

PARK CITY MUNICIPAL CORPORATION
BOARD OF ADJUSTMENT
MINUTES OF JANUARY 21, 2020

BOARD MEMBERS IN ATTENDANCE: Ruth Gezelius – Chair; Hans Fuegi, Dave Robinson, Mary Wintzer, Stefanie Wilson (Alternate)

EX OFFICIO: Director Bruce Erickson; Planner Hannah Tyler; Jody Burnett, Outside Counsel; Jessica Nelson

ROLL CALL

Chair Gezelius called the meeting to order at 5:00 p.m. and noted that all Board Members were present except Jennifer Franklin, who was excused.

ADOPTION OF MINUTES

December 10, 2019

MOTION: Board Member Fuegi moved to APPROVE the Minutes of December 10, 2019 as corrected. Stephanie Wilson seconded the motion.

VOTE: The motion passed unanimously.

PUBLIC COMMUNICATIONS

There were no comments.

STAFF/BOARD MEMBERS COMMUNICATIONS AND DISCLOSURES

Board Member Wintzer disclosed that due to her work on behalf of the Senior Citizens Center, she did not believe she could be impartial and would be recusing herself from the agenda item this evening.

Chair Gezelius noted that the Board still had a quorum without Mary Wintzer.

Board Member Wintzer recused herself and left the meeting.

Director Erickson thanked the Board for taking the time to hear the appeal this evening. He also thanked Jessica Nelson for her effort in scheduling this meeting.

REGULAR MEETING – Discussion, Public Hearing and Possible Action

Appeal of the Woodside Park Phase II Master Planned Development Application – Setbacks Remand - The appellant is appealing an October 9, 2019 decision made by the Planning Commission to approve (as amended) the Remand of the Woodside Park Phase II Master Planned Development specific to LMC 15-6-5(C) Master Planned Development Requirements – Setbacks. The Appellant's letter preserves his right to challenge and seek judicial review of the previous decision of the Board of Adjustment and outlines those additional reasons for his appeal. However, the scope of this particular appeal is limited to the topics reviewed by Planning Commission on the Remand, which in this case, only pertains to Setbacks. (Application PL-19-04359)

Planner Hannah Tyler reported that on May 22, 2019 the Planning Commission approved the full Master Planned Development for Woodside Park Phase II. The Appellant appealed that project and on July 16, 2019 the BOA denied three of the four points of the appeal. The fourth point was setbacks and the BOA remanded it back to the Planning Commission. Planner Tyler clarified that the Planning Commission was only looking at 15-6-5C, which is specific to the boundary setback but allows the Planning Commission to vary the setback if it provides necessary architectural interest and variation.

Planner Tyler noted that the remand went back to the Planning Commission. It was continued in August and reviewed by the Planning Commission on September 11, 2019. After a lengthy discussion, the Commissioners concluded that on the north, south, and east boundaries the project did provide necessary desired architectural interest and variation, and that that project could use the zone setbacks. However, on the west side, the Planning Commission determined that the project needed to comply with the 25' boundary setback.

Planner Tyler reported that on October 9, 2019 the Planning Commission approved the setbacks as amended for the 25' west boundary. On October 10, 2019, this second appeal came before the Board of Adjustment and it was continued until this evening.

Nicole Deforge, legal counsel representing the Appellant, Doug Lee, stated that Mr. Lee owns a home adjacent to this proposed development. Ms. Deforge noted that the Appellant previously came before the Board of Adjustment to appeal setbacks reductions for the Woodside MPD project. At that time, the front setbacks were to be reduced from 25 feet to 10-20 feet. The side setbacks were to be reduced from 25 feet to 5-10 feet. The rear setbacks were to be reduced from 25 feet to 5-10 feet as well. The result was up to 80% reductions in the required setbacks for MPDs. With those numbers in mind, Ms. Deforge asked the Board members to imagine living directly next door to this development.

