

ACTION

BZA COMMITTEE	DATE
BZA M.A.P.G. <i>(see BZA 3-74)</i> Request to allow new application to be filed on this property deferred to meeting of 2-26-74.	1-22-74
BZA B.C.C./B.C.C. Request to allow new application to be filed on this property denied.	2-26-74

Approved per Journal Entry
from District Court dated
May 10, 1974

BZA Case No. 32-73 Clewal Constru
tion requests variance to reduce
required side yard setback adja-
cent to E line of Lot 13 from 6
ft. to 5 ft. on the NS of Birch
Ln. in an area between Wood Av. &
Tyler Rd.

POSTED
9-25-73

6-19-74
MAPV
C.F.

ACTION

BZA COMMITTEE		DATE
	<u>Denied</u>	<u>10-23-73</u>
	(See BZA 3-74)	
BZA	Request to allow new	
M.A.P.C.	Application to be filed on this property deferred to meeting of 2-26-74.	<u>1-22-74</u>
BZA B.C.C./B.C.C.	Request to allow new application to be filed on this property denied.	<u>2-26-74</u>

Approved per Journal Entry
from District Court dated
May 10, 1974

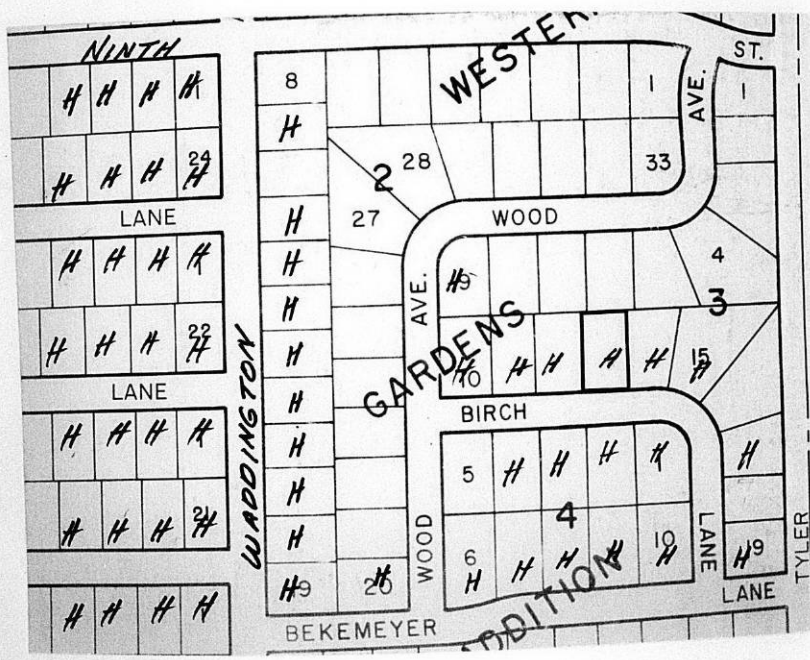
BZA Case No. 32-73 Clewani Construc
tion requires variance to reduce
required height of setback addi-
cent to 5 ft. on the NS of from 6
ft. to 5 ft. on the NS of from 6
ft. in an area between Wood Av. &
Tyler Rd.

Map No. 4848
 Sec. 17
 Twp. 27
 Range 1W

BZA- 32-73
 SCZ- _____
 CU- _____
 Filed _____

AREA DATA:
 1. Acres: 0.24 (90 ft. by 135 ft.)
 2. Adjoining Zoning: E _____ S _____ W _____ N _____
 3. Land Use: East SINGLE FAM South SINGLE FAM
 West SINGLE FAM North UNDEVELOPED
 4. Sketch Plan Land Use is for: SINGLE FAM
 5. Present Land Use if for: _____
 6. Area (is) (is not) platted. _____

PHOTO DATA:
 Taken by _____ Date _____ Time _____



WICHITA-SEDGWICK COUNTY

METROPOLITAN AREA PLANNING DEPARTMENT

DATE

May 22, 1974

TO Board of Zoning Appeals

FROM Jack H. Galbraith, Secretary *JHG*

SUBJECT Journal Entries of Judgment on cases BZA 32-73, BZA 33-73, and BZA 34-73.

Attached for your information is a memorandum to me from Joe Bogle, Assistant City Attorney and three Journal Entries applying to the above captioned cases. Based on these Journal Entries we have marked each case file approved as to the requested variance and have forwarded copies to the office of Central Inspection and the City Clerk.

JHG:js

Attachment

cc: Ralph Eberly, City Clerk
Robert Feldner, Superintendent of Central Inspection
Joe Donnelly, Central Inspection
Jack Kirkby, Central Inspection

THE CITY OF WICHITA

OFFICE OF LAW DEPARTMENT

DATE May 21, 1974



TO Jack Galbraith, Secretary, Board of Zoning Appeals

FROM Joe M. Bogle, Jr., Assistant City Attorney

SUBJECT District Court Appeals of cases
BZA 32-73, BZA 33-73 and
BZA 34-73

This will serve as a report on what is apparently the final disposition of the above captioned Board of Zoning Appeals cases.

As you know, the captioned cases represent applications to the Board for variances from the required 6 foot sideyard setbacks for the addresses of 8824, 8902 and 8808 Birch Lane. These applications for variances were made by the Clewal Construction Company and were denied based upon the Board of Zoning Appeals inability to find the five conditions necessary to grant a variance. Applications for rehearing were also later denied and appeals were taken to the Sedgwick County District Court on behalf of the occupants, Steven Erickson and Charles Manning and the owner of 8902 Birch Lane, Pat Sinclair.

The trial of the Erickson and Manning cases (33-73 and 34-73) was held on May 10, 1974 in front of Judge B. Mack Bryant. The facts of the case were stipulated to and the plaintiff's attorney, George Powers, argued their case. He stated that his clients were not personally involved in the houses not being in compliance with the zoning regulations and also contending that the city should have stopped the construction on the houses in question when they were first discovered to be in violation.

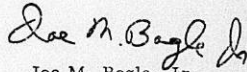
It was brought out by myself that the rules and regulations of the Board of Zoning Appeals did not distinguish between individuals who are at fault; rather the rules were concerned with the status of the building being in violation of the zoning ordinances. In other words, even though the plaintiffs in the case were not personally involved, that still did not necessarily entitle them to a zoning variance. It was also brought out that the contractor was notified on two occasions of the sideyard setbacks and that he apparently made no effort to correct the problem, relying on his ability to obtain a variance from the Board of Zoning Appeals. The plaintiffs, Mr. and Mrs. Erickson and Mr. and Mrs. Manning, were present at the trial; however, their testimony was not allowed as their attorney included in his argument the numerous financial and practical problems which face his clients due to the lack of a variance.

Jack Galbraith, Secretary, Board of Zoning Appeals
Page 2
May 21, 1974

After the court heard the arguments of the plaintiffs and the city, he ruled in favor of the plaintiffs and against the city on a basis of equitable estoppel. The judge held that the city should have stopped the construction on the residences when they first suspected that a violation existed. He indicated that an oral or written notice was not sufficient when the city had knowledge that the houses were being built in violation of the zoning ordinances. It was upon this reasoning that the court held that the residences of 8824 and 8808 Birch Lane should be granted variances and held to be located properly on the lots.

It is our understanding that no further action need be taken on the part of the Board of Zoning Appeals and that the Journal Entry indicating that court's decision will suffice to grant the necessary variance to the plaintiffs.

The third Board of Zoning Appeals case, BZA 32-73, was scheduled to be tried separately at a later date. However, based upon the ruling on BZA 33-73 and BZA 34-73, we have decided to agree on a Journal Entry of Judgment in that case granting them the same relief which was obtained in the other two cases. Attached is a copy of the Journal Entries of Judgment on the three captioned cases for your files. If you have any questions concerning any of the above, please contact me.



Joe M. Bogle, Jr.
Assistant City Attorney

JMB:kh

LILLESTON SPRADLING, GOTT STALLWITZ & HOPE
923 FIRST NATIONAL BANK BUILDING
WICHITA, KANSAS (316) 263-8218

IN THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS

PATRICK B. SINCLAIR and
LADONNA M. SINCLAIR,

Plaintiffs,

vs.

THE BOARD OF ZONING APPEALS
OF THE CITY OF WICHITA,
WICHITA, KANSAS,

Defendant.

Case No. C-30149

JOURNAL ENTRY OF JUDGMENT

Now on this 14 day of May, 1974, the same being one of the regular judicial days of this court, the above entitled matter comes on for trial, the plaintiffs being present in person and represented by their counsel, William A. Wells of Lilleston, Spradling, Gott, Stallwitz & Hope, the defendant appearing by its attorney, Joe M. Bogle, Jr.

Whereupon, all parties agree to try said cause to the court and both parties announce ready for trial. Whereupon, both parties offered their evidence and rested.

Thereupon, the court, having heard the evidence and arguments of counsel, finds in favor of the plaintiffs and against the defendant herein, and makes the following findings of fact and conclusions of law:

The court finds that from the evidence, the court is satisfied that the plaintiffs have met all requirements of the statute, to-wit:

1. That the variance requested arises from a condition which is unique to the property in question and is not ordinarily found in the same zone or district and is not created by the action of the applicant.
2. That the granting of the permit for variance will not adversely affect the rights of adjacent property owners

or residents and, in fact, the adjacent property owners and residents are not in opposition to the granting of the variance.

3. That the strict application of the provisions of Title 28 of which variance is requested will constitute unnecessary hardship upon the property owner represented in the application.

4. That the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare; and

5. That the granting of the variance desired will not be opposed to the general spirit and intention of Title 28 (Zoning Ordinance).

IT IS, THEREFORE, BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED:

1. That the granting of the variance requested by the plaintiff is approved and judgment is entered in favor of said variance.

2. That the property in said petition is described as:

Lot Thirteen (13), Block Three (3),
Western Gardens, Wichita, Sedgwick
County, Kansas, commonly known as
8902 Birch in Wichita, Kansas.

3. That the variance shall be allowed and that the zoning shall hereafter be, in regard to said above described lot as follows:

A side yard setback adjacent to the
East property line of Lot 13 of
five feet (5').

4. That the house located upon said property falls within the setback above set forth and the location of the house upon the property is approved.

5. That the described zoning in paragraph 3 above applies only to the location of the present residence on the property and that all future building on said lot will conform to the zoning and building ordinances of the City of Wichita.

IT IS BY THE COURT SO ORDERED.

JUDGE

APPROVED:

LILLESTON SPRADLING GOTT STALLWITZ & HOPE

By _____
William A. Wells,
Attorney for Plaintiffs

BOARD OF ZONING APPEALS
CITY OF WICHITA, KANSAS

By Joe M. Bogle, Jr.
Joe M. Bogle, Jr.
Its Attorney

LAW OFFICES

LILLESTON, SPRADLING, GOTT, STALLWITZ & HOPE

923 FIRST NATIONAL BANK BUILDING

TELEPHONE (316) 263-0218

WICHITA, KANSAS 67202

December 20, 1973

HENRY V. GOTT
RALPH M. HOPE
RONALD M. GOTT
GLENN D. YOUNG, JR.
JERRY D. BOGLE
WILLIAM A. WELLS
HENRY J. SCHULTEIS
J. MICHAEL PETERS

STANLEY & VERMILION . 1886-1897
STANLEY, VERMILION
& EVANS 1897-1909
STANLEY, VERMILION,
EVANS & CAREY 1909-1913
VERMILION, EVANS,
CAREY & LILLESTON . 1913-1946
CAREY, LILLESTON,
SPRADLING & GOTT . 1946-1950
LILLESTON, SPRADLING,
GOTT & STALLWITZ . 1950-1958

Mr. Jack Galbraith, Secretary
Board of Zoning Appeals
City of Wichita
104 South Main
Wichita, Kansas 67202

Re: Application for Variance;
8902 Birch Lane

Dear Mr. Galbraith:

Pursuant to Article III (B) we hereby respectfully request on behalf of Patrick B. Sinclair and LaDonna M. Sinclair, owners of the above-referenced property, the opportunity to present to the Board of Zoning Appeals an Application for Variance.

In support of this request, we wish the Board of Zoning Appeals to know that the Application for Variance contained in Case No. BZA 32-73, filed by Clewal Construction, Inc. and showing Patrick B. and LaDonna M. Sinclair as applicants was filed without the knowledge or authorization of Patrick B. and LaDonna M. Sinclair and that said property owners and the principal parties interested in the obtaining of a variance have not heretofore been present or represented at the hearings on said application. Furthermore, it is our contention that the application of Mr. and Mrs. Sinclair for variance will meet the criteria as required under the provisions of Section 2.12.590.B of the Code of the City of Wichita and that such facts should be given consideration by the Board of Zoning Appeals.

Sincerely thanking you for your kind assistance in this matter to date, I remain,

Very truly yours,

William A. Wells
William A. Wells
of LILLESTON SPRADLING GOTT
STALLWITZ & HOPE

WAW:mt



WICHITA-SEDGWICK COUNTY

ATTACHMENT 2

DATE

METROPOLITAN AREA PLANNING DEPARTMENT

January 16, 1974

TO Board of Zoning Appeals

FROM Jack H. Galbraith, Secretary *JHG*

SUBJECT Request to allow application to be filed on property previously considered in Case No. BZA 32-73.

Article III, Paragraph D, of the Rules and Regulations of the Board of Zoning Appeals states that:

No application shall be considered wherein an application has been previously decided, involving the same premises and/of Zoning Ordinance requirements; except in cases where new plans or new facts pertaining to said requirements or regulations are presented, showing changed conditions or circumstances which in the opinion of the Board, materially alter the aspects of the case.

The attorney representing Mr. and Mrs. Patrick Sinclair has requested that the Board allow his clients to file an application for variance on the property previously considered in Case No. BZA 32-73. He states that this case was filed by Clewley Construction, Inc., showing Patrick B. and LaDonna M. Sinclair as applicants, without the knowledge or authorization of his clients. He points out that his clients, who are the property owners and the principal parties interested in obtaining a variance, have not heretofore been present or represented at the hearings on said application. The attorney contends that Mr. and Mrs. Sinclair will meet the criteria as required under the provisions of Section 2.12.590.B, Code of the City of Wichita, and that such facts should be given consideration by the Board of Zoning Appeals.

Although the application was originally filed with Clewley Construction, Inc. listed as the applicant, the attorney representing the contractor was contacted about the failure to list Mr. and Mrs. Sinclair (property owners) as co-applicants. The attorney therefore inserted their names and initialed this change on the application. The Sinclairs were properly notified of the date and time for the public hearing, and could have appeared and/or been represented at that time. (Unlike zone change applications, the applicant in a BZA case does not have to be the property owner. In this case the contractor was served with notice to make the structure conform, and therefore filed the variance request.)

Board of Zoning Appeals
January 16, 1974
Page 2

If the Board determines that sufficient new facts have been presented to justify allowing another variance application to be filed on this property, a new filing fee will be required (Paragraph D, Article III, Rules and Regulations of the Board of Zoning Appeals). If the Board concurs with the Secretary that the evidence presented is not sufficient to justify reconsideration of a new application, the request should be denied, and any further action involving this property should consist of an appeal to the District Court of Sedgwick County.

JHG:rme

cc: William A. Wells, Attorney
Lilleston, Spradling, Gott, Stallwitz & Hope
923 First National Bank Building, 67202

Mr. & Mrs. Patrick B. Sinclair
8902 Birch Lane, 67212

Joe Bogle, Legal Counsel
Board of Zoning Appeals
Law Department

IN THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS

MAR 26 1 24 PM '74

PATRICK B. SINCLAIR and

LaDONNA M. SINCLAIR

Plaintiff

Case No. 30149

vs.

THE BOARD OF ZONING APPEALS OF

THE CITY OF WICHITA, KANSAS

c/o Jack Galbraith, Secretary

Board of Zoning Appeals

Defendant

City Annex Building

103 S. Main

Wichita, Kansas 67202

To the above-named Defendant:

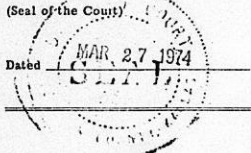
SUMMONS

You are hereby summoned to defend an action brought in the District Court of SEDGWICK

County, and required to serve upon William A. Wells, plaintiff's attorney, 923 First National Bank Building whose address is Wichita, Kansas 67202, a pleading to the petition which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the petition. Your pleading

also must be filed with the District Court of SEDGWICK County. As provided in section 60-213 (a), your answer must state as a counterclaim any related claim which you may have against the plaintiff, or you will thereafter be barred from making such claim in any other action.

