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**BOARD OF ADJUSTMENT**

**August 11, 2009**

**Minutes**

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Members Present: Wayne Bradshaw  
Brad Carter  
Scott Hay  
Dani Ramsey  
Rick Waldruff

Staff Present: Kelley Messer, Assistant City Attorney  
Ben Bryner, Planning Services Manager  
Zack Rainbow, Planner I  
Cody Marshall, P.E., City Engineer  
Terry Pribble, P.E.  
JoAnn Sczech, Executive Secretary, Recording

Others Present: Charlotte Stewart  
Billy Mitchell  
Martin & Antonia Castillo  
Norma Collazo

**Item One: Call the Meeting to Order:**

Mr. Bradshaw called the meeting to order at 8:40 AM and declared a quorum present.

**Item Two: Approval of the Minutes**

**Mr. Brad Carter moved to approve the minutes of the July 14, 2009, meeting. Mr. Hay seconded the motion and the motion carried by a vote of four (4) in favor (Bradshaw, Carter, Hay, and Waldruff) to none (0) opposed.**

Mr. Bradshaw read the opening statement for the Board of Adjustment.

**Item Three: Special Exception/Variance Requests:**

**a. BA-2009-18**

A public hearing to consider a request from Martin and Antonia Castillo, for a variance from the minimum finished floor elevation for a residential building in the 100-year flood plain on property zoned RS-6 (Residential Single Family). Legal description being Riverside Drive Addition, Block 4, Lot 8. Located at 3149 S. 4th Street.

Mr. Zack Rainbow presented the staff report for this case. The applicant applied for and received a building permit on October 8, 2008, for construction of a single family house. The lot is in the 100-year flood plain in Flood Zone A-11 with a base flood level of 1727. The City of Abilene requires that new structures in the flood plain be elevated one (1) foot above the base flood level. Therefore when the permit was issued the required minimum finished floor elevation of 1728 feet above mean sea level (msl) was written on the permit. During the final inspection by the City Building Inspector it was determined that the house was built at 1725.8 (msl). The Board of Adjustment has the authority to grant a variance up to 2 feet below the base flood elevation. In this case the base flood elevation is 1727 (msl) and the finished floor elevation of the house is 1725.8.

If a variance is approved, record of this variance will be recorded with the property records at the Taylor County Courthouse so that any potential purchaser of the property will be aware of the low finished floor elevation. If approved, this variance will be likely to significantly increase flood insurance premiums for this property.

**Section and Requirement of Regulations being varied:**

Section 23-264.8 regarding development in flood hazard areas.

**Conditions peculiar to the land:**

The entire lot lies within the 100-year Floodplain.

**Hardship from strict interpretation:**

Staff could find no hardship with this case. When the applicant applied for a building permit the minimum finished floor elevation of 1728 feet above mean sea level (msl) was written on the permit.

**Effects on the health, safety and welfare:**

Although the general public is not likely to be affected by this request, the proposed structure would be susceptible to property damage from significant rainfalls. Variances such as this can ultimately affect flood insurance rates across the community.

Property owners within 200 feet of the variance request were notified. Four (4) comment forms were returned in favor and one (1) in opposition.

Although staff determined a peculiarity to the land in this case, a non-financial hardship could not be determined; therefore, staff is recommending denial of the variance request.

Mr. Hay asked if the normal course of progress inspections were completed on this structure.

Mr. Rainbow stated that a foundation inspection (to check setbacks but not the elevation of the finished floor), a framing inspection and a final inspection were conducted. It was during the final inspection that the elevation issue was discovered.

Mr. Hay asked the reason why the City could catch a finished floor violation at a final inspection and not at a form and rebar inspection.

Mr. Rainbow stated that the elevation requirement is not a part of the foundation inspection.

Mr. Hay stated that he felt it should be, particularly when a permit has been issued that indicates a flood plain issue (elevation) on the permit. Mr. Hay stated that this would be an easy issue to rectify and that the City shares culpability in this issue.

Mr. Bradshaw opened the public hearing.

Ms. Antonia Castillo, proponent, was asked by Mr. Bradshaw if she was aware of this issue (flood zone elevation) prior to construction of the home.

Ms. Castillo stated that she knew the property was in a flood zone and informed the individual preparing the blueprint for the home. This individual told Ms. Castillo that he had raised the elevation of the house more than required. Also, the individual who completed the foundation stated that the foundation was nine (9) inches above the required height. Ms. Castillo stated that two (2) inspections had been conducted and no one mentioned that the foundation was not at the required elevation. When the final inspection was conducted, the Certificate of Elevation was requested and it was discovered at this time that the house was not at the required elevation. Ms. Castillo stated that Mr. Hernandez (foundation contractor) took measurements yesterday and her house is higher than the adjacent houses. Ms. Castillo stated that the new proposed FEMA maps indicate that her house is only 10 inches below the requirement.

