

**BOARD OF ADJUSTMENT  
MINUTES**

**March 3, 2010**

The Urbandale Board of Adjustment met in regular session on Wednesday, March 3, 2010, at the Urbandale Administrative Offices Building, 3600 86<sup>th</sup> Street, with Chairperson Patrick Kirchner calling the meeting to order at 6:00 p.m.

Board members present were Carey Evans, John Pittman, and Patrick Kirchner. Mark Wandro arrived after roll had been called. Staff members present were Heather Mac Bean, Planner II, and Cheryl Vander Linden, Department Secretary.

There were no objections to the official publications as they appeared in the Urbandale/Johnston Register.

Mr. Kirchner said this is a 5-member board and the Code of Iowa requires 3 affirmative votes to grant any variance or conditional use, regardless of how many members are present or may have a conflict of interest and be unable to participate and vote on a particular appeal. A minimum of 3 members must be present to constitute a quorum and allow the meeting to be held. In such case a unanimous vote is necessary. A vote of 2 to 1 in favor, or 2 to 1 with one abstention, if 4 were present, as examples, would constitute a denial. Knowing that, anyone who wishes to have his or her item deferred until a future meeting may do so by requesting a deferral now or at any time prior to a motion being made. Once a motion has been made, it will no longer be possible to request deferral. If denied, a variance or conditional use cannot be resubmitted for the Board's consideration for a minimum of one year. We ask that each person addressing the Board this evening please speak from the podium at the front of the room so your voice will be picked up by the sound system, state your name and address for the record prior to making your presentation. Also please turn off your cell phones or, at a minimum, set them to silent or vibrate.

Ms. Evans moved, and it was seconded by Pittman, to approve the February 3, 2010, meeting minutes. On roll call: Ayes: Evans, Pittman, Wandro; Passes: Kirchner; Nays: none. Motion carried.

The first item on the agenda was the "Denton Homes Rear Yard Setback Variance", 16106 Maple Drive, Case number 011-2010-01.01.

Mr. Clifford Schwartz, 6701 Westown Parkway, West Des Moines, said I'm the attorney for the Larry and Lori Baker, who own Lot 10 and Outlot Z in Summit Hills. We have reviewed Staff recommendations. In fact, a week or so ago we met with Mr. Dekker, Ms. Mac Bean, and City Attorney Bob Laden, and talked through the earlier Staff recommendations. They were modified based on that conversation. We'll accept the staff recommendations which are conditions to the granting of the variance. If you have any questions, I'd be happy to answer them.

Mr. Wandro asked why would you choose to go the variance route instead of simply replatting?

Mr. Schwartz said it's not complicated, but is a function of what the Bakers wanted to try to do. Without going into any detail, at this point, they didn't realize that this was a problem until the latter part of January apparently. And they had made plans both structural plans, they've got all the architectural work done, they've actually acquired a substantial amount of the furniture for this property, and that all occurred without their knowledge that there was going to be this particular problem. And so at this point, the variance would allow us from this point forward to get into construction much quicker than a replatting will. And I think Mr. Dekker and Ms. Mac Bean and Bob Laden and I talked about that at our meeting a week or so ago, and we're estimating that we can get into construction probably a month quicker at least, if we go the variance route, than we can replatting.

Mr. Wandro said okay, thank you.

Mr. Schwartz said I feel a little bit compelled to tell you that if the variance is granted and certain other things don't happen, we will not go forward. We want to do it, but we're not going to do it unless we get some concessions from some other people.

There was no one present who wished to speak in opposition.

Ms. Mac Bean said the action required on this item is to approve or deny a variance from Section 3.2 of the Zoning Ordinance to allow a portion of an outlot to be utilized for compliance with the minimum rear yard setback requirements and for buildable area.

This appeal was deferred on January 6 and February 3, 2010 by the Board of Adjustment at the request of the homeowner's attorney to allow the homeowners to evaluate the conditions of approval.