(Seal of the Court)



DOROTHY I. VAN ARSDALE

Clerk of said District Court

Dated

By

Dorothy Harnden

Deputy Clerk

RETURN ON SERVICE OF SUMMONS

I hereby certify that I received the foregoing summons at _____ o'clock _____ M. on the _____ day of _____, 19____, and I served the same in the following manner:

(1) By delivering on the _____ day of _____, 19____, a copy of the summons, copy of the petition, and copy of _____ to each of the within-named defendants _____

(2) By leaving on the _____ day of _____, 19____, for each of the within-named defendants _____

A copy of the summons, a copy of the petition, and _____ at the respective dwelling place or usual place of abode of said defendants with some person of his or her family of suitable age and discretion.

(3) Corporate or Partnership Return: On the _____ day of _____, 19____, by _____

(4) After diligent search and inquiry was unable to find the within-named defendant _____ on the _____ day of _____, 19____.

All done in _____ County, Kansas.

Sheriff's fees:

Summons _____
Not Found _____
Mileage _____
Total _____

Sheriff of _____ County, Kansas

By _____

Deputy.

LILLESTON SPRADLING GOTT STALLWITZ & HOPE
923 FIRST NATIONAL BANK BUILDING
WICHITA, KANSAS (316) 263-8218

IN THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS

PATRICK B. SINCLAIR, and
LaDONNA M. SINCLAIR,

Plaintiffs,

vs.

THE BOARD OF ZONING APPEALS
OF THE CITY OF WICHITA, KANSAS,

Defendant.

C 30149
Case No. _____

FILED
MAR 28 1 24 PM '74

P E T I T I O N

COME NOW the plaintiffs, Patrick B. Sinclair and
LaDonna M. Sinclair, and for their cause of action against
the defendant, allege, state and aver as follows:

1. That they are citizens and residents of Wichita,
Sedgwick County, Kansas, and their correct post office address
is 8902 Birch, Wichita, Kansas.

2. That the Board of Zoning Appeals of the City of
Wichita was created by statute K.S.A. 1973 Supp. 12-714, and
by the ordinances of the City of Wichita, Section 2-12-600 to
610, and has the legal capacity to sue and be sued.

3. That the facts in said action involve a refusal of
the Board of Zoning Appeals to grant a variance on the property
used as plaintiffs' residence and described as:

Lot 13, Block 3, Western Gardens Addition
to the City of Wichita, Sedgwick County, Kansas,
Commonly known as 8902 Birch, Wichita, Kansas.

That a house was built and completed on said property
by Clewal Construction Company. That said house was intended
to be a sixty foot house as shown on the plat plan; however, due
to an error on the part of someone, other than the petitioners,
the house was built approximately two inches larger than it
should have been and shifted slightly too far toward the east
property line as evidenced by a copy of the survey and plat
attached hereto, labeled Exhibit "A" and made a part hereof.

9am or 10am
Feb. 11
Circuit
written
(Clew)

That after said house was virtually completed, the Clewal Construction Company was advised that the house invaded the side yard setback and that it would be necessary to secure a variance from the zoning laws of the City of Wichita before approval would be made.

That Clewal Construction Company filed an application for variance and the case was assigned No. BZA 32-73; that Clewal Construction Company was led to believe that it could finish said house and that the variance would be made upon its application and request; that petitioners, who are not experienced home-buyers, received the assurance of the builder that no real problem existed and that an application for variance would be made and obtained.

That the Board of Zoning Appeals heard said matter and denied the variance and that a request for a rehearing on the separate application of the petitioners was made and denied by the Board of Zoning Appeals.

That the plaintiffs are now legal owners of the property, are living in the residence thereon, and that the City of Wichita has demanded that the house be torn down, moved or modified to conform to the side yard setback; that such injury or loss to the property would cause grave financial harm to the petitioners, and that the builder, Clewal Construction Company is now insolvent and incapable of coming to the assistance of plaintiffs.

4. That it is the position of the plaintiffs that the City of Wichita and the Board of Zoning Appeals of the City of Wichita have contributed to petitioners present plight by failing to take such actions as would be necessary to halt or stop Clewal Construction Company, the builders, or prevent them from making sales to innocent purchasers such as petitioners, and further by leading the builders to believe that a variance would be granted and that the Board of Zoning Appeals should be enjoined from enforcing the side yard setbacks through the legal department of the City of Wichita.

5. That it is the position of the plaintiffs herein that the variance should be granted by reason of the fact that:

- (a) It arises from a condition unique to the property in question and which is not ordinarily found in the same district.
- (b) That the granting of the variance will not adversely affect the rights of adjacent property owners or residents.
- (c) That strict compliance with the provisions of the Code of the City of Wichita will constitute unnecessary hardship upon all parties involved.
- (d) That the variance will not adversely affect public health, safety, morals, order, convenience, prosperity, or general welfare, but will, in fact, enhance the general welfare.
- (e) That the granting of the variance desired will not be opposed to the general spirit and intent of the zoning ordinances. That attached hereto and labeled Exhibit "B" and made a part hereof, is a Notice of Appeal, a copy of which was served upon John Decker, City Attorney, and on Jack Galbraith, Secretary of the Board of Zoning Appeals, and that Exhibit "C", attached hereto and made a part hereof, is a true and correct copy of all pertinent proceedings before such Board, all as required in K.S.A. 60-2101.

*Created by James
Cowan (original
in file)*

6. Petitioners herein further allege that a refusal to grant the variance will cause them irreparable damage.

WHEREFORE, plaintiffs pray that the District Court of Sedgwick County, Kansas, hear said matter and that it grant a variance to the plaintiffs herein approving the location of the

residence upon the lot and enjoin the Board of Zoning Appeals
from enforcing the side yard setbacks against plaintiffs and
make such further orders as may be necessary to terminate all
issues between the plaintiffs and the Board of Zoning Appeals
of the City of Wichita to the end that the premises owned and
occupied by the plaintiffs be considered as legally located on
said lot.

CID in
Dist. of
? Kansas

LILLESTON SPRADLING GOTT
STALLWITZ & HOPE

By /s/ William A. Wells
William A. Wells, Attorneys
for Plaintiffs

JURY DEMAND

Plaintiffs demand a trial by jury.

LILLESTON SPRADLING GOTT
STALLWITZ & HOPE

By /s/ William A. Wells
William A. Wells, Attorneys
for Plaintiffs

Certificate of Clerk of the District Court. The above
is a true and correct copy of the original instrument
which is on file of record in this court.

Done this 27 day of March, 1974
Deputy Clerk of the District Court
By D. Starnes Deputy



BEFORE THE BOARD OF ZONING APPEALS

IN THE MATTER)
))
 OF))
BZA 32-73))
_____))

NOTICE OF APPEAL TO THE DISTRICT COURT

TO: JACK GALBRAITH, Secretary of the Board of Zoning Appeals, and JOHN DEKKER, City Attorney.

TAKE NOTICE that Patrick B. Sinclair and LaDonna M. Sinclair, do and have appealed to the District Court of Sedgwick County, Kansas from the decision rendered and made in the above entitled action of the Board of Zoning Appeals wherein their application for a variance and their application for a rehearing on variance was denied, and from all other rulings and findings of said Board adverse to Patrick B. Sinclair and LaDonna M. Sinclair.

DATED: March 26th, 1974.

LILLESTON SPRADLING GOTT STALLWITZ & HOPE
Attorneys for Patrick B. Sinclair and
LaDonna M. Sinclair

By

William A. Wells
William A. Wells

ACKNOWLEDGMENT OF SERVICE

The undersigned, Jack Galbraith, Secretary of the Board of Zoning Appeals and John Dekker, City Attorney, acknowledge service of the foregoing Notice of Appeal to the Sedgwick County District Court by Patrick B. Sinclair and LaDonna M. Sinclair this 26th day of March, 1974.

Jack Galbraith by Martha Mummery
Jack Galbraith

John Dekker
John Dekker

February 28, 1974

Mr. William A. Wells
Attorney at Law
923 First National Bank Bldg.
Wichita, Kansas 67202

Subject: Case NO. BEA 32-73 and
BEA 3-74 - Request for
Variance

Dear Mr. Wells:

At the regular meeting of the Board of Zoning Appeals on February 26, 1974, your request to allow an application for a variance to be filed on property previously involved in Case BEA 32-73, was considered.

It was the action of the Board to deny the request, and therefore, Case NO. BEA 3-74 was not considered.

Sincerely,

Jack H. Galbraith
Secretary

JHG:MM:js

cc: Mr. and Mrs. Patrick B. Sinclair, 8902 Birch Lane, 67212
Robert Feldner, Superintendent of Central Inspection
Ralph Eberly, City Clerk
Joe Donnelly, Central Inspection

THE CITY OF WICHITA

OFFICE OF Board of Zoning Appeals DATE February 20, 1974

TO Board of Zoning Appeals

FROM Jack H. Galbraith, Secretary

SUBJECT Request to Allow an Appli-
cation to be filed on property
previously considered in Case
No. BZA 32-73

On January 22, 1974, the Board of Zoning Appeals considered the above-captioned request from William A. Wells, attorney, on behalf of Patrick B. Sinclair and Ladonna M. Sinclair. Inasmuch as a fifth member had not yet been appointed to the Board, it was the action of the Board to defer this request to the meeting of February 26, 1974, so that the matter could be considered by a full Board.

Inasmuch as it was the decision of the Board to allow the associated cases (BZA 33-73 and BZA 34-73) to be advertised for public hearing at the Board's February meeting, if the requests for rehearing are granted, Case No. BZA 3-74, which represents the new application filed by Mr. Wells, was also advertised for consideration on February 26. This is dependent, however, on the Board first deciding to allow a new application to be filed on the property previously considered in Case No. BZA 32-73. Copies of the statement requesting a new hearing (Attachment 1) and the Secretary's January 16 memo to the Board (Attachment 2) are attached. Excerpts from the minutes of October 23, 1973, involving Case No. BZA 32-73 are attached to the memo concerning requests for rehearing for all three cases involving houses constructed by Clewal Construction, Inc.

After reviewing the attachments and associated minutes, if the Board determines that sufficient new facts have been presented to justify allowing another variance application to be considered on subject property, your action should be to grant the consideration of the new application.

If the Board concurs with the Secretary that the evidence presented is not sufficient to materially alter the aspects of the case or justify reconsideration of a new application, the request should be denied, and any further action involving this property should consist of an appeal to the District Court of Sedgwick County.

JHG:ber

Attachments

cc: William A. Wells, Attorney, 923 1st National Bank Bldg.
67202, w/a
Mr. and Mrs. Patrick B. Sinclair, 8902 Birch Lane 67212, w/a
Joe Bogle, Legal Counsel, Board of Zoning Appeals, w/a

LAW OFFICES

LILLESTON, SPRADLING, GOTT, STALLWITZ & HOPE

923 FIRST NATIONAL BANK BUILDING

TELEPHONE (316) 263-8218

WICHITA, KANSAS 67202

December 20, 1973

HENRY V. GOTT
RALPH M. HOPE
RONALD M. GOTT
GLENN D. YOUNG, JR.
JERRY D. BOGLE
WILLIAM A. WELLS
HENRY J. SCHULTEIS
J. MICHAEL PETERS

STANLEY & VERMILION . 1886-1897
STANLEY, VERMILION
& EVANS 1897-1909
STANLEY, VERMILION,
EVANS & CAREY 1909-1913
VERMILION, EVANS,
CAREY & LILLESTON . 1913-1946
CAREY, LILLESTON,
SPRADLING & GOTT . 1946-1950
LILLESTON, SPRADLING,
GOTT & STALLWITZ . 1950-1958

Mr. Jack Galbraith, Secretary
Board of Zoning Appeals
City of Wichita
104 South Main
Wichita, Kansas 67202

Re: Application for Variance;
8902 Birch Lane

Dear Mr. Galbraith:

Pursuant to Article III (B) we hereby respectfully request on behalf of Patrick B. Sinclair and LaDonna M. Sinclair, owners of the above-referenced property, the opportunity to present to the Board of Zoning Appeals an Application for Variance.

In support of this request, we wish the Board of Zoning Appeals to know that the Application for Variance contained in Case No. BZA 32-73, filed by Clewal Construction, Inc. and showing Patrick B. and LaDonna M. Sinclair as applicants was filed without the knowledge or authorization of Patrick B. and LaDonna M. Sinclair and that said property owners and the principal parties interested in the obtaining of a variance have not heretofore been present or represented at the hearings on said application. Furthermore, it is our contention that the application of Mr. and Mrs. Sinclair for variance will meet the criteria as required under the provisions of Section 2.12.590.B of the Code of the City of Wichita and that such facts should be given consideration by the Board of Zoning Appeals.

Sincerely thanking you for your kind assistance in this matter to date, I remain,

Very truly yours,

William A. Wells
William A. Wells
of LILLESTON, SPRADLING, GOTT
STALLWITZ & HOPE



WAW:mt

BZA 32-73

W. L. KORBER R. G. WAYMIRE
BAUGHMAN CO.
SURVEYORS

PHONE 316/262-7271

330 LAURA

WICHITA, KANSAS 67211

State of Kansas)

) SS

September 14, 1973

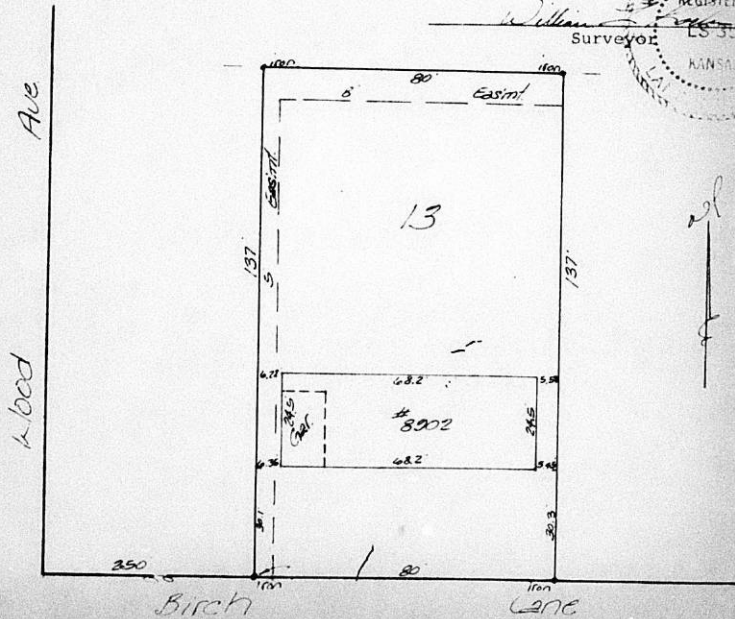
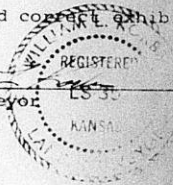
County of Sedgwick)

We, Baughman Company, Surveyors in aforesaid county and state do hereby certify that we did on this 14th day of September, 1973 survey Lot 13, Block 3, Western Gardens, Wichita, Sedgwick County, Kansas.

On said lot is house No. 8902 with an attached garage which is in the clear of all boundary lines. There are no encroachments on said lot by buildings on the adjacent lots.

The accompanying plat is a true and correct exhibit of said survey for mortgagee title insurance.

Surveyor



THE CITY OF WICHITA

OFFICE OF Board of Zoning Appeals **DATE** February 20, 1974

TO Board of Zoning Appeals

FROM Jack H. Galbraith, Secretary

SUBJECT Request to Allow an Application to be filed on property previously considered in Case No. BZA 32-73

On January 22, 1974, the Board of Zoning Appeals considered the above-captioned request from William A. Wells, attorney, on behalf of Patrick B. Sinclair and Ladonna M. Sinclair. Inasmuch as a fifth member had not yet been appointed to the Board, it was the action of the Board to defer this request to the meeting of February 26, 1974, so that the matter could be considered by a full Board.