Mr. Billy Mitchell stated that he added an addition to a house across and down the alley from the Castillo's home. Mr. Mitchell stated that he worked with the City to drop the elevation to 18 inches above gutter level. The adjacent houses are at ground level. Mr. Mitchell stated that in his opinion if these individuals were at fault, the City should have "red tagged" the project and stopped the construction immediately. Mr. Mitchell stated that he is in favor of granting this variance. Mr. Mitchell stated that he has lived in his home since 1962 and water has never flooded the homes nor been higher than just over the curb. Mr. Mitchell stated that, in his opinion, the 100 year floodplain was created by insurance companies. Mr. Mitchell stated that when he checked with the City at the time he was doing his project and was told that this area would be taken out of the floodplain. Mr. Mitchell stated that Mr. Pribble provided him with information regarding proposed FEMA map revisions (which may or may not eliminate this area as a floodplain area).

Ms. Charlotte Stewart stated that they purchased a home on South 4<sup>th</sup> Street and added a front porch, a bedroom and a bath. Ms. Stewart stated that she obtained the required permits from the City and upon inspection of the foundation, she was notified that the foundation must be raised 9 inches. Ms. Stewart stated they complied with the City's regulations. Ms. Stewart stated that inspections should begin at "ground zero" not at the completion of a project to determine that a project is not in compliance. Ms. Stewart stated that if these errors are discovered prior to completion of the project then it should be corrected. Otherwise, it should be permitted.

Mr. Mitchell provided pictures of the project he completed across the alley.

Ms. Norma Collazo, sister of Ms. Castillo, stated that her sister followed the rules, depending upon those knowledgeable in the area of building a house. Ms. Collazo stated that Ms. Castillo followed all instructions and completed all steps that she was told must be completed. Ms. Collazo stated that when the house was completed, Ms. Castillo was asked for a surveyor's certificate. Ms. Castillo did not have this certificated because no one had mentioned a surveyor to her. Upon final inspection it was determined that the structure did not meet all the requirements.

Mr. Martin Castillo, proponent, stated that they are not builders and did not understand why the problem was not discovered until the project was completed. Mr. Castillo stated that the foundation contractor contacted him prior to the foundation being poured to tell him that the foundation was four inches lower than permitted. The contractor told Mr. Castillo that he would be raising the foundation nine inches higher so that there would be no problem. Mr. Castillo stated that the house has been completed for 5 months and they are unable to move in until this situation is resolved.

Mr. Cody Marshall, City Engineer and Floodplain Administrator for the City of Abilene, stated the he would be speaking against the granting of this variance. Mr. Marshall stated that the Castillos are correct, they are not home builders, but it is their contractor's responsibility to build the slab according to the elevation established by the Building Inspection Division. Mr. Marshall stated that the question here is how was this elevation determined. Mr. Castillo has stated that that the slab was built nine (9) inches above the requirement. The foundation appears to be at the same level as other slabs in the neighborhood, which were all grandfathered according to FEMA maps. Mr. Marshall stated that if this variance is granted, precedence is being set and could affect everyone in the community.

Mr. Bradshaw asked Mr. Marshall what action the Castillos should take in this situation.

Mr. Marshall responded that this is the responsibility of the homebuilder. He did not know if the house could be elevated two to three feet and would hate to see a new house destroyed, but the home is in violation of FEMA rules. Mr. Marshall pointed out that the current Building Inspection practice does meet FEMA's minimum guidelines. Mr. Marshall stated that improvements can and should be made to the guidelines; however, current FEMA guidelines are being followed

Mr. Hay asked Mr. Marshall what changes could be made to the FEMA guidelines.

Mr. Marshall stated that a good time to make an intermediate determination of the elevation is when the foundation is framed and this problem could be avoided. Mr. Marshall stated that it is his understanding that this is the first problem encountered in past several years.

Mr. Hay asked Mr. Marshall who should be responsible for checking the forms.

Mr. Marshall responded that unfortunately this will be an added cost to the homeowner – additional cost to the City or a private surveyor.

Mr. Hay recommended that anytime a building permit is issued for a site in a flood zone (and the finished floor elevation is noted on the building permit) that the procedure be that the owner is required to provide the City with a certificate from a surveyor (at the owner's expense) stating the form elevation prior to the foundation being poured. To back this up, the Inspection staff would send a City surveyor to the site to check the elevation. Two individuals checking something this important is warranted. This simple procedure change would prevent situations such as the one being considered today.

Mr. Carter asked if the flood map presented at this meeting was the update map.

Mr. Marshall responded that this is the effective map. Staff is currently looking at preliminary revisions to the FEMA map and it is not known when this will go into effect. Mr. Marshall stated that he believed the flood elevation will be lowered in this area; however, this particular property would still be in violation.

Mr. Waldruff asked Mr. Marshall if he has seen a situation such as this affect the community in the past, i.e., FEMA has increased the insurance rates. Mr. Marshall deferred this question to Terry Pribble, P.E.

Mr. Terry Pribble, Flood Engineer for the City of Abilene, stated that basically FEMA is very stringent regarding variances. The uniqueness of this variance is that it is a variance "after the fact" in order to be

“legal.” Mr. Pribble stated that during his discussions with FEMA if a hardship variance is sought, the variance should be obtained prior to completion of the project. FEMA has sternly reprimanded the City in the past for an “after the fact” variance. Mr. Pribble stated that it is regrettable that this occurred. After it was determined that this situation existed, Mr. Pribble and Mr. Bob Lindley discussed the issue with the Building Inspection Division, and the Building Inspection Division indicated that a procedural change would be established (check the elevation certificate and ensure that the foundation is at the proper elevation) to catch such an error early in the building process.