Denton Homes, represented by Stephanie Denton, are requesting variances to construct a single-family dwelling that extends 3.94 feet, and a deck that extends an additional 7.06 feet, into Outlot "Z" which is located south of and adjacent to a building lot that is legally described as Lot 10 in Summit Estates Plat 1. The variances would allow a portion of Outlot "Z" to be used to comply with the minimum rear yard setback requirement for the dwelling and to allow a portion of the Outlot to be used for buildable area.

Denton Homes is constructing the single-family dwelling for the property owner who has consented to the variance request. The property is located at 16106 Maple Drive in Summit Estates Plat 1, which was developed in 2008.

The subject property consists of a building lot (Lot 10) and an outlot (Outlot "Z"). Outlots are not considered to be buildable property under City ordinances, usually because they contain unmitigated hazards to health, safety, or welfare; they do not comply with all ordinance requirements such as not being fully served by required public improvements; or other legal constraints that substantially limit their use beyond agricultural or open space uses. Accordingly, outlots cannot be used to satisfy minimum setback requirements for a dwelling or other buildings.

Ms. Mac Bean said, in this specific case, Outlot "Z" (and other outlots in the Summit Estates development) has steep grades that slope down to a narrow, comparatively deep drainageway with an actively-eroding channel, dropping a total of 30 feet with slopes commonly ranging 35 to 40%. Such slopes generally are unstable, exceeding the soils' natural "angle of repose", and subject to landslide or slump if burdened by a structure or other construction, or simply by disturbances as simple as tree removal. They also may be evidence of significant underlying soils issues, such as shale or other impervious materials with "perched" water tables that may create slippage planes. The drainage channel has been actively cutting (eroding) under natural conditions, and with development of upstream areas and the resulting increase in runoff the channel erosion will worsen. That is, all developments in all Metro cities are required to provide storm water detention, which prevents increased flooding from added development runoff by detaining the added runoff during major storms, and actually improves (reduces) the major floods over natural conditions. However, the storm detention is allowed to release runoff at a rate that is called a "5-year undeveloped storm", and accordingly the post-development runoff from small storm events DOES increase over natural conditions. That is, small rains/snow melts in developed areas will run off at a rate that would be infrequent under natural conditions, and therefore the erosion rate is increased. Footing drains also run more or less continuously contributing to added saturation of stream channel soils, which makes them somewhat more erodible. Finally, the lower portion of the drainageway is a flood hazard area under FEMA regulations (referred to as an "approximate study area", meaning FEMA has not conducted a detailed flood study to establish a flood protection elevation or floodway. Accordingly, the outlot falls under Section 4.1, paragraph J. of the Zoning Ordinance, titled "Hazardous Site Conditions", which reads as follows:

*"No land shall be used or structure erected where the land is held unsuitable for such use or structure by the Zoning Administrator by reason of flooding, concentrated runoff, inadequate drainage, adverse soil or rock formation, unfavorable topography, low percolation rate or bearing strength, erosion susceptibility or any other feature likely to be harmful to the health, safety, prosperity, aesthetics and general welfare of the community."*

When property is developed, the Subdivision Ordinance requires any such areas portions to be fully investigated to identify the hazards, and to either be fully improved in such manner to mitigate (eliminate) the hazards, OR to be legally restricted in such

manner that their use will not endanger health, safety, and welfare, or property improvements. In the case of Summit Estates and Outlot "Z", the developer chose to restrict the use of Outlot "Z", i.e. not allow it to be used for building purposes including setbacks (not allowed to be used for setback purposes to ensure that structures and other improvements are properly located out of and away from the hazards, and that hazard area won't be inappropriately disturbed in a way that might worsen the hazard), rather than investigated and improved to mitigate the hazards and to thereby allow the outlot areas to be platted as buildable lot area.

