

BZA Case 33-73 Clewal Construction Inc. request variance to reduce the required side yard setback adjacent to the West property line from 6 feet to 4 feet on the NS of Birch Ln. in an area between Wood Av. and Tyler Rd. *from 6 to 5' adjacent to east property line*

*MAP  
C.I.  
6-19-74*

**ACTION**

|                  |                 |
|------------------|-----------------|
|                  | DATE            |
| BZA COMMITTEE    | <u>10.23.73</u> |
| BZA Comm.        | <u>11.27.73</u> |
| M.A.P.C.         | _____           |
| B.C.C./B. CO. C. | _____           |

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

Posted  
1-10-74  
CH  
MAPL  
CJ  
6-17-74

# ACTION

|                  |                 | DATE            |
|------------------|-----------------|-----------------|
| BZA COMMITTEE    | <u>Deferred</u> | <u>10.23.73</u> |
| BZA Comm.        | <u>Denied</u>   | <u>11.27.73</u> |
| M.A.P.C.         | _____           | _____           |
| B.C.C./B. CO. C. | _____           | _____           |

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

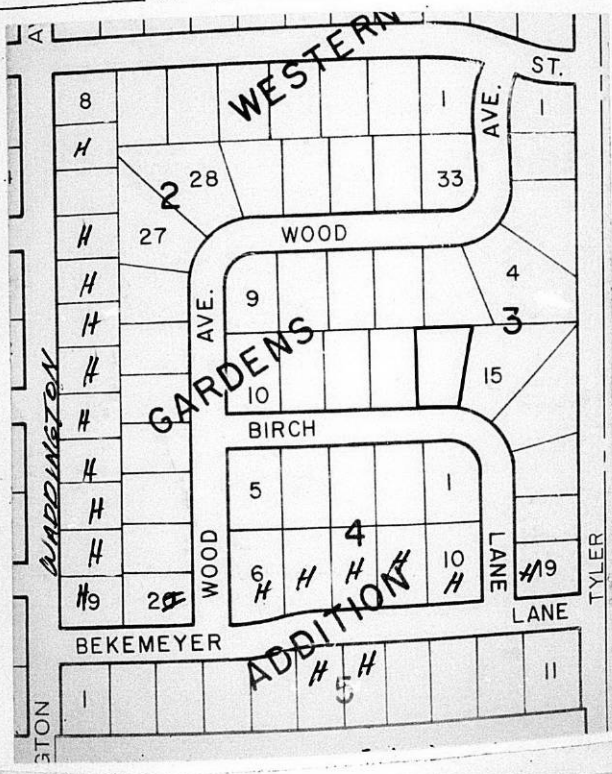
BZA Case 33-73 Clewaj Construction Inc. request Variance to reduce the required side yard setback adjacent to the West property line from 6 feet to 4 feet on the NS of Birch Ln. in an area between Wood Av. and Tyler Rd. from W to E. Variance for property line.

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

BZA- 33-73  
 SCZ- \_\_\_\_\_  
 CU- \_\_\_\_\_  
 Filed \_\_\_\_\_

AREA DATA:  
 1. Acres: 0.27 ( 85 ft. by 142 ft.)  
 2. Adjoining Zoning: E \_\_\_\_\_ S \_\_\_\_\_ W \_\_\_\_\_ N \_\_\_\_\_  
 3. Land Use: East UNDEVELOPED South UNDEVELOPED  
 West UNDEVELOPED North UNDEVELOPED  
 4. Sketch Plan Land Use is for: \_\_\_\_\_  
 5. Present Land Use if for: \_\_\_\_\_  
 6. Area (is) (is not) platted: \_\_\_\_\_

PHOTO DATA:  
 Taken by \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_



February 28, 1974

Mr. T. Michael Wilson  
Attorney at Law  
430 S. M. Garvey Building  
300 West Douglas  
Wichita, Kansas 67202

Subject: Case No. BEA 33-73 and  
BEA 34-73 - Request for  
Variance

Dear Mr. Wilson:

At the regular meeting of the Board of Zoning Appeals on February 26, 1974, your request for a rehearing of the above captioned cases was considered.

It was the action of the Board to deny reconsideration of either Case No. BEA 33-73 or BEA 34-73.

If you have any questions on these cases, please contact our office.

Sincerely,

Jack H. Galbraith  
Secretary

JHG:MM:jd

cc: Mr. and Mrs. Charles Manning, 8809 Birch Lane, 67212  
Mr. and Mrs. Steven Erickson, 9824 Birch Lane, 67212  
Cleveland Construction, Inc., 420 Acadia, 67212  
Gale A. Hultman, 620 Clayton, 67203  
Robert Feldner, Superintendent of Central Inspection  
Ralph Aberly, City Clerk  
Joe Donnelly, Central Inspection

7/2/74

# Year's Nightmare Ends, Their Home Is Their Own

By BOB HEATON  
Staff Writer

J. Steven Erickson and his wife Elizabeth went to a sheriff's sale this morning.

It was, they hoped, the last chapter in a nightmare which has complicated their lives for more than a year.

They were high bidders at the sale,

offering \$27,600 for the property and house at Lot 14, Block 3 of Western Gardens Addition, also known as 8824 Birch Lane—their own home.

The Ericksons' bid will pay the first mortgage, and will pay priority creditors with mechanics' and suppliers' liens against the property.

After 120 days, it will give them clear title to their home.

The Ericksons' problem began long before they signed the purchase contract for the house at 8824 Birch Lane. The house itself was not even well under way when the mistake was made.

Clewal Construction Co. put it up too close to the sideyard property lines. City building codes call for clearances between sideyard and building of at least six feet. The house at 8824 Birch Lane didn't have enough clearance. The mistake went unnoticed, possibly because basement excavations covered survey markers.

The same problem may have existed for city inspectors, who made no note of the discrepancy when their inspections were made.

The home, newly completed and ready for a family, was offered for sale about 14 months ago. The Ericksons bought it.

The sale was never completed. The sideyard setback violations were discovered by the city before the sale could be closed.

The Ericksons went to the board of zoning appeals being denied a variance permit by the zoning board.

The six-foot setback requirement in AA residential zoned districts would be respected, they were told.

They went to the board of zoning appeals. Another denial.

Clewal Construction Co., meanwhile, had been denied a permit to do business in Kansas by the secretary of state's

office. It became a defunct corporation.

American Savings Association filed a foreclosure action in district court, to recover money loaned. Clewal for construction of the home. Fourteen other creditors had filed liens against the property, as well.

The Ericksons went to district court to force the City of Wichita to grant a variance.

They won the action.

But the sheriff's sale was unavoidable. Since buying their home, the Ericksons had seen it appreciate tremendously in value. It is a beautifully built, comfortable home in a fine neighborhood.

They feared bidding might reach levels they would be unable to afford.

If that happened, they would be evicted by the high bidders.

At the sale this morning, the opening bid was \$22,182.

Lt. Kathleen Gragg, who was conducting the sale in the lobby of the courthouse, wrote down the bid. Silence followed.

"Are there any other bidders?" she asked.

H.R. Kuhn, attorney for the Ericksons, stepped forward.

"We bid \$27,000," he said.

"Are there any other bidders?" Lt. Gragg repeated, writing down the second bid.

There were none.

The Ericksons' bid was amended to \$27,600 moments later (to cover all costs) and the sale was over. The young homeowners' first reaction seemed to be quiet relief. After months of worry and distress, relief may come slowly.

The little knot of people in the courthouse lobby dispersed. The Ericksons went home.

Their home was their own.

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

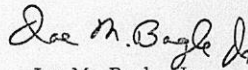
Page 2

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

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

IN THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS

J. STEVEN ERICKSON and  
ELIZABETH ERICKSON,

Plaintiffs,

vs.

CASE NO. C-30053

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

Defendant.

JOURNAL ENTRY OF JUDGMENT

Now on this 10th 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, George B. Powers of Foulston, Siefkin, Powers & Eberhardt, 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 make their opening statements. Whereupon, both parties offered their evidence and rested.

Thereupon, both parties argued said cause to the court. 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 Fourteen (14), Block Three  
(3), Western Gardens, Wichita,  
Sedgwick County, 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 sideyard setback adjacent to the West property line of Lot 14 of four feet (4'), and the required side yard setback adjacent to the East property line 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:

FOULSTON, SIEPKIN, POWERS & EBERHARDT  
600 Fourth National Bank Building  
Wichita, Kansas 67202

By   
George E. Powers  
Attorneys for the Plaintiffs

BOARD OF ZONING APPEALS  
CITY OF WICHITA, KANSAS

By   
Joe M. Bogle, Jr.  
Its Attorney

IN THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS

J. STEVEN ERICKSON and

ELIZABETH ERICKSON

Plaintiff

Case No. 80053

THE BOARD OF ZONING APPEALS

vs.

OF THE CITY OF WICHITA,  
WICHITA, KANSAS

Defendant

**SUMMONS**

To the above-named Defendant:

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

County, and required to serve upon George B. Powers Kansas, plaintiff's attorney,

whose address is 600 Fourth National Bank Bldg., Wichita, Kansas, 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 \_\_\_\_\_

Sheriff of \_\_\_\_\_ County, Kansas

Not Found \_\_\_\_\_

Mileage \_\_\_\_\_

Total \_\_\_\_\_

By \_\_\_\_\_

Deputy.

RECEIVED  
SHERIFF'S DEPARTMENT  
SEDGWICK COUNTY, KANSAS  
Mar 18 5 06 PM '74

IN THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS

J. STEVEN ERICKSON and  
ELIZABETH ERICKSON,

Plaintiffs,

vs.

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

Defendant.

C 30053  
CASE NO. \_\_\_\_\_

P E T I T I O N

COME NOW the plaintiffs, J. Steven Erickson and Elizabeth Erickson, and for their cause of action allege, state and aver:

1. That they are citizens and residents of Wichita, Sedgwick County, 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, §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 described as:

Lot Fourteen (14), Block Three (3),  
Western Gardens, Wichita, Sedgwick  
County, Kansas (a/k/a 8824 Birch  
Lane).

That a house was built and completed on said property by Clewal Construction Company. That after said house was virtually completed, Clewal Construction Company was advised that the house invaded the sideyard 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 number BZA 33-73; that said 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 the Board of Zoning Appeals heard said matter and denied the variance.

That Clewal Construction Company has assigned the proceeds from the contract to the Farmers and Merchants State Bank, Derby, Kansas; that Clewal Construction Company is now a defunct corporation.

That the plaintiffs herein contracted to purchase said house, have moved into the premises, and are living there at this time; that a request for rehearing in said matter was filed and again was denied by the Board of Zoning Appeals on February 26, 1974.

4. 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, including the property owners and the bank to whom said proceeds have been assigned.

(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.

The plaintiffs herein further allege that a refusal to grant the variance will cause irreparable damage to all parties involved.

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 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.

FOULSTON, SIEFKIN, POWERS & EBERHARDT

By George B. Powers  
George B. Powers

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 or of record in this court.  
Date this 18 day of March 1944  
BERNICE H. VAN ARMANE, Clerk  
By D. Harnden Deputy

FOULSTON, SIEFKIN, POWERS & EBERHARDT  
SUITE 600 FOURTH NATIONAL BANK BUILDING  
WICHITA, KANSAS 67202  
TELEPHONE 267-6371, AC 314

N O T I C E

CITY CLERK  
City of Wichita  
Wichita, Kansas

In re: Board of Zoning Appeals  
Case No. BZA 33-73

Dear Sir:

TAKE NOTICE that Mr. and Mrs. Steven Erickson intend to, and by this notice notify you, that they are appealing the findings, order and decision of the Board of Zoning Appeals in Case No. BZA 33-73 to the District Court of Sedgwick County, Kansas; that the property involved is:

Lot Fourteen (14), Block Three (3),  
Western Gardens, Wichita, Sedgwick  
County, Kansas;

that this notice is given pursuant to K.S.A. 60-2101; that this appeal is taken within thirty (30) days of the final decision in said matter by said Board of Zoning Appeals.