Inasmuch as it was the decision of the Board to allow the associated cases (BZA 33-73 and BZA 34-73) to be advertised for public hearing at the Board's February meeting, if the requests for rehearing are granted, Case No. BZA 3-74, which represents the new application filed by Mr. Wells, was also advertised for consideration on February 26. This is dependent, however, on the Board first deciding to allow a new application to be filed on the property previously considered in Case No. BZA 32-73. Copies of the statement requesting a new hearing (Attachment 1) and the Secretary's January 16 memo to the Board (Attachment 2) are attached. Excerpts from the minutes of October 23, 1973, involving Case No. BZA 32-73 are attached to the memo concerning requests for rehearing for all three cases involving houses constructed by Clewal Construction, Inc.

After reviewing the attachments and associated minutes, if the Board determines that sufficient new facts have been presented to justify allowing another variance application to be considered on subject property, your action should be to grant the consideration of the new application.

If the Board concurs with the Secretary that the evidence presented is not sufficient to materially alter the aspects of the case or justify reconsideration of a new application, the request should be denied, and any further action involving this property should consist of an appeal to the District Court of Sedgwick County.

JHG:ber

Attachments

cc: William A. Wells, Attorney, 923 1st National Bank Bldg.
67202, w/a
Mr. and Mrs. Patrick B. Sinclair, 8902 Birch Lane 67212, w/a
Joe Bogle, Legal Counsel, Board of Zoning Appeals, w/a

WICHITA-SEDGWICK COUNTY

ATTACHMENT 2

DATE

METROPOLITAN AREA PLANNING DEPARTMENT

January 16, 1974

TO Board of Zoning Appeals

FROM Jack H. Galbraith, Secretary *JHG*

SUBJECT Request to allow application to be filed on property previously considered in Case No. BZA 32-73.

Article III, Paragraph D, of the Rules and Regulations of the Board of Zoning Appeals states that:

No application shall be considered wherein an application has been previously decided, involving the same premises and/of Zoning Ordinance requirements; except in cases where new plans or new facts pertaining to said requirements or regulations are presented, showing changed conditions or circumstances which in the opinion of the Board, materially alter the aspects of the case.

The attorney representing Mr. and Mrs. Patrick Sinclair has requested that the Board allow his clients to file an application for variance on the property previously considered in Case No. BZA 32-73. He states that this case was filed by Clewal Construction, Inc., showing Patrick B. and LaDonna M. Sinclair as applicants, without the knowledge or authorization of his clients. He points out that his clients, who are the property owners and the principal parties interested in obtaining a variance, have not heretofore been present or represented at the hearings on said application. The attorney contends that Mr. and Mrs. Sinclair will meet the criteria as required under the provisions of Section 2.12.590.B, Code of the City of Wichita, and that such facts should be given consideration by the Board of Zoning Appeals.

Although the application was originally filed with Clewal Construction, Inc. listed as the applicant, the attorney representing the contractor was contacted about the failure to list Mr. and Mrs. Sinclair (property owners) as co-applicants. The attorney therefore inserted their names and initialed this change on the application. The Sinclairs were properly notified of the date and time for the public hearing, and could have appeared and/or been represented at that time. (Unlike zone change applications, the applicant in a BZA case does not have to be the property owner. In this case the contractor was served with notice to make the structure conform, and therefore filed the variance request.)

Board of Zoning Appeals
January 16, 1974
Page 2

If the Board determines that sufficient new facts have been presented to justify allowing another variance application to be filed on this property, a new filing fee will be required (Paragraph D, Article III, Rules and Regulations of the Board of Zoning Appeals). If the Board concurs with the Secretary that the evidence presented is not sufficient to justify reconsideration of a new application, the request should be denied, and any further action involving this property should consist of an appeal to the District Court of Sedgwick County.

JHG:rme

cc: William A. Wells, Attorney
Lilleston, Spradling, Gott, Stallwitz & Hope
923 First National Bank Building, 67202

Mr. & Mrs. Patrick B. Sinclair
8902 Birch Lane, 67212

Joe Bogle, Legal Counsel
Board of Zoning Appeals
Law Department

28th
April 11, 1973

Mr. Walter Suter
7371 West Central
Wichita, Kansas 67212

Dear Mr. Suter:

In regard to 8824 and 8902 West Birch, houses under construction by your company, the side yard setback is not adequate. It will be necessary for you to determine which house (or both) is in violation and take proper steps to correct this violation. Occupancy will not be permitted unless a variance is granted or proper setback is obtained.

Also, I observed that the condition of the streets is still not clean; and considerable lumber, etc. is being stored on the fifteen foot public right-of-way behind the curb line.

Due to complaints received from residents of this area, it will be necessary for you to rectify this situation immediately.

Sincerely,

Jack Kirkby
Inspector

JK:ml

October 23, 1973

CUSICK asked if the next three similar requests were to be taken together. GALBRAITH announced that the attorney representing the applicant in Case No. BZA 33-73 had requested that the case be deferred. GALBRAITH explained that after reviewing the Secretary's report where it stated that from the plot plan submitted by the applicant it appeared that the east side yard also violated the requirements of the zoning ordinance, the attorney had checked into the matter. After determining that this was correct, he had submitted a letter requesting that the case be deferred so that it could be readvertised requesting a variance for both side yards.

CUSICK asked if the request could be amended to include the other side yard without readvertising it.

GALBRAITH replied that it was his opinion that the Board could not consider a variance for a side yard which had not been advertised for public hearing and for which adjoining property owners had not been properly notified.

GALBRAITH stated he would like to present some background on all three cases at the same time. He pointed out the area on the map and explained the variances requested for Lots 13, 14 and 18. He pointed out that the Subdivision Committee had recently recommended the vacation of a portion of the utility easement over which the house on Lot 18 was constructed, and this would be considered at the next Planning Commission meeting.

GALBRAITH summarized the five conditions which must be found to exist before a variance can be granted. He stated that he thought it would be difficult to find that all five conditions existed when Central Inspection advised that the violations had been found to exist practically since construction began, and it had been a series of issuing notifications, writing letters, issuing citations and advising that the houses were not to be occupied unless variances were granted or the houses conformed, and now all three houses appeared to be occupied.

8. Case No. BZA 32-73 - Clewal Construction, Inc. , 420 Acadia, Wichita, Kansas, 67212, pursuant to Section 2.12.590.B, Code of the City of Wichita, requests a variance to reduce the required side yard setback adjacent to the east line of Lot 13 from 6 feet to 5 feet, on property zoned the

October 23, 1973

"AA" Single Family Dwelling District, and legally described as Lot 13, Block 3, Western Gardens Addition to Wichita, Sedgwick County, Kansas. Generally located on the north side of Birch Lane in an area between Wood Avenue and Tyler Road.

GALBRAITH pointed out that although the application for Case No. BZA 32-73 had originally shown Clewal Construction, Inc. as the owner of the property, the ownership list indicated that Patrick B. Sinclair owned the property. He explained that the applicant's attorney had clarified the matter by explaining that the deed had been recorded and the Sinclairs were the owners; and the attorney had corrected and initialed the application to reflect the Sinclairs as the owners and Clewal Construction, Inc. as the contractor. GALBRAITH went on to review the following Secretary's report:

JURISDICTION:

The Board has jurisdiction to consider the variance request under the provisions outlined in Section 2.12.590.B, Code of the City of Wichita. The Board may grant the request when all five of the following conditions are found to exist:

1. That the variance requested arises from such condition which is unique to the property in question and which is not ordinarily found in the same zone or district; and is not created by an action or actions of the property owner or the applicant.
2. That the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents.
3. That the strict application of the provisions of Title 28 of which variance is requested will constitute unnecessary hardship upon the property owner represented in the application.
4. That the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity or general welfare; and
5. That granting the variance desired will not be opposed to the general spirit and intent of Title 28 (zoning ordinance).

October 23, 1973

COMMENTS BY THE SECRETARY:

On January 16, 1973, an application for a residential building permit and certificate of occupancy was filed, and building permit No. C66438 was issued to the applicant for the construction of a single family house on subject property (Lot 13). The site plan accompanying the application indicated that Lot 13 is 80 feet in width and that the house would be 68 feet in width and would be located on the lot in such a manner as to observe the required 6 foot side yards. The Secretary has been advised that the applicant was repeatedly warned by the Division of Central Inspection that the side yard setbacks for one or both houses being built on Lots 13 and 14 were inadequate. The construction company was notified by the attached letter dated April 11, 1973, of the violation. The letter further stated that proper steps must be taken to correct the violation (s) and that occupancy would not be permitted unless a variance was granted or the proper setback obtained.

The applicant continued construction, and on September 5, 1973, Central Inspection issued a notice stating that variances must be obtained or the structures must be altered to obtain the required 6 foot side yard on or before September 12, 1973, and that failure to comply with this notice would be followed by prosecution. The applicant subsequently filed requests for variances from the Board of Zoning Appeals.

It should be pointed out that although an application for a building permit is also an application for a certificate of occupancy, when an inspector notifies a builder/owner that the dwelling under construction is in violation of the zoning ordinance or building code, the structure cannot legally be occupied until such violation is corrected. All three houses for which the applicant has had to file variance requests now have families living in them despite notification that they were not to be occupied. It should also be pointed out that, although the application lists the owner as Clewal Construction Inc., the abstract ownership list indicates Patrick B. Sinclair as the owner. The attorney should clarify this prior to the meeting.

Uniqueness:

It is the opinion of the Secretary that the variance requested does not arise from such condition which is unique to the property in question, and was in fact created by actions of the applicant

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(owner) since it is impossible to construct a 68.2 foot house on an 80 foot lot and observe the required 6 foot side yards; in addition, the applicant was given adequate notice and instructed to correct the violation prior to occupancy.

Adjacent Property:

It is the opinion of the Secretary that it is difficult to find that the granting of the permit for variance would not have an adverse affect on adjacent property owners inasmuch as side yard requirements are established to provide structures with adequate air, light and space, and the side yard of Lot 13 which is in violation adjoins the side yard of Lot 14 which is also in violation, reducing the distance between dwellings to approximately 9 feet, and the roofs of both structures extend into the side yards.

Hardship:

Although recognizing the problem created for the occupant, it is difficult for the Secretary to find that the strict application of the provisions of Title 28 would constitute unnecessary hardship upon the applicant/owner inasmuch as the applicant was informed that the structure was in violation of the required side yard setback and it was not to be occupied until the violation was corrected or a variance obtained.

Public Interest:

It is the opinion of the Secretary that it is difficult to determine whether or not the requested variance would adversely affect the public health, safety, or general welfare; however, the requested variance is for a side yard that is interiorly located.

Spirit and Intent:

In the opinion of the Secretary, the variance desired will be opposed to the general spirit and intent of Title 28 due to the fact that the zoning ordinance requires a minimum side yard of 6 feet for single family dwellings and it is not possible to construct a 68.2 foot house on an 80 foot lot and observe these requirements.

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RECOMMENDATION:

Inasmuch as all five conditions necessary to the granting of the variance cannot be found to exist, it is the recommendation of the Secretary that the application for variance not be approved.

T. MICHAEL WILSON, attorney for the applicant, addressed the Board on behalf of his client. He stated that first he would like to eliminate any idea that anything was done with an intent to violate any zoning ordinance. He explained that the project was started shortly after the application for a building permit was filed last January. The building permit that was taken out was for a 68 foot house on an 80 foot lot, and clearly, if positioned correctly, that would comply with the 6 foot side yard regulations. He stated that was the intent of Mr. Suter, head of Clewal Construction. When the house was staked prior to excavation that was exactly how it was staked -- as a 68 foot house. He said apparently, although there was no explanation for it, the subcontractors were in there and the stakes were knocked down, and rather than advise people in charge that a stake had been knocked down, somebody just put the stake back in, and this was possibly how the house got off the correct side yard measurement. WILSON stated they were offering this as a possible explanation of what had happened. He reminded the Board that last January was a time of adverse weather and there was a great deal of mud, and possibly a vehicle was driven in and slid over and knocked down one of the stakes. WILSON stated this was another possible explanation, but Suter and the officials of Clewal Construction did not know how this happened. He emphasized that this was not done intentionally or with any intent to violate any side yard ordinances. WILSON explained that apparently those in charge failed to recheck the stakes prior to the time excavation was done. He added that the foreman in charge of the three projects for which variances had been requested had since been terminated from the company, for obvious reasons.

WILSON stated the problem that arose in this case was that all three of these homes were occupied. He stated that although he would not dispute that Central Inspection repeatedly warned his client from the beginning that the houses were in violation, as they said they did, he would certainly question whether that was true or not. He said he thought that probably Suter was advised, that he was probably told, but certainly not in a letter form --that there was no evidence of that. He felt that these

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were apparently verbal warnings. The only written request was in April, after a time the construction of the houses had progressed to the point where the foundation was poured and a great deal of the construction of the home was completed. At that point, WILSON explained, his client was led to believe it was a matter of requesting a variance, and he did not file the case at that moment because he was led to believe it did not have to be, but could be done at some future date. He stated his client was in a great deal of financial difficulty and even if he had been required, or if he had known the applications had to be made at that moment, he was not sure Suter would have had the appropriate filing fee -- or legal fees -- to do so. For that reason he did not make the applications any sooner than he did.

WILSON stated that when a notice went out the last part of August, that he must make application for a variance or else prosecution would result, Suter advised his counsel of the problem and the applications were filed. WILSON said he did agree with the Secretary that in regard to the five conditions which had to be met. "uniqueness" would be difficult to justify, other than the fact this was not a situation created deliberately by his client -- negligently maybe -- but not deliberately. When Suter was advised that something would have to be done about it, he did, with due diligence, proceed to file the applications.

WILSON pointed out the variances requested in Cases No. BZA 32-73 and BZA 33-73 still provided 9 feet between structures, and under the circumstances he did not think anyone would be affected since these were internal side yards. He thought it (9 feet) was still within the spirit and intent of the zoning ordinance requirement of 6 foot side yards, and there would be no adverse effect on the public welfare by shortening the two side yards by some 3 feet. He emphasized it was not a deliberate act, and said he would be glad to answer questions from the Board.

CUSICK asked if anyone was present to speak in opposition. No one appeared to oppose the request.

GALBRAITH pointed out that representatives from the Central Inspection Division were present to answer any questions the Board might have.

CUSICK stated that the Board had run into this type of case before, and it was always difficult when a licensed contractor made this kind of mistake. Once it is done, the question arises

what can be done -- cut off the house? He mentioned the Board had required a house to be moved to conform with a front yard setback less serious than this. CUSICK said he would have to agree than on an error from a licensed contractor it was awfully hard to justify that was a permissible error to make. In some cases where a homeowner did his own work and made a mistake, that was understandable. He said he assumed that the reason contractors were licensed was so that they would be aware of this sort of thing.

WILSON stated that to his knowledge the applicant had never before violated the side yard requirements. He pointed out that the side of the house for which a variance was requested in Case No. BZA 32-73 was the living quarters of the house, not the garage, and this would have a very adverse effect on the people living in the house. He said this had all come up because they were trying to close the real estate deal and could not convey title with this matter pending. He said, like the Board, he did not know what could be done. It's a brick home --do they knock down the wall of the house with a sledge hammer and move it in? He said he understood that the Board could not just say "Well, it's a mistake".

CUSICK said "No. not three times."

WILSON pointed out that it was three times under the same conditions, with the same foreman in charge. It was not a situation where there were three separate incidents divided by a span of time. It simply resulted from the acts of one individual -- the foreman on the job who did not properly supervise construction of the homes, and this person was no longer with the company.

CUSICK said he would be interested to hear the representative from Central Inspection relate how many times he discussed this matter and with whom.

JACK KIRKBY from the Division of Central Inspection replied that he would agree that the superintendent on a job was responsible for the mistake, but he thought that if Mr. Suter had supervised his superintendents a little more it would not have happened since it could have been rectified long before the house was framed up.

CUSICK asked if they were notified of this when he checked the foundations.

KIRKBY replied that he talked with the man on the job, who said they would do something about it right away. He explained he only got through the area on regular checks about once every two months, and by the time he got back the framing was done.