Since unmitigated hazards continue to exist, it is necessary to ensure that such hazard/sensitive areas are appropriately controlled and restricted so personal safety and/or property is not endangered. Legal mechanisms for controlling of hazard/sensitive areas include covenants, public easements, and outlots, with the "choice" of controls generally depending on the situation and nature of the "control area". In this case, the outlot was established to prevent development within the hazard area, and by Ordinance, the principal structure and any accessory structures must comply with all minimum setback requirements and easement restrictions within the building lot (Lot 10), exclusive of use of any outlots such as Outlot "Z".

As a part of a review process prior to the filing of this appeal, City staff suggested that the soil and slope conditions be investigated to determine whether the soils/slopes were stable and would remain stable post-construction with whatever precautions/mitigation might be appropriate, or whether there might be underlying conditions such as shale (bedrock) that could not easily be remedied. Such tests were conducted on the subject property by Allender Butzke, Inc., a local geotechnical engineering firm, which determined that there were no unusual soil conditions present, and that the slopes were currently stable and would remain stable IF appropriate precautions were taken, including but not limited to additional soils investigations to ascertain precise conditions under the structure's footings, proper compaction of "soft spots", deeper footing placements within slopes, dewatering via both subsurface drainage and carrying surface drainage beyond the slope, protection of the "toe" of the slope, and especially careful placement of any fill since placement of fill to create a "walkout" lower level could destabilize the slope and lead to a landslide that could endanger the residence or related improvements. Additionally, both the engineering consultant and the City Engineer required that channel stabilization (riprap or similar measures) be provided within the creek channel etal, as necessary to control channel erosion so erosion is less likely to destabilize the slopes/soils, whether by cutting out the toe of the slope, channel movement that might increase ground water, etc.

The entire Outlot was not investigated, and hazards accordingly may remain within the uninvestigated portion of the Outlot. Accordingly, a Plat of Survey is proposed to divide Outlot Z into 2 parcels, with Parcel A being the portion of the outlot that is immediately adjacent to Lot 10 that is the subject of this appeal. The creation of Parcel A would define the specific area that has been investigated and where hazards are to be

mitigated, while continuing to restrict use of the remainder of the Outlot in the manner that it currently is restricted.

Ms. Mac Bean explained that the property is zoned "P.U.D." Planned Unit Development District and is regulated by the "Berkshire Estates" P.U.D., which requires a 30-foot rear yard setback. The buildable portion of the property (Lot 10) is a pie-shaped lot with 81 feet of frontage on Maple Drive and a lot width of approximately 120 feet at the building line. The building lot has a depth of 130 feet along the west property line and 141 feet along the east property line which equals a building depth of 70 feet and 81 feet, respectively. The lot has a total lot area of 15,665 square feet. Therefore, the building lot (Lot 10) complies with all requirements of the P.U.D. Master Plan exclusive of Outlot "Z", as required by the "Berkshire Estates" P.U.D.

Outlot Z has an area of 83,268 square feet (1.91 acres). Combined, the building lot and outlot have a total area of 98,933 square feet (2.27 acres). The other lots on the Maple Drive cul-de-sac have areas ranging from 17,900 square feet to 30,132 square feet. These lots also have buildable depths up to 140 feet, exclusive of the front and rear yard setback requirements.

The properties to the north, east and west are also a part of the "Berkshire Estates" P.U.D. To the south are residential properties in the City of Clive that are zoned "R-1" Single-Family Residence that are similar to Urbandale's R-1I Intermediate Density District.

The appellant notes that the lot is not deep enough for the dwelling to meet the required setbacks and the property is unique because of its location on a cul-de-sac and the depth of the lot. The appellant states intent of the Ordinance will be preserved because of the large outlot which gives separation and privacy. They also state that they have considered other building structures, and the required setback limits the quality of the building structure.

Ultimately, the homeowner may replat the property, to avoid potential issues relating to the outlot and the flood hazard it will still contain, thereby rendering the variance moot. Also, an alternative house design is being considered, that may "shrink" the variance.