Mr. Pribble stated that there are two divisions of FEMA; the enforcement portion (mitigation) and the insurance program. When City records are inspected by FEMA, variances are flagged and the City must explain why a variance was granted. Mr. Pribble explained that this particular variance may surface 10-15 years from now when the property changes hands and flood insurance is required.

Ms. Dani Ramsey asked if the City received a warning from FEMA prior to being removed from the program.

Mr. Marshall stated that if the City is abusing or misinterpreting the regulations, the City would be placed on suspension (which would increase everyone’s flood insurance rates). If the City continues to violate FEMA’s rules, the City would be suspended from the program itself until the violations have been corrected. The City would then have to reapply for inclusion in the program.

Ms. Ramsey asked if there are a number of variances already approved that would place the City in this category (suspension).

Mr. Marshall stated that, if approved, this would be the second variance granted. Mr. Marshall stated that one of his fears is if this variance is approved, other cases may follow (repetitive process). Mr. Marshall stated that we should not be in the business of approving slabs that are substantially below the base flood elevation. The Castillos would not be required to carry flood insurance if they do not have a mortgage; however, if the home is sold it becomes an encumbrance on the property if future buyers do want to carry a mortgage and want to obtain flood insurance.

Mr. Waldraff asked Mr. Marshall if he is recommending that the Board deny this variance because in his professional opinion as the Floodplain Administrator he feels this action will raise the FEMA rates for the City of Abilene or does he want the Board to decline the request because the Board is setting precedence.

Mr. Marshall stated that his primary concern is that approval is given for a structure that is below the base flood elevation and this decision would impact the entire citizenry and potentially increase everyone’s flood insurance rates.

Mr. Waldraff asked if one (1) exception would affect the insurance rate or the City’s rating with FEMA.

Mr. Marshall stated that he could not confidently answer this question.

Mr. Bradshaw closed the public hearing.

Mr. Bradshaw stated that he agrees with the floodplain regulations; however, this error should have been caught early on by one of the inspectors.

Mr. Carter stated that he agrees that granting the variance does set precedence, but, he also has great sympathy for the homeowners. Mr. Carter stated that he will bring this issue to the attention of the Land Development Code Committee in order to provide a solution for this in the future.

Mr. Waldraff stated that he did not believe that the granting of this variance would set precedence. Mr. Waldraff stated that during the years that he has been a member of this Board, variance to any flood requirements is taken very seriously.

Mr. Hay asked to refute a couple of issues:

- ⇒ In response to Mr. Marshall's question as to what is to stop the neighbor down the street from doing this – there are many ways to stop this and the City has the capability to stop others from doing this. The City has the capability to stop this issue from ever coming before this Board again by simple changes to the policies that would stop this situation at the point where it should have been stopped (when the forms were in place).
- ⇒ The Board will not permit this to continue to happen – this case is an exception – a very infrequent exception.
- ⇒ Challenge the City to ensure that this issue does not even come before this Board again.

Mr. Bryner stated that these regulations apply not only to new structures, but also to additions, accessory structures, etc. The finished floor elevation is required for any new construction and today's case relates to a new house. However, if others in this area make an addition to their structure, it will be necessary to meet the same requirements (1728 elevation). Mr. Bryner stated that staff may receive more variances because this was approved. Mr. Bryner stated that the proponents were provided with the required information prior to construction of their home. These requirements were not met and the City took the necessary action.

Ms. Ramsey asked if any type of notice or disclosure is provided to individuals regarding the strictness of the codes for those planning to build in a flood zone

Mr. Bryner stated that the following information was provided on the building permit:

- ⇒ The property is located in a floodplain
- ⇒ The minimum finished floor elevation is provided (in order for a final inspection or a Certificate of Occupancy to be approved)

Mr. Bryner stated that the person obtaining the building permit is responsible for these requirements.

**Mr. Scott Hay moved to approve BA-2009-18 under the following conditions:**

- ⇒ **There is a peculiarity to the land – located in the 100 year flood zone**
- ⇒ **Non Financial Hardship imposed on the Castillos if the variance is not granted in that there are inconsistent actions on the part of the City's Inspection staff that could have prevented this situation. It is obvious that there would be many more other hardships placed on them beyond financial if they were to have to tear this house down.**
- ⇒ **There will not be a City-wide affect on public health, safety and welfare because of the infrequency with which this Board grants variances.**

**Ms. Ramsey seconded the motion and the motion carried by a vote of five (5) in favor (Bradshaw, Carter, Hay, Ramsey and Waldraff) to none (0) opposed.**

**Item Four: Adjourn**

Mr. Hay moved to adjourn the meeting. Mr. Carter seconded the motion and the motion carried unanimously.

Mr. Bradshaw adjourned the meeting at approximately 9:47 a.m.

Approved: \_\_\_\_\_, Chairman