Ms. Deforge stated that on appeal the Board of Adjustment unanimously concluded that the Planning Commission findings did not meet the strict requirements of the ordinances and remanded the decision to the Planning

Commission. The Appellant was before the BOA today for the same reason. The City still failed to meet the legal requirements for approving large and unnecessary setback reductions for the Woodside Park project.

Ms. Deforge stated that the minimum setbacks for the Woodside Park project are 25' around the exterior boundary and that issue is not in dispute. It is also undisputed that the City cannot reduce the minimum setbacks unless the requested reduction is "necessary to provide desired architectural interest and variation". Ms. Deforge remarked that her intent in quoting the standard was to call attention to Planner Tyler's comment because she had not stated it accurately. Ms. Deforge believed Planner Tyler was saying that the standard was to provide necessary architectural interest and variation. To be accurate, the standard is that it must be necessary to provide desired architectural interest and variation. Those are two very different intents and reflect an ongoing lack of clarity regarding the standard.

Ms. Deforge stated that the only issue before the BOA is whether the City has fulfilled its legal responsibility to the citizens and the community by upholding and applying the law as written. It has repeatedly failed to do so. Instead, the City has attempted to shoehorn a development that it wants through the approval process, with after-the-fact justifications for unnecessary setback reductions that do not meet the legal requirements. Ms. Deforge remarked that the legal requirements are clear and undisputed. Setbacks cannot be reduced for this project unless they are necessary for architectural interest and variation.

Ms. Deforge stated that from the beginning, in the initial application, the applicant never suggested that setback reductions were necessary for architectural interest in this project. In the initial review and recommendation to approve this project, the City Planning Staff did not include a single finding that setback reductions were necessary for architectural interest and variety. They simply ignored or overlooked the law, rubber stamped the request for setback reductions, and recommended approval of the project with the reduced setbacks. Ms. Deforge did not think that was surprising since Woodside Park is a City sponsored project.

Ms. Deforge noted that Mr. Lee was paying attention and objected to the reductions that were unsupported by law or by facts. At that point, the City, together with the Planning Commission, added the proposed Staff findings during a Planning Commission meeting to justify the reductions and to plug the holes in the Staff report. However, the BOA concluded on Appeal that none of the findings by the Planning Commission supported a legal conclusion that setback reductions were necessary. The project was remanded back to the Planning Commission for another opportunity to see whether they could come up with something that would satisfy the legal standard. Ms. Deforge noted that in considering the remand, the Planning Commission acknowledged that there had never been a legal basis for setback reductions along Empire Avenue, despite

the fact that the Planning Staff twice concluded that the reductions were appropriate and the Commissioners previously agreed.

Ms. Deforge stated that in looking at it the second time, the Planning Commission injected a number of new findings in their conclusion as to why the rear and side setback reductions were valid; as well as the front setback on Woodside Avenue, and hoped they would pass legal muster. Ms. Deforge argued that they still did not meet the legal standard. Setback reductions should not be granted because of project benefits such as public amenities, developer concessions, or because the City likes the project. Those are not legal basis for setback reductions. It is also not enough to find that reducing setbacks might achieve architectural interest and variation. She referred to page 11 of the Staff report which states, "The Planning Commission agreed with the applicant's argument that the requested setback reduction to the zone required will achieve the following results." Ms. Deforge remarked that it goes back to not being necessary to provide architectural interest and variation, but rather to achieve desired architectural interest and variation. Trying to achieve architectural interest and variation does not mean that setback reductions are necessary for that purpose. Ms. Deforge stated that the list of results that follow the five bullets after the statement in the Staff report are merely features that are achieved by the project. They are no findings that reduced setbacks are necessary to achieve any of those features, or that reduced setbacks are necessary for architectural interest and variation in general. Ms. Deforge stated that a cursory review of the findings makes clear that all of these so-called result could be achieved without setback reductions. She believed the City had applied the wrong legal standard again because they cannot make the findings that would be required under the correct legal standard. In addition, they cannot build the project without the reduced setbacks because it was designed with reduced setbacks.

