

CITY OF COLORADO SPRINGS PLANNING COMMISSION
RECORD-OF-DECISION

DATE: August 20, 2015
ITEM: 7
STAFF: Ryan Tefertiller
FILE NO.: AR NV 15-00413-AP
PROJECT: 5675 MAJESTIC

STAFF PRESENTATION

Ryan Tefertiller, Planning Manager, made a presentation regarding the non-use variance. The subject property had a residence on it however it was destroyed in the Waldo Canyon Fire. The appellant of the variance request is the property owner located to the east of the subject property. After the Waldo Canyon fire, the City adopted a plan and policies to redevelop the properties destroyed by the fire. For this particular property, a building permit was approved in April of 2015; the home extends the entire width of the lot up to the side yard setbacks. During the construction, the foundation layout was slightly skewed encroaching into the side yard setback. Once the encroachment was identified, the builder spoke with City staff, the Homeowner Association and the adjacent property owner; a variance for the encroachment was approved administratively. An appeal was filed ten days later on July 24th with some of the reasoning being that the lot was of similar size, the placement of the foundation, the presence of the driveway on the subject property and the existing location of the residence directly towards the east. Per City Code, an appeal has certain criteria that must be met. The appellant sent in a significant explanation and justification why the variance needed to be denied. The applicant also provided a significant justification why the variance decision should be upheld. The Parkside Homeowners Association has stated that they are in support of the variance with the original covered patio being removed from the approved site plan. City staff recommended denial of the appeal and affirmation of the non-use variance.

APPELANT PRESENTATION

Maria Koziak-Petcash stated that they are opposed to the non-use variance as it fails on all requirements. An appeal statement was provided when the appeal was filed. Mr. Hente excavated the subject property however the foundation was built in the wrong place. She asserted that the foundation was wrong because they disregarded the staking and moved towards her property. A non-use variance is not permitted for bad building practices and negligence. She stated that Mr. Tefertiller contacted them and stated that the standard process was to send out public notification and allow for ten days for comments however since Ms. Petcash's property was the only property affected, if she would think about the request over the weekend and provide him comments on Monday rather than have the standard public notification process. She stated that the property value of her property will be compromised because the new owner of the 5675 Majestic will not be able to walk along the east side without trespassing onto her property. The window wells will be within the adjacent property. There are 30 year old building covenants that allow a builder to have a blanket control easement to a builder to do whatever they want. She asked if the easement allows for the property owner to trespass from one property to the next. Ms. Petcash stated that she believes that the variance creates a trespass and safety issue. With regards to the non-use variance criteria, there are no extraordinary issues to the property because the lot is smaller but that generally exists throughout Parkside. This lot is actually larger than others in the area. She stated that Mr. Hente's original plan did not indicate that there was an issue with the existing driveway. The foundation did not need to be put in wrong; if the correct property line were used, the side walls would have been parallel to the boundary lines and not be a

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problem. There are other options that could have pursued; they could have discussed the driveway issue with the adjacent property owner, a smaller home could have been built or the driveway could have been moved to fit the new house. The driveway should have been moved to fit the new house not the new house built to fit the existing driveway. The problem is a self-imposed condition because the foundation was installed in the wrong place. The foundation could be done to meet the requirements. Approval of the variance will compromise property values and create a liability issue because the new owner cannot step off their patio without trespassing onto the adjacent property. The Parkside neighborhood suffered a significant loss due to the Waldo Canyon fire. Ms. Petcash stated that she feels that the City has made the variance with the new home a safety and legal issue that the adjacent property owner will be left to live with once the home is completed. The adjacent property was purchased for her 81 year mother in good faith and they had no idea that the driveway encroached onto the neighboring property. Because of these comments and those written in the appeal statement, Ms. Petcash stated that the appeal should be upheld and the variance denied.

Commissioner Shonkwiler stated that he had a question but wasn't sure when to get the answer or who to pose it to. He stated that he understood that there was an easement of 5' on each property line. He mentioned that he was unsure whether anything could be built within that 5' easement without a vacation. Also, if there are window wells on the residence, what is the required width and would they extend over the property line without an additional easement.

APPLICANT PRESENTATION

Scott Hente of Robert Scott Builders stated that he would address Commissioner Shonkwiler's questions in his presentation. Mr. Hente had a short presentation on the variance request. Mr. Hente provided some background and history about the Parkside neighborhood. He stated that there is a uniqueness to the Parkside neighborhood; it was built in the 1980's with standards that would not be allowed today. There were houses that crossed property lines and setbacks were ignored however the Parkside neighborhood figured out a way to work within those standards until the Waldo Canyon fire. At that point, discussions were held to try to figure out how to apply modern development standards to a 30 year old development plan with issues that included utilities and irrigation. Robert Scott Builders was the first builder to build in Mountain Shadows after the Fire; the property in question wanted their house exactly as it was prior to the fire however it crossed property lines and didn't meet the setbacks as required so the City and the HOA had to figure out to make the old development plan work within the modern standards and criteria.