WILSON said that apparently he had talked with the job foreman and not Mr. Suter. KIRKBY said he had tried to reach Mr. Suter, but could not get in touch with him.

WILSON said he would suppose, based on that, that he (the foreman) had probably talked with Mr. Suter and advised him that the inspector had been out and had indicated to him that something would have to be done, whether this would be in the form of a variance application or not, he did not know. But obviously that was the impression Mr. Suter had, so work progressed with this house.

KIRKBY stated he had advised him (the foreman) at the time not to do any more work on the house.

WILSON stated that the only thing he could say to that was that apparently that message was not conveyed to Mr. Suter.

TAYLOR asked if he (Wilson) did not think some question would have come to mind by way of the letter, and specifically "occupancy will not be permitted unless a variance is granted", and all three houses were occupied. Surely if he had been in business a number of years he would be aware of some of those ordinances.

CUSICK pointed out that the letter was written in April.

WILSON said the Board would have to understand that the house was framed at that point.

CUSICK said he understood that, but that Suter went ahead and sold the house despite this warning and put people in it.

TAYLOR said surely Suter would have investigated or inquired as to what was necessary to be done.

WILSON said he believed that Suter was led to believe all along that he would simply have to apply for a variance and this thing would be granted, and that would take care of the matter.

EXCERPT FROM BZA MINUTES

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He stated that it would be his recommendation that for future situations like this, Central Inspection go to the job site with some sort of court order and stop any further construction on the house -- simply telling someone on the job site really did not get the job done.

CUSICK stated that the letter of April 11th should have gotten the job done. He said that frankly he was adverse to saying the houses could not be left as they were, but he was more adverse to the assumption that the request would be granted back in April and the fact that at that time nothing was done.

WILSON said that as he had indicated, at that point his client was not in a financial position to do anything.

CUSICK stated that there was even a provision for that, that the Board could have heard the requests regardless of the applicant's financial condition.

RICHARDSON asked Mr. Kirkby if the conversation he had with the foreman on the job occurred before construction started on the foundation.

KIRKBY said the foundation was in and the framing was started.

RICHARDSON added that the violation still could have been corrected.

KIRKBY agreed it could have been, and at much less expense at that time than at present.

WILSON stated that he did not think that the language in the letter was strong enough: -- "the side yard setback is not adequate. It will be necessary for you to determine which house (or both) is in violation and take proper steps to correct this violation. Occupancy will not be permitted unless a variance is granted or proper setback is obtained." WILSON said he did not think it was strong enough to indicate to his client that he must cease all future construction on this house until he went before the Board of Zoning Appeals to make application for a variance. He said the applicant had never been in that difficulty before, and he did not believe he understood that to mean he must cease all construction on the house until a variance was applied for and granted.

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CUSICK asked how long Mr. Suter had been building houses. WILSON said he could not answer that question.

CUSICK asked if Suter held an official contractor's license.

WILSON said he was sure he did.

CUSICK said he was sure when he was told the house could not be occupied, and that's the product he was selling, he understood exactly what was meant, and he would have to take exception to that (statement).

MRS. TAYLOR pointed out that the last phrase was pretty direct: "It will be necessary to rectify this situation immediately."

MOTION: CUSICK said he would have to move denial of Case No. BZA 32-73. TAYLOR seconded the motion. CUSICK said he would concur with the Secretary's report that the five conditions could not be justified and in view of the fact that written notice had been given as far back as April 11, 1973, and that as a licensed contractor the applicant knows the regulations, for these reasons he would move for denial. The motion carried unanimously that the application be denied inasmuch as the Board failed to find the five conditions necessary to the granting of the variance, as shown by the adoption of the following Resolution:

RESOLUTION NO. BZA 32-73

WHEREAS, Clewal Construction, Inc., 420 Acadia, Wichita, Kansas, by T. Michael Wilson, Suite 430, R. H. Garvey Building, Wichita, Kansas, requests a variance to reduce the required side yard setback adjacent to the east line of Lot 13 from 6 feet to 5 feet on property zoned the "AA" Single Family Dwelling District, and legally described as follows:

Lot 13, Block 3, Western Gardens Addition to Wichita, Sedgwick County, Kansas. Generally located on the north side of Birch Lane in an area between Wood Avenue and Tyler Road.

October 23, 1973

WHEREAS, proper notice as required by ordinance and by the rules of the Board of Zoning Appeals has been given; and

WHEREAS, the Board of Zoning Appeals did, at the meeting of October 23, 1973, consider said application; and

WHEREAS, the Board of Zoning Appeals has proper jurisdiction to consider said request for a variance under the provisions of Section 2.12.590.B, Code of the City of Wichita; and

WHEREAS, the Board of Zoning Appeals has found that the variance does not arise from such condition which is unique to the property in question, and was in fact created by the actions of the applicant (owner) since it is impossible to construct a 68.2 foot house on an 80 foot lot and observe the required 6 foot side yards; in addition, the applicant was given adequate notice and instructed to correct the violation prior to occupancy; and

WHEREAS, the Board of Zoning Appeals has found that the granting of the permit for the variance would have an adverse effect on adjacent property owners inasmuch as side yard requirements are established to provide structures with adequate air, light, and space. and the side yard of Lot 13 which is in violation adjoins the side yard of Lot 14 which is also in violation, reducing the distance between dwellings to approximately 9 feet, and the roofs of both structures extend into the side yards.

WHEREAS, the Board of Zoning Appeals has found that, although recognizing the problem created for the occupant, the strict application of the provisions of Title 28 would not constitute unnecessary hardship upon the applicant/owner inasmuch as the applicant was informed that the structure was in violation of the required side yard setback and it was not to be occupied until the violation was corrected or a variance obtained; and

WHEREAS, the Board of Zoning Appeals has found that although it is difficult to find the variance desired would not adversely affect the public health, safety, or general welfare, the requested variance is for a side yard that is interiorly located; and

WHEREAS, the Board of Zoning Appeals has found that the granting of the variance desired will be opposed to the general spirit and intent of Title 28 due to the fact that the zoning ordinance requires a minimum side yard of 6 feet for single

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family dwellings and it is not possible to construct a 68.2 foot house on an 80 foot lot and observe these requirements; and

WHEREAS, each of the five conditions required by Section 2.12.590.B, Code of the City of Wichita, to be present before a variance can be granted has not been found to exist.

NOW, THEREFORE, BE IT RESOLVED by the Board of Zoning Appeals of the City of Wichita that this request for a variance to reduce the required side yard setback adjacent to the east line of Lot 13 from 6 feet to 5 feet, on property zoned the "AA" Single Family Dwelling District, and legally described as:

Lot 13, Block 3, Western Gardens Addition to Wichita, Sedgwick County, Kansas. Generally located on the north side of Birch Lane in an area between Wood Avenue and Tyler Road.

be denied.

ADOPTED AT WICHITA, KANSAS, this 23rd day of October, 1973.

S/S Kenneth M. Cusick
Kenneth M. Cusick, Temporary
Chairman

ATTEST:

S/S Jack H. Galbraith
Jack H. Galbraith, Secretary

9. Case No. BZA 33-73 - Clewal Construction, Inc. 420 Acadia, Wichita, Kansas, pursuant to Section 2.12.590.B, Code of the City of Wichita, requests a variance to reduce the required side yard setback adjacent to the west property line from 6 feet to 4 feet on property zoned the "AA" Single Family Dwelling District, and legally described as Lot 14, Block 3, Western Gardens Addition, Wichita, Sedgwick County, Kansas. Generally located on the north side of Birch Lane in an area between Wood Avenue and Tyler Road.

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GALBRAITH explained that the attorney for the applicant had requested that this case be deferred so a variance could be requested for the other side yard and it could be readvertised for public hearing for the meeting of November 27, 1973.

MOTION: CUSICK moved, RICHARDSON seconded, and it carried unanimously that Case No. BZA 33-73 be deferred to the November 27th meeting.

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10. Case No. BZA 34-73 - Clewal Construction, Inc., 420 Acadia, Wichita, Kansas, pursuant to Section 2.12.590.B, Code of the City of Wichita, request a variance to reduce the required side yard setback adjacent to the north line of Lot 18 from 6 feet to 3 feet on property zoned the "AA" Single Family Dwelling District and legally described as Lot 18, Block 3, Western Gardens Addition, Wichita, Sedgwick County, Kansas. Generally located on the east side of Birch Lane in an area between Wood Avenue and Tyler Road.

GALBRAITH pointed out the area on the map and reviewed the following Secretary's report:

JURISDICTION:

The Board has jurisdiction to consider the variance request under the provisions outlined in Section 2.12.590.B, Code of the City of Wichita. The Board may grant the request when all five of the following conditions are found to exist:

1. That the variance requested arises from such condition which is unique to the property in question and which is not ordinarily found in the same zone or district; and is not created by an action or actions of the property owner or the applicant.
2. That the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents.
3. That the strict application of the provisions of Title 28 of which variance is requested will constitute unnecessary hardship upon the property owner represented in the application.
4. That the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity or general welfare; and

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5. That granting the variance desired will not be opposed to the general spirit and intent of Title 28 (zoning ordinance).

COMMENTS BY THE SECRETARY:

On December 27, 1972, an application for a residential building permit and certificate of occupancy was filed, and building permit No. C66196 was issued to the applicant for the construction of a single family house on subject property (Lot 18). The site plan accompanying the application indicated that Lot 18 is 80 feet in width and that the house would be 68 feet in width and would be located on the lot in such a manner as to observe the required 6 foot side yards. The Secretary has been advised that the applicant was given several verbal warnings by the Division of Central Inspection that the side yard setback was inadequate.

On September 5, 1973, Central Inspection issued a notice stating that a variance must be obtained or the structure must be altered to obtain the required 6 foot side yard on or before September 12, 1973, and that failure to comply with this notice would be followed by prosecution. The applicant subsequently filed a request for variance from the Board of Zoning Appeals. In addition to extending into the north side yard approximately 3 feet, the dwelling also encroaches on the 5 foot utility easement adjacent to the north property line, and vacation case No. V-0660 has been filed to vacate this easement.

It should be pointed out that although application for a building permit is also an application for a certificate of occupancy, when an inspector notifies a builder/owner that the dwelling under construction is in violation of the zoning ordinance or building code, the structure cannot legally be occupied until such violation is corrected.

Uniqueness:

It is the opinion of the Secretary that the variance requested does not arise from such condition which is unique to the property in question, and was in fact created by actions of the applicant (owner) since it is impossible to construct a 68.2 foot house on an 80 foot lot and observe the required 6 foot side yards.

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Adjacent Property:

It is the opinion of the Secretary that inasmuch as the dwelling adjacent to the north of subject property maintains a larger than average side yard of approximately 8 feet, the desired variance should have no adverse effect on adjacent property, unless there is later an addition to the house.

Hardship:

Although recognizing the problem created for the occupant, it is difficult for the Secretary to find that the strict application of the provisions of Title 28 would constitute unnecessary hardship upon the applicant/owner inasmuch as a structure is not to be occupied until a violation is corrected or a variance obtained.

Public Interest:

It is the opinion of the Secretary that it is difficult to find the requested variance would not adversely affect the public safety, health, morals, order, convenience, prosperity or general welfare; however, the area in violation is interiorly located.

Spirit and Intent:

In the opinion of the Secretary, the variance desired will be opposed to the general spirit and intent of Title 28 due to the fact that the zoning ordinance requires a minimum side yard of 6 feet for single family dwellings and it is not possible to construct a 68.2 foot house on an 80 foot lot and observe these requirements.

RECOMMENDATION:

Inasmuch as all five conditions necessary to the granting of the variance cannot be found to exist, it is the recommendation of the Secretary that the application for variance not be approved.

GALBRAITH announced that the Board had received a letter from Mr. G. A. Hultman, an adjacent property owner to the east, who stated that he objected to the variance because he thought that 6 foot side yards were almost too small.

October 23, 1973

CUSICK asked how long the first house (BZA 32-73) was. GALBRAITH replied that it was 68.2 feet long, the same as the house currently being considered. The house on Lot 14 (BZA 33-73, which was deferred) was 68.1 feet long, and all were placed where the lots were approximately 80 feet wide.

T. MICHAEL WILSON, representing the applicant, stated that he presumed the Central Inspection Division would again state that they verbally warned contractors, or foremen, on the site that they were in violation. However, WILSON said he was not able to see any evidence that any written notification was ever sent to Mr. Suter, President of Clewal Construction. He said that if there was any written documentation of any warning whatsoever relative to that, he was unaware of it.

JACK KIRKBY, from the Central Inspection Division, stated that he sent a notice on the violation in September.

WILSON said that when they filed the application, in September after receiving the notice. Prior to that, WILSON said he presumed there had been some oral notification.

KIRKBY said that this mistake was not brought to his attention until the man on the construction job told him about it.

CUSICK said that the oddity here was that all three houses were within 0.1 foot of being exactly the same length, which seemed the strangest part of the whole application to him.

MOTION: CUSICK said he moved the denial of the application, TAYLOR seconded, and it carried unanimously that the request be denied for the same reason as in the first application -- a licensed contractor knows the regulations, and the five conditions necessary to the granting of the variance could not be found to exist, as shown by the adoption of the following resolution:

October 23, 1973

RESOLUTION NO. BZA 34-73

WHEREAS, Clewal Construction, Inc., 420 Acadia, Wichita, Kansas, by T. Michael Wilson, Suite 430, R. H. Garvey Building, 300 West Douglas, Wichita, Kansas, requests a variance to reduce the required side yard setback adjacent to the north line of Lot 18 from 6 feet to 3 feet on property zoned the "AA" Single Family Dwelling District, and legally described as follows:

Lot 18, Block 3, Western Gardens Addition to Wichita, Sedgwick County, Kansas. Generally located on the East side of Birch Lane in an area between Wood Avenue and Tyler Road.

WHEREAS, proper notice as required by ordinance and by the rules of the Board of Zoning Appeals has been given; and

WHEREAS, the Board of Zoning Appeals did, at the meeting of October 23, 1973, consider said application; and

WHEREAS, the Board of Zoning Appeals has proper jurisdiction to consider said request for a variance under the provisions of Section 2.12.590.B, Code of the City of Wichita; and

WHEREAS, the Board of Zoning Appeals has found that the variance does not arise from such condition which is unique to the property in question, and was in fact created by actions of the applicant (owner) since it is impossible to construct a 68.2 foot house on an 80 foot lot and observe the required 6 foot side yards; and

WHEREAS, the Board of Zoning Appeals has found that the granting of the permit for variance will not adversely affect the rights of adjacent property owners or residents inasmuch as the dwelling adjacent to the north of subject property maintains a larger than average side yard of approximately 8 feet; and

WHEREAS, the Board of Zoning Appeals has found that although recognizing the problem created for the occupant, the strict application of the provisions of Title 28 would not constitute unnecessary hardship upon the applicant/owner inasmuch as a structure is not to be occupied until a violation is corrected or a variance obtained; and

October 23, 1973

WHEREAS, the Board of Zoning Appeals has found that although it is difficult to find the requested variance would not adversely affect the public safety, health, morals, order, convenience, prosperity or general welfare, the area in violation is interiorly located; and

WHEREAS, the Board of Zoning Appeals has found that the variance desired will be opposed to the general spirit and intent of Title 28 due to the fact that the zoning ordinance requires a minimum side yard of 6 feet for single family dwellings and it is not possible to construct a 68.2 foot house on an 80 foot lot and observe these requirements; and

WHEREAS, each of the five conditions required by Section 2.12.590.B, Code of the City of Wichita, to be present before a variance can be granted has not been found to exist.

NOW, THEREFORE, BE IT RESOLVED by the Board of Zoning Appeals of the City of Wichita that this request for a variance to reduce the required side yard setback adjacent to the north line of Lot 18 from 6 feet to 3 feet on property zoned the "AA" Single Family Dwelling District, and legally described as:

Lot 18, Block 3, Western Gardens Addition to Wichita, Sedgwick County, Kansas. Generally located on the East side of Birch Lane in an area between Wood Avenue and Tyler Road.

be denied.

ADOPTED AT WICHITA, KANSAS, this 23rd day of October, 1973.