Ms. Deforge stated that the legal standard is also not whether setback reductions are necessary for this particular design. A project cannot be designed with reduced setbacks and then claim that the reduced setbacks are necessary. The reduced setbacks are a function of the plan as designed, not a legal necessity under the ordinance. Ms. Deforge remarked that in the Planning Commission's latest attempt to justify this project, there are no findings that this large development could not have been designed within the required setbacks and still achieve desired architectural interest and variation. Ms. Deforge believed the Planning Commission only looked at this plan and determined whether it required reduced setbacks. She pointed out that the designed plan was not the only possible plan for the site. Ms. Deforge noted that Mr. Lee is an architect, and he believes the project could have been designed in different ways within the required setbacks and still maintain architectural interest and variation.

Ms. Deforge referred to page 9 of the Staff report and the discussion of Section 15-2.16-1 of the Park City ordinances. She noted that paragraph 5 states that

“One of the purposes of the RC zone in which the project is located is to provide opportunities for variation in architectural design and housing types”. She noted that the Staff concluded that this project meets that requirement of variation in architectural design because it has a variety of housing types, as well as several different types of buildings. In other words, the project already has sufficient architectural interest and variation based on the mixed housing and building types without any need for reduced setbacks. Ms. Deforge pointed out that setback reductions were not mentioned in paragraph 5. The same was true for paragraphs 8 and 9. In both paragraphs the City references the need for project design to be consistent with the City’s historic and mountain character. In both paragraphs the City concludes that the project incorporates the necessary architectural features to satisfy those requirements without any mention of setback reductions being necessary.

Ms. Deforge stated that the findings directly contradict any possible argument that setback reductions are necessary to provide architectural interest and variation for this project. As made clear in the Staff report, the project will already have the desired architectural interest and variation without the reduction. Therefore, the setback reductions are not legally supportable and the Planning Commission’s conclusion to the contrary is legally unsustainable.

Ms. Deforge asked why the City continues to approve its own project despite its obvious failure to comply with these legal requirements. She stated that as explained in the Appeal letter, this project was designed for reduced setbacks from the beginning. The City, as the applicant, assumed the setbacks would be approved and designed the project accordingly. Ms. Deforge remarked that there is nothing in the initial application claiming that setback reductions were necessary for architectural interest and variation, or that they tried and failed to design the project within the legal setbacks but could not achieve architectural interest and variation. Ms. Deforge stated that the City could not come to the BOA after the fact and attempt to justify the setbacks as being necessary because of the design they created themselves. That is not the standard and one cannot manufacture a necessity by designing something that creates necessity.

Ms. Deforge walked through the Planning Commission’s latest attempt to craft findings that would support the reduction, and how the City was attempting to justify this particular design rather than determine whether reduced setbacks are necessary. Ms. Deforge read from page 12 of the Staff report, the revised Finding #19. “The desired architectural interest and variation compliments the existing streetscapes and achieves a site plan consistent with the zone, General Plan, and sustainability goals”. She noted that setback reductions were not mentioned. Ms. Deforge stated that sustainability goals are irrelevant to the legal standard. She continued reading, “On this site, the desired results are best evaluated from the totality of the architectural characteristics of the entire site plan and the buildings collectively rather than individually”. Ms. Deforge thought