With regards to the variance for 5675 Majestic, the appellant's driveway is located on the subject property. Mr. Hente stated that they had no desire to remove the driveway so it was thought that they would push the house back towards the rear of the property. However as the excavator dug out the land for the foundation, utilities and irrigation lines were found at the rear of the property and the builder had been warned by the Homeowner Association to not cut or impact those lines. Since the lines do not go straight across the property but angle, the foundation was installed to angle as well. Mr. Hente stated that he was not aware that that was being done; it was done on purpose. As soon as the error was found, the construction stopped and they met with the City, the Homeowner Association and the adjacent property owner. Since the appellant's driveway existing on the 5675 Majestic property, the layout of the new home construction had to be changed. The approximation of the utilities lines also caused an angle to the foundation layout. At the time of the purchase, it was a reasonable assumption that the driveway was on the adjacent property. Mr. Hente stated that they did not complete an

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easement for the driveway issue. While it's true that the City does not deal with covenants, some of them are applicable to this situation. There are mutual easements when a house is being construction that encroachments cannot occur between properties for access purposes consequently it's not uncommon that equipment and construction crews do not encroach across property lines. There are also covenants that talks about foundation supports and those two houses could touch when they're too close. Mr. Hente stated that they had tried to work out the situation with Ms. Petcash. He stated that they admit that the subject property is closer to the adjacent property that it could be but the driveway is also on the subject property rather than on their own property. There has been discussion on the exchange of liability issues as well as a possible property boundary adjustment. Ms. Petcash and her Attorney stated that a cash settlement was possible with an exchange of liability and easements issues. Mr. Hente stated that they believe the main issue driving the problem for the layout of the home at 5675 Majestic was the layout of the neighbor's driveway and therefore did not see the need for a compromise. The question is a matter of fairness as that the two site plans cannot co-exist.

Commissioner Shonkwiler asked a question about the temporary easement for construction. The subdivision plat shows an easement for utilities. The window wells are used for egress and do they go over the property line. Mr. Hente stated that 36" window wells are required for egress but those are located on the rear of the property. The window wells on the side of the property are 24" but are not set up for an escape route. Commissioner Shonkwiler stated that the window well should not cross the property line. Mr. Hente stated no. He then stated that there are two parts to a setback variance; one through Land Use and second through Real Estate. He stated that he wanted to get through this process first before proceeding. Commissioner Shonkwiler confirmed that there was a process to be completed before starting construction again. Peter Wysocki stated that that is correct. Commissioner Shonkwiler then asked if there would be further construction until the variance and vacation were completed. Mr. Hente stated that he had talked with Real Estate but would not proceed until the variance was done. Commissioner Shonkwiler asked if they would move forward, there was still another process. Mr. Wysocki confirmed that yes that was correct.

Commissioner Donley stated that he had questions about the drainage in Parkside. Mr. Hente stated that soon after the Fire and with the rush to rebuild, there was a realization by the Homeowner Association and the Builders that the houses were different with floor levels and building height. Consequently the Parkside Homeowner association requested and a drainage report was completed in 2013. Since that time, all grading has to be approved by the Homeowner Association with the builder showing the grading of the lot and how it complies with the drainage plan. In this case, the lot was simple and the drainage was not affect. Commissioner Donley stated that the drainage would be on the neighboring property. Mr. Hente stated no, it has to be on the subject property and everything runs between the house and the driveway. Commissioner Donley stated that the drainage is at the front of the property. Mr. Hente stated that the drainage goes towards the front and not on the side. Commissioner Donley asked how the drainage gets to the front. Mr. Hente stated that a high point is created at the back of the lot in the far corner so that the drainage curves around and goes down the side. Commissioner Donley stated that that was a non-answer. The drainage is parallel to the side of the house and will have to be on the adjacent property because the window wells will block the flow. Mr. Hente stated that within the setback there was enough room.

Commissioner Smith stated that the drainage at the neighbor's property seems to be at the back of the house and not at the front of the house so how will that be accommodated. The drainage for this

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property is at the front while theirs is at the back and comes down into the cul-de-sac. Your drainage is going in the opposite direction from the adjacent property. Mr. Hente stated that he could not speak for what happens on the adjacent property. He stated that if he did not comply with the Parkside drainage plan, there would be penalties. Also, he is required to complete a final grading plan prior to the Improvement Location Certificate.