This shall serve as further notice that it is the intention of the said Mr. and Mrs. Steven Erickson to file a separate action in the District Court of Sedgwick County, Kansas, as provided in the Code of the City of Wichita, Kansas, §2-12-610, which provides:

"Appeal. Any person. . .dissatisfied with any order or determination of the Board may bring action in the District Court of Sedgwick County to determine the reasonableness of any such order or determination."

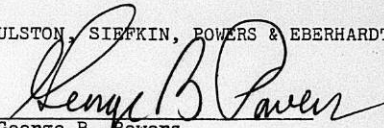
The undersigned are attorneys of record and agents of Mrs. and Mrs. Steven Erickson, and are authorized to sign for and on behalf of them as appellants in this matter.

FOULSTON, SIEPKIN, POWERS & EBERHARDT  
SUITE 600 FOURTH NATIONAL BANK BUILDING  
WICHITA, KANSAS 67202  
TELEPHONE 267-6371, AC 316

*Reid ABZ*  
3-15-74 4:30 PM

Dated, this 15th day of March, 1974.

FOULSTON, SIEFKIN, POWERS & EBERHARDT

By   
George B. Powers

Attorneys for Appellants

The undersigned acknowledges service of the above  
Notice on this 15th day of March, 1974.

BOARD OF ZONING APPEALS

By \_\_\_\_\_

-2-

March 7, 1974

Mr. Steven Erickson  
8824 Birch Lane  
Wichita, Kansas 67212

Subject: Case No. BZA 33-73

Dear Mr. Erickson:

Enclosed are the copies of the following file materials  
you requested:

1. Application for Variance, filed September 24, 1973.
2. Survey Submitted with Application.
3. Statement of Justification, dated September 20, 1973.
4. Notice to Adjoining Property Owners, October 2, 1973.
5. Secretary's Report, Case No. BZA 33-73.
6. Letter Amending Application for Variance, October 19, 1973.
7. Letter from BZA Secretary stating Action of Board,  
October 24, 1973.
8. Amended Survey showing Sideyard setback for southeast  
corner of house.
9. Revised Secretary's Report, Case No. BZA 33-73.
10. Letter to Walter Suter from Central Inspection Division,  
April 11, 1973.
11. Notice to Adjoining Property Owners, November 7, 1973.
12. Letter from BZA Secretary Stating Action of Board,  
November 30, 1973.
13. Letter Forwarding Resolution No. BZA 33-73, December 14, 1973.
14. Resolution No. BZA 33-73.
15. Request for Rehearing, dated December 20, 1973.
16. BZA Secretary's Response to Request for Rehearing,  
December 20, 1973.

Mr. Steven Erickson  
Page Two  
March 7, 1974

17. Application for Variance, filed February 1, 1973.
18. Letter from BZA Secretary stating Action of the Board, January 24, 1974.
19. Excerpt of Minutes from Board of Zoning Appeals meeting of November 27, 1973. (Rough Draft)

If you and your attorney would like to discuss this matter at any time, or if we can provide you with additional information or material, please feel free to contact us.

Sincerely,

Jack H. Galbraith  
Secretary

JHG:MM:js

February 26, 1974

Mr. T. Michael Wilson  
Attorney at Law  
430 R. H. Garvey Building  
300 West Douglas  
Wichita, Kansas 67202

Dear Mr. Wilson:

Subject: Case No. BEA 33-73 and  
BEA 34-73 - Request for  
Variance

At the regular meeting of the Board of Zoning Appeals on February 26, 1974, your request for a rehearing of the above captioned cases was considered.

It was the action of the Board to deny reconsideration of either Case No. BEA 33-73 or BEA 34-73.

If we can be of any assistance to you, please contact our office.

Sincerely,

Jack H. Galbraith  
Secretary

JHG:MM:js

cc: Mr. and Mrs. Charles Manning, 8808 Birch Lane, 67212  
Mr. and Mrs. Steven Erickson, 8824 Birch Lane, 67212  
Ciewal Construction, Inc., 420 Acadia, 67212  
Gale A. Bultman, 620 Clayton, 67203  
Robert Feldner, Superintendent of Central Inspection  
Ralph Eberly, City Clerk  
Joe Donnelly, Central Inspection

BEFORE THE BOARD OF ZONING APPEALS

IN THE MATTER )  
                  ) OF )  
BZA 33-73 and )  
                  ) 34-73 )  
\_\_\_\_\_ )

PETITION

We, the undersigned, property owners in Block 2, 3, 4 and 5 of Western Gardens Addition to the City of Wichita, Sedgwick County, Kansas, hereby petition the Board of Zoning Appeals to grant the requested sideyard variance setbacks in the above-referenced case now pending before the Board; we fully understand the implications involved and hereby acknowledge that we have no objections to the requested sideyard variance setbacks being granted.

We, the undersigned, further acknowledge that the granting of the requested sideyard variance setbacks will have no adverse effect on the adjoining property owners and other property owners in Block 2, 3, 4 and 5 of Western Gardens Addition to the City of Wichita, Sedgwick County, Kansas.

Name:

Address:

|                           |                       |
|---------------------------|-----------------------|
| <u>Carl B. Fuchs</u>      | <u>8803 Bekemeyer</u> |
| <u>Carl B. Fuchs</u>      | <u>8802 Bekemeyer</u> |
| <u>Carl J. Kuhlman</u>    | <u>8818 Bekemeyer</u> |
| <u>Mary Schupbach</u>     | <u>8817 Bekemeyer</u> |
| <u>Mark Schupbach</u>     | <u>8817 Bekemeyer</u> |
| <u>Carolyn Hesilet</u>    | <u>8826 Bekemeyer</u> |
| <u>Morris Hesilet</u>     | <u>8826 Bekemeyer</u> |
| <u>Mary Loree Jackson</u> | <u>8902 Bekemeyer</u> |
| <u>Edwin L. Jackson</u>   | <u>8902 Bekemeyer</u> |

Name:

Address:

|                            |                        |
|----------------------------|------------------------|
| <u>Harold K. Kullman</u>   | <u>8818 Bekemeyer</u>  |
| <u>Richard B. Anderson</u> | <u>8815 Birch Lane</u> |
| <u>Marilyn J. Anderson</u> | <u>8815 Birch Lane</u> |
| <u>Jeanne Florence</u>     | <u>8901 BIRCH LANE</u> |
| <u>Rich Florence</u>       | <u>8901 BIRCH LANE</u> |
| <u>Janet Weigand</u>       | <u>8907 Birch Lane</u> |
| <u>Connie Manning</u>      | <u>8808 Birch Lane</u> |
| <u>Charles Manning</u>     | <u>8808 Birch Lane</u> |
| <u>Al Sevelan</u>          | <u>8902 Birch Ln</u>   |
| <u>Lee Moore</u>           | <u>8908 Birch Lane</u> |

BEFORE THE BOARD OF ZONING APPEALS

IN THE MATTER )  
                  ) OF )  
BZA 33-73 and )  
                  ) 34-73 )  
\_\_\_\_\_ )

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We, the undersigned, further acknowledge that the granting of the requested sideyard variance setbacks will have no adverse effect on the adjoining property owners and other property owners in Block 2, 3, 4 and 5 of Western Gardens Addition to the City of Wichita, Sedgwick County, Kansas.

Name:

Address:

|                            |                        |
|----------------------------|------------------------|
| <u>Lucille Coleman</u>     | <u>8916 Birch Lane</u> |
| <u>Ray Coleman</u>         | <u>8916 Birch Lane</u> |
| <u>Loretta Self</u>        | <u>8915 Birch Lane</u> |
| <u>Onaida Ray</u>          | <u>8923 Birch</u>      |
| <u>Thelma L. Ray</u>       | <u>8923 Birch</u>      |
| <u>Elizabeth A. Eudson</u> | <u>8824 Birch</u>      |
| <u>Ray M. Rosen</u>        | <u>8816 Birch</u>      |
| <u>Lucy L. Rosen</u>       | <u>8816 Birch</u>      |
| <u>D. M. Root</u>          | <u>8812 Birch</u>      |

Name:

Address:

*Esther Root*

*8812 Birch Lane*

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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 for Rehearing of  
Cases No. BZA 33-73 and  
BZA 34-73

On January 22, 1974, the Board of Zoning Appeals considered requests for rehearing of Cases No. BZA 32-73, BZA 33-73 and BZA 34-73. Inasmuch as a motion to approve these requests resulted in a moot vote (2-2), consideration of the requests was deferred until the meeting of February 26, 1974, as provided by Article VII.C, of the Rules and Regulations of the Board of Zoning Appeals.

Attached for your information and review are copies of the requests for rehearing submitted by Mr. Wilson (Attachments 1 and 2), the Secretary's January 16th memo to the Board (Attachment 3), and excerpts from the Board's meetings of October 23, 1973, and November 27, 1973 (Attachments 4 and 5), involving consideration of these cases. It should be noted that requests for rehearing have now been filed only on Cases No. BZA 33-73 and BZA 34-73. A request to allow a new application to be filed on property previously considered has been filed with regard to Case No. BZA 32-73.

After viewing the submitted requests for rehearing and reviewing the minutes of the October and November meetings, it is the opinion of the Secretary that, although the names of the applicants have changed, nothing can be seen which would justify the Secretary changing his position on the five conditions.

It would not appear that the Board has authority to resolve the conflicting claims of the increasing number of parties and issues involved in this matter, since it has authority only to consider whether or not the five conditions necessary to the granting of the variance exist. While sympathizing with the occupants, the lien claimants, the assignee of the contractor's proceeds and the real estate firm, it is the opinion of the Secretary that no new evidence has been presented which would enable the Board to justify all five conditions.

You will recall that previously, I have discussed with you Mr. Wilson's request that the cases be re-advertised for public hearing at the meeting of February 26, 1974, with the understanding that in the event the Board granted the requests for rehearing, it could then proceed to consider the cases themselves. As you are aware, I polled the Board by telephone, and a majority of the members favored allowing the cases to be re-advertised. After reviewing the attachments, if the Board

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February 20, 1974

determines there is sufficient new evidence to warrant rehearing, your action would be to approve the requests and reconsider the cases.

However, if the Board concurs in the Secretary's position that the evidence is not sufficient to warrant a rehearing, the requests should be denied, and any further action should consist of an appeal to the District Court of Sedgwick County.