Ms. Mac Bean said Staff analysis is as follows:

1. This property may be somewhat unique compared to other similarly zoned properties in this area of the plat, since the building lot was platted with a depth that is about 70 feet shallower than the buildable depth of the other nearby lots in the plat. However, the lot depth complies with the Zoning Ordinance's minimum depth and all other requirements. The depth/buildable area also is sufficient to accommodate a house that complies with the plat's restrictive covenants (private requirements not enforced by the City), and it appears possible to construct a

different house design on the lot without need for a variance.

2. The Ordinance may create a hardship IF the hazardous site conditions can be and are mitigated. It is not legal to restrict use of property simply to create/maintain open space, but only to protect safety and property for the reasons/in the manner stipulated by Section 4.1, paragraph J of the Zoning Ordinance (see recitation in summary). Accordingly, if the site hazards are properly mitigated, restrictions on the use of the property would be inappropriate and the Ordinance would create a hardship warranting relief.
3. As noted in the staff report, Outlots cannot be used to satisfy setback requirements because of potentially hazardous conditions within the Outlot. The Outlot boundaries are intended to delineate the boundaries of the site hazards, and application of the setback requirements from the boundary of the hazards is intended to ensure that property improvements will be kept a suitable and proper distance away from the hazard area. IF the hazards are mitigated within the "variance area", use of that area to comply with setback requirements would satisfy the spirit and intent of the Zoning Ordinance.
4. One alternative to the variances would be to select a house design that would meet all of the required setbacks. Another alternative would be to replat the building lot and a portion of the outlot, which by Ordinance would require all of the hazards within the "redefined" buildable lot to be fully mitigated.

Therefore, the Board could find that the property is not unique; no hardship exists; the proposed variance could be detrimental to health, safety and welfare; that the spirit and intent of the Ordinance has not been satisfied; that a reasonable alternative exists; and that the requested variance should be denied. Or, the Board could find that subject property is unique; hardship has been created by the Ordinance; the proposed variance does not create a negative impact upon the character of the neighborhood, and the spirit and intent of the Ordinance have been satisfied; health, safety, and welfare have been preserved; no reasonable alternative to the variance exists; and that the requested variance be approved.

Ms. Mac Bean said Staff recommends approval of a variance from Section 3.2 of the Zoning Ordinance to allow a portion of an outlot to be utilized for compliance with the minimum rear yard setback requirements and for buildable area, subject to:

1. The variances applying only to the future Parcel A, of Outlot Z of the Plat of Survey for which the soils investigation has been conducted and for which channel stabilization etal will be done, and not to the balance of the Outlot where hazards have not been fully identified and may continue to exist in an unmitigated condition.
2. The builder complying with all recommendations of the geotechnical exploration on

Lot 10, Summit Estates, identified as PN 091425 and dated November 30, 2009 as performed for Peak 8 Development by Allender Butzke Engineers Inc.

3. The builder engaging Allender Butzke or other qualified geotechnical engineers to conduct additional tests and investigations during the course of construction, including but not limited to certification that the footings and foundation design and construction fully complies with Soils Report; certification that the final grading and drainage is fully compliant with Soils Report and all professional engineering practices; and any additional testing and investigations that may be required by City building inspectors.
4. The builder bearing all costs for the design of plans and specifications in accordance with City requirements and for construction of all improvements deemed necessary by the City Engineer or Allender Butzke Engineers to stabilize the drainage channel located in Outlot "Z".
5. The builder complying in full with all stipulations and requirements of the variance approval precedent to City approval or issuance of any Certificate of Occupancy for the property and actual occupancy thereof.
6. The builder making continual progress towards full compliance with these conditions of variance approval including but not limited to:

Recording the plat of survey prior to the issuance of a building permit and if the property is re-platted, completing same in full compliance with all requirements of the City's Subdivision Ordinance and Code of Iowa, and any requirements that may be stipulated by the City Council in the approval of such replat on or before May 30, 2010 including the recording of the subdivision plat by said date; and

Submitting and obtaining approval from the City Engineer for plans and specifications stated in #4 above on or before March 15, 2010, and satisfactorily completing the construction of the improvements on or before June 30, 2010.

