

BEFORE BEXLEY CITY COUNCIL

IN RE: APPEAL OF DECISION OF BEXLEY BOARD OF ZONING AND PLANNING FOLLOWING AN APPEAL OF THE DENIAL OF VARIANCES POOL AND POOL HOUSE AS REQUESTED IN APPLICATION NO. 21-47 AT 81 N. DREXEL AVENUE.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND DECISION OF COUNCIL**

This matter comes before City Council upon appeal of the owners of the real property located at 81 N. Drexel Avenue, Bexley, Ohio, Consecutive Primes, LLC and the applicants, Nathan Sampson and Keith Witt (collectively “Appellants” or “Applicants”) pursuant to Section 1226.19 of the Codified Ordinances of the City of Bexley (“Bexley City Code” or “BCC”). Appellants appealed the April 28, 2022 Decision and Record of Action of the Bexley Board of Zoning and Planning (“BZAP”) denying the application for a variance for a pool and pool house on the western end of the front yard of the residential property located at 81 N. Drexel Avenue (“Property”) and zoned R-2 Intermediate Density Single-Family Residential District. Appellees, Thomas Hadley and Lee Ann Hadley, the owners of the adjacent property to the west, appeared before BZAP and council on appeal in opposition to the variances.

BZAP Proceedings and Determination

On October 14, 2021, the Appellants filed an application with BZAP for multiple variances for proposed improvements to the residential property located at 81 N. Drexel Avenue. BZAP held a hearing on the entire application that continued, at the Appellants’ request, over three meetings on December 2, 2021, March 24, 2022 and April 28, 2022.

The Bexley City Code requires the Architectural Review Board (ARB) to review any buildings and structures included in a variance application to make a recommendation to BZAP on the architecture only in the event that BZAP grants a variance and chooses to issue a certificate of appropriateness. ARB makes no recommendation on the merits of a variance. On November 11, 2021 ARB recommended approval of a certificate of appropriateness for the buildings and structures proposed, subject to review and approval by the Tree and Public Gardens Commission, should BZAP grant variances.

Appellants’ application sought approval of proposed modifications to previously approved variances for a front yard fence, gates and columns on the property. After hearing the merits of the proposed variance amendments, BZAP approved the proposed modifications to the existing variance on March 24, 2022. That decision was not appealed by any party and is not before Council in this appeal.

Appellants’ application also sought a variance from BCC 1252.15(g) to allow the construction of a pool and pool house on the western end of the front yard of their residential

property. Bexley City Code Section 1252.12(g) prohibits accessory structures such as pools, pool houses and associated equipment to be located in a front yard. A similar variance had been granted by Bexley City Council in 2007 by Amd. Ord. 29-07 authorizing the construction of a 20' x 50' reflection pool/swimming pool in the western half of the front yard as shown on a plan that was approved by Council. That variance expired when construction of the reflection pool/swimming pool did not commence within one year of its final approval. In 2007, Bexley City Council had jurisdiction over area variances. Jurisdiction for area variances is now vested in BZAP, and the variance for the proposed pool and pool house were properly presented to BZAP for consideration. Appellants' also modified their application to propose a 6 foot tall landscape wall in the front yard at the west end of the pool in addition to the variances for the front yard fence previously granted by Council and amended by BZAP. BCC 1264.02.

After the hearing on the merits of the variances was closed on April 28, 2022 and, following BZAP's deliberations on the merits, BZAP denied the proposed pool and pool house variances by a vote of 3 - 2 and issued a Decision and Record of Action on April 28, 2022.

The Appeal

Appellants appealed the April 28, 2022 decision of BZAP and assigned three errors to the BZAP proceedings and decision as follows: (1) BZAP erred by failing to follow its own rules and regulations; (2) the variance application meets all necessary requirements for a variance; and (3) the denial of the variance deprives the applicants of their rights under the Ohio and United States Constitution.

Council considers and determines this appeal of the Decision of the Bexley Board of Zoning and Planning on Application No. BZAP 21-47 pursuant to Bexley City Code Section 1226.19. Council had before it the entire record including the ARB recommendation, all filings in the case, the decision of BZAP, video transcript of the proceedings, Appellants' three (3) assigned errors and the brief of the Appellants. Council also heard oral argument of Appellants and Appellees.