JHG:ber

Attachments

cc: Joe Bogle, Legal Counsel, Board of Zoning Appeals, w/a  
T. Michael Wilson, Attorney, 430 R. H. Garvey Building,  
300 West Douglas 67202, w/a  
Charles Manning, 8808 Birch Lane 67212, w/a  
Mr. and Mrs. Steven Erickson, 8824 Birch Lane 67212, w/a

BEFORE THE BOARD OF ZONING APPEALS

IN THE MATTER )  
                  )  
          OF        )  
                  )  
BZA 33-73        )  
                  )

REQUEST FOR REHEARING

WHEREAS, it has been brought to the attention of the applicant that a request for a variance has been previously denied by the Board of Zoning Appeals based upon facts and evidence presented to it at the Board's meeting of November 27, 1973; whereas, since that meeting numerous facts have been brought to this applicant's attention which could not have been shown at the Board's meeting of November 27, 1973, and further this applicant shows that additional innocent parties have become interested in seeing that the requested variance is granted by the Board, which parties were not interested at the time of the Board's meeting of November 27, 1973. Therefore, this applicant hereby submits the following new evidence which could not have been reasonably presented at the Board's meeting of November 27, 1973, to-wit:

1. Contractor's Insolvency. The contractor and original applicant for the requested variance, is now an insolvent corporation. The effect of the contractor's insolvency leaves this applicant with no effective remedy should the variance be denied.

This applicant has made a considerable investment in subject property which does not include what additional amount it would cost the applicant to buy an equivalent house in today's real estate market.

2. Innocent Parties. Numerous innocent parties are now financially involved in subject property and unless the requested variance is granted, these innocent parties stand to suffer financially. Specifically, the following lien claimants have claims against subject property:

|                          |           |
|--------------------------|-----------|
| House of Lighting        | \$ 181.07 |
| Vosburgh Wallpaper       | 76.79     |
| Star Lumber Company      | 2,148.28  |
| Brag Temp                | 853.38    |
| Sherwin Williams         | 234.88    |
| Thornton & Florence      | 1,788.32  |
| Sunderland & Son Drywall | 760.72    |



## BEFORE THE BOARD OF ZONING APPEALS

IN THE MATTER )  
 )  
 OF )  
 )  
 BZA 34-73 )  
 \_\_\_\_\_ )

REQUEST FOR REHEARING

WHEREAS, it has been brought to the attention of the applicant that a request for a variance has been previously denied by the Board of Zoning Appeals based upon facts and evidence presented to it at the Board's meeting of October 23, 1973; whereas, since that meeting numerous facts have been brought to this applicant's attention which could not have been shown at the Board's meeting of October 23, 1973, and further this applicant shows that additional innocent parties have become interested in seeing that the requested variance is granted by the Board, which parties were not interested at the time of the Board's meeting of October 23, 1973. Therefore, this applicant hereby submits the following new evidence which could not have been reasonably presented at the Board's meeting of October 23, 1973, to-wit:

1. Contractor's Insolvency. The contractor and original applicant for the requested variance, is now an insolvent corporation. The effect of the contractor's insolvency leaves this applicant with no effective remedy should the variance be denied.

This applicant has made a considerable investment in subject property (estimated by the applicant at \$3,300.00) which does not include what additional amount it would cost the applicant to buy an equivalent house in today's real estate market.

2. Innocent Parties. Numerous innocent parties are now financially involved in subject property and unless the requested variance is granted, these innocent parties stand to suffer financially. Specifically, the following lien claimants have claims against subject property:

|                     |           |
|---------------------|-----------|
| Star Lumber Company | \$ 717.06 |
| Delta Electric      | 889.10    |
| Brag Temp           | 1,236.02  |
| Sherwin Williams    | 56.08     |

Further, Gordon Dotzour, the realtor who sold the house to the applicant will lose approximately \$1,600.00 if the real estate contract cannot be fulfilled. This would be totally unfair to Mr. Dotzour as he has innocently invested time and energy into this transaction.

In addition, the Farmers and Merchants State Bank of Derby is now assignee of the contractor's proceeds and has a real interest in seeing that the requested variance is granted so that mortgage loans may be closed, lien claimants satisfied and persons in possession vested with clear title to the property.

3. Neighborhood Petition. 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.

Respectfully submitted,  
STINSON, WISDOM & LASSWELL  
Attorneys for Applicant

By: T. Michael Wilson

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 15, day of February, 1974.



James C. Chick  
Notary Public

WICHITA-SEDGWICK COUNTY  
METROPOLITAN AREA PLANNING DEPARTMENT

ATTACHMENT 3

DATE

January 16, 1974

TO Board of Zoning Appeals  
FROM Jack H. Galbraith, Secretary *JHG*  
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

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

October 23, 1973

(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.

October 23, 1973

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

October 23, 1973

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

Page 9

October 23, 1973

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.

October 23, 1973

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.

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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:

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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

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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

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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 six feet to four feet and to reduce the required side yard setback adjacent to the east property line from six feet to five feet, on property zoned the "AA" Single Family Dwelling District and legally described as Lot 14, 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.

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

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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. C66195 was issued to the applicant for the construction of a single family house on subject property (Lot 14). The site plan accompanying the application indicated that Lot 14 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. After several verbal warnings 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 again notified by letter (attached) 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 application for a building permit is also an application for a certificate of occupancy. when an inspector notified 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.

In the plot plan submitted with the original application, the surveyor omitted the dimension for the side yard at the southeast corner of the house, which also appeared to be in violation of the 6 foot required side yard setback. Since the information subsequently provided by the applicant's surveyor indicated the side yard was only 5.5 feet at this point, it was the action of the Board of Zoning Appeals, at the meeting of October 23, 1973, to defer Case No. BZA 33-73 at the applicant's request so that the amended variance request could be advertised and scheduled for public hearing.

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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 68.1 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 effect on adjacent property owners inasmuch as side yard requirements are established to provide structures with adequate air, light, and space, and the west side yard of Lot 14 which is in violation adjoins the side yard of Lot 13 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 setbacks 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 side yards that are 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

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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 68.1 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.

T. MICHAEL WILSON, attorney for the owner-applicant, said he wished to provide more clarification as to how this situation developed. He said he believed the statement in the Secretary's report saying that the building permit was taken out in December was correct, but he thought the actual construction of the home began some time in February of 1973. WILSON reminded the Board that at that time there was a great deal of rain and the lot was very muddy. At that time the lot was staked for the foundation and then apparently, although nobody seems to know, the stakes were removed and then replaced and shifted in such a way that it was not possible to construct the house without violation of the side yard requirements of 6 feet on each side.

WILSON said that he thought the Secretary's report related that several verbal warnings were given to the contractor that he was in violation --this was after the foundation had been poured and the framing was up. At this point, WILSON said, as he understood it, several men from the Central Inspection Division advised orally somebody on the job site, nobody seemed to know for sure who --apparently it was a foreman, or simply a workman out there, it might have been a subcontractor--no one seemed to be sure. WILSON stated they did know for sure that Walt Suter, the president of Clewal Construction, was not advised at that point orally. The letter attached to the Secretary's report indicated that on April 11th a letter did go out addressed to Mr. Suter advising him that 8824 Birch Lane, the house in question, was in violation of the side yard setback, and it further advised that he must determine which house was in violation and take steps to correct that violation. The letter also stated that occupancy would not be permitted unless a variance was granted or the proper setback was obtained.

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WILSON pointed out that this particular letter was addressed to 7271 West Central which was the corporate headquarters for Clewal Construction. He noted, however, that Mr. Walt Suter, the president of that corporation, at that point in time was not effectively running the corporation. WILSON acknowledged Suter was president of the company at that time, but said he really had no control over it. WILSON said a foreman, apparently, had taken over most of the responsibility for the construction in the west part of the city, and with respect to this notice, Walt Suter did not remember whether or not he received it personally. WILSON said possibly somebody, the foreman, had picked up the notice, read it, and rather than admit that he had made a mistake in allowing the foundation to be poured and construction to continue, he simply threw the notice away or disposed of it so that Walt Suter was not advised.

WILSON said that after this time, after the home was constructed, on or about September 5th, a notice did go out from Central Inspection addressed to Mr. Walt Suter, again at the corporate headquarters; and it advised him that 8824 Birch Lane was in violation and he should take steps to apply for a side yard variance, or alter the structure to obtain the required 6 foot side yard.

WILSON stated at this point Suter came to their law office, upon the first time of being notified there was a problem with respect to the side yard, and that's when they immediately applied for the variance. At that time with respect to this piece of property, 8824 Birch Lane, it was not occupied on September 5th, and it had not been occupied up to this point. In approximately June the house was looked at by Mr. and Mrs. Steve Erickson, with the idea of purchasing the home. (WILSON indicated that Mr. Erickson was present at the meeting.) WILSON said a contract was signed for the purchase of the home on or about June 15th with the idea that the home would be completed in 30 days. The home was not completed in that time.

WILSON explained that Mr. Erickson was starting a job as a pharmaceutical salesman and was under great pressure to get in a home because he had to operate his office out of his home, and he had to have business cards, stationery, etc. made up, and he had to have a headquarters. WILSON said he believed Mr. Erickson was advised by his employer he would have to either get in a home

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or else he was going to lose his job. WILSON said when Mr. Erickson presented this information to the real estate people and Mr. Suter, they indicated to him they would get as much of the home completed so he could get into the home and live there, and then a contract would be out to complete the home as quickly as possible. This was done, and then prior to the time the Ericksons moved in, (again Wilson reminded the Board that September 5th was the time Mr. Walt Suter was first advised as to the problem), Suter indicated to the Ericksons they could not move in because of this problem, since Suter was advised he could not get people into the home. At this point the attorneys were filing the variance application.

WILSON explained that Mr. Suter and Mr. Erickson went to the mortgage company involved and advised them of the problem. The mortgage company at this point would not close the loan because of the problem. Consequently, an agreement was drawn up between Clewal Construction and the Ericksons relative to the fact that a variance request had been applied for with the City, and upon the granting of the variance the loan would be closed. And the parties were moved in on or about September 18th, after the application was submitted for the variance. WILSON said that at that point he supposed Mr. Suter felt that as long as he had applied for the variance that there would probably be no problem in getting the variance granted, and there was no problem in moving the Ericksons in under their circumstances. WILSON said that was the history up to about September 18th. As the Secretary's report indicated, two other residences were in violation, and their applications for variance were denied the previous month.

WILSON stated that a number of things had occurred since that time that he thought changed the circumstances. He said if it was the Board's feeling a month ago that the problem was created by Clewal Construction and Walt Suter, and therefore they must pay for it via not granting of the variances, that was fine -- that was probably true at that point.

WILSON said that in the meantime, Clewal Construction had "gone under" -- they were no longer building, Mr. Suter was no longer a contractor, he was no longer building any homes in the city. WILSON explained that the Derby State Bank had taken over all of the property that Clewal Construction had previously been

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building, and their law firm had contacted a reputable builder to finish up all of these homes so that they could get all of the mortgages closed and get the people into the homes, satisfy any secured creditors, lien claimants, etc. that there might be, and in effect get this corporation in a situation where the least harm would be done. He said he referred first to getting people like the Ericksons in a home, getting their loan closed, and letting them be happy homeowners without a problem like this over their heads; and also to taking care of as many creditors as they possibly could, which obviously could not be done until they could get the loans closed on these homes.

WILSON said he wanted to make sure the Board understood that Clewal Construction was no longer in existence; Mr. Walt Suter was no longer a contractor, and they did not suppose he ever would be a contractor in the City of Wichita again. The people who were responsible, the foreman on the job site that allowed this matter to occur was fired, and no longer worked for Clewal Construction after this problem came to light.