If the requested variances are not granted by the Board of Adjustment, the appellant will replat the subject property in full compliance with all requirements of the City's Subdivision Ordinance and Code of Iowa, and any requirements that may be stipulated by the City Council in the approval of such replat, to convert a sufficient amount of Outlot "Z" to fully improved, buildable lot area.

Mr. Kirchner said I have a question about the change to the 6<sup>th</sup> condition. A new twist to this condition deals with the property being replatted. Does that apply only to Parcel A, or is that the entire property?

Ms. Mac Bean said it's going to be both lots. It's going to be a replat of lot 10 and outlot

Z. As part of our initial discussion in January, the line between the two lots will be moved, and so it will be replatted into lot 1 probably and an outlot. The lot line will move and it will be a plat instead of a plat of survey.

Mr. Kirchner said all right. I think with this new stipulation, the date has been moved back from the original date of April 15, and now it's May 30. Is that feasible to have both of those conditions taken care of? Or have the second part taken care of on or before March 15? Is that still feasible to get that done, to submit and obtain the approval of the City Engineer on or before March 15?

Ms. Mac Bean said yes, a second revision to the grading plan was submitted, but Allender-Butzke has never confirmed or reconfirmed their assessment based on the new drawing from CDA, Civil Design Advantage, who also is doing the plat of survey. So we don't have a second response from Allender Butzke. They would need to respond that any corrections or improvements that are going to be done in the creek area would be satisfactory, if the lot line is moved. So we need that from them, and then the plat date of May 30. That probably could be done, because a replat, in this particular case, probably won't take that long.

Mr. Wandro said this is my role, so to speak, in my job, it's what I do for a living. It is somewhat unique for the property owner, not the person that filed the plat. The person that filed the plat played by the rules but didn't want to go through the expense of defining the floodway and the flood fringe, and the minimum elevation necessary to protect the property from the 100-year flood, and unfortunately it burdened the property owner and what they want to use the lot for. The staff, reading through the recommendations, has basically required the same thing, in a different way. They want stability in the slope of the creek to make certain that that doesn't erode in to where any other property could be in jeopardy. They want to make certain it's out of the water, and so what they basically are asking are for these conditions to be satisfied in return. Because of that, if they are to the satisfaction of staff, then the portion of Outlot Z, Parcel A, can be then used for a buildable portion of the lot. There are plenty of assurances in there, it's just the manner in which we want to let them get there. We could be difficult and say just go replat it all and work through the normal process. It would cost them some time, and it isn't going to provide the City any more assurance that the property is protected by their ordinance. We're providing them a venue to get it done quicker. I'm comfortable with that, and am just being open about it.

Mr. Kirchner said the property owner gets to pay for what the developer didn't want to pay for.

Mr. Wandro said yes.

Mr. Wandro moved, and it was seconded by Evans, to approve the Denton Homes Rear Yard Setback Variance, based upon Staff recommendations and the conditions listed,

Board of Adjustment Meeting Minutes

March 3, 2010

Page 9 of 9

based upon the uniqueness of the property and this is necessary to make Parcel A a buildable portion of the lot. On roll call: Ayes: Wandro, Evans, Pittman, Kirchner; Nays: none. Passes: none. Motion carried.

Regarding Staff reports, Ms. Mac Bean said we'll possibly have two conditional use permits next month, both related to classic car shows that would operate on a continual basis from May through September in two separate locations. One would be at Stella's and one would be at the Maid-Rite at Northpark. Those may be the only two items, but the agenda doesn't close until next Friday.

The meeting adjourned at 6:14 p.m.