Commissioner Shonkwiler asked if there was a prohibition of having fences higher than 6'. Mr. Hente stated that no fences were permitted; a decorative split rail fence was possible but otherwise they were prohibited.

Commissioner Walkowski asked about the irrigation and whether it was within the 10' setback. Mr. Hente stated that the drawings showed an approximate location because it was shown to not be within the 10' setback and then it was discovered to be outside that location.

Commissioner Donley asked questions about the landscape maintenance by the Homeowner Association. Mr. Hente stated that yes; they are maintained by the Homeowner Association.

Commissioner Donley stated that he was bothered by the excavation of the property being more than the foundation. The error should have been noted after the hole was dug not after foundation installed. There should have lot pins installed on the property line so that the error did not happen. Mr. Hente stated that that was correct. The foundation company has to put in the pins and at the time everything was thought to have been okay but after talking with the Surveyor that was not the case. The excavator pushed the dig over to make it fit within the confines of the utility and irrigation lines. In most neighborhoods this would not be an issue as there is enough property to work with but Parkside is different due to the small lots and tight confines. Commissioner Donley asked if when the house is built if the surveyor marks the offsets. Mr. Hente stated that they mark the foundation and offsets.

Commissioner Shonkwiler asked a question about the zero foot lot line issue. The standard is that they foundation is dug and they verify placements where everything is to be; he stated that he saw no nexus between the driveway being in the wrong place and the foundation being installed wrong. Commissioner Shonkwiler stated that there was a way to build the house correctly but that didn't occur; the issue is not a valid conclusion. Mr. Hente stated that to look at the site plan that there was no way to build the house as approved by the City. They did not want to alter the driveway so pushed the house back towards the rear. Commissioner Shonkwiler stated he had the approved site plan but it did not convince him that there was a requirement for a variance. Mr. Hente stated it was a combination of issues; matching the angle of the house with the adjacent utilities and irrigation lines in back and matching the house with the existing property lines.

Commissioner Walkowski asked if there was a remedy other than the variance. Mr. Hente stated that the foundation could be removed however he could not build the approved house without altering the driveway. So without affect the existing driveway, the answer is no.

Commissioner Markewich asked about the process to push the house back where the utility lines are located. Could the home be pushed back and fit within the side yard setbacks? When the foundation was poured and put in at an angle, the mistake was how they angled it. Mr. Hente stated that there is not enough room to move straight back because of the utility lines. The Company that installed the

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irrigation lines marked them and they were told stay at least 18" away because the locates were not an exact science. Mr. Hente stated that the crew knew where the lines were supposed to be but didn't know for sure until they completed the excavation. When they pushed the house back toward the rear, it was thought that there would be enough room but when the dig was angled back and installed parallel for the irrigation and utility line that was not the case. Commissioner Markewich asked if the hole dug was different from the poured foundation. Was the hole dug and the house moved back? Mr. Hente stated that when the hole was dug, there was thought to be enough room but not realize the house was angled until it was too late.

Commissioner Smith asked if there was a requirement that the house is to be a certain distance from the irrigation lines. Mr. Hente said not specifically from the Homeowner Association. They were to stay away from the lines but not a specific 3' or 5' distance. Commissioner Smith stated that if there is not distance requirement, he didn't understand the reason to angle the house. Mr. Hente stated that to push the house back towards the rear, it was angled over so as to not impact the irrigation lines.

QUESTIONS OF STAFF:

Commissioner Smith asked about the record of decision in the agenda. A statement was written that the driveway consumer much of the front yard setback which necessitated the home to pushed back toward the rear of the lot. Commissioner Smith stated that he did not understand because construction was not within the 5' setback. Ryan Tefertiller stated that the home was constructed within the 5' side yard setback; there is 2.3' to property line where 5' is required.

CITIZENS IN FAVOR:

Mike Finkbinder, Architectural Control Committee of the Parkside at Mountain Shadows. He stated he has been in the position for seven years and was there prior to the Fire and worked with the team to set up the floating setbacks for the development. There was an allowance for a house to be up to 3' from the property line but was standardized to 5' with the new development plan. The Homeowners Association has met on site with the City, Mr. Hente and the appellant and see no problem with the setback issue. The covered patio at the rear of the property was eliminated to reduce the encroachment to 2.3' from the 1.7'.

Commissioner Donley asked about the floating setbacks. How was this 10' separate between buildings codified. Mr. Finkbinder stated that this setback was established with the original development plan from 1985 and abandoned with the rebuilds and the new development plan.