With respect to the five conditions which have to be shown in order that the Board could justify granting a variance, WILSON pointed out that one of the requirements was "uniqueness". He stated that the Secretary pointed out that it was impossible to construct a 68.1 foot house on an 80 foot lot and observe the required 6 foot side yards. He acknowledged that mathematically that was true; however, he said that Clewal was not trying to build a 68.1 foot house on an 80 foot lot. He pointed out that as the plot plan showed it was not simply a square lot with an 80 foot front on it -- it got wider toward the back, and if the house had been built maybe 6 feet further back on the lot, there would have been no problem, even though it was a 68.1 foot home. WILSON said obviously what had happened was that when the home was staked out it was simply brought forward a little bit -- hopefully it was a mistake. He said he could not imagine anyone deliberately putting it in that position knowing there was a 6 foot side yard requirement. He said he thought it was not quite as belligerent as it appeared to be, they were not trying to construct a 68.1 foot house on an 80 foot lot.

With respect to adjacent property, WILSON said that to his knowledge no one in the neighborhood had even raised any comment on the matter. He said he believed there was a letter from a gentleman who owned a lot across Tyler Road who said that he did

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not believe 6 foot side yards were enough, but that was with respect to another piece of property, and not 8824 Birch Lane. He said this was the only person who ever raised a question, and he did not come to the last meeting, but sent a letter which was probably attached to the Secretary's report for one of the other BZA cases.

With respect to the condition of hardship, WILSON said he did not know what more he could say than they had already. He said he realized that the ordinance called for hardship to the owner/applicant, but he did not know who the owner/applicant was at that point. It was not Clewal Construction. Technically, they were simply no longer in being. He said he supposed if it was anybody, it was the Derby State Bank. He pointed out that Mr. and Mrs. Erickson, all of the lien claimants and any other number of people were going to be harmed if the variance was not granted. WILSON stated certainly Mr. Erickson could tell the Board the hardship he would suffer. He had lived in this home for a couple of months, and like any homeowner would do, he had made a number of changes to the home and used his own money to do that. He said the mortgage company was going to lose, all of the lien claimants would lose, and it would mean moving a man and his wife out on the streets. He stated that Erickson did not go out and buy the home knowing there was a problem -- he had no idea -- the real estate people had no idea; the mortgage company had no idea -- nobody with any authority to act had any idea that there was a violation or a problem until this notice on September 5th was received by Mr. Walt Suter personally and taken to his attorneys.

CUSICK asked how a house could be sold without the occupancy permit having been issued. He said he did not see how all the process could be gone through, and it had never occurred to anybody all through all of this that an occupancy permit had not been issued. He said as he understood it, nothing could be occupied until Central Inspection said it could. He said that was part of the question last time. He stated that he did not see how any abstract company which would do the abstract work on the property would fail to have caught it at that point. CUSICK stated that in his limited dealings with abstract companies, they were pretty astute at finding errors like that. He said he realized nobody had probably written (title) insurance with the loan not being closed.

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WILSON said that was when the problem came to light.

CUSICK said he could not understand why after all this, and after the loan commitment had been made, the problem came up now.

WILSON said he believed it was correct that a loan commitment had been made.

CUSICK said he was in a great deal of sympathy with the occupants of the house, but he was having a hard time seeing where it was anybody but Clewal Construction's fault, whether Clewal was a thriving entity or whether it was a defunct one. And in view of the other two houses, he said he was also having problems seeing how they were occupied, too. He said he was not aware things had gone quite this far within a month's time. CUSICK said it was always a bad assumption to assume you were going to be granted something.

WILSON said he admitted that.

CUSICK said it surprised him that the mortgage company would go on that assumption.

WILSON said he did not wish to be misunderstood, that the loan had not been closed until this was done. He said that he thought they realized Mr. and Mrs. Erickson's problem, and they wanted to get them in the home and the only way they could get them in the home was to come up with an agreement whereby Mr. Erickson would assume the principle and interest of the contractor's loan and that was the situation -- the Ericksons had to get into a home and so they were allowed to move in knowing that a variance had been applied for. He agreed that maybe that was a bit presumptuous that the variance would be granted.

CUSICK said he knew at that time housing was hard to find.

WILSON said he might point out, too, that certainly more than considering the hardship that would occur if the variance was denied, is what happens to the house, what happens to the Ericksons, are they to be moved out onto the street. Is it good to have a vacant home sitting there that cannot be sold. He said this was a fine neighborhood, and he did not think the people in the

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neighborhood would be very happy with a nice home like that sitting there deteriorating. He said he did not know if that would happen or not, but it was certainly a possibility.

CUSICK said he thought that the assumption would be rather than the house sitting empty, somebody would go and cut a few feet off the house.

WILSON pointed out they were talking about both sides of the house.

With regard to the public interest, WILSON said he thought the Secretary's report stated that as well as he could -- these side yards were interiorly located, not front yards. With regard to "spirit and intent", WILSON said he did not know, but he saw in the Rules and Regulations of the Board of Zoning Appeals that "the intent and purpose of these Rules and Regulations is .. to provide relief for those persons, in the form of modifications or variances of the strict interpretation of the Zoning Ordinance, who would suffer a severe hardship if the Ordinance was strictly enforced ...." He said he thought that to grant a variance under the circumstances before the Board would certainly be within the spirit and intent of the Rules and Regulations of the Board of Zoning Appeals. He pointed out that he had indicated the number of people who were going to suffer if the variance was denied -- innocent people, he added -- not the person who created the situation, and who was out there and had an opportunity to modify it. People who did not know at the time that this problem existed would suffer. He emphasized that Mr. Erickson was a personal friend of his and he wanted to see him get his loan closed, and the only way to get the loan closed was to get the variance granted.

DOKE asked if Wilson represented Clewal Construction, Inc. WILSON said that was a difficult question to answer, but yes, he did at the time the application was filed.

DOKE asked if he now represented the corporation.

WILSON said they did.

DOKE said the corporation was not defunct, then, it still existed?

WILSON said they had not gone through the formal procedures of dissolution.

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DOKE asked if he also represented Mr. Erickson.

WILSON said they did not represent Mr. Erickson.

DOKE said he could not see any reason they should approve the application in behalf of the applicant, Clewal Construction, Inc., with all sympathy to Mr. Erickson and his wife. He said he did not see how they could justify that the five conditions could be found to exist. He said he might have a different viewpoint if Mr. Erickson were the applicant. DOKE said he would like to know what the situation was with regard to changing the applicant from Clewal Construction to the Ericksons -- did it have to be done by separate application, or could it be done on the original application?

WILSON said at one point when the application was made for 8902 Birch Lane they indicated that the owner was Clewal Construction and that was not true, but they thought it was. He said Mr. Galbraith called him because there was some question with respect to the difference between the application and the abstract ownership list. He said Galbraith indicated they could simply change it if he would come over and initial the change; and the change was made.

A brief discussion brought out the fact that the application was corrected to reflect the Sinclairs as owners of the property and Clewal as the contractor.

GALBRAITH said they could change the application at any time they wanted to, if Clewal was no longer the owner, but the attorney said he did not know who the owner was, that he supposed that Derby State Bank was (the owner).

WILSON said the corporation had not been put into receivership. GALBRAITH explained that several people could file an application: the contract purchaser, lessee, or owner of the land, however, the owner of the property is usually also listed on the application.

DOKE asked what happened after an application was once made and acted upon.

GALBRAITH said the facts were changing all the time, that next week Mr. Erickson might own the property. He said that the

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problem as he viewed it was that, regardless of who owned the lot in question, how that made any justification in finding the five conditions? He said the owner could change every week, and the unaware buyer would just buy himself a problem. He thought the situation was that if the Board could justify uniqueness and hardship by there being a quick change in the owner of the land, that was the kind of application the Board would always have -- that someone would be quickly changing ownership and that could supposedly justify uniqueness or hardship.

WILSON said he would take it from Galbraith's comments that he did not want to set a precedent of somebody like a contractor making a mistake like this and then saying "Well, I'll continue with the home and sell it and they can go before the Board and get a variance granted without any problem."

GALBRAITH said that was correct in part, however, he was not generally worried about a precedent because he thought each individual case had to be considered on its own merits. He said he was strictly looking at the five conditions stemming from the State statutes.

CUSICK explained that the Board was required by the State statutes to find the five conditions to exist, or they could not approve the variance even if they wanted to, and the problem at this point was that he felt like Clewal Construction, if the "house of cards" that was created was knocked down, in the long run that whatever Clewal Construction might be, they were the ones who had the problem. He said he did not know, but it appeared to him that Clewal probably still held title in some respect to that property, and Clewal was the one who should have the problem instead of the people who moved into the house.

WILSON said that the effective remedy for the innocent people, for example the mortgage company and the Ericksons, was nothing, simply because if their remedy was to go after Clewal Construction, what did they have?

TAYLOR stated that they could go to the District Court, that they could appeal the Board's decision, and that would certainly be an effective remedy should the Court decide in their favor.

CUSICK said, however, that since he had been on the Board, the Board had not generally granted this type of variance to a

licensed contractor, who was licensed in the City of Wichita, and who knew what the setbacks were. He said they could probably consider another application if it came from another applicant, but he did not see how the five conditions could be justified in that case either.

DOKE said in regard to the condition of uniqueness, it would not be a problem created by the applicant or owner, if Mr. Erickson were actually the owner, and did not create it.

BOGLE said Erickson was aware of the problem when he bought the house.

WILSON said he did not believe that was correct. ERICKSON said that he was aware of it on approximately September 10th. GALBRAITH asked for clarification as to whether Erickson owned the house.

ERICKSON said he did not own the house, but he was in it at the present time. WILSON explained that he was the contract purchaser.

DOKE said he had misunderstood, that he thought Erickson did own the house. He said that Erickson, then, had relief under the contract if the variance was not approved.

ERICKSON said this was not in his contract, that he was not notified there was a problem of a variance until approximately September 10th. ERICKSON said the contract was signed on June 15th and presented a copy of the contract to the Board.

CUSICK said it appeared to be a standard contract form and asked if that did not grant Erickson relief if the seller could not furnish clear title.

WILSON asked what relief he had. ERICKSON said the cost of the house had gone up considerably in that period of time, so he could not get a comparable house for the same price. He said he could not move that easily because there were not that many housing starts in Wichita. ERICKSON said if he did move it would affect his job because as a pharmaceutical representative, his business was based out of his house, his samples were stored in the garage and his office was in one of the rooms. He stated that he had letterheads and business cards that he had distributed,

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he called on customers, and if he was moving every six months, he was not very much of a representative for his firm and he might as well "hang it up". He said his house was supposed to have closed September 1st, actually in August, but the contractors were behind schedule. He stated a certain arrangement was made, certain items were not finished, and they were going to allow the Ericksons to close and the contractors could finish the items at a later date and hold money back. ERICKSON said they were supposed to close on September 1st or 5th and then somebody found out about this (variance problem). He explained that they made an agreement on September 18th that they (Ericksons) would assume the builder's principle and interest because he (Erickson) had to move into a home to store samples, etc., and it was all affecting his job.

WILSON said he did not know what the situation was with regard to changing the name of the applicant. He asked if Erickson would be a proper applicant to apply.

DOKE said not at this point in the procedure.

CUSICK said he did not know if it was a proper question, but he would like to know what happened about the other people, did they have a remedy, or were people still living in the houses?

WILSON said people were still in all three homes. CUSICK said they had never heard a case quite like this.

DOKE said he did not see how under the existing circumstances they could approve the application.