it was clear that the Planning Commission only voted on what was necessary for the plan rather than the site. There was no consideration as to whether the site could have been designed within the required setbacks. Ms. Deforge continued. "The proposed setbacks are necessary to achieve breaking up massing of multiple buildings rather than one larger mass, the clustering of density towards the center of the site and increase the public plaza space and walkway". Ms. Deforge pointed out that again, the Planning Commission only looked at the plan and not the site. She thought they could easily break up the massing, have multiple buildings, and cluster density towards the center in a different plan without reduced setbacks. Ms. Deforge stated that wanting extra plaza space and walkways is not a legal basis for reduction of setbacks under the ordinance. Ms. Deforge read, "Building to larger MPD setbacks on Woodside Avenue is not desired because the result would be inconsistent with the existing buildout on the street and would detract from the character of the neighborhood". She believed it was incorrect that all the Woodside buildings have the same setbacks and that consistency with existing streetscapes would require variation. Ms. Deforge noted that this would only apply to the front setback on Woodside; however, all the side and rear setbacks had been reduced as well. She continued, "The proposed townhouse configuration with smaller setbacks and porches is desired". She noted that there can be porches without reduced setbacks. The issue is that the City designed the porches to go out into the required setbacks. Ms. Deforge read, "The large public plaza and east-west connection are desired public amenities that help reduce the overall massing". She reiterated that desire for more public amenities is not a legal basis for setback reductions under the ordinance. "The setbacks proposed are necessary for the desired dense site plan, which balances affordability, pedestrian connections, open space and variations in building scale". Ms. Deforge stated that desire for these items is not a legal basis for reducing setbacks. "The additional 5' front setback on Empire Avenue is not necessary as the proposed buildings may be shifted without materially impacting the desired site plan or architecture". Ms. Deforge stated that this is true, and it was true when the Planning Staff twice recommended approval of the setback reduction and when it was previously approved by the Planning Commission. Ms. Deforge thought it was clear that the Planning Commission only looked at the desired site plan rather than the site itself in determining what is necessary in terms of setback reductions.

Ms. Deforge stated that the revised Finding #20 mirrors Finding #19 with a few additions. One is that it would provide for increased parking, which is not a legal basis for setback reductions. In addition, variation between the architecture of each building would be a result of this plan, which does not require reduced setbacks to achieve architectural variation of the buildings.

Ms. Deforge emphasized that none of the Findings satisfy the actual legal requirements for reducing setbacks under the City's zone ordinances. The architectural interest and variation claimed in the Planning Commission's most recent findings could be achieved without reduced setbacks; or else it does not

constitute architectural interest and variation and does not satisfy the ordinance. Ms. Deforge stated that the City failed to show that it cannot achieve architectural interest and variation on this site without reduced setbacks. The City has only argued that this specific plan cannot be achieved without reduced setbacks. The Planning Commission has done its best to “wave a magic wand” over the City’s failure, but it cannot be fixed regardless of how creative they get. Reduced setbacks are not necessary on this large and varied site that provides a myriad of options for achieving architectural interest and variation.

Ms. Deforge stated that allowing the City to reduce setbacks only because it created a design that assumed reduced setbacks would not only violate the law, but it would also set a precedent for other developers to do the same. If that is allowed to occur, setbacks requirements would be rendered meaningless and reduced setbacks would always be the rule.

Ms. Deforge noted that the City argues that this situation is different because developers typically seek reduced setbacks to address increased density and height. However, if design for increased density or heights has never been the basis for approval of any MPD setback reductions, the City is violating its own ordinance. Ms. Deforge clarified that she was not suggesting that the City has done anything untoward; and it is natural not to scrutinize their own project as closely as they do other projects. She believed that tendency is especially true in this situation where the City wants this project.

Ms. Deforge stated that if not for Mr. Lee, this project would have moved through the planning process without any consideration of whether the setback reductions complied with the law. She urged the BOA to pay careful attention to the City’s recommendation and the Planning Commission findings, and the contrast to what the law actually requires. The Board cannot allow the City to continue to violate its mandatory ordinance simply because it wants this development. Ms. Deforge remarked that this time a remand was not appropriate because it is clear that the findings necessary for a setback reduction cannot be made for this project.

Doug Lee, the Appellant, stated that he was representing his family, the owners of 1356 Empire Avenue, which is adjacent to the Woodside Park Phase II project. His family has owned the home for 40 years. Mr. Lee stated that he has a degree in Architecture and he originally specialized in designing in historic district. He believed his experience gives him great insight into the planning exceptions the City was requesting. Mr. Lee strongly objected to the City’s claim that the project as currently designed with numerous setback reductions is necessary for architectural interest and variation. Mr. Lee was prepared to show the Board why the setback reductions are not necessary.