S/S Kenneth M. Cusick
Kenneth M. Cusick,
Temporary Chairman

ATTEST:

S/S Jack H. Galbraith
Jack H. Galbraith, Secretary

BEFORE THE BOARD OF ZONING APPEALS

IN THE MATTER)
)
- OF)
)
BAZ 32-73)

STATEMENT OF JUSTIFICATION

WHEREAS, it has been brought to the attention of the applicant, Patrick B. Sinclair, that the residence and the property his family has recently purchased and now occupies is in violation of City Ordinance No. 30-783 Code Chapter 28.04.040.2(2.2) inasmuch as the northeast corner of their residence is 5.58 feet from the east property line and the southeast corner of their residence is 5.45 feet from the east property line; whereas, it is this applicant's desire to seek a sideyard setback variance from 6 feet to 5 feet along the east property line so as to comply with the zoning ordinance of the City of Wichita; and whereas, it is understood by the applicant that before a request for a variance may be granted, the Board of Zoning Appeals must find that all of the five conditions set out in Code Chapter 2.12.590 B must be shown. Therefore, this applicant hereby submits the following statement of justification to accompany his application for variance.

1. That the variance requested arises from such condition which is unique to the property in question and which is not ordinarily found in the same zone or district; and is not created by an action or actions of the property owner or the applicant.

The variance requested appears to arise from a problem created by human error on the part of the building subcontractors who were assigned the responsibilities of pouring the foundation from the stake work previously done. It does not appear to be an attempt to put a larger than authorized house on the lot; as the plot plan indicates, a 68 foot house was intended for an 80 foot lot. Due to an error on the part of someone, other than the applicant, the house was built approximately 4 inches larger than it should have been and shifted slightly too far toward the east property line to comply with the sideyard setback requirements.

It is clear in this case that the condition for which the variance is requested was not created by the applicant. The applicant, Mr. and Mrs. Patrick Sinclair, located subject property through Dotzour Realtors and through them contracted to buy their home. All of this was after the home was substantially built and before the problem of the variance came to light. No documented notice of violation ever went to the builder with respect to 8902 Birch Lane until a letter dated April of 1973. This was well after the home was substantially started. Even then, Walt Suter, President of Clewal Construction, Inc., does not acknowledge ever having received notice of the violation.

At such time as the violation on said property became known to applicant, who is not an experienced homebuyer, the subject property representing his first home, applicant received the assurance of the builder that no real problem existed and that a variance would be applied for and obtained. Not having any reason to doubt that the builder was knowledgeable concerning such matters or to doubt the integrity of the builder, applicant completed loan arrangements and incurred loan and closing costs totalling \$27,023.99.

As the builder is no longer the owner of said property and is insolvent and the denial of this application would not work as a penalty to other than an innocent party, and because of the unique set of circumstances surrounding this matter, it is felt that Condition No. 1 is met.

2. That the granting of the permit for the variance will not adversely effect the rights of adjacent property owners or residents.

Even though this variance requested has been pending and advertised since September, 1973, no adjacent property owners or residents have complained that they would be adversely effected. In fact, a petition containing twenty (20) names representing ten (10) families in the neighborhood have signed the petition requesting the Board of Zoning Appeals to grant requested variance and they further acknowledge that granting the requested sideyard variance setback will have no adverse effect on adjoining property owners.

Although brief, this portion of the statement of justification is intended to meet the conditions that the granting of the permit for the variance will not adversely effect the rights of adjacent property owners or residents, and should be considered met, as in this case, where when having had the opportunity to complain, no adjacent property owners have.

3. That the strict application of the provisions of Title 28 of which variances requested will constitute unnecessary hardship upon the property owner represented in the application.

If the requested variance is not granted, certainly the applicant and his family will suffer

severe financial injury. Specifically, the applicant has invested a sizeable sum of his own money in the property and has made certain other commitments inherent in buying one's own home. In addition to incurring a loan and closing costs in the amount of \$27,023.99, applicant has invested additional sums in his home and has, as a result of the insolvency of the builder, been required to spend substantial sums of money and time in completing work not finished by the builder.

If the variance is not granted, the house or a portion thereof may be, as the City legal staff suggests, torn down, moved or modified to conform. Any costs incurred or losses resulting therefrom will be solely at the injury of the Sinclairs as the builder is not financially capable of responding or coming to their assistance. In fact, builder's corporate charter has been revoked and Clewal Construction Company is no longer in existence.

Further, as a result of the violation, applicant's property is no longer saleable at any sum close to its original purchase price and has little resale value.

In summary, it becomes clear that strict application of the provisions of Title 28 of which variances requested will constitute unnecessary hardship upon the applicant and his family.

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

It should be understood that both areas in violation are interiorly located and not areas in a position to affect the public in general. In other words, the parties most affected, if not the only parties affected, would be the neighbors immediately adjacent to the violations. Still there is adequate light, air and space between the adjacent home on the west as it is approximately 14 feet 6 inches from the subject property. The property on the east is approximately 10 feet 6-1/2 inches from the northeast corner of the subject property and 11 feet 4 inches from the southeast corner of the subject property.

5. That granting the variance desired will not be opposed to the general spirit and intent of Title 28 (Zoning Ordinance).

When construing condition No. 5 (the variance will not be opposed to general spirit intent of Title 28) consideration should be given to exceptions and variances which are also a part of Title 28. This is stated as well as can be in the opening remarks of the rules and regulations of the Board of Zoning Appeals, to-wit:

"The intent and purposes of these rules and regulations is to provide procedures for the Board of Zoning Appeals

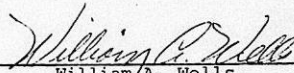
to follow in the consideration of application for appeals by those persons who do not agree with the interpretation of the zoning ordinance as made by the superintendent of central inspections; to provide relief for those persons in the form of modifications or variances to the strict interpretation of the zoning ordinance, who would suffer a severe hardship if the ordinance were strictly enforced; and to consider exceptions to the zoning ordinance as authorized by Title 28 of the Code of the City of Wichita."
(Emphasis Supplied)

This case when considering the applicant's innocent position is just what the exceptions and variances to the zoning ordinances was created for.

Respectfully submitted,

LILLESTON SPRADLING GOTT STALLWITZ & HOPE
Attorneys for Applicant

By



William A. Wells

SECRETARY'S REPORT

CASE NO. BZA 3-74

APPLICANT: Patrick B. Sinclair, 8202 Birch Lane, Wichita, Kansas.

AGENT: William A. Wells, 923 First Nat'l Bank Bldg.,
Wichita, Kansas.

REQUEST: Variance pursuant to Section 2.12.590.B, Code of the City of Wichita, to reduce the required side yard setback adjacent to the east line of Lot 13 from 6 feet to 5 feet.

GENERAL LOCATION: North side of Birch Lane in an area between Wood Avenue and Tyler Road.

ZONING: Subject property is zoned the "AA" Single Family Dwelling District, as are those properties to the east, west, south, and north.

LAND USE: Subject property contains a single family home, as do those properties to the east, west, and south. The property to the north is undeveloped.

JURISDICTION:

The Board has jurisdiction to consider the variance request under the provisions outlined in Section 2.12.590.B, Code of the City of Wichita. The Board may grant the request when all five of the following conditions are found to exist:

1. That the variance requested arises from such condition which is unique to the property in question and which is not ordinarily found in the same zone or district; and is not created by an action or actions of the property owner or the applicant.
2. That the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents.
3. That the strict application of the provisions of Title 28, of which variance is requested, will constitute unnecessary hardship upon the property owner represented in the application.
4. That the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity or general welfare; and
5. That granting the variance desired will not be opposed to the general spirit and intent of Title 28 (Zoning ordinance).

COMMENTS BY THE SECRETARY

On January 16, 1973, an application for a residential building permit and certificate of occupancy was filed, and building permit No. C66438 was issued to the contractor, ~~for~~ Clewal Constuction, Inc., for construction of a single family house on subject property (Lot 13). The site plan accompanying the application indicated that Lot 13 is 80 feet in width and that the house would be 68 feet in width and would be located on the lot in such a manner as to observe the required 6 foot side yards. The Secretary has been advised that the contractor, or his agents, were orally warned by the Division of Central Inspection that the side yard setbacks for one or both houses being built on Lots 13 and 14 were inadequate. The construction company was notified by the attached letter dated April 11, 1973, of the violation. The letter further stated that proper steps must be taken to correct the violation(s) and that occupancy would not be permitted unless a variance was granted or the proper setback obtained.

The contractor continued construction, and on September 5, 1973, Central Inspection issued a notice stating that variances must be obtained or the structures must be altered to obtain the required 6-foot side yard on or before September 12, 1973, and that failure to comply with this notice would be followed by prosecution. The contractor subsequently filed requests for variances from the Board of Zoning Appeals.

It should be pointed out that although an application for a building permit is also an application for a certificate of occupancy, when an inspector notifies a builder/owner that the dwelling under construction is in violation of the zoning ordinance or building code, the structure cannot legally be occupied until such violation is corrected. All three houses for which the contractor has had to file variance requests now have families living in them despite notification that they were not to be occupied.

On October 23, 1973, the Board of Zoning Appeals considered an application for variance (BZA 32-73) on subject property filed by Clewal Construction, Inc. as the contractor and listing Patrick B. and LaDonna M. Sinclair as owners. It was the action of the Board to find that all five conditions necessary to the granting of a variance did not exist, and the request for variance of the required side yard setback was denied. The Board is to first consider whether or not a request for filing a new application is to be granted to Mr. Sinclair.

Uniqueness:

The failure to meet side yard requirements arises from failure to position the house correctly on the lot, not from a condition unique to the property in question and which is not ordinarily found in the same zone or district; and is not created by an action or actions of the property owner or applicant, as required by the provisions of KSA 12-715 (State statutes) and Section 2.12.590.B, Code of the City

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Case No. BZA 3-74

of Wichita. The problem was created by Clewal Construction, Inc. (or its agents), which owned the property at the time of construction, and the Division of Central Inspection notified the company and/or its agents, both orally and in writing, that the structure was not to be occupied until the violation was corrected or a variance obtained. Neither can it be justified that "the problem is not created by an action or actions of the property owner or the applicant", since Clewal Construction was the property owner at the time the violation occurred. (It is difficult to see how clear title could have been furnished by the contractor to the Sinclairs in the presence of this violation, since a copy of the plat furnished by the surveyor as a "true and correct exhibit of said survey for mortgage title insurance" clearly indicates the required 6-foot side yard is not observed adjacent to the east property line.) It does not appear that a change in ownership would allow the justification of uniqueness since uniqueness must arise from a condition related to the actual property in question, not an error by the contractor.

It is, therefore, the opinion of the Secretary that the variance requested does not arise from such condition which is unique to the property in question, and was in fact created by actions of the former property owner, since it is impossible to construct a 68.2 foot house on an 80-foot lot and observe the required 6-foot side yards; in addition, the contractor was given adequate notice and instructed to correct the violation prior to occupancy.

Adjacent Property:

It is the opinion of the Secretary that it is difficult to find that the granting of the permit for variance would not have an adverse affect on adjacent property owners inasmuch as side yard requirements are established to provide structures with adequate air, light and space, and the side yard of Lot 13 which is in violation adjoins the side yard of Lot 14 which is also in violation, reducing the distance between dwellings to approximately 10 feet, and the roofs of both structures extend into the side yards.

Hardship:

KSA 12-715 and Section 2.12.590.B, Code of the City of Wichita, provide that the Board must find that "the strict application of the provisions of Title 28 of which variance is requested will constitute unnecessary hardship upon the property owner represented in the application." In other words, the hardship must be created by the provisions of the ordinance, not the actions of the owner, applicant or some other person, in order for relief by means of a variance to be granted. It has been the policy of the Board, based on legal interpretations and court decisions from many jurisdictions, that the hardship must not be economic, but must relate to a specific piece of property, and be caused by the provisions of the ordinance which, if strictly enforced, would prevent any reasonable use of the property.

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Case No. BZA 3-74

Although recognizing the problem created for the occupant, it is difficult for the Secretary to find that the strict application of the provisions of Title 28 would constitute unnecessary hardship upon the applicant/owner inasmuch as the previous owner (the contractor) was informed that the structure was in violation of the required side yard setback, and it was not to be occupied until the violation was corrected or a variance obtained.

Public Interest:

It is the opinion of the Secretary that it is difficult to determine whether or not the requested variance would adversely affect the public health, safety, or general welfare; however, the requested variance is for a side yard that is interiorly located.

Spirit and Intent:

In the opinion of the Secretary, the variance desired will be opposed to the general spirit and intent of Title 28 due to the fact that the zoning ordinance requires a minimum side yard of 6 feet for single family dwellings and it is not possible to construct a 68.2-foot house on an 80-foot lot and observe these requirements.

RECOMMENDATION

Inasmuch as all five conditions necessary to the granting of the variance cannot be found to exist, it is the recommendation of the Secretary that the application for variance not be approved.

WICHITA-SEDGWICK COUNTY

DATE

METROPOLITAN AREA PLANNING DEPARTMENT

January 31, 1974

TO Memo to the Files
FROM Jack Galbraith, Secretary, Board of Zoning Appeals
SUBJECT BZA Cases 32-73, 33-73 and 34-73

On January 29, 1974, Mike Wilson and Mr. Erickson came in to discuss the procedure on the above-captioned cases. Specifically, Wilson's request was would I readvertise the three cases for the BZA meeting of February 26, 1974, even though I had not been so instructed by the Board. Since the Board had split on this decision 2-2, I advised that, administratively I didn't want to be responsible for readvertising the cases when I had not been instructed to do so. He then asked if I would contact each member to see if they would so authorize as the clients involved were about to be foreclosed.

In contacting the members, three were opposed to readvertising until they made that decision on February 26th. Mr. Clonts was in favor and Mrs. Murphy requested that I use my judgment based on the desire of the other members, that she would probably vote to rehear the cases since she was a new member and had not been on the Board when originally considered and denied.

On January 30, 1974, Mike Wilson discussed the matter with Bob Lakin and I along with Tom Powell of the Legal Staff. After advising him of the poll, he wanted to contact the three members to see if they would change their position.

The general discussion was to attempt to expedite the procedure on to the District Court, to see if that wouldn't assist in reaching a quicker, more equitable solution to all those concerned. It was left that we would contact the Director of Law and advise Wilson by Thursday or Friday.

JHG:js

WICHITA-SEDGWICK COUNTY

ATTACHMENT 2

DATE

METROPOLITAN AREA PLANNING DEPARTMENT

January 16, 1974

TO Board of Zoning Appeals

FROM Jack H. Galbraith, Secretary *JHG*

SUBJECT Request to allow application to be filed on property previously considered in Case No. BZA 32-73.

Article III, Paragraph D, of the Rules and Regulations of the Board of Zoning Appeals states that:

No application shall be considered wherein an application has been previously decided, involving the same premises and/of Zoning Ordinance requirements; except in cases where new plans or new facts pertaining to said requirements or regulations are presented, showing changed conditions or circumstances which in the opinion of the Board, materially alter the aspects of the case.

The attorney representing Mr. and Mrs. Patrick Sinclair has requested that the Board allow his clients to file an application for variance on the property previously considered in Case No. BZA 32-73. He states that this case was filed by Clewal Construction, Inc., showing Patrick B. and LaDonna M. Sinclair as applicants, without the knowledge or authorization of his clients. He points out that his clients, who are the property owners and the principal parties interested in obtaining a variance, have not heretofore been present or represented at the hearings on said application. The attorney contends that Mr. and Mrs. Sinclair will meet the criteria as required under the provisions of Section 2.12.590.B, Code of the City of Wichita, and that such facts should be given consideration by the Board of Zoning Appeals.

Although the application was originally filed with Clewal Construction, Inc. listed as the applicant, the attorney representing the contractor was contacted about the failure to list Mr. and Mrs. Sinclair (property owners) as co-applicants. The attorney therefore inserted their names and initialed this change on the application. The Sinclairs were properly notified of the date and time for the public hearing, and could have appeared and/or been represented at that time. (Unlike zone change applications, the applicant in a BZA case does not have to be the property owner. In this case the contractor was served with notice to make the structure conform, and therefore filed the variance request.)