MOTION: DOKE moved to concur with the Secretary's report that the five conditions could not be justified, CUSICK seconded, and it carried unanimously that the application be denied, as shown by the adoption of the following resolution:

RESOLUTION NO. BZA 33-73

WHEREAS, Clewal Construction, Inc., 420 Acadia, Wichita, Kansas, 67212, by T. Michael Wilson, Suite 430, R. H. Garvey Building, 300 West Douglas, Wichita, Kansas, 67202, requests a variance as provided in Section 2.12.590.B, Code of the City of Wichita, to reduce the required side yard setback adjacent to the west property line from 6 feet to 4 feet and to reduce the required side yard setback adjacent to the east property line from 6 feet to 5 feet,

on property zoned the "AA" Single Family Dwelling District, and legally described as follows:

Lot 14, 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 at the meeting of October 23, 1973, in considering said application, deferred it at the request of the applicant until November 27, 1973; and

WHEREAS, the Board of Zoning Appeals did, at the meeting of November 27, 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 68.1 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 variance will 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 west side yard of Lot 14 which is in violation adjoins the side yard of Lot 13 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; and

WHEREAS, the Board of Zoning Appeals although recognizing the problem created for the occupant, has found that the strict application of the provisions of Title 28 (Zoning Ordinance) will not constitute unnecessary hardship upon the applicant/owner inasmuch as the applicant was informed that the structure was in violation

November 27, 1973

of the required side yard setbacks 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 it is difficult to determine whether or not the requested variance will adversely affect the public health, safety or general welfare; however, the requested variance is for side yards that are 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 68.1 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 west property line from 6 feet to 4 feet and to reduce the required side yard setback adjacent to the east property line from 6 feet to 5 feet, on property zoned the "AA" Single Family Dwelling District, and legally described as:

Lot 14, 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 27th day of November, 1973.

S/S Priscilla L. Lee, Chairman  
Priscilla L. Lee, Chairman

ATTEST:

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

November 27, 1973

ERICKSON asked where he stood. During brief discussion it was suggested that he seek advice from his attorney. WILSON explained again that he did not represent Erickson.

Discussion followed about what action would be taken. BOGLE stated that as far as the Ericksons being forced out of the house, the City did not yet know what would be done. He said some action would have to be taken on this case and the other two similar cases. He stated that they would notify Erickson before action was taken.

SECRETARY'S REPORT

Case No. BZA 33-73

APPLICANT: Mr. and Mrs. Steven Erickson, 2024 Birch Lane,  
Wichita, Kansas

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 west property line from 6 feet to 4 feet *and to reduce the required  
side yard setback adjacent to the east property line 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 north, south,  
east, and west.

LAND USE: Subject property contains a single family dwelling,  
as do those properties to the south, east, and west.

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 ordi-  
narily 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 appli-  
cation.

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Case No. BZA 33-73  
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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 December 27, 1972 an application for a residential building permit and certificate of occupancy was filed, and building permit No. C66195 was issued to the owner-contractor for the construction of a single family house on subject property (Lot 14). (Although the statement of justification submitted with the application states the builder, Clewal Construction, Inc. is insolvent and the Farmers & Merchants State Bank of Derby is the assignee of its proceeds, the updated abstract ownership list still lists Clewal as the property owner.)

The site plan accompanying the application indicates that the house would observe a minimum front yard setback of 30 feet, 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, since the lot would be more than 80 feet in width at that point. After several verbal warnings 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 again notified by letter (attached) 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. (Requests were subsequently filed on September 24, 1973, for variances from the Board of Zoning Appeals.)

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. 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.

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It should also be noted that the Ericksons were aware of the violation and the fact the house was not to be occupied until it was corrected or a variance obtained prior to moving into the house on or about September 18, 1973, as explained in the minutes of the Board's meeting of November 27, 1973. Further, the mortgage company would not close the loan because of this problem, and an agreement was drawn up between the Ericksons and Walt Suter (president of Clewal Construction, Inc.) relative to the fact that a variance had been applied for and upon the granting of the variance the loan would be closed.

On October 23, 1973, the Board of Zoning Appeals considered Case No. BZA 33-73, an application for variance for subject property filed by the owner/contractor, Clewal Construction, Inc. It was the action of the Board to defer the case, as requested by the attorney for the applicant, so that the request could be amended to include both side yards and readvertised for the November meeting. On November 27, 1973, the Board again considered Case No. BZA 33-73, and it was the action of the Board to find that all five conditions necessary to the granting of the variance did not exist, and the request for variance was denied. The Board is to first consider whether or not the request for rehearing is to be granted.

Uniqueness:

The failure to meet side yard requirements arises from the 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 K.S.A. 12-715 (State statutes) and Section 2.12.590.B, Code of the City 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, although there is some confusion as to the present owner of the property. It does not appear that a change in applicant 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 contractor/property owner, since it is impossible to construct a 68.1 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.

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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.

Although recognizing the problem created for the occupancy, 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 68.1 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.

3/8 dk  
April 11, 1973

Mr. Walter Suter  
7371 West Central  
Wichita, Kansas 67212

Dear Mr. Suter:

In regard to 8824 and 8502 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

BEFORE THE BOARD OF ZONING APPEALS

IN THE MATTER )  
                  ) OF )  
BZA 33-73      ) )  
                  ) )

STATEMENT OF JUSTIFICATION

WHEREAS, it has been brought to the attention of the applicant that their residence and the property they currently have under a contract of purchase is in violation of City Ordinance No. 30-783 Code Chapter 28.04.040.2(2.2) inasmuch as the west side of their residence is 4.55 feet from the west property line and the east side of their residence is 5.5 feet from the east property line; whereas, it is this applicant's desire to seek a sideyard setback variance from 6 feet to 4 feet along the west property line and 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 arises 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. Aside from the fact that it was a human error and regardless of who was at fault, it was not an act or acts purposely committed by anyone. It was certainly not 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 inadvertant

mistake or mistakes on the part of someone, other than the applicant, the house was built closer to the front of the lot than it should have been so as to comply with the sideyard setback requirements.

As is apparent from a drawing of the lot, the east property line slopes inward from the back to the front making the lot something less than a perfect rectangle. As a consequence, it should be apparent that in order to comply with the sideyard setback requirement, the house would have to set back on the lot further than usual.

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. Steve Erickson, 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 8824 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.

Because the builder, Clewal Construction, Inc., is now an insolvent corporation, the Farmers & Merchants State Bank of Derby is the assignee of its proceeds, it is felt that the real parties in interest are Farmers & Merchants State Bank of Derby and the Ericksons. It should be clear that neither of them created this problem 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.

Because of the peculiar set of circumstances surrounding this case, it is difficult to determine just who is the "owner" of the property for which the sideyard variance setback is requested. This much is clear, however, regardless of who has legal title to the property, the applicant, Mr. and Mrs. Erickson, have an equitable interest in the property inasmuch as they are contract purchasers of the property. Therefore, if the requested variance is not granted, certainly the equitable title holder, Mr. and Mrs. Erickson, will be financially ruined. Specifically, the Ericksons have invested a sizeable sum of their own money in the property and have made certain other commitments inherent in buying ones own home. This, of course, does not consider how much more it would cost the Ericksons to purchase a comparable house in today's real estate market.

If the variance is not granted, the Ericksons will not be able to close their loan with American Savings & Loan and the next step is for American Savings & Loan to foreclose. American Savings & Loan will foreclose because Ericksons will not make payments on a house which might, as the City legal staff suggests, be torn down, moved or modified to conform. American Savings & Loan will foreclose because Clewal Construction, Inc., the current mortgagor, cannot make payments because they are financially insolvent.

The consequences of American Savings & Loan foreclosing is, of course, to wipe out all claims such as:

|                          |           |
|--------------------------|-----------|
| House of Lighting        | \$ 181.07 |
| Vosburgh Wallpaper       | 76.79     |
| Star Lumber Company      | 2,148.28  |
| Brag Temp                | 853.38    |
| Sherwin Williams         | 234.88    |
| Thornton & Florence      | 1,788.32  |
| Sunderland & Son Drywall | 760.72    |

A foreclosure of the Ericksons property would also eliminate Gordon Dotzour's real estate commission which he has earned in good faith, and possibly prevent the Ericksons from purchasing their home.

To this point, only the financial hardships to numerous innocent parties have been discussed. There is, of course, another aspect. For example, Mr. Erickson's job as a pharmaceutical salesman dictates that he be a stable homeowner as he offices out of his home and his customers know this as his office. Consequently, he cannot up and move without affecting his livelihood.

In summary, it should be all to obvious that strict application of the provisions of

Title 28 of which variances requested will constitute unnecessary hardship upon numerous innocent parties and, in particular, the Ericksons.

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 interiorally located and not areas in a position to affect the public in general. In other words, the parties most effected, 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 9 feet from the subject property. The property on the east has a larger than required sideyard setback so as to allow more than the required 12 feet between subject property and the house east of it.

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 consideratin 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,

STINSON, WISDOM & LASSWELL  
Attorneys for Applicant

By A. Mitchell Wilson

Board of Zoning Appeals

February 20, 1974

Board of Zoning Appeals

Jack H. Galbraith, Secretary

Request for Rehearing of  
Cases No. BZA 33-73 and  
BZA 34-73

On January 22, 1974, the Board of Zoning Appeals considered requests for rehearing of Cases No. BZA 32-73, BZA 33-73 and BZA 34-73. Inasmuch as a motion to approve these requests resulted in a moot vote (2-2), consideration of the requests was deferred until the meeting of February 26, 1974, as provided by Article VII.C, of the Rules and Regulations of the Board of Zoning Appeals.

Attached for your information and review are copies of the requests for rehearing submitted by Mr. Wilson (Attachments 1 and 2), the Secretary's January 16th memo to the Board (Attachment 3), and excerpts from the Board's meetings of October 23, 1973, and November 27, 1973 (Attachments 4 and 5), involving consideration of these cases. It should be noted that requests for rehearing have now been filed only on Cases No. BZA 33-73 and BZA 34-73. A request to allow a new application to be filed on property previously considered has been filed with regard to Case No. BZA 32-73.

After viewing the submitted requests for rehearing and reviewing the minutes of the October and November meetings, it is the opinion of the Secretary that, although the names of the applicants have changed, nothing can be seen which would justify the Secretary changing his position on the five conditions.

It would not appear that the Board has authority to resolve the conflicting claims of the increasing number of parties and issues involved in this matter, since it has authority only to consider whether or not the five conditions necessary to the granting of the variance exist. While sympathizing with the occupants, the lien claimants, the assignee of the contractor's proceeds and the real estate firm, it is the opinion of the Secretary that no new evidence has been presented which would enable the Board to justify all five conditions.

You will recall that previously, I have discussed with you Mr. Wilson's request that the cases be readvertised for public hearing at the meeting of February 26, 1974, with the understanding that in the event the Board granted the requests for rehearing, it could then proceed to consider the cases themselves. As you are aware, I polled the Board by telephone, and a majority of the members favored allowing the cases to be re-advertised. After reviewing the attachments, if the Board

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determines there is sufficient new evidence to warrant rehearing, your action would be to approve the requests and reconsider the cases.

However, if the Board concurs in the Secretary's position that the evidence is not sufficient to warrant a rehearing, the requests should be denied, and any further action should consist of an appeal to the District Court of Sedgwick County.

JHG:ber

**Attachments**

cc: Joe Bogle, Legal Counsel, Board of Zoning Appeals, w/a  
T. Michael Wilson, Attorney, 430 R. H. Garvey Building,  
300 West Douglas 67202, w/a  
Charles Manning, 8808 Birch Lane 67212, w/a  
Mr. and Mrs. Steven Erickson, 8824 Birch Lane 67212, w/a

WICHITA-SEDGWICK COUNTY

ATTACHMENT 3

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  
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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

**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 for Rehearing of  
Cases No. BZA 33-73 and  
BZA 34-73

On January 22, 1974, the Board of Zoning Appeals considered requests for rehearing of Cases No. BZA 32-73, BZA 33-73 and BZA 34-73. Inasmuch as a motion to approve these requests resulted in a moot vote (2-2), consideration of the requests was deferred until the meeting of February 26, 1974, as provided by Article VII.C. of the Rules and Regulations of the Board of Zoning Appeals.

