that that his client did not ignore the rules; that there was a permit which included the patio. He stated that as far as the staff's findings, he has to respectfully disagree. He said he does not think it is injurious to public health, public safety, or morals. There would be no adverse affects or consequences except to the owner. He stated there is vehicular access and the encroachment is not large – it does not block drainage. The part it encroaches in the bank does not impede the flow of the water. He asked for consideration due to the facts that there was nothing intentional or sinister on Mr. Merlau's part, there were no objections from the neighbors, and that Mr. Merlau will take out the patio with no issue of damages if it had to be crushed or taken apart. He stated that Ken was advised by the building and planning office to go to the BOW for an encroachment first and then the BZA but the Mayor informed him the procedure should have been done in the opposite order. Mr.

Merlau stated unfortunately, Mr. Ken Merlau was a victim of incompetent contractors. Ms. Richardson asked Mr. John Merlau about the picture he showed of the lift station he mentioned as an alternative access. She stated she had driven down to the cul de sac where the lift station is and she did not think a large truck could fit through that area. Mr. Terry asked if the downspouts shown in exhibit 5 drain out at grade level. Mr. Ken Merlau stated that it drains underground and runs west. Ms Richardson asked if the pavers on the patio wall are on concrete or on dirt and sand. Mr. Ken Merlau stated they are on compacted gravel. Mr. Mike Terry asked if the patio was included on the original plan. Ms. Fitzwater stated no but Mr. Ken Merlau stated he thought it was. Digby Terry asked Ms. Fitzwater if it was possible to request to rewrite the dimensions of the easement. Ms. Fitzwater stated no, that would set a precedent for future encroachment requests. She stated that -Mike Fruth, City Engineer, went to the site and looked at the situation. He was concerned about the limited access to the drain. Ms. Richardson asked how many square feet are in the corner encroaching into the easement and was told 35 sq. ft. Mike Terry asked if this petition is denied,, can Mr. Merlau still back to the BOW again? Mr. Morelock answered yes, but it is not likely the BOW would overturn the decision of the BZA.

Mr. Morelock stated that a variance runs with the land thus he is concerned about allowing a condition that applies to Mr. Merlau only and not to the future home owners. He stated he is also concerned about tracking these conditions when the property is sold and is forgotten about. He stated that it could be recorded but then the question is would it get picked up in a title search. He stated that the language and format would have to be worked out if approved. John Merlau stated that it should be placed in the deed of ownership and recorded in a quit claim deed from Ken Merlau to Ken Merlau himself. He said that way the restriction would be of record and would be found when sold. There being no other questions, Mr. Morelock suggested that if there were to be any conditions, they should be read now. That way if the conditions are approved, the questions must be considered with the conditions applied. Paulette Richardson made a motion to approve the following conditions:

1. No waiver of rights- Landowner acknowledges that Greenfield does not, in any way, waive or forfeit its full right to use and enjoyment of the drainage or utility easement. Upon request by Greenfield, Landowner shall remove the encroachment for the purpose of allowing Greenfield, or any public utility access to the easement. Should Landowner fail to remove the encroachment within a reasonable period of time, Greenfield or any public utility may, at its discretion, remove the encroachment and assess Landowner the cost of removing the encroachment.
2. Limitation of Liability – Landowner agrees to indemnify and hold Greenfield harmless for any and all actions arising out of any claim for personal injury (including death), property damage, consequential damages, attorney fees and costs caused by Landowner's encroachment upon the drainage or utility easement. Under no circumstances will Greenfield or any public utility be liable for any claims by Landowner for any personal injury or damages caused by Greenfield or any public utility's removal of the encroachment.
3. Encroachment shall be nontransferable. Upon sale of home, landowner will remove the corner of the deck out of the easement before the sale of the property – this condition must be added to the deed.

A vote on the three conditions was taken. Paulette Richardson and Duane Knecht voted yes. Digby Terry and Mike Terry voted no.

Mike Terry made a motion to deny the petition. Digby Terry seconded the motion. A vote was taken to deny the petition and the board voted yes unanimously to deny the petition.

There being no further business to come before the Board, a motion to adjourn was made by Ms. Richardson and seconded by Mike Terry. Meeting adjourned.

Respectfully submitted,  
Terri Sharrer  
Secretary