Mr. Lee stated that he fully supports the concept of increasing affordable housing in Park City. However, as a City-owned, publicly sponsored project, Woodside

Park should consider all of the stakeholders, including the immediate neighbors, not just the future residents of the project. Mr. Lee stated that he was also speaking for a group of two dozen neighbors who strongly believe that this project should be built without any exceptions to the setback requirements. At the first Board of Adjustment meeting last year, some of the Board members agreed that the City had not substantiated its request for setbacks. Some also said that architectural interest and variation could be created in numerous ways without reducing the setbacks. Other Board members wanted to know how many designs were considered that respected the 15' setback, and why they were scrapped. Board members also said that the Planning Commission decision had serious flaws. Mr. Lee noted that one Board member commented that the current proposal was not the only solution and there must be a way to design within the setback requirement.

Mr. Lee noted that the City has done nothing since the last BOA meeting to address their concerns. Instead, they chose to hide behind their findings rather than engage in any re-design of the project to meet the required setbacks.

Mr. Lee presented design iterations that he had prepared within the required setbacks, compared to the City's design that requires reducing the setbacks. He also pointed out other pieces of the City's design that violate the Historic Preservation laws. Mr. Lee indicated places where some of the Woodside Park buildings could easily conform with the setbacks; however, for whatever reason, they chose not to move the buildings two to five feet to comply.

Mr. Lee stated that he and his neighbors believe the project is too large and too close to their properties with the reduced setbacks. He hoped the BOA would find that reduced setbacks are not necessary to achieve architectural interest and variation; and will remand the project back to the Staff and Planning Commission to study alternatives. He also hoped the City project would satisfy their concerns and incorporate their feedback by complying with the 25' setback.

Kelly Morgan, with Method Studio, stated that the project was designed under his responsibility and he was responsible for overseeing the project. The day to day drawings and design work were done by others in his office. Mr. Morgan noted that when they were last before the BOA four items were presented in the Appeal. The Board denied three items and remanded the fourth item, which were the setbacks, to the Planning Commission for additional review and consideration. Mr. Morgan remarked that they were only addressing setbacks this evening, as well as the definition in the LMC "necessary to provide desired architectural interest and variation".

Mr. Morgan stated that he respected and appreciated the Appellant's presentation; however, there are many architects in the world and many approaches to every design problem. He acknowledged that Mr. Lee had presented options that might possibly work, but this project has been in the works

for two years. After many design discussions, a lot of rules, and many other items on the table for discussion over those two years, they reached the conclusion that the design presented was the best solution. Mr. Morgan believed the current design fits the goals of the City as the applicant in being responsible for the use of this property. He pointed out that every applicant has a legal right to request a setback reduction as allowed by the LMC.

Mr. Morgan presented imagery of the project and explained some of the reasons for what they had designed. He asked the Board to look at this project as a whole and within the entire fabric of the context it is in, rather than looking at specific elevations or pieces. Mr. Morgan stated that in looking at the entire context of the neighborhood, the townhomes are less of a presence on the street. The Building where the flats are located is stepped off the street and provides a more pleasant approach to the building. Mr. Morgan stated that they were not maximizing the setbacks allowed by the zone. They were trying to be sensitive to the neighbors along the street and now crowd them where possible so all parties involved can have a successful project that adds to the viability of the neighborhood. Mr. Morgan presented a plan showing what the setbacks would do and how it relates to the project. He referred to the LMC definition regarding being necessary to provide desired architectural interest and variation; and noted that there are many ways to interpret that sentence. Mr. Morgan clarified that Method Studio looked at a holistic interpretation of that sentence. There are ways to manipulate a façade and manipulate materiality and provide architectural interest; but the critical part to the success of this project is good site planning because it is part of architectural interest. It all works together cohesively to provide that architectural interest and success of a project. Mr. Morgan remarked that this project was planned in a way that does not fully push out as far as they could if they wanted to provide additional density. He pointed out that the project is below the allowed density for the area. They did not push out to the maximum because it was not good design or good site planning. Mr. Morgan stated that they were pulling back wherever possible, and only pushing out where necessary to provide architectural interest and massing.