Bexley City Code Sections 1226.19(h) and (i) provide the standards council must apply when considering this appeal as follows:

(h) If upon oral argument, consideration of the record and decision of the Board, and briefs filed pursuant to section (f), Council finds that Appellant has failed to prove, by clear and convincing evidence, the decision of the Board appealed from is not supported by the record or is unreasonable or unlawful, it shall affirm the same.

(i) Council shall give deference to the findings and conclusions of the Board being appealed from and shall not substitute its judgment for the judgment of the Board.

Decision of Council

I. FIRST ASSIGNMENT OF ERROR

In their first assignment of error, Appellants claim BZAP erred by failing to follow its own rules and regulations. The BZAP Chairperson is entitled to preside at all meetings and issue all notices, orders and generally provide for the administration of the Board's affairs. (BZAP Rule 1). This includes the ability to preside over all quasi-judicial hearings before the Board and make decisions on the conduct of the hearing, including the presentation of relevant testimony and arguments presented at the hearing. Contrary to Appellants' assertion, BZAP Rule 17 does not limit the ability of the Chair or BZAP to limit the testimony or legal argument when it hears a case in a quasi-judicial capacity. The Board does, in its discretion, have the authority to limit testimony when appropriate as it has in many cases before it.

In this case, Appellants do not allege or show how they were prejudiced by any limitation on time. The Appellants and every other witness or party was permitted to testify or speak regarding the application on the third day of the hearing. Additionally, the Appellants did not proffer or propose to proffer any new evidence or new arguments into the record that they had not already presented or that had not previously been heard by the Board.

Appellants were permitted the opportunity to present their application and evidence to support the variances they requested over the course of a hearing that continued over three meetings, at Appellants' request. Appellants had few limitations on their presentation until the final day of hearing when they were not granted unlimited time to re-present their case and every person was limited in his or her testimony. Furthermore, the Board did not limit the Applicants or their witnesses to one period of testimony during the hearing as the rules provide. (BZAP Rule 17(c)(4)). Rather, the Applicants were permitted throughout the hearing to submit amended plans and additional testimony. On the third day of hearing Applicants submitted amended plans and were permitted to give testimony on the latest modifications they were proposing. Appellants also filed with the Board written argument on the merits of the application and variance standards and the application of those standards to the evidence they had already presented in the case. Accordingly, Council overrules Appellants' First Assignment of Error.

II. SECOND ASSIGNMENT OF ERROR

In their second assignment of error, Appellants allege the variance application meets all necessary requirements for a variance and should have been granted by BZAP. The nature and standards for area variances are set forth in BCC 1226.11. The purpose of variances is to permit properties with existing extraordinary circumstances the flexibility to adapt to unusual conditions when the applicant meets the standards for an area variance. BZAP shall only approve area variances where the evidence demonstrates that the literal enforcement of the Bexley City Code will result in practical difficulties and granting the variances requested complies with the purpose and intent of the Code. BZAP was required to weigh and consider seven factors set forth in BCC 1226.11(c)(1)-(7) and determine whether, on balance, a preponderance of the evidence supported the granting of the variances. BZAP made no specific findings in its written decision when it denied the variances from BCC 1252.15(g) to allow a pool, pool house and wall in the front yard of the Property, though various members stated their concerns about the location of the pool, on the record, throughout the hearing.

Appellants have the burden to prove to Council that the decision of BZAP is not supported by the record or is unreasonable or unlawful by clear and convincing evidence. Council must give deference to the findings and conclusions of BZAP and shall not substitute its judgment for the Board.

The Property has existing extraordinary circumstances. It is a large (1.5 acres) mostly rectangular parcel at the northwest corner of Clifton Avenue (south) and N. Drexel Avenue (east) that is comprised of 3½± combined platted lots. The parcel is 300 feet wide and adjacent to Clifton Avenue on its south side and 200 feet deep and adjacent to N. Drexel Avenue on its east side. There is a significant large residence located on the Property. The Clifton Avenue (south) side of the property has previously been determined by City Council (and the City Code) to be the front yard. Thus, the south side of the residence is the 'front' of the house. The house sits back approximately 110 feet from its Clifton Avenue property line and has a commensurate front yard.

The driveway access to the house is from the east off N. Drexel Avenue and the driveway runs along the north (rear) property line, leaving limited space for any improvements in the rear yard as shown on the county auditor's map below and the amended exhibits to the application. (Sheet SD.1 and Sheet L 7.02).