CITIZENS IN OPPOSITION:

None

REBUTTAL FROM APPELLANT:

Mark Francis, Attorney for the appellant stated that the problem is a very large house was trying to be squeezed into a small lot. The 5' side yard setback left no room for error. The driveway encroachment issue was not investigated. The subdivision plat notes that there are shared driveways and to use the driveway as is. There is no reason that the house had to be moved to make the driveway usable. The house does not fit and will affect the property owner in the future. There are 3' and 2' window wells; how will they walk around the property without trying to avoid the neighboring property? The window wells are not functional and are actually dangerous. There are issues with drainage, safety and access

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around the side of the house; this will be ongoing issue forever. If the variance is approved, the property owner will have to dance to get around the side of the house. The variance does not work within a planning perspective and there are other remedies other than the variance. One option is to move foundation where it should have been in the first place; another is to work out something with the neighbor's driveway. While either option will cost money, the main issue is that the variance ultimately does not meet the criteria. To talk about the variance criteria, the lot is flat with no trees. However all issues have to be weighed against the cost and cost is not a factor in the criteria. Mr. Francis stated that changing the utility lines would have been cheaper to work out with the Homeowner Association first but that was not done as that would have been an easy solution. That would have been a viable approach to take rather than a variance and rather than lay the blame on the neighbor's driveway. There are other options; could work with the appellant to buy a portion of the land and complete a property boundary adjustment or reset the easement locations. There are other options available other than the variance so there is no reason to approve and support the variance.

REBUTTAL FROM APPLICANT:

Scott Hente stated that the issue is the property setback. There are property boundary adjustments occurring throughout Parkside. The problem is this is what happens when modern criteria are used in an old neighborhood. It is not a common practice but done a lot in Parkside. He stated that he regrets not talking with the neighbor to remove part of the driveway to make a more usable lot. Even if the house is built, two cars cannot park in the driveway and not block the driveway of the neighbor. The issue is two incompatible plans and trying to work with the City within the regulations.

DECISION OF THE PLANNING COMMISSION

Marc Smith of the City Attorney's office stated that there are not a lot of appeals heard by Planning Commission. He wanted to remind the Commissioners that they needed to direct the decision back to the appeal criteria based on City Code appeal section.

Commissioner Donley stated that they should go back to the non-use variance criteria and whether the decision was erroneous.

Commissioner Smith stated that he has experience with building construction and this issue is unfortunate. Based on the criteria, staff's analysis that all criteria were met. Commissioner Smith stated he was in concurrence with staff. He stated that he did not see how this would impact the adjacent neighbor. Commissioner Smith stated that the neighbor's home is angled where the encroachment is occurring and there is a lot of space between the property line and the appellant's home. Most areas were landscaped with rocks and he was surprised that that is to be maintained by the Homeowner's Association. Commissioner Smith stated that for the reasons he's stated, he will support staff's recommendation.

Commissioner Markewich stated that looking back at the Code related to a variance, it appears that there should have been extra due diligence on the builder to make sure that the home would fit on the lot. The house could possibly have been flipped so as to utilize the shared driveway and possibly not have had to move the house back at all. There is a tremendous adverse impact to the neighbor and he cannot imagine trying to sell the house. A potential purchaser would notice the issue and see the

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liabilities. Commissioner Markewich stated that the house was not done correctly and moving the irrigation lines would have been a lot easier. Based on the express language of the City Code, he would vote to approve the appeal and overturn the staff's recommendation.

Commissioner Donley stated that he read the criteria and strictly by the book, the lot size is totally the same within the Parkside development. He stated that he understands the driveway encroachment but feels that that is the nature of Parkside. There is a reasonable use to the property and room to place the house within the requirements. There is adverse impact on the neighborhood. As a minor issue, Commissioner Donley stated that this would generate discord between the two final property owners. All three criteria have to be met and the first two are not so therefore would approve appeal and overturn the staff's recommendation.

Commissioner Shonkwiler asked about the legality in the event a tie vote occurs. Marc Smith stated that if a positive motion and a tie vote, the vote would fail and the variance would still be in effect. If the motion is to deny the appeal, then the motion would have to be flipped and redone. If the motion is to uphold the appellant's position, four votes would be needed otherwise a tie vote would fail.

Motion by Commissioner Smith, seconded by Commissioner Donley to deny the appeal and reaffirm the non-use variance and the City's recommendation that the variance meets the criteria. Motion failed 3-3. Commissioner McDonald, Henninger and Gibson excused.

Motion by Commissioner Markewich, seconded by Commissioner Donley to approval the appeal and deny the non-use variance administrative approval. Motion failed 3-3 and therefore appeal denied. Commissioner McDonald, Henninger and Gibson excused.

August 20, 2015

Date of Decision

Planning Commission Chair

Planning Commission adjourned at 6:17 pm.