Mr. Morgan presented images that he believed showed compatibility and the necessity of why the reduced setbacks are needed. It is a balance between the needs of the project and the needs of the neighbors.

Mr. Morgan recognized that their approach to the design was different than what others might do, but it was consistent with thinking through the problem and thinking through the wants, needs, and goals of all the parties involved. Mr. Morgan stated that they were sensitive and respectful to the neighbors and pulled back where possible to promote harmony in the neighborhood as good architectural and good site planning practices.

Board Member Fuegi understood that the setbacks were changed since the last Board of Adjustment meeting. He asked if Mr. Morgan could show the Board

exactly what was done. Mr. Morgan presented an image to show where a 20' setback was changed to a 25' setback.

Board Member Wilson noted that the Planning Commission meeting minutes state that multiple exhibits were provided showing setback use as proposed and what the project might look like if it were within the setbacks. She asked if Mr. Morgan had an exhibit showing what the project would look like if it complied with the setbacks. Mr. Morgan did not have anything available this evening.

Board Member Fuegi recalled from the BOA Minutes that the Appellant claimed that if the design was built as proposed, one of the buildings would look directly into the Appellant's bedroom. Mr. Fuegi asked if that would change if the 25' setbacks were respected.

Jason Glidden, Park City Housing Development Manager, replied that changing the setback to 25' on Empire would increase the building height, which would be more intrusive to the Appellant's property. Mr. Glidden stated that they made an effort to reduce the height because Mr. Lee has a deck area. Pushing the setback to 25' actually increased the height of the building and took away their mitigation efforts to lower the heights.

Planner Tyler stated that the building is actually more than 30' from that property boundary. In theory, because of the road improvements, respecting the 25' setback would not move the building further away from that particular property boundary.

Mr. Glidden stated that the applicant was asked to push the building back from Empire on to the property, not further away from Mr. Lee's property. They did not affect that spacing at all between the building and Mr. Lee's property.

Chair Gezelius wanted to know the width of the property at the street in feet. She was asking for the size of the parcel and the amount of street frontage on Empire. Mr. Morgan presented a drawing showing the 25' setbacks on either side. The parcel was approximately 90' wide on Empire.

Chair Gezelius opened the public hearing.

Maureen Moriarty, a resident at 1259 Norfolk, thanked Doug Lee for his efforts on behalf of "we the people". She hoped their concerns will be heard and that they are treated accordingly to the Planning Commission's responsibility.

Amy Knudsen, a long-time resident of Park City, stated that her parents sold part of their land to the City where the five condos will be located. Ms. Knudsen remarked that the land was sold with the understanding that there would just be a walkway and chairlift and possibly parking. It was a surprise to them to have so many large buildings and reduced setbacks. For the sake of the neighbors, she

urged the Board to look at those setbacks and consider what it means to those who have live there for so long. Ms. Knudsen was grateful to Doug Lee for taking this on and to keep pushing the process. She agreed with the need for affordable housing; but the City also needs to respect the people who have lived here and contributed to the community for many years. Ms. Knudsen requested that the Board consider the residents and keep within the guidelines of the law.

Chair Gezelius closed the public hearing.

Jody Burnett thought it was appropriate to give the Appellant a chance to respond.

Ms. Deforge quoted from the applicant's presentation. "There are a lot of approaches to every design problem. "You get ten different options from ten different architects." "The Plan that Mr. Lee sketched out might work." "There are lots of ways to provide architectural interest." "We had opportunities to pull in even further than this". Ms. Deforge thought all those statements sounded like concessions. This was not the only way to design this project and provide desired architectural interest and variety, and that setback reductions are not required to provide architectural interest and variety.

Ms. Deforge stated that during the presentation she heard a number of things that were irrelevant to the legal issue, including the number of years this project has been ongoing, how many discussions were held, and whether other lots in this neighborhood had smaller setbacks. She noted that for many of these lots different laws were in effect when the homes were built, and for some there were no laws at all. The comment about providing more open space was not relevant even if it was true. Another comment was that they did not take as much as they could under the zone. Ms. Deforge reiterated that none of these issues or factors are relevant to the legal standard for allowing reduced setbacks under the ordinance.