Although Appellants argued the functional and architecturally designed 'front' of the house faces north and has been treated as the front yard even though it is not adjacent to any street and the south side of the house should be treated as the functional equivalent of a rear yard, this argument is not supported by the previous determinations of City Council, the Bexley City Code nor the previous regulation and use of the Property. The front of the principal building and front yard of the Property is south side of the residence and variances are required for the pool, pool house and its accompanying equipment that is located in the front yard as well as the proposed six foot landscape wall at the west end of the proposed pool that is also in front of the front building line of the residence. There was no evidence presented of any similarly situated property in the City of Bexley with a comparable large parcel of combined lots with a large designated front yard with significant development constraints in the rear yard of the property.

The front yard of the Appellees' adjacent property at 90 N. Columbia Avenue that combines 1½± lots has also been determined to be Clifton Avenue. Appellees requested and were granted a variance to allow a smaller pool in the east side yard of their property just west of the common lot line their property shares with 81 N. Drexel Avenue and its proposed pool.

The Applicants submitted detailed site plans for the proposed variances they requested for the location of the pool, pool house and accompanying structures as well as landscape plans. The Applicants included with their amended plans conditions and safeguards to buffer the proposed pool and pool house from Appellees' adjacent property to the west, at least in part in response to Appellees' concerns. These proposed conditions included retaining the existing landscaping, adding additional mature landscaping along the Property's west property line adjacent to Appellees' property and the south property line that significantly exceed the requirements of the Bexley Code, ground mounting all outdoor speakers to minimize the impact of sound and turn it away from Appellees' yard, relocating the pool equipment, and installing a 6 feet landscape wall at the west end of the pool area at the request of the Appellees. The Applicants would not agree to move the location of the pool and pool house an additional 10 feet farther east as Appellees and some members of BZAP requested due to the architectural compatibility of pool and pool house at its current location and the potential damage and required removal of existing mature trees in the front yard of the property if it were moved further east.

Appellees opposed the variances for the pool and its accompanying structures because they believed the pool was too large (16' x 50') and too close to their lot line asserting the pool water is only 18 feet from their property line and the 6 feet tall landscape wall (not the pool deck as Appellees argued) was only 6.55 feet from their property line. Appellees requested that the pool be moved 10 feet east. Appellee Thomas Hadley testified at the hearing and argued on appeal that he did not believe the hardscape proposed could accommodate the proposed landscaping. He also testified that while he was not opposed to a pool, he was opposed to the location of the pool, size and scope of the project and speculated too much noise would be generated from the use of pool so close to his property, particularly given the size of the pool and the parties he anticipated at the pool on the Property.

Appellants' proposed project, including the pool, pool house and all other proposed improvements meet the requirements of the Bexley City Code for size of the pool and permitted lot coverage, which are relative to the size of the lot. No variance was required for the size or scope of the project on the Property, only its location in the large front yard, which is uniquely situated in Bexley. Appellants presented evidence that many other corner lots in Bexley had pools, that Appellees were granted a variance for a side yard pool on a corner lot, and that the Property was similarly situated and should also be granted a variance. Appellants did not present any evidence that any of the properties they identified were granted a variance for their pool (except Appellees) or that any variance that may have been granted for these pools was to permit the location of a pool in a front yard. A pool in a front yard is not the same or significantly similar to having a pool on a corner lot. There was no evidence presented that any pool or other accessory structure was granted a variance to be located in a front yard, except the now expired variance that was granted for a similar pool at a similar location on this Property in 2007.

Upon considering the whole record, testimony and arguments in this case, the decision of the BZAP and the factors this Council is required to consider, Council finds that the literal enforcement of the Bexley City Code will result in practical difficulty and the granting of a variance complies with the purpose and intent of the Code. There was insufficient reliable and credible evidence to find that Appellants met their burden to prove the Property would not yield a reasonable return or have any beneficial use without a variance. BCC 1226.11(c)(1). Appellants' speculation that a pool is a highest and best use of the owners' property or an expected attribute of homes of similar size and quality is not reliable or credible and does not address how the home would not yield a reasonable return since there was no evidence that it has ever had a pool or how Appellants cannot continue the beneficial use of the home they purchased without a pool if they cannot build one. There was also no evidence that the variance would adversely affect the delivery of government services. BCC 1226.11(c)(4).

Appellant, Mr. Timm provided undisputed testimony that he had no knowledge of the zoning restriction when the property was purchased and that he believed the City considered the proposed pool location to be the Property's backyard. However, there was also no evidence that Mr. Timm or any of the owner's representatives contacted the City to determine if any variances were required for a pool before purchasing the property. Even if an owner had or should have had knowledge a variance was required at the time the property was purchased, that would not preclude a variance from being granted, and Council considers this a neutral factor. BCC 1226.11(c)(5).