Attached for your information and review are copies of the requests for rehearing submitted by Mr. Wilson (Attachments 1 and 2), the Secretary's January 16th memo to the Board (Attachment 3), and excerpts from the Board's meetings of October 23, 1973, and November 27, 1973 (Attachments 4 and 5), involving consideration of these cases. It should be noted that requests for rehearing have now been filed only on Cases No. BZA 33-73 and BZA 34-73. A request to allow a new application to be filed on property previously considered has been filed with regard to Case No. BZA 32-73.

After viewing the submitted requests for rehearing and reviewing the minutes of the October and November meetings, it is the opinion of the Secretary that, although the names of the applicants have changed, nothing can be seen which would justify the Secretary changing his position on the five conditions.

It would not appear that the Board has authority to resolve the conflicting claims of the increasing number of parties and issues involved in this matter, since it has authority only to consider whether or not the five conditions necessary to the granting of the variance exist. While sympathizing with the occupants, the lien claimants, the assignee of the contractor's proceeds and the real estate firm, it is the opinion of the Secretary that no new evidence has been presented which would enable the Board to justify all five conditions.

You will recall that previously, I have discussed with you Mr. Wilson's request that the cases be readvertised for public hearing at the meeting of February 26, 1974, with the understanding that in the event the Board granted the requests for rehearing, it could then proceed to consider the cases themselves. As you are aware, I polled the Board by telephone, and a majority of the members favored allowing the cases to be re-advertised. After reviewing the attachments, if the Board

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February 20, 1974

determines there is sufficient new evidence to warrant rehearing, your action would be to approve the requests and reconsider the cases.

However, if the Board concurs in the Secretary's position that the evidence is not sufficient to warrant a rehearing, the requests should be denied, and any further action should consist of an appeal to the District Court of Sedgwick County.

JHG:ber

Attachments

cc: Joe Bogle, Legal Counsel, Board of Zoning Appeals, w/a  
T. Michael Wilson, Attorney, 430 R. H. Garvey Building,  
300 West Douglas 67202, w/a  
Charles Manning, 8808 Birch Lane 67212, w/a  
Mr. and Mrs. Steven Erickson, 8824 Birch Lane 67212, w/a

SECRETARY'S REPORT

Case No. BZA 33-73

APPLICANT: Mr. and Mrs. Steven Erickson, 6624 Birch Lane,  
Wichita, Kansas

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 west property line from 6 feet to 4 feet and reduce the required  
*Side yard setback adjacent to the east property line from 6 feet to 4 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 north, south,  
east, and west.

LAND USE: Subject property contains a single family dwelling,  
as do those properties to the south, east, and west.

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 ordi-  
narily 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 appli-  
cation.

Secretary's Report  
Case No. BZA 33-73  
Page Two

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 December 27, 1972 an application for a residential building permit and certificate of occupancy was filed, and building permit No. C66195 was issued to the owner-contractor for the construction of a single family house on subject property (Lot 14). (Although the statement of justification submitted with the application states the builder, Clewal Construction, Inc. is insolvent and the Farmers & Merchants State Bank of Derby is the assignee of its proceeds, the updated abstract ownership list still lists Clewal as the property owner.)

The site plan accompanying the application indicates that the house would observe a minimum front yard setback of 30 feet, 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, since the lot would be more than 80feet in width at that point. After several verbal warnings 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 again notified by letter (attached) 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. (Requests were subsequently filed on September 24, 1973, for variances from the Board of Zoning Appeals.)

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. 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.

Secretary's Report  
Case No. BZA 33-73  
Page Three

It should also be noted that the Ericksons were aware of the violation and the fact the house was not to be occupied until it was corrected or a variance obtained prior to moving into the house on or about September 18, 1973, as explained in the minutes of the Board's meeting of November 27, 1973. Further, the mortgage company would not close the loan because of this problem, and an agreement was drawn up between the Ericksons and Walt Suter (president of Clewal Construction, Inc.) relative to the fact that a variance had been applied for and upon the granting of the variance the loan would be closed.

On October 23, 1973, the Board of Zoning Appeals considered Case No. BZA 33-73, an application for variance for subject property filed by the owner/contractor, Clewal Construction, Inc. It was the action of the Board to defer the case, as requested by the attorney for the applicant, so that the request could be amended to include both side yards and readvertised for the November meeting. On November 27, 1973, the Board again considered Case No. BZA 33-73, and it was the action of the Board to find that all five conditions necessary to the granting of the variance did not exist, and the request for variance was denied. The Board is to first consider whether or not the request for rehearing is to be granted.

Uniqueness:

The failure to meet side yard requirements arises from the 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 K.S.A. 12-715 (State statutes) and Section 2.12.590.B, Code of the City 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, although there is some confusion as to the present owner of the property. It does not appear that a change in applicant 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 contractor/property owner, since it is impossible to construct a 68.1 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.

Secretary's Report  
Case No. BZA 33-73  
Page Four

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.

Although recognizing the problem created for the occupancy, 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 68.1 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.

BEFORE THE BOARD OF ZONING APPEALS

IN THE MATTER )  
                  )  
          OF        )  
                  )  
BZA 33-73        )  
\_\_\_\_\_         )

STATEMENT OF JUSTIFICATION

WHEREAS, it has been brought to the attention of the applicant that their residence and the property they currently have under a contract of purchase is in violation of City Ordinance No. 30-783 Code Chapter 28.04.040.2(2.2) inasmuch as the west side of their residence is 4.55 feet from the west property line and the east side of their residence is 5.5 feet from the east property line; whereas, it is this applicant's desire to seek a sideyard setback variance from 6 feet to 4 feet along the west property line and 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 arises 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. Aside from the fact that it was a human error and regardless of who was at fault, it was not an act or acts purposely committed by anyone. It was certainly not 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 inadvertant

mistake or mistakes on the part of someone, other than the applicant, the house was built closer to the front of the lot than it should have been so as to comply with the sideyard setback requirements.

As is apparent from a drawing of the lot, the east property line slopes inward from the back to the front making the lot something less than a perfect rectangle. As a consequence, it should be apparent that in order to comply with the sideyard setback requirement, the house would have to set back on the lot further than usual.

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. Steve Erickson, 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 8824 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.

Because the builder, Clewal Construction, Inc., is now an insolvent corporation, the Farmers & Merchants State Bank of Derby is the assignee of its proceeds, it is felt that the real parties in interest are Farmers & Merchants State Bank of Derby and the Ericksons. It should be clear that neither of them created this problem 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.

Because of the peculiar set of circumstances surrounding this case, it is difficult to determine just who is the "owner" of the property for which the sideyard variance setback is requested. This much is clear, however, regardless of who has legal title to the property, the applicant, Mr. and Mrs. Erickson, have an equitable interest in the property inasmuch as they are contract purchasers of the property. Therefore, if the requested variance is not granted, certainly the equitable title holder, Mr. and Mrs. Erickson, will be financially ruined. Specifically, the Ericksons have invested a sizeable sum of their own money in the property and have made certain other commitments inherent in buying ones own home. This, of course, does not consider how much more it would cost the Ericksons to purchase a comparable house in today's real estate market.

If the variance is not granted, the Ericksons will not be able to close their loan with American Savings & Loan and the next step is for American Savings & Loan to foreclose. American Savings & Loan will foreclose because Ericksons will not make payments on a house which might, as the City legal staff suggests, be torn down, moved or modified to conform. American Savings & Loan will foreclose because Clewal Construction, Inc., the current mortgagor, cannot make payments because they are financially insolvent.

The consequences of American Savings & Loan foreclosing is, of course, to wipe out all claims such as:

|                          |           |
|--------------------------|-----------|
| House of Lighting        | \$ 181.07 |
| Vosburgh Wallpaper       | 76.79     |
| Star Lumber Company      | 2,148.28  |
| Brag Temp                | 853.38    |
| Sherwin Williams         | 234.88    |
| Thornton & Florence      | 1,788.32  |
| Sunderland & Son Drywall | 760.72    |

A foreclosure of the Ericksons property would also eliminate Gordon Dotzour's real estate commission which he has earned in good faith, and possibly prevent the Ericksons from purchasing their home.

To this point, only the financial hardships to numerous innocent parties have been discussed. There is, of course, another aspect. For example, Mr. Erickson's job as a pharmaceutical salesman dictates that he be a stable homeowner as he offices out of his home and his customers know this as his office. Consequently, he cannot up and move without affecting his livelihood.

In summary, it should be all to obvious that strict application of the provisions of

Title 28 of which variances requested will constitute unnecessary hardship upon numerous innocent parties and, in particular, the Ericksons.

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 interiorally located and not areas in a position to affect the public in general. In other words, the parties most effected, 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 9 feet from the subject property. The property on the east has a larger than required sideyard setback so as to allow more than the required 12 feet between subject property and the house east of it.

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 consideratin 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,

STINSON, WISDOM & LASSWELL  
Attorneys for Applicant

By A. Michael Wilson

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

February 5, 1974

NOTICE TO ADJOINING PROPERTY OWNERS:

AS AUTHORIZED BY ARTICLE VIII OF THE RULES AND REGULATIONS OF THE BOARD OF ZONING APPEALS, consideration of requests for rehearing for Cases No. BZA 33-73 and BZA 34-73 is scheduled for the meeting of February 26, 1974. If the Board determines a rehearing shall be allowed, said hearing shall take place on the same date, and the following applications will be considered:

1. Case No. BZA 33-73 - Mr. and Mrs. Steven Erickson (contract purchasers), 8824 Birch Lane, 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 west property line of Lot 14 from six feet to four feet and to reduce the required side yard setback adjacent to the east property line from six feet to five feet on property zoned the "AA" Single Family Dwelling District and legally described as follows:

Lot 14, 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.

2. Case No. BZA 34-73 - Mr. and Mrs. Charles E. Manning, (contract purchasers), 8808 Birch Lane, 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 six feet to three 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.

Notice to Adjoining Property Owners  
February 5, 1974  
Page Two

The Board of Zoning Appeals meets 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

*12 Notices to Adjoining Property Owners mailed 2-5-74*

*10 Notices to MAPC members mailed 2-5-74*

## BEFORE THE BOARD OF ZONING APPEALS

IN THE MATTER )  
 )  
 OF )  
 )  
 BZA 33-73 )  
 \_\_\_\_\_ )

REQUEST FOR REHEARING

WHEREAS, it has been brought to the attention of the applicant that a request for a variance has been previously denied by the Board of Zoning Appeals based upon facts and evidence presented to it at the Board's meeting of November 27, 1973; whereas, since that meeting numerous facts have been brought to this applicant's attention which could not have been shown at the Board's meeting of November 27, 1973, and further this applicant shows that additional innocent parties have become interested in seeing that the requested variance is granted by the Board, which parties were not interested at the time of the Board's meeting of November 27, 1973. Therefore, this applicant hereby submits the following new evidence which could not have been reasonably presented at the Board's meeting of November 27, 1973, to-wit:

1. Contractor's Insolvency. The contractor and original applicant for the requested variance, is now an insolvent corporation. The effect of the contractor's insolvency leaves this applicant with no effective remedy should the variance be denied.