Ms. Deforge did not dispute the statement that developers have a legal right to request reduced setbacks. However, they have no right to get reduced setbacks if they do not meet the legal standards. In fact, if they do not meet the legal standards, the City cannot approve reducing the setbacks. Ms. Deforge felt that the applicant's interpretation of this ordinance is if they like the project and like the design, they are entitled to setback reductions because it is necessary to achieve the architectural interest and variation they like about the plan. Ms. Deforge emphasized that it provides no standard for allowing setback reductions.

Ms. Deforge reiterated her earlier comment that this matter should not be remanded back to the Planning Commission and that the Planning Commission's decision should be reversed.

Chair Gezelius reminded the Board that the only subject for discussion was the issue of setbacks. She emphasized that setbacks are the rules they all live with in town that provides security of what occurs in neighborhoods and on their own properties. Chair Gezelius stated that the Board of Adjustment has often seen very tiny setback variation requests. This project was requesting a large number of variations to the setback.

Board Member Robinson thought the Appellant made a compelling case about following the law and the LMC. The Board has dealt with this issue for many years and this is a much larger project than usual. Mr. Robinson remarked that it also appears that the current plan works to reduce the setbacks as much as possible. However, in looking at the drawings and the site plan, he thought there was room for further work and further decrease of the setbacks. Mr. Robinson believed more work needed to be done to get the setbacks more in line with the LMC.

Board Member Fuegi thought the argument was made that the setbacks are required for the project as it is designed. It resonated with him that the project was designed first and the setback reduction was requested after. He could not understand why they did not even try to comply when they had such a large parcel to work with. Mr. Fuegi liked the design but it is not within what the rules require. In his opinion, you first start with following the rules and if there is a hardship or some good reason to request a change, that is understandable. He was having a difficult time justifying that the reduction is necessary to make the project work as designed. Mr. Fuegi stated that he was not against affordable housing because it is needed in the City. However, with as much land as they had to work with, he thought they could have respected at least 90% of the required setbacks.

Board Member Wilson echoed Mr. Fuegi. She recalled that the last time this came to the BOA, the Board asked to see what other designs had been considered before deciding on the current design that is necessary to have reduced setbacks. She thought the City came back with the same plan and no proof that this was the only plan that would work. Ms. Wilson stated that she was having a hard time with "necessary".

Chair Gezelius noted that the options for action were outlined under Alternatives in the Staff report. The Board could 1) affirm; 2) reverse the Planning Commission decision; 3) affirm in part and reverse in part; 4) remand back to the Planning Commission; 5) request additional information.

Chair Gezelius stated that the Board has already done several of these options and it has not resulted in a project that falls within the general feeling regarding respecting setbacks. She asked what alternatives the Board could consider.

Mr. Burnett stated that in recent years, a public or private applicant tried to avoid being in a perpetual spin cycle without the ability to bring finality to projects. He clarified that this was not a variance so those standards do not apply. If the BOA finds that the burden has not been met to prove “necessary” and that the Planning Commission erred in granting the setback reductions, Mr. Burnett believed they had reached a point in the process to either affirm the decision of the Planning Commission or reverse it; unless the applicant wishes to request a remand simply for the purpose of redesigning the project. Mr. Glidden was not interested in starting over. Mr. Burnett did not think a useful purpose would be served by a further remand.

Mr. Burnett stated that if the Board chooses to reverse the Planning Commission decision, there were no proposed findings in the Staff report in support of that decision. If that is their decision, they should make a motion this evening and direct the Staff to prepare appropriate findings. The decision would not be final until it is adopted and the findings are ratified at the next meeting.

Director Erickson clarified that the suggested motion would be to reverse the Planning Commission decision with respect to the application of the setbacks and meeting the test of necessity as stated in the LMC. It was not to reduce the entire project. Chair Gezelius replied that he was correct. Director Erickson requested that the Board provide specific direction on how the Planning Commission erred in applying the “necessity question” to help the Staff draft the appropriate findings.