Board of Zoning Appeals
January 16, 1974
Page 2

If the Board determines that sufficient new facts have been presented to justify allowing another variance application to be filed on this property, a new filing fee will be required (Paragraph D, Article III, Rules and Regulations of the Board of Zoning Appeals). If the Board concurs with the Secretary that the evidence presented is not sufficient to justify reconsideration of a new application, the request should be denied, and any further action involving this property should consist of an appeal to the District Court of Sedgwick County.

JHG:rme

cc: William A. Wells, Attorney
Lilleston, Spradling, Gott, Stallwitz & Hope
923 First National Bank Building, 67202

Mr. & Mrs. Patrick B. Sinclair
8902 Birch Lane, 67212

Joe Bogle, Legal Counsel
Board of Zoning Appeals
Law Department

January 24, 1974

Mr. T. Michael Wilson
Stinson, Wisdom & Lasswell
Attorneys at Law
Suite 430, R. H. Garvey Building
300 West Douglas
Wichita, Kansas 67202

Subject: Cases No. BZA 32-73,
BZA 33-73 and BZA 34-73 -
Request for rehearing.

Dear Mr. Wilson:

At the regular meeting of the Board of Zoning Appeals on January 22, 1974, your request for a rehearing of Cases No. BZA 32-73, BZA 33-73 and BZA 34-73 was considered.

Inasmuch as a motion to approve this request resulted in a moot vote (2-2), consideration of this request was deferred until the next regular meeting, as provided by Article VII. C of the Rules and Regulations of the Board of Zoning Appeals. Your request for rehearing will be scheduled for the meeting of February 26, 1974. Inasmuch as you indicated that you had additional information to present to the Board, please submit copies to our office by 5:00 p.m. on February 13, 1974, so that it can be mailed to them with our agenda.

If you have any questions concerning this matter, please contact this office.

Very truly yours,

Jack H. Galbraith
Secretary

JHG:rme

January 23, 1974

Mr. William A. Wells, Attorney
Lilleston, Spradling, Gott, Stallwitz & Hope
923 First National Bank Building
Wichita, Kansas 67202

Subject: Request to allow appli-
cation to be filed on
property previously con-
sidered in Case No.
BZA 32-73.

Dear Mr. Wells:

At the regular meeting of the Board of Zoning Appeals on January 22, 1974, your request to allow Mr. and Mrs. Patrick Sinclair to file an application for variance on the property previously considered in Case No. BZA 32-73 and generally located on the north side of Birch Lane in an area between Wood Avenue and Tyler Road, was considered.

Inasmuch as a fifth member has not yet been appointed to the Board of Zoning Appeals, it was the action of the Board to defer this request until the meeting of February 26, 1974, so that the matter could be considered by a full Board. If you have any questions concerning this matter, please contact this office.

Very truly yours,

Jack H. Galbraith
Secretary

JHG:rme

cc: Mr. & Mrs. Patrick B. Sinclair, 8902 Birch Lane, 67212

WICHITA-SEDGWICK COUNTY

DATE

METROPOLITAN AREA PLANNING DEPARTMENT

January 16, 1974

TO Board of Zoning Appeals

FROM Jack H. Galbraith, Secretary *J.H.G.*

SUBJECT Request for rehearing of cases BZA 32-73, BZA 33-73
and BZA 34-73.

On December 20, 1973, the attorney for the original applicant, Clewal Construction, Inc., submitted requests for rehearing for cases BZA 32-73, BZA 33-73 and BZA 34-73. Article VIII of the Rules and Regulations of the Board of Zoning Appeals provides that such requests:

...Shall be in writing and duly verified and shall be submitted to the Secretary of the Board within sixty (60) days of the date of the original hearing. No requests for rehearing shall be entertained unless new evidence is submitted which could not reasonably have been presented at the previous hearing.

It is further stated that the "Secretary of the Board shall determine if a rehearing shall be allowed, however, the applicant shall have the right to appeal the Secretary's determination to the Board of Zoning Appeals."

Pertaining to case BZA 32-73, the Secretary had previously been contacted by an attorney representing the owners of subject property, who advised that he was submitting a request for permission to file a new application on behalf of his clients. Because of the unusual circumstances involving the property, in that both attorneys had an interest in this case, and due to the determination of the Secretary that the attorney representing Clewal Construction, Inc., and its assignees (the Farmers and Merchants State Bank of Derby) failed to present sufficient new evidence which could not reasonably have been presented at the previous hearing, this request was denied by the Secretary. The attorney for the Clewal Construction, Inc. advised the Secretary that he wished to exercise his right to appeal this determination to the Board at its next regular meeting.

With respect to the requests for rehearing for cases BZA 33-73 and BZA 34-73, after reviewing the statements submitted by the attorney for the applicant, it was the determination of the Secretary that none of the information provided constituted new evidence. In fact, it was the opinion of the

Board of Zoning Appeals
January 16, 1974
Page 2

Secretary that at the Board's meeting of November 27, 1973, these same points were made. The facts pertaining to either case did not appear to have changed, and therefore the requests for rehearing of cases BZA 33-73 and BZA 34-73 were denied. The applicant's attorney again advised the Secretary that he wished to appeal this decision to the Board.

Attached for your information and review are copies of the statements submitted by the attorney requesting a rehearing. Consideration of these requests has been scheduled for your meeting of January 22, 1974. Upon your review, should you determine that there is sufficient new evidence to warrant a new hearing, your action should be to instruct the Secretary to readvertise these cases for public hearing. The attorney for Clewal Construction, Inc. and its assignees would then follow the same procedure as was followed in consideration of the original application (Paragraph A, Article VIII, Rules and Regulations of the Board of Zoning Appeals). That is, a new application, filing fee and statement of justification would be required.

However, if you concur in the Secretary's position that the evidence is not sufficient to warrant a rehearing, the requests should be denied and any further action by the attorney representing Clewal Construction, Inc. and its assignees should consist of an appeal to the District Court of Sedgwick County.

JHG:rme
Attachment

cc: Joe Bogle, Legal Counsel
Board of Zoning Appeals
Law Department

T. Michael Wilson
Stinson, Wisdom & Lasswell
Attorneys at Law
Suite 430, R. H. Garvey Building
300 West Douglas, 67202

Mr. Charles Manning
8808 Birch Lane, 67212

Mr. & Mrs. Steven Erickson
8824 Birch Lane, 67212

January 16, 1974

Board of Zoning Appeals

Jack H. Galbraith, Secretary

Request to allow application to be filed on property previously considered in Case No. BEA 32-73.

Article III, Paragraph D, of the Rules and Regulations of the Board of Zoning Appeals states that:

No application shall be considered wherein an application has been previously decided, involving the same premises and/of Zoning Ordinance requirements; except in cases where new plans or new facts pertaining to said requirements or regulations are presented, showing changed conditions or circumstances which in the opinion of the Board, materially alter the aspects of the case.

The attorney representing Mr. and Mrs. Patrick Sinclair has requested that the Board allow his clients to file an application for variance on the property previously considered in Case No. BEA 32-73. He states that this case was filed by Clewal Construction, Inc., showing Patrick B. and LaDonna M. Sinclair as applicants, without the knowledge or authorization of his clients. He points out that his clients, who are the property owners and the principal parties interested in obtaining a variance, have not heretofore been present or represented at the hearings on said application. The attorney contends that Mr. and Mrs. Sinclair will meet the criteria as required under the provisions of Section 2.12.590.B, Code of the City of Wichita, and that such facts should be given consideration by the Board of Zoning Appeals.

Although the application was originally filed with Clewal Construction, Inc. listed as the applicant, the attorney representing the contractor was contacted about the failure to list Mr. and Mrs. Sinclair (property owners) as co-applicants. The attorney therefore inserted their names and initialed this change on the application. The Sinclairs were properly notified of the date and time for the public hearing, and could have appeared and/or been represented at that time. (Unlike zone change applications, the applicant in a BEA case does not have to be the property owner. In this case the contractor was served with notice to make the structure conform, and therefore filed the variance request.)

Board of Zoning Appeals
January 16, 1974
Page 2

If the Board determines that sufficient new facts have been presented to justify allowing another variance application to be filed on this property, a new filing fee will be required (Paragraph D, Article III, Rules and Regulations of the Board of Zoning Appeals). If the Board concurs with the Secretary that the evidence presented is not sufficient to justify reconsideration of a new application, the request should be denied, and any further action involving this property should consist of an appeal to the District Court of Sedgwick County.

JHG:rme

cc: William A. Wells, Attorney
Lilleston, Spradling, Gott, Stallwitz & Hope
923 First National Bank Building, 67202

Mr. & Mrs. Patrick E. Sinclair
8902 Birch Lane, 67212

Joe Bogle, Legal Counsel
Board of Zoning Appeals
Law Department

THE CITY OF WICHITA

JOHN DEKKER, DIRECTOR OF LAW AND CITY ATTORNEY
JOE M. BOGLE, JR., ASSISTANT CITY ATTORNEY



DEPARTMENT OF LAW
OFFICE OF CITY ATTORNEY
262-0611 — APEA CODE 316
SUITE 600 — CITY BLDG ANNEX
WICHITA, KANSAS 67202

January 6, 1974

Mr. and Mrs. Pat Sinclair
8902 Birch Lane
Wichita, Kansas 67212

RE: Required sideyard setback
at 8902 Birch Lane

Dear Mr. and Mrs. Sinclair:

As you are aware, the house which you occupy and apparently own at 8902 Birch Lane was built with insufficient sideyard setbacks as provided for in Section 28.04.040 (c) (2.2) of the Code of the City of Wichita. Furthermore, an application for a variance from this Code requirement was made to the Board of Zoning Appeals and considered by them on October 23, 1973.

This application for a variance, which was made by Clewal Construction Company was denied by the Board based upon their inability to find the existence of five (5) necessary and specific conditions which are listed in Section 2.12.590 (b) of the Code.

Thus, as a result of the Board of Zoning Appeals denial of the variance application, it is necessary that you or the builder of the home have it moved or modified so that it conforms to the required sideyard setbacks.

Yours truly,

Joe M. Bogle, Jr.
Assistant City Attorney

JMB:kh

cc: Bill Wells, Attorney at Law
Clewal Construction Company
/ Jack Galbraith, Secretary, Board of Zoning Appeals
Walter H. Suter, 420 Acadia
John Dekker, City Attorney



December 21, 1973

Mr. William A. Wells, Attorney
Lilleston, Spradling, Gott, Stallwitz & Hope
923 First National Bank Building
Wichita, Kansas 67202

Re: Application for New Hearing
for Property Involved in
BZA 32-73

Dear Mr. Wells:

This is to advise you that we have received your request to come before the Board of Zoning Appeals to ask that they allow Mr. and Mrs. Sinclair to file an application for variance on property previously involved in Case No. BZA 32-73, as permitted under Article III, paragraph D, of the Rules and Regulations of the Board (rather than Article III (B) cited in your letter).

We are scheduling this matter for the next regular meeting of the Board of Zoning Appeals on January 22, 1974. The Board meets at 1:30 p.m. in Room 401 City Building Annex, 104 South Main.

If we can be of any assistance to you in this matter, please call.

Sincerely,

Martha McMurry
Assistant Secretary

MM:ber

cc: Mr. and Mrs. Patrick B. Sinclair, 8902 Birch Lane 67212
T. Michael Wilson, 430 R. H. Garvey Building 67202

December 20, 1973

Mr. T. Michael Wilson
Stinson, Wisdom & Lasswell
Attorneys at Law
Suite 430, R. H. Garvey Building
300 West Douglas
Wichita, Kansas 67202

Re: Cases No. BZA 32-73, BZA
33-73, and BZA 34-73 -
Request for rehearing

Dear Mr. Wilson:

As we discussed this morning, we have reviewed the three requests for rehearing you submitted on the above-captioned BZA cases as authorized under Article VIII Rehearings - of the Board of Zoning Appeals Rules and Regulations. Pertaining to BZA 32-73, we were contacted earlier this date by Mr. William Wells, attorney representing Mr. and Mrs. Sinclair, who are the owners of subject property. Mr. Wells advised that he was submitting either a request for rehearing or a request that he be permitted to file a new application on behalf of his client, that he felt the facts would justify the Board to authorize his filing a new application on subject property. Because of these unusual circumstances, being that you both apparently have an interest in this case, it is my determination, as Secretary of the Board, that you have not presented sufficient new evidence which could not reasonably have been presented at the previous meeting and, therefore, your request is denied. As Article VIII B. provides, you may appeal my decision to the Board.

With respect to your request for a rehearing of Cases No. BZA 33-73 and 34-73, after reviewing your submitted statements, none of the information they contain, in my opinion, constitutes new evidence. In fact, on Case BZA 33-73, you made all these same points at the Board meeting on November 27, 1973. As to either case, however, the facts do not appear, in my judgment, to have changed, and therefore, your request for rehearing is denied.

Page 2 - Mr. T. Michael Wilson
December 20, 1973

However, from our discussion, you know that Article VIII, paragraph B of the Rules and Regulations of the Board of Zoning Appeals provides that: "The Secretary of the Board shall determine if a rehearing shall be allowed, however, the applicant shall have the right to appeal the Secretary's determination to the Board of Zoning Appeals." From our conversation with you on December 20, 1973, we are aware that you will wish to exercise your right to appeal this decision to the Board. Unless you notify us otherwise, this matter will be placed on the Board's agenda for their regular meeting of January 22, 1974, to allow them to determine whether or not a rehearing will be granted.

If you have any questions concerning this matter, please call.

Sincerely,

Jack H. Galbraith
Secretary

JHG:ber

BEFORE THE BOARD OF ZONING APPEALS

IN THE MATTER)
)
 OF)
)
BAZ 32-73)
_____)

STATEMENT OF JUSTIFICATION

WHEREAS, it has been brought to the attention of the applicant, Patrick B. Sinclair, that the residence and the property his family has recently purchased and now occupies is in violation of City Ordinance No. 30-783 Code Chapter 28.04.040.2(2.2) inasmuch as the northeast corner of their residence is 5.58 feet from the east property line and the southeast corner of their residence is 5.45 feet from the east property line; whereas, it is this applicant's desire to seek a sideyard setback variance from 6 feet to 5 feet along the east property line so as to comply with the zoning ordinance of the City of Wichita; and whereas, it is understood by the applicant that before a request for a variance may be granted, the Board of Zoning Appeals must find that all of the five conditions set out in Code Chapter 2.12.590 B must be shown. Therefore, this applicant hereby submits the following statement of justification to accompany his application for variance.

1. That the variance requested arises from such condition which is unique to the property in question and which is not ordinarily found in the same zone or district; and is not created by an action or actions of the property owner or the applicant.

The variance requested appears to arise from a problem created by human error on the part of the building subcontractors who were assigned the responsibilities of pouring the foundation from the stake work previously done. It does not appear to be an attempt to put a larger than authorized house on the lot; as the plot plan indicates, a 68 foot house was intended for an 80 foot lot. Due to an error on the part of someone, other than the applicant, the house was built approximately 4 inches larger than it should have been and shifted slightly too far toward the east property line to comply with the sideyard setback requirements.

It is clear in this case that the condition for which the variance is requested was not created by the applicant. The applicant, Mr. and Mrs. Patrick Sinclair, located subject property through Dotzour Realtors and through them contracted to buy their home. All of this was after the home was substantially built and before the problem of the variance came to light. No documented notice of violation ever went to the builder with respect to 8902 Birch Lane until a letter dated April of 1973. This was well after the home was substantially started. Even then, Walt Suter, President of Clewal Construction, Inc., does not acknowledge ever having received notice of the violation.

At such time as the violation on said property became known to applicant, who is not an experienced homebuyer, the subject property representing his first home, applicant received the assurance of the builder that no real problem existed and that a variance would be applied for and obtained. Not having any reason to doubt that the builder was knowledgeable concerning such matters or to doubt the integrity of the builder, applicant completed loan arrangements and incurred loan and closing costs totalling \$27,023.99.

As the builder is no longer the owner of said property and is insolvent and the denial of this application would not work as a penalty to other than an innocent party, and because of the unique set of circumstances surrounding this matter, it is felt that Condition No. 1 is met.

2. That the granting of the permit for the variance will not adversely effect the rights of adjacent property owners or residents.