The variances sought are not substantial and will not alter the essential character of the neighborhood or create a substantial detriment to adjoining properties, particularly given the size and development constraints of the property and significant conditions and safeguards the Applicants proposed to buffer the pool, pool house and related equipment from Appellees' adjacent property and Clifton Avenue. BCC 1226.11(c)(2) and (3). The entire project meets all the development standards of the City Code except for its location in the front yard. The size and scale of the pool and pool house are appropriate for the Property. The large residence and historic and existing development on the property make the large front yard the only reasonable location for a new pool and pool house to be constructed on the Property, which generally are permitted accessory structures under the Bexley City Code. The design of the house and existing large trees as well as the intersection of two streets at the southeast corner of the parcel make the proposed location of the pool on the west end of the property with dense landscape and hardscape buffering along the west and south property lines reasonable. ARB recommended approval of the architectural design and location of the pool house. The proposed pool and pool house are compatible with other large homes in the neighborhood, many of which have pools, including Appellees.

The Property owner's predicament cannot be obviated through some method other than a variance. BCC 1226.11(c)(6). The historic combination of multiple lots to configure a large parcel of land, construction of the existing residence within 25 feet of the rear lot line of the parcel with a large 110 feet front building line are existing conditions that effectively prohibit the construction of a pool and pool house in the rear yard of the property, or on the property at all unless a variance is granted.

The spirit and intent behind the zoning requirement will be observed and substantial justice done by granting the variances. BCC 1226.11(c)(7). The Property has existing extraordinary circumstances with the configuration of the lot and the setbacks of structures built close to the rear lot line. A variance grants Appellants the flexibility to adapt to these unusual conditions and improve their property with a pool and pool house at an appropriate location that will have significant buffering and conditions to mitigate the front yard location.

Upon due consideration of the decision of BZAP, the facts, entire record and the arguments in this case, Council finds that the Appellants have shown, by clear and convincing evidence, that the decision of BZAP to deny the variances is not supported by a preponderance of reliable, substantial and probative evidence on the whole the record. Accordingly, Council grants Appellants' Second Assignment of Error, reverses the decision of the Board of Zoning and Planning, and grants the property located at 81 N. Drexel Avenue variances from BCC 1252.15(a) and (g) to allow a pool and pool-house and landscape wall on the western end of the front yard of the Property with the following conditions: (1) the outdoor speakers are to be ground mounted; (2) the pool equipment is to be located to the east portion of the pool deck; (3) a 6 feet masonry landscape wall shall be constructed in the west front yard of the property as shown in Sheet SD.1 dated 4-28-22; and (4) that landscaping be provided in accordance with the final amended plans submitted to BZAP on 4-28-22 in Sheet L_7.02 subject to the approval of the Tree and Public Garden Commission; (5) that the project be constructed in accordance with all final plans, as amended before BZAP except as modified by the conditions of Council and any minor modifications that may be approved by staff; and (6) the Appellants comply with all other requirements of the Bexley City Code and permits for the project.

Council further approves a Certificate of Appropriateness for the pool and pool-house as recommended by the Architectural Review Board and the landscape wall proposed at BZAP, all located in the front yard and as modified and in accordance with all final plans before BZAP on April 28, 2022 and the conditions of Council, which shall be identified in the Certificate of Appropriateness, with landscaping subject to final review and approval by the Tree and Public Gardens Commission as recommended by ARB.

III. THIRD ASSIGNMENT OF ERROR

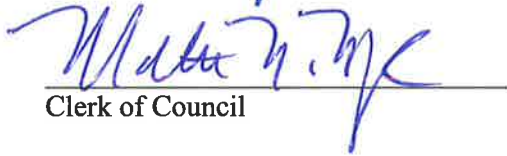
In their third assignment of error, Appellants claim the denial of the variance deprives the applicants of their rights under the Ohio and United States Constitution. Council finds that its decision on the Appellants' second assignment of error renders the third assignment of error moot, and further finds that it has no jurisdiction to determine the constitutional rights of the parties in an administrative-related appeal under the Bexley City Code.

This Decision was adopted by a vote of 7 yeas and 0 nays on September 13th, 2022, with two-thirds of the members of Council concurring.



Troy Markham
President of Council

Attest: Sept. 13, 2022


Clerk of Council

Approved as to Form:


Law Director