Chair Gezelius remarked that the purpose of setbacks is to protect the neighbors, for snow storage, and for streetscape, light and air. She stated that architectural variation is a subjective matter and a subjective decision regarding aesthetic items. Chair Gezelius did not believe it was necessary to mix the definitive nature of the setback requirements and the subjective statements regarding the need for architectural variation. It is possible to have both, but the setback requirement should be observed first. If architectural variation is necessary after that a setback reduction could be considered. That process applies to all projects and not just this project. Chair Gezelius stated that to use architectural interest and variation as the criteria for a reduced setback is not appropriate.

Mr. Burnett was cautious about Chair Gezelius’ comment. Taking it to a logical conclusion, that provision can be read out of the Code. He believed Ms. Deforge would agree that every applicant has the right to request a setback reduction as provided by the Code. Mr. Burnett was concerned that Chair Gezelius disagreed with the language being in the Code.

Chair Gezelius clarified that she was only saying that they should not mix two separate issues and tie them together in order to clarify what they want. Mr. Burnett agreed with that idea but cautioned the BOA to be careful how it is stated because it is equally legally indefensible if their position is that no applicant could

ever make a finding that architectural variation is necessary to achieved desired interest and variation. He pointed out that there will always be a subjective element. Mr. Burnett stated that the fact that other designs might be possible was not for the BOA to consider. The Board of Adjustment needs to find that the rationale offered to justify the setback reductions meets the criteria in the LMC to establish that it is necessary to provide desired architectural interest and variation.

Board Member Robinson noted that they were talking about several different setbacks as one lump plan. If he could look at each individual setback as a necessity, he would be more apt to look favorably on reducing an individual setback as opposed to all the setbacks together. Mr. Burnett understood his position; however, the Board is not the original decisionmaker. That is typically done at the Planning Commission level.

Chair Gezelius pointed out that setback reductions are requested on all sides, which makes it a lump sum application. Mr. Burnett was reluctant to have the BOA remand because some setbacks might be justified but not all. He believed the City would be better served if the Board makes a decision. If they feel that the burden has not been met, they should reverse the Planning Commission decision.

Chair Gezelius remarked that the issue of the architectural variation is driven by the plan in terms of number of units, type of units and unit size. In her opinion, the test for the design as it encroaches in the setbacks has a different standard than it would within the setbacks for architectural variation. It was obvious that it could be achieved in some way regardless of the setback. Chair Gezelius could not see a necessity to give such concessions on setbacks for this one and only project. She believed that small projects could also have architectural variation.

Board Member Wilson remarked that the applicant had not proven that any alternatives were considered that might meet the Code. She noted that the applicant said that ten different architects could come up with ten different answers, and she did not believe they had explored those answers.

Director Erickson stated that if the BOA intends to reverse the Planning Commission decision, the first test for the Staff would be to determine whether the applicant met the test of proving necessity. They will need to look at the necessity for each of the setbacks. Architectural interest has to do with materials, building shape, and site plan. If the Board chooses to take this action, the Staff will be looking at whether the applicant proved the necessity for setback changes in order to achieve good site planning and good architecture.

Chair Gezelius stated that good site planning is the reason why they have setbacks. It allows for snow storage, air circulation, and pedestrian ingress and egress.

Board Member Fuegi thought the issue was necessary versus desirable. Proof that reduced setbacks are absolutely necessary has not been met.

MOTION: Board Member Fuegi moved to REVERSE the Planning Commission decision on the basis that the applicant has failed to demonstrate that the reductions in the required setbacks are necessary to provide desired architectural interest and variation, and direct the Staff to come back with a proposed written decision for approval at the next meeting. Board Member Robinson seconded the motion.

VOTE: The motion passed unanimously.

Chair Gezelius adjourned the meeting at 6:20 p.m.

Approved by _____
Ruth Gezelius, Chair
Board of Adjustment