This applicant has made a considerable investment in subject property which does not include what additional amount it would cost the applicant to buy an equivalent house in today's real estate market.

2. Innocent Parties. Numerous innocent parties are now financially involved in subject property and unless the requested variance is granted, these innocent parties stand to suffer financially. Specifically, the following lien claimants have claims against subject property:

|                          |           |
|--------------------------|-----------|
| House of Lighting        | \$ 181.07 |
| Vosburgh Wallpaper       | 76.79     |
| Star Lumber Company      | 2,148.28  |
| Brag Temp                | 853.38    |
| Sherwin Williams         | 234.88    |
| Thornton & Florence      | 1,788.32  |
| Sunderland & Son Drywall | 760.72    |

Further, Gordon Dotzour, the realtor who sold the house to the applicant, will lose approximately \$1,600.00 if the real estate contract cannot be fulfilled. This would be totally unfair to Mr. Dotzour as he has innocently invested time and energy into this transaction.

In addition, the Farmers and Merchants State Bank of Derby is now assignee of the contractor's proceeds and has a real interest in seeing that the requested variance is granted so that mortgage loans may be closed, lien claimants satisfied and persons in possession vested with clear title to the property.

3. Neighborhood Petition. 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.

Respectfully submitted,  
STINSON, WISDOM & LASSWELL  
Attorneys for Applicant

By: T. Michael Wilson

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 15, day of February, 1974.

Jane E. Chick  
Notary Public



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 14, Block 3, in 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   |
|-----------------------------|-----|-----------------|---|
| 32,                         | 2,  | WESTERN GARDENS | Ronald G. Ogden<br>Virginia J. Ogden, ux<br>2720 S. Mosley 67216        |
| 33,                         | 2,  |                 | Clewal Construction, Inc.<br>962 N. Wood 67212                          |
| 3, 4, 5, 6, 7, 8, 3,<br>14, |     |                 | Clewal Construction, Inc.<br>962 N. Wood 67212                          |
| 11,                         | 3,  |                 | Ray L. & Lucille Coleman, ux<br>No Address Available                    |
| 12,                         | 3,  |                 | Harrison Mathew Moore, sgle.<br>8908 Birch Lane 67212                   |
| 13,                         | 3,  |                 | Patrick B. Sinclair<br>LaDonna M. Sinclair, ux<br>8902 Birch Lane 67212 |
| 15,                         | 3,  |                 | Clewal Construction, Inc.<br>962 N. Wood 67212                          |
| 16,                         | 3,  |                 | Searle L. & Mary M. Rosen, ux<br>No Address Available                   |
| 17,                         | 3,  |                 | Daniel M., Jr. & Esther Root,<br>No Address Available ux                |



| LOT | BLK. | ADDITION               | OWNER   |
|-----|------|------------------------|---|
| 18, | 3,   | <u>WESTERN GARDENS</u> | Clewal Construction, Inc.<br>962 N. Wood 67212                          |
| 1,  | 4,   |                        | Richard B. Anderson<br>Marilyn J. Anderson, ux<br>8815 Birch Lane 67212 |
| 2,  | 4,   |                        | Richard A. & Joanne Florence, ux<br>No Address Available                |
| 3,  | 4,   |                        | Jimmie L. & Janet R. Weigand, ux<br>8907 Birch Lane 67212               |
| 4,  | 4,   |                        | Richard G. & Loretta B. Helf, ux<br>8915 Birch Lane 67212               |
| 9,  | 4,   |                        | Morris G. & Carolyn N. Desilet,<br>8826 Bekemeyer 67212 ux              |
| 10, | 4,   |                        | Harold Keith Kuhlman<br>Carol Jean Kuhlman, ux<br>8818 Bekemeyer 67212  |

Dated at Wichita, Kansas this 11th day of  
February, 1974 at 7:00 A. M.

FIDELITY TITLE COMPANY, INC.

By *Opita Gray* OEM  
Asst. Sec.

Tracer # 22717

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

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

# 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 — AREA CODE 316  
SUITE 600 — CITY BLDG. ANNEX  
WICHITA, KANSAS 67202

January 6, 1974

Mr. and Mrs. Steven Erickson  
8824 Birch Lane  
Wichita, Kansas 67212

RE: Required sideyard setback at  
8824 Birch Lane  
Wichita, Kansas

Dear Mr. and Mrs. Erickson:

As you are aware, the house which you occupy and apparently own at 8824 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 November 27, 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 house 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: Clewal Construction Company  
Walter H. Suter, 420 Acadia  
Jack Galbraith, Secretary, Board of Zoning Appeals  
John Dekker, City Attorney



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

BOARD OF ZONING APPEALS  
CITY OF WICHITA, KANSAS

CASE NO. B2A 33-73

FILED 2-1-74

APPLICATION FOR VARIANCE

I. Name of Applicant Mr. and Mrs. Steven Erickson  
Mailing Address 8824 Birch Lane Phone 722-0026  
Name of Authorized Agent T. Michael Wilson  
Stinson, Wisdom & Lasswell  
Mailing Address 430 R. H. Garvey Building Phone 264-9137  
Relationship of applicant to property is that of contract purchaser  
(Owner, Tenant, Lessee, Other)

II. The variance requested is a sideyard setback variance from  
6 feet to 4 feet along the west property line and a sideyard  
setback variance from 6 feet to 5 feet along the east property line.  
for property located 8824 Birch Lane

and legally described as: Lot 14, Block 3, Western Gardens,  
Wichita, Sedgwick County, Kansas

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

- III. The applicant herein, or his authorized agent, acknowledges:
- That he has received an instruction sheet concerning the filing and hearing of this matter;
  - 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;
  - 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.
  - That all documents are attached hereto as noted in paragraphs 2, 3, 4, and 5 of the instructions.

T. Michael Wilson  
Applicant Mr. & Mrs. Steven Erickson

T. Michael Wilson  
Authorized Agent T. Michael Wilson

OFFICE USE ONLY: Received in office of Secretary, Board of Zoning Appeals 4:50 (a.m. - p.m.), February 2 1974 together with appropriate fee of \$50.00.

T9-402

Martha McGarry  
Signed

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                    )  
  )  
BZA 33-73                            )

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 8824 Birch Lane, Wichita, Kansas. Said application for a sideyard variance was previously denied by the Board of Zoning Appeals at their meeting of November 27, 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 November 27, 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 mortgage loans may be closed, lien holders are satisfied and persons in possession are vested with clear title to said property.

*T. Michael Wilson*  
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, PLS - Notary Public

My Commission Expires:  
March 29, 1976

December 14, 1973

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

RE: Case No. BZA 33-73  
Request for Variance

Dear Mr. Wilson:

Enclosed is a signed copy of the Resolution adopted by the Board of Zoning Appeals on November 27, 1973, in connection with your request for a variance to reduce the required side yard setback adjacent to the west property line from 6 feet to 4 feet and to reduce the required sideyard setback adjacent to the east property line 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: Mr. and Mrs. Steve Erickson, 8824 West Birch, 67212  
Walt Suter, Clewail Construction, Inc., 420 Acadia, 67212  
Robert Feldner, Superintendent of Central Inspection  
Ralph Eberly, City Clerk  
Joe Donnelly, Central Inspection

RESOLUTION NO. BZA 33-73

WHEREAS, Clewal Construction, Inc., 420 Acadia, Wichita, Kansas, 67212, by T. Michael Wilson, Suite 430, R. H. Garvey Building, 300 West Douglas, Wichita, Kansas, 67202, requests a variance as provided in Section 2.12.590.B, Code of the City of Wichita, to reduce the required side yard setback adjacent to the west property line from 6 feet to 4 feet and to reduce the required sideyard setback adjacent to the east property line from 6 feet to 5 feet, on property zoned the "AA" Single Family Dwelling District, and legally described as follows:

Lot 14, 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 at the meeting of October 23, 1973, in considering said application, deferred it at the request of the applicant until November 27, 1973; and

WHEREAS, the Board of Zoning Appeals did, at the meeting of November 27, 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 68.1 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 variance will 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 west side yard of Lot 14 which is in violation adjoins the side yard of Lot 13 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; and

WHEREAS, the Board of Zoning Appeals although recognizing the problem created for the occupant, has found that the strict application of the provisions of Title 28 (Zoning Ordinance) will 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 setbacks 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 it is difficult to determine whether or not the requested variance will adversely affect the public health, safety or general welfare;

20820

Do not remove from  
file without per-  
mission from JHG.

|                       |                     |
|-----------------------|---------------------|
| TO: [illegible]       | FROM: [illegible]   |
| DATE: [illegible]     | TIME: [illegible]   |
| LOCATION: [illegible] | STATUS: [illegible] |

MESSAGE

RE: [illegible]

ATTENTION: [illegible]

URGENT MESSAGE

however, the requested variance is for side yards that are 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 68.1 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 west property line from 6 feet to 4 feet and to reduce the required sideyard setback adjacent to the east property line from 6 feet to 5 feet, on property zoned the "AA" Single Family Dwelling District, and legally described as:


Lot 14, 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 27th day of November, 1973.

\_\_\_\_\_  
Priscilla L. Lee, Chairman

ATTEST:

  
\_\_\_\_\_  
Jack H. Galbraith, Secretary

December 6, 1973

Robert Feldner, Superintendent of Central Inspection

Jack H. Galbraith, Chief Planner

BZA Case No. 33-73 - On the North side of Birch Lane  
in an area between Wood Avenue and Tyler Road

This is to inform you that at the meeting of November 27, 1973, the Board of Zoning Appeals denied the variance requested by Clewal Construction Company, Inc., to reduce the side yard setback adjacent to the west property line from 6 feet to 4 feet and reduce the side yard setback adjacent to the east property line from 6 feet to 5 feet. Subject property is legally described as Lot 14, Block 3, Western Gardens Addition and is located at 8824 Birch Lane.

On October 23, 1973, the Board denied two similar variance requests also filed by Clewal Construction Company, Inc. for Lots 13 and 18, Block 3, Western Gardens Addition. Action should now be taken to see that these properties are brought into compliance with the provisions of the Zoning Ordinance.

JHG:rw

November 30, 1973

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

RE: Case No. BEA 33-73  
Request for Variance

Dear Mr. Wilson:

At the regular meeting of the Board of Zoning Appeals on November 27, 1973, your request for a variance to reduce the required side yard setback adjacent to the west property line from 6 feet to 4 feet and to reduce the required sideyard setback adjacent to the east property line 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: Mr. and Mrs. Steve Erickson, 8824 West Birch, 67212  
Walt Suter, Cleval Construction, Inc. 420 Acadia, 67212  
Robert Feldner, Superintendent of Central Inspection  
Ralph Eberly, City Clerk  
Joe Donnelly, Central Inspection

SECRETARY'S REPORT  
CASE NO. BZA 33-73

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 west property line from 6 feet to 4 feet and to reduce the required sideyard setback adjacent to the east property line 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 north, south, east, and west.

LAND USE: Subject property contains a single family dwelling, as do those properties to the south, east, and west. 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.

Secretary's Report  
BZA Case No. 33-73  
Page 2

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 December 27, 1972, an application for a residential building permit and certificate of occupancy was filed, and building permit No. C66195 was issued to the applicant for the construction of a single family house on subject property (Lot 14). The site plan accompanying the application indicated that Lot 14 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. After several verbal warnings 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 again notified by letter (attached) 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 application for a building permit is also an application for a certificate of occupancy, when an inspector notified 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.