Even though this variance requested has been pending and advertised since September, 1973, no adjacent property owners or residents have complained that they would be adversely effected. In fact, a petition containing twenty (20) names representing ten (10) families in the neighborhood have signed the petition requesting the Board of Zoning Appeals to grant requested variance and they further acknowledge that granting the requested sideyard variance setback will have no adverse effect on adjoining property owners.

Although brief, this portion of the statement of justification is intended to meet the conditions that the granting of the permit for the variance will not adversely effect the rights of adjacent property owners or residents, and should be considered met, as in this case, where when having had the opportunity to complain, no adjacent property owners have.

3. That the strict application of the provisions of Title 28 of which variances requested will constitute unnecessary hardship upon the property owner represented in the application.

If the requested variance is not granted, certainly the applicant and his family will suffer

severe financial injury. Specifically, the applicant has invested a sizeable sum of his own money in the property and has made certain other commitments inherent in buying one's own home. In addition to incurring a loan and closing costs in the amount of \$27,023.99, applicant has invested additional sums in his home and has, as a result of the insolvency of the builder, been required to spend substantial sums of money and time in completing work not finished by the builder.

If the variance is not granted, the house or a portion thereof may be, as the City legal staff suggests, torn down, moved or modified to conform. Any costs incurred or losses resulting therefrom will be solely at the injury of the Sinclairs as the builder is not financially capable of responding or coming to their assistance. In fact, builder's corporate charter has been revoked and Clewal Construction Company is no longer in existence.

Further, as a result of the violation, applicant's property is no longer saleable at any sum close to its original purchase price and has little resale value.

In summary, it becomes clear that strict application of the provisions of Title 28 of which variances requested will constitute unnecessary hardship upon the applicant and his family.

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

It should be understood that both areas in violation are interiorly located and not areas in a position to affect the public in general. In other words, the parties most affected, if not the only parties affected, would be the neighbors immediately adjacent to the violations. Still there is adequate light, air and space between the adjacent home on the west as it is approximately 14 feet 6 inches from the subject property. The property on the east is approximately 10 feet 6-1/2 inches from the northeast corner of the subject property and 11 feet 4 inches from the southeast corner of the subject property.

5. That granting the variance desired will not be opposed to the general spirit and intent of Title 28 (Zoning Ordinance).

When construing condition No. 5 (the variance will not be opposed to general spirit intent of Title 28) consideration should be given to exceptions and variances which are also a part of Title 28. This is stated as well as can be in the opening remarks of the rules and regulations of the Board of Zoning Appeals, to-wit:

"The intent and purposes of these rules and regulations is to provide procedures for the Board of Zoning Appeals

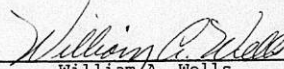
to follow in the consideration of application for appeals by those persons who do not agree with the interpretation of the zoning ordinance as made by the superintendent of central inspections; to provide relief for those persons in the form of modifications or variances to the strict interpretation of the zoning ordinance, who would suffer a severe hardship if the ordinance were strictly enforced; and to consider exceptions to the zoning ordinance as authorized by Title 28 of the Code of the City of Wichita."
(Emphasis Supplied)

This case when considering the applicant's innocent position is just what the exceptions and variances to the zoning ordinances was created for.

Respectfully submitted,

LILLESTON SPRADLING GOTT STALLWITZ & HOPE
Attorneys for Applicant

By



William A. Wells

LAW OFFICES

LILLESTON, SPRADLING, GOTT, STALLWITZ & HOPE

923 FIRST NATIONAL BANK BUILDING

TELEPHONE (316) 263-8218

WICHITA, KANSAS 67202

HENRY V. GOTT
RALPH M. HOPE
RONALD M. GOTT
GLENN D. YOUNG, JR.
JERRY D. BOGLE
WILLIAM A. WELLS
HENRY J. SCHULTEIS
J. MICHAEL PETERS

STANLEY & VERMILION . 1886-1897
STANLEY, VERMILION
& EVANS 1897-1909
STANLEY, VERMILION,
EVANS & CAREY . . . 1909-1913
VERMILION, EVANS,
CAREY & LILLESTON . 1913-1946
CAREY, LILLESTON,
SPRADLING & GOTT . 1946-1950
LILLESTON, SPRADLING,
GOTT & STALLWITZ . 1950-1958

December 20, 1973

Mr. Jack Galbraith, Secretary
Board of Zoning Appeals
City of Wichita
104 South Main
Wichita, Kansas 67202

Re: Application for Variance;
8902 Birch Lane

Dear Mr. Galbraith:

Pursuant to Article III (B) we hereby respectfully request on behalf of Patrick B. Sinclair and LaDonna M. Sinclair, owners of the above-referenced property, the opportunity to present to the Board of Zoning Appeals an Application for Variance.

In support of this request, we wish the Board of Zoning Appeals to know that the Application for Variance contained in Case No. BZA 32-73, filed by Clewial Construction, Inc. and showing Patrick B. and LaDonna M. Sinclair as applicants was filed without the knowledge or authorization of Patrick B. and LaDonna M. Sinclair and that said property owners and the principal parties interested in the obtaining of a variance have not heretofore been present or represented at the hearings on said application. Furthermore, it is our contention that the application of Mr. and Mrs. Sinclair for variance will meet the criteria as required under the provisions of Section 2.12.590.B of the Code of the City of Wichita and that such facts should be given consideration by the Board of Zoning Appeals.

Sincerely thanking you for your kind assistance in this matter to date, I remain,

Very truly yours,

William A. Wells
William A. Wells
of LILLESTON SPRADLING GOTT
STALLWITZ & HOPE



WAW:mt

BEFORE THE BOARD OF ZONING APPEALS


IN THE MATTER OF)
)
BZA 32-73)

REQUEST FOR REHEARING

We hereby respectfully request on behalf of Clewal Construction, Inc., Farmers and Merchants State Bank, Derby, Kansas, assignees of contractor's proceeds, persons in possession of the premises and homeowners in the neighborhood, a rehearing of the application for a sideyard variance for property located at 8902 Birch Lane, Wichita, Kansas. Said application for a sideyard variance was previously denied by the Board of Zoning Appeals at their meeting of October 23, 1973.

This request is being made for the reason that new evidence has developed which could not have been reasonably presented at the previous hearing of the Board of Zoning Appeals on October 23, 1973, to wit:

- a. The contractor, Clewal Construction, Inc. is now a defunct corporation and Walt Suter, President of said corporation is no longer in the construction business.
- b. Numerous innocent parties have now become involved and said innocent parties stand to suffer financially unless the requested variances are granted.
- c. The Farmers and Merchants State Bank of Derby is now the assignee of said contractor's proceeds and has a real interest in seeing that the requested variances are granted so that the mortgage loans may be closed, lien holders are satisfied and persons in possession are vested with clear title to said property.



T. Michael Wilson
of STINSON, WISDOM & LASSWELL

VERIFICATION

STATE OF KANSAS)
) SS
SEDGWICK COUNTY)

T. Michael Wilson, of lawful age, being first
duly sworn upon oath, states:

That he is the attorney for the parties herein;
that he has read the above and foregoing Request for
Rehearing; that the statements made therein are true and
correct.

T. Michael Wilson

Subscribed and sworn to before me,
a Notary Public, this 20th day of
December, 1973.



Julie Ahrens
Notary Public - Julie Ahrens, PLS

My Commission Expires:
March 29, 1976

December 14, 1973

T. Michael Wilson
Suite 430, R. H. Garvey Building
300 West Douglas
Wichita, Kansas 67202

RE: Case No. BZA 32-73
Request for Variance

Dear Mr. Wilson:

Enclosed is a signed copy of the Resolution adopted by the Board of Zoning Appeals on October 23, 1973, in connection with your request for a variance to reduce the required side yard setback adjacent to the east line of Lot 13 from 6 feet to 5 feet on property zoned the "AA" Single Family Dwelling District, and generally located on the North side of Birch Lane in an area between Wood Avenue and Tyler Road.

This Resolution reflects the official action of the Board to deny your request. It is forwarded to you for your information and files.

If you have any questions concerning this matter, please call our office.

Very truly yours,

Jack H. Galbraith
Secretary

JHG:rw

Enclosure

cc: Walt Suter, Cleval Construction, Inc., 420 Acadia, 67212
LaDonna M. & Patrick B. Sinclair, 8902 Birch Lane, 67212
Robert Feldner, Superintendent of Central Inspection
Ralph Eberly, City Clerk
Joe Donnelly, Central Inspection

RESOLUTION NO. BZA 32-73

WHEREAS, Clewal Construction, Inc., 420 Acadia, Wichita, Kansas, by T. Michael Wilson, Suite 430, R. H. Garvey Building, Wichita, Kansas, requests a variance to reduce the required side yard setback adjacent to the east line of Lot 13 from 6 feet to 5 feet on property zoned the "AA" Single Family Dwelling District, and legally described as follows:

Lot 13, Block 3, Western Gardens Addition to Wichita, Sedgwick County, Kansas. Generally located on the North side of Birch Lane in an area between Wood Avenue and Tyler Road.

WHEREAS, proper notice as required by ordinance and by the rules of the Board of Zoning Appeals has been given; and

WHEREAS, the Board of Zoning Appeals did, at the meeting of October 23, 1973, consider said application; and

WHEREAS, the Board of Zoning Appeals has proper jurisdiction to consider said request for a variance under the provisions of Section 2.12.590.B, Code of the City of Wichita; and

WHEREAS, the Board of Zoning Appeals has found that the variance does not arise from such condition which is unique to the property in question, and was in fact created by actions of the applicant (owner) since it is impossible to construct a 68.2 foot house on an 80 foot lot and observe the required 6 foot side yards; in addition, the applicant was given adequate notice and instructed to correct the violation prior to occupancy; and

WHEREAS, the Board of Zoning Appeals has found that the granting of the permit for the variance would have an adverse effect on adjacent property owners inasmuch as side yard requirements are established to provide structures with adequate air, light, and space, and the side yard of Lot 13 which is in violation adjoins the side yard of Lot 14 which is also in violation, reducing the distance between dwellings to approximately 9 feet, and the roofs of both structures extend into the side yards.

WHEREAS, the Board of Zoning Appeals has found that, although recognizing the problem created for the occupant, the strict application of the provisions of Title 28 would not constitute unnecessary hardship upon the applicant/owner inasmuch as the applicant was informed that the structure was in violation of the required side yard setback and it was not to be occupied until the violation was corrected or a variance obtained; and

WHEREAS, the Board of Zoning Appeals has found that although it is difficult to find the variance desired would not adversely affect the public health, safety, or general welfare, the requested variance is for a side yard that is interiorly located; and

WHEREAS, the Board of Zoning Appeals has found that the granting of the variance desired will be opposed to the general spirit and intent of Title 28 due to the fact that the zoning ordinance requires a minimum side yard of 6 feet for single family dwellings and it is not possible to construct a 68.2 foot house on an 80 foot lot and observe these requirements; and

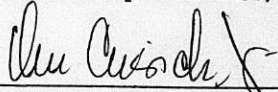
WHEREAS, each of the five conditions required by Section 2.12.590.B, Code of the City of Wichita, to be present before a variance can be granted has not been found to exist.

NOW, THEREFORE, BE IT RESOLVED by the Board of Zoning Appeals of the City of Wichita that this request for a variance to reduce the required side yard setback adjacent to the east line of Lot 13 from 6 feet to 5 feet, on property zoned the "AA" Single Family Dwelling District, and legally described as:

Lot 13, Block 3, Western Gardens Addition to Wichita, Sedgwick County, Kansas. Generally located on the North side of Birch Lane in an area between Wood Avenue and Tyler Road.

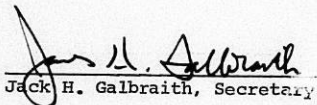
be denied.

ADOPTED AT WICHITA, KANSAS, this 23rd day of October, 1973.



Kenneth M. Cusick, Temporary
Chairman

ATTEST:



Jack H. Galbraith, Secretary

October 26,
1973

Robert Feldner, Superintendent of Central Inspection
Jack H. Galbraith, Chief Planner

BZA Case No. 32-73 and BZA Case No. 34-73

This is to inform you that at the meeting of October 23, 1973, the Board of Zoning Appeals denied the requests for variances for Lot 13 (BZA 32-73), and Lot 18 (BZA 34-73), Western Gardens Addition, and action should now be taken to see that these properties are brought into compliance with the provisions of the Zoning Ordinance.

It was brought to the attention of the Board by the attorney for the applicant that although the foreman on the construction site received a verbal warning of the violations on Lots 13 and 14 in January or February, the property owner (Clewal Construction, Inc.) was allegedly unaware of said violations until receiving a letter from the inspector dated April 11, 1973. In addition, the attorney asserted the property owner (Clewal Construction, Inc.) did not receive notice of the violation concerning Lot 18 until the citation was issued on September 5, 1973.

In view of the increased difficulty and expense involved in correcting violations as a structure nears completion and the inconvenience to the buyer when a house in violation is allowed to be completed and occupied, it appeared to be the opinion of the Board that upon the initial discovery of a violation, written notice should be issued to the property owner that all construction is to cease until the violation is corrected or a variance obtained.

The action of the Board to deny the two cases is provided for your information so that immediate steps can be taken to achieve compliance.

JHG:rw

cc: Jack Kirkby, Central Inspection
John Dekker, Director of Law
Joe Boyle, BZA Legal Counsel, Law Dept.

October 24, 1973

T. Michael Wilson
Suite 430, R. H. Garvey Building
300 West Douglas
Wichita, Kansas 67202

RE: Case No. BSA 32-73
Request for Variance

Dear Mr. Wilson:

At the regular meeting of the Board of Zoning Appeals on October 23, 1973, your request for a variance to reduce the required side yard setback adjacent to the east line of Lot 13 from 6 feet to 5 feet on property zoned the "AA" Single Family Dwelling District, and generally located on the North side of Birch Lane in an area between Wood Avenue and Tyler Road, was considered.

It was the action of the Board to deny this request.

A Resolution setting forth the official action of the Board is being prepared and you will be mailed a copy as soon as the signatures of the Chairman and Secretary have been obtained.

If you have any questions, please call our office.

Very truly yours,

Jack H. Galbraith
Secretary

JHG:rw

cc: Walt Suter, Cleval Construction, Inc., 420 Acadia, 67212
LaDonna M. & Patrick B. Sinclair, 8902 Birch Lane, 67212
Robert Feldner, Superintendent of Central Inspection
Ralph Eberly, City Clerk
Joe Donnelly, Central Inspection

October 19,
1973

Robert Feldner, Supt. of Central Inspection

Jack H. Galbraith, Chief Planner *JHG by m.m.*

BZA 32-73, BZA 33-73, and BZA 34-73

Cases No. BZA 32-73, BZA 33-73, and BZA 34-73, filed by Clewal Construction, Inc., requesting variances of the required side yard setbacks for three properties on Birch Lane are scheduled to be heard by the Board of Zoning Appeals on Tuesday, October 23, 1973. Because of the considerable history of these cases involving Central Inspection, i.e. repeated verbal (as well as written) notices of the violations from Inspector Kirkby to the contractor since early stages of construction, we would appreciate it if you could be present at the meeting to answer any questions the Board might have concerning these matters.

JHG:rw

SECRETARY'S REPORT
CASE NO. BZA 32-73

APPLICANT: Clewal Construction, Inc., 420 Acadia, Wichita, Kansas, 67212.

AGENT: T. Michael Wilson, Suite 430, R. H. Garvey Building, 300 West Douglas, Wichita, Kansas, 67202.

REQUEST: Variance pursuant to Section 2.12.590.B, Code of the City of Wichita, to reduce the required side yard setback adjacent to the east line of Lot 13 from 6 feet to 5 feet.

GENERAL LOCATION: On the North side of Birch Lane in an area between Wood Avenue and Tyler Road.

ZONING: Subject property is zoned the "AA" Single Family Dwelling District, as are those properties to the east, west, south, and north.

LAND USE: Subject property contains a single family home, as do those properties to the east, west, and south. The property to the north is undeveloped.