Secretary's Report  
BZA Case No. 33-73  
Page 3

In the plot plan submitted with the original application, the surveyor omitted the dimension for the side yard at the southeast corner of the house, which also appeared to be in violation of the 6 foot required side yard setback. Since the information subsequently provided by the applicant's surveyor indicated the side yard was only 5.5 feet at this point, it was the action of the Board of Zoning Appeals, at the meeting of October 23, 1973, to defer Case No. BZA 33-73 at the applicant's request so that the amended variance request could be advertised and scheduled for public hearing.

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 68.1 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 west side yard of Lot 14 which is in violation adjoins the side yard of Lot 13 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.

Hardships:

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 setbacks and it was not to be occupied until the violation was corrected or a variance obtained.

Secretary's Report  
BZA Case No. 33-73  
Page 4

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 side yards that are 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 68.1 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

3844  
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

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

November 7, 1973

NOTICE TO ADJOINING PROPERTY OWNERS:

An amended 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 West property line from 6 feet to 4 feet and to reduce the required side yard setback adjacent to the east property line from 6 feet to 5 feet, on property zoned the "AA" Single Family Dwelling District and legally described as follows:

- 5 Lot 14, 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 33-73, and will be considered by the Board of Zoning Appeals at its meeting on Tuesday, November 27, 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

9 notices sent to Property Owners 11-8-73

October 24, 1973

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

RE: Case No. BEA 33-73  
Request for Variance

Dear Mr. Wilson:

At its regular meeting of October 23, 1973, it was the action of the Board of Zoning Appeals to defer Case No. BEA 33-73 as you requested by your letter of October 19, 1973. The amended variance request will be readvertised and scheduled to be heard before the Board of Zoning Appeals on November 27, 1973.

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

Yours very truly,

Jack H. Galbraith  
Secretary

JHG:rw

cc: Walt Suter, Clew Construction, Inc., 420 Acadia, 67212  
Robert Feldner, Superintendent of Central Inspection  
Ralph Eberly, City Clerk  
Joe Donnelly, Central Inspection

**STINSON, WISDOM & LASSWELL**

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

October 19, 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: Request for amended variance  
application - 8824 Birch Lane

Dear Mr. Galbraith:

We hereby respectfully request on the behalf of Clewal Construction, Inc., the owner of the above referenced property, a sideyard variance to five feet on the east side of said property 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 feet in width.

This request should be considered as an addition to and not in lieu of the application for variance previously filed with your office on September 20, 1973. It is my understanding that the certified ownership list already on file and the filing fee previously paid are sufficient, but that revised drawings reflecting the southeast corner measurement of 8824 Birch Lane are necessary, the same being enclosed.

The sideyard variance request with respect to 8824 Birch Lane only, will be deferred from the October 23rd meeting of the Board of Zoning Appeals to the November 27th meeting so that the additional variance request may be advertised.

If you have any question regarding the above or if any additional requirements are necessary, please do not hesitate to contact this office.

Very truly yours,

STINSON, WISDOM & LASSWELL

*T. Michael Wilson*  
T. Michael Wilson

TMW:sh  
Enclosure

BZA 33-73

W. L. KORBER R. G. WAYMIRE  
**BAUGHMAN CO.**  
S U R V E Y O R S

PHONE 316/262-7271

330 LAURA

WICHITA, KANSAS 67211

State of Kansas )  
                  ) SS  
County of Sedgwick)

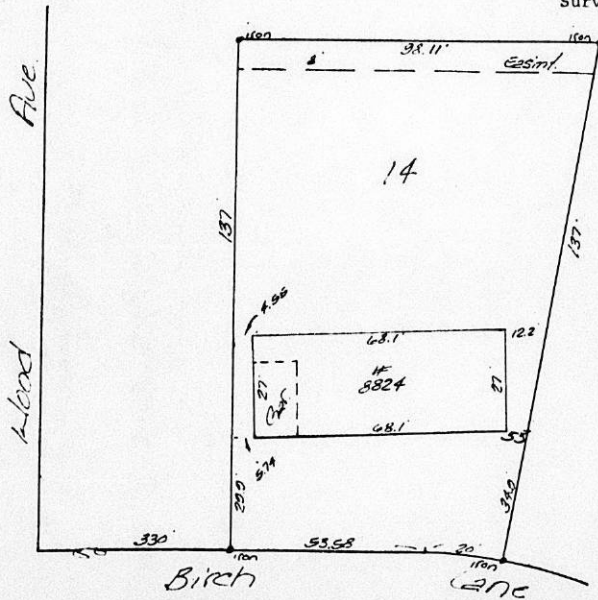
September 13, 1973

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

On said lot is house No. 8824 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.

*W. L. Korber*  
Surveyor



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 33-73

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 west property line from 6 feet to 4 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 north, south, east, and west.

LAND USE: Subject property contains a single family dwelling, as do those properties to the south, east, and west.

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 23 (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. C05195 was issued to the applicant for the construction of a single family house on subject property (Lot 14). The site plan accompanying the application indicated that Lot 14 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. After several verbal warnings 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 again notified by letter dated April 11, 1973, of the violation. (Copy of letter attached to BZA Case No. 32-73.) 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 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 the survey submitted by the applicant does not indicate a dimension for the side yard at the south east corner of the house. It appears by the drawing, that the setback is less than the one applied for on the west side. The applicant should have his surveyor provide this dimension prior to the BZA 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 (owner) since it is impossible to construct a 68.1 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 14 which is in violation adjoins the side yard of Lot 13 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

Secretary's Report  
BZA Case No. 33-73  
Page 4

6 feet for single family dwellings and it is not possible to construct a 68.1 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.

BZA 33-73

3844  
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

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 33-73

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 West property line from 6 feet to 4 feet on property zoned the "AA" Single Family Dwelling District and legally described as follows

Lot 14, 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 33-73, 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

7 Notices sent to Property Owners 10.2.73  
10 " " " Plng. Comms. 10.3.73

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 -  
8824 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 four (4) 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 four (4) 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 four (4) 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 four (4) feet is not contrary to the general spirit and intent of Title 28 as a sideyard of four (4) 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



BOARD OF ZONING APPEALS  
CITY OF WICHITA, KANSAS

CASE NO. BZA 33-73  
FILED 1

APPLICATION FOR VARIANCE

I. Name of Applicant Walt Suter CLEWAL CONSTRUCTION, INC.  
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, Phone 264-9137  
300 West Douglas, Wichita, Ks.  
Relationship of applicant to property is that of Owner  
(Owner, Tenant, Lessee, Other)

II. The variance requested is a sideyard variance setback <sup>from 6 feet</sup> to 4 feet  
from the west property line.

for property located 8824 Birch Lane

and legally described as: Lot 14, 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.

Walt 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 3:20 (a.m. - p.m.), September 24 1973 together with appropriate fee of \$50.00.

T9-402

C 66195

Martha M. Murphy  
Signed

W. L. KORBER R. G. WAYMIRE  
**BAUGHMAN CO.**  
 S U R V E Y O R S

PHONE 316/262-7271

330 LAURA

WICHITA, KANSAS 67211

State of Kansas )  
 ) SS  
 County of Sedgwick )

September 13, 1973

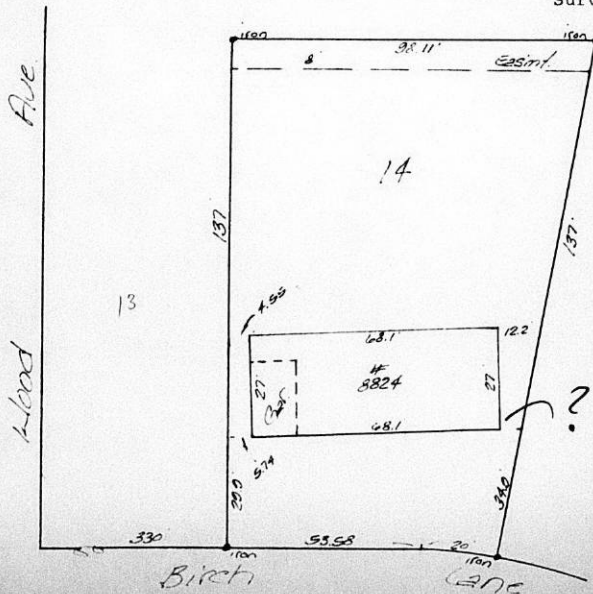
We, Baughman Company, Surveyors in aforesaid county and state do hereby certify that we did on this 13th day of September, 1973 survey Lot 14, Block 3, Western Gardens, Wichita, Sedgwick County, Kansas.

On said lot is house No. 8824 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.



*William Korber*  
 Surveyor





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 14, 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   |
|---|-----|-----------------|---|
| 32,                                     | 2,  | WESTERN GARDENS | Harold G. Ogden<br>Virginia J. Ogden, ux<br>2720 S. Mosley 67216          |
| 33,                                     | 2,  |                 | Clewal Construction Co., Inc.<br>962 N. Wood 67212                        |
| 3, 4, 5, 6, 7, 8, 9, 3,<br>11 & 14,     | 3,  |                 | Clewal Construction Co., Inc.<br>962 N. Wood 67212                        |
| 12, Harrison M. Moore,<br>8908 Birch Ln | 3,  |                 | Clifford B. Sipple<br>Shelia Sipple, ux<br>8908 Birch Lane 67212          |
| 13,                                     | 3,  |                 | Patrick B. Sinclair<br>LaDonna M. Sinclair, ux<br>8902 Birch Lane 67212   |
| 15,                                     | 3,  |                 | Clewal Construction Co., Inc.<br>962 N. Wood 67212                        |
| 16,                                     | 3,  |                 | Searle L. & Mary M. Rosen, ux<br>No Address Available<br>8816 Birch Ln    |
| 17,                                     | 3,  |                 | Daniel M., Jr. & Esther Root,<br>No Address Available ux<br>8812 Birch Ln |
| 18,                                     | 3,  |                 | Clewal Construction Co., Inc.<br>962 N. Wood 67212                        |



| LOT   | BLK   | ADDITION                                   | OWNER  |
|-------|---|--|--|
| ✓ 1,  | Richard B. & Marie Ann J. Anderson<br>7815 Birch Ln 4,    | WESTERN GARDENS (also 32)                  | Carl B. & Cheryl D. Forshee, ux<br>8802 Bekemeyer 67212  |
| ✓ 2,  | Richard & Florence L. Joannell-Florence 4,                | Returned and sent to new address (also 32) | C & G Development Co., Inc.<br>Curtis R. Harper,<br>Sven Harper,<br>Jerry L. Harper,<br>3965 W. 13th St. 67203<br>1615 N. Mt. Carmel 67203<br>D Clew Construction, Inc.<br>962 N. Wood 67212 |
| ✓ 3,  | Gimmie L. Weigand<br>Janet R. Weigand 4,<br>8907 Birch Ln |  | Harper Homes, Inc.<br>9825 W. 13th St. 67203   |
| ✓ 4,  | Richard G. & Loretta B. Helf 4,                           |  | Morris G. & Carolyn N. Desilet,<br>8826 Bekemeyer 67212 ux   |
| ✓ 9,  | 8915 Birch Ln 4,  |  | Harold Keith Kuhlman<br>Carol Jean Kuhlman, ux<br>8818 Bekemeyer 67212   |
| ✓ 10, | 4,  |  |  |

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

FIDELITY TITLE COMPANY, INC.

By Anita Mason  
Asst. Sec. OEM

Tracer # 21248