JURISDICTION:

The Board has jurisdiction to consider the variance request under the provisions outlined in Section 2.12.590.B, Code of the City of Wichita. The Board may grant the request when all five of the following conditions are found to exist:

1. That the variance requested arises from such condition which is unique to the property in question and which is not ordinarily found in the same zone or district; and is not created by an action or actions of the property owner or the applicant.
2. That the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents.
3. That the strict application of the provisions of Title 28 of which variance is requested will constitute unnecessary hardship upon the property owner represented in the application.

4. That the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity or general welfare; and
5. That granting the variance desired will not be opposed to the general spirit and intent of Title 28 (zoning ordinance).

COMMENTS BY THE SECRETARY:

On January 16, 1973, an application for a residential building permit and certificate of occupancy was filed, and building permit No. C66438 was issued to the applicant for the construction of a single family house on subject property (Lot 13). The site plan accompanying the application indicated that Lot 13 is 80 feet in width and that the house would be 68 feet in width and would be located on the lot in such a manner as to observe the required 6 foot side yards. The Secretary has been advised that the applicant was repeatedly warned by the Division of Central Inspection that the side yard setbacks for one or both houses being built on Lots 13 and 14 were inadequate. The construction company was notified by the attached letter dated April 11, 1973, of the violation. The letter further stated that proper steps must be taken to correct the violation(s) and that occupancy would not be permitted unless a variance was granted or the proper setback obtained.

The applicant continued construction, and on September 5, 1973, Central Inspection issued a notice stating that variances must be obtained or the structures must be altered to obtain the required 6 foot side yard on or before September 12, 1973, and that failure to comply with this notice would be followed by prosecution. The applicant subsequently filed requests for variances from the Board of Zoning Appeals.

It should be pointed out that although an application for a building permit is also an application for a certificate of occupancy, when an inspector notifies a builder/owner that the dwelling under construction is in violation of the zoning ordinance or building code, the structure cannot legally be occupied until such violation is corrected. All three houses for which the applicant has had to file variance requests now have families living in them despite notification that they were not to be occupied. It should also be pointed out that, although the application lists the owner as Clewal Constructio, Inc., the abstract ownership list indicates Patrick B. Sinclair as the owner. The attorney should clarify this prior to the meeting.

A) Uniqueness:

It is the opinion of the Secretary that the variance requested does not arise from such condition which is unique to the property in question, and was in fact created by actions of the applicant (owner) since it is impossible to construct a 68.2 foot house on an 80 foot lot and observe the required 6 foot side yards; in addition, the applicant was given adequate notice and instructed to correct the violation prior to occupancy.

Adjacent Property:

It is the opinion of the Secretary that it is difficult to find that the granting of the permit for variance would not have an adverse affect on adjacent property owners inasmuch as side yard requirements are established to provide structures with adequate air, light and space, and the side yard of Lot 13 which is in violation adjoins the side yard of Lot 14 which is also in violation, reducing the distance between dwellings to approximately 9 feet, and the roofs of both structures extend into the side yards.

Hardship:

Although recognizing the problem created for the occupant, it is difficult for the Secretary to find that the strict application of the provisions of Title 28 would constitute unnecessary hardship upon the applicant/owner inasmuch as the applicant was informed that the structure was in violation of the required side yard setback and it was not to be occupied until the violation was corrected or a variance obtained.

Public Interest:

It is the opinion of the Secretary that it is difficult to determine whether or not the requested variance would adversely affect the public health, safety, or general welfare; however, the requested variance is for a side yard that is interiorly located.

Spirit and Intent:

In the opinion of the Secretary, the variance desired will be opposed to the general spirit and intent of Title 28 due to the fact that the zoning ordinance requires a minimum side yard

Secretary's Report
BZA Case No. 32-73
Page 4

of 6 feet for single family dwellings and it is not possible to construct a 68.2 foot house on an 80 foot lot and observe these requirements.

RECOMMENDATION:

Inasmuch as all five conditions necessary to the granting of the variance cannot be found to exist, it is the recommendation of the Secretary that the application for variance not be approved.

BOARD OF ZONING APPEALS
Room 402 City Building Annex
104 South Main Street
Wichita, Kansas 67202

October 2, 1973

NOTICE TO ADJOINING PROPERTY OWNERS:

Case No. BZA 32-73

An application has been filed by Clewal Construction, Inc., 420 Acadia, Wichita, Kansas, 67212, pursuant to Section 2.12.590.B, Code of the City of Wichita, requesting a variance to reduce the required side yard setback adjacent to the east line of Lot 13 from 6 feet to 5 feet on property zoned the "AA" Single Family Dwelling District, and legally described as follows:

Lot 13, Block 3, Western Gardens Addition to Wichita, Sedgwick County, Kansas. Generally located on the North side of Birch Lane in an area between Wood Avenue and Tyler Road.

This application has been assigned Case No. BZA 32-73, and will be considered by the Board of Zoning Appeals at its meeting on Tuesday, October 23, 1973, at 1:30 p.m., in Room 401 City Building Annex, 104 South Main Street, Wichita, Kansas. If you desire, you may write to the Board of Zoning Appeals at 104 South Main to express your opinion on this matter. You are also welcome to speak or be represented by a spokesman at the Board of Zoning Appeals meeting when this matter will be considered.

If additional information is desired so that you may be fully informed on this matter, please call the Metropolitan Area Planning Department at 262-0611, Extension 205.

Jack H. Galbraith
Secretary

11 notices sent to Property Owners 10.2.73
10 " " " Plng. Comms. 10.3.73

BOARD OF ZONING APPEALS

CASE NO. BZA 32-73

CITY OF WICHITA, KANSAS

FILED _____

Map No. 4348

APPLICATION FOR VARIANCE

PATRICK B. & LA DONNA M. SINCLAIR (Owner) *10-16-73 by owner*

I. Name of Applicant Clewal Construction, Inc. (Contractor)

Mailing Address 420 Acadia, Wichita, Ks. 67212 phone 722-6665

Name of Authorized Agent T. Michael Wilson

Mailing Address Suite 430, R. H. Garvey Building, Wichita, Ks. 67202 phone 264-9137

Relationship of applicant to property is that of owner
(Owner, Tenant, Lessee, Other)

II. The variance requested is a sideyard variance setback *from 6 feet* to 5 feet
from the East property line.

for property located 8902 Birch Lane

and legally described as: Lot 13, Block 3, Western Gardens

in the City of Wichita; and which is presently zoned AA.

III. The applicant herein, or his authorized agent, acknowledges:

- a. That he has received an instruction sheet concerning the filing and hearing of this matter;
- b. That he has been advised of the fee requirements established by Section 2.12.580 of the Code of the City of Wichita (Ordinance No. 24-606); and that the appropriate fee is herewith tendered;
- c. That he has been advised of his right to bring action in the District Court of Sedgwick County to appeal the decision of the Board.
- d. That all documents are attached hereto as noted in paragraphs 2, 3, 4, and 5 of the instructions.

Walter H. Suter
Applicant, Clewal Construction, Inc.
by Walt Suter

T. Michael Wilson
Authorized Agent, T. Michael Wilson

OFFICE USE ONLY: Received in office of Secretary, Board of Zoning Appeals 3 (a.m. - p.m.), September 24 19 73 together with appropriate fee of \$50.00.

T9-402

M. M. Murray
Signed

C-666 438 - 68'

STINSON, WISDOM & LASSWELL

ATTORNEYS AT LAW
SUITE 430 R. H. GARVEY BUILDING
300 WEST DOUGLAS
WICHITA, KANSAS 67202
September 20, 1973

DALE B. STINSON, JR.
STAN E. WISDOM
GERALD D. LASSWELL
T. MICHAEL WILSON

AREA CODE 316
264-9137

Mr. Jack Galbraith, Secretary
Board of Zoning Appeals
City of Wichita
City Annex Building
104 South Main
Wichita, Kansas

Re: Application for variance -
8902 Birch Lane

Dear Mr. Galbraith:

We hereby respectfully request on behalf of Clewal Construction, Inc., the owner of the above referenced property, a sideyard variance to five (5) feet from that specifically provided for in City Ordinance No. 30-783 Code Chapter 28.04.040.2 (2.2), the same requiring that there shall be a sideyard on each side of not less than six (6) feet in width.

In support of our request, we allege that:

1. The variance requested arises from a condition not knowingly created by the owner. It is a condition unique to the property inasmuch as the dwelling located on the property has already been built and completed and is already occupied by a family;
2. The granting of the requested variance will not adversely affect the rights of adjacent property owners inasmuch as their building structures are located ample distances from that in question so as to not encroach upon their air, light and space. Also, there is no structural overhang onto adjoining property and a sideyard of five (5) feet along with the adjoining lots sideyard will allow both owners a sufficient distance between their dwellings so as to not adversely affect the rights of one another;
3. If the provisions of Title 28 are strictly construed, the property owner will be made

Mr. Jack Galbraith

September 20, 1973

to suffer undue hardship, economically, because the buildings located on the property have been completed and the real estate closing cannot be completed because the owner cannot convey clear title. Also, not only will the owner suffer but the occupants will be made to suffer if structural changes are required;

4. The requested variance to five (5) feet will not adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare as it is internally located and only the adjacent lot owner could be injured and he will be duly notified of the requested variance and be given the opportunity to be heard; and

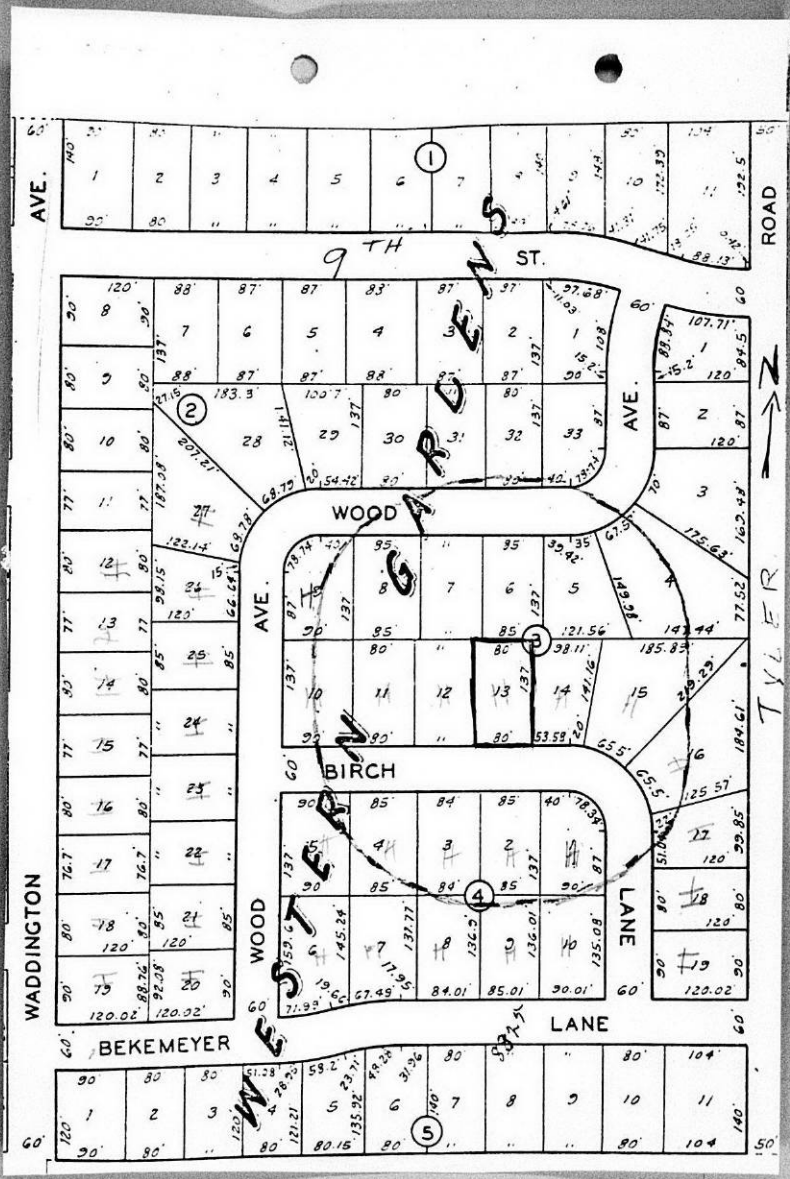
5. The granting of the requested variance to five (5) feet is not contrary to the general spirit and intent of Title 28 as a sideyard of five (5) feet will still leave substantially as much air, light and space as that intended under the provisions of Title 28.

Very truly yours,

STINSON, WISDOM & LASSWELL

By *T. Michael Wilson*
T. Michael Wilson

TMW:sh



STATEMENT OF OWNERSHIP

STATE OF KANSAS)
) SS
 SEDGWICK COUNTY)

The undersigned duly bonded and qualified abstractor within and for the County and State aforesaid, does hereby certify:

That we have examined the records in the office of the Register of Deeds of Sedgwick County, Kansas, with reference to the ownership of the following property in Sedgwick County, Kansas, viz:

Property lying within a radius of 200 ft of:
 Lot 13, Block 3, Western Gardens, Wichita,
 Sedgwick County, Kansas.

**Fidelity
 Title
 Company,
 inc.**

And from such examination find that the owners thereof are as set opposite the description of the property below, viz: (Addresses as given are furnished as a service and not certified.)

LOT	BLK.	ADDITION	OWNER
30,	2,	<u>WESTERN GARDENS</u>	Kenneth Wayne Bender Dixie J. Bender, ux No Address Available
31,	2,		D Clewal Construction Co. 962 N. Wood 67212
32,	2,		✓ Ronald G. Ogden Virginia J. Ogden, ux 2720 S. Mosley 67216
33,	2,		D Clewal Construction Co. 962 N. Wood 67212
4, 5, 6, 7, 8, 3, & 9,			D Clewal Construction Co. 962 N. Wood 67212
10,	3,		✓ Charles L. & Jane A. Mundy, ux 2402 Mesita 67211
11 & 14,	3,		D Clewal Construction, Inc. 962 N. Wood 67212
12,	3,		✓ Clifford R. & Shelia Sipple, ux 8908 Birch Lane 67212
13,	3,		✓ Patrick B. Sinclair LaDonna M. Sinclair, ux 8902 Birch Lane 67212

*N/A
 returned
 10-9-73*



LOT	BLK	ADDITION	OWNER
15,	3,	<u>WESTERN GARDENS</u>	Clewal Conatruction, Inc. 962 N. Wood 67212
16,	3,		Searle L. & Mary M. Rosen, ux No Address Available
17,	3,		Daniel M. Root, Jr. Father F. Root, ux No Address Available
1,	4,		Carl E. & Cheryl L. Forshee, ux 8802 Bekemeyer 67212
2,	4,		C & G Development Co., Inc. Curtis R. Harper Gwen Harper Jerry L. Harper 3825 W. 13th St. 67203
3,	4,		1615 N. Mt. Carmel 67207 D Clewal Construction, Inc. 962 N. Wood 67212
4,	4,		D Harper Homes, Inc. 3825 W. 13th St. 67203
5,	4,		D Curtis R. & Gwen Harper, ux 3825 W. 13th St. 67203
8,	4,		Warren Lee Jackson Mary Lynne Jackson, ux 8902 Bekemeyer 67212
9,	4,		Morris G. Desilet Carolyn N. Desilet, ux 8826 Bekemeyer 67212
10,	4,		Harold Keith Kuhlman Carol Jean Kuhlman, ux 8818 Bekemeyer 67212

*Returned 4/5/73
and sent to
new address*

Dated at Wichita, Kansas this 19th day of
September, 1973 at 7:00 A. M.

FIDELITY TITLE COMPANY, Inc.

By *Arita Mason*
Asst. Sec. OEM

FORM 235-021

PAYMENT NOTICE
City of Wichita

PAY AT TREASURER'S OFFICE - FIRST FLOOR

Bldg & Elev.	Elec.	Elev. Insp.	Exam. Fees
Hse. Mvr.	Hse. Moving	Licse.	Mech.
Oil Well	Pav. Cuts	Plan.	Plbg. Cert.
Sanitation	Sewer	Signs	Sidewalk
Street	Trailer		

DESCRIPTION AMOUNT

Name _____

Address _____

Type _____ Due Date _____

Comments: _____

Date _____ By _____