

Case Number: 17-BZA-011

Type of Appeal: Non-Conformance Hearing

Applicant: Randall Plikerd agent for Clover Hill Farm LTD

Staff Report: Completed by Jeff Palmer, Director of Planning & Zoning

Report Date: October 25, 2017

Hearing Date: November 14, 2017

Current Zoning of Property: Residence Zone “R-1”

Description of Property:

The address of the property is 2390 Old Route 122. The property is 4.537 acres in size. The property is identified by parcel id 09-22-376-010 and account number 0101001. The parcel is located in Section 22, Town 4 and Range 4 in Clearcreek Township. The property is zoned Residence Zone “R-1”. (See Exhibits: 1A-H, 2A-C, 3, 4, 5)

Nature of the Request:

Applicant states: “~ 100 square foot addition to rear of house to have a modern bathroom and breakfast room.” (See Exhibits: 6A-D)

Background on the Nature of the Request

Staff Comments:

The request is add an addition to the rear of a legal non-conforming structure. The structure is classified as legal non-conforming structure since it fails to meet the minimum 50’ front yard setback required by Section 5.754 (A) of the Clearcreek Township Zoning Resolution. (See Exhibit: 7)

Per the Warren County Auditor’s Website, the rear area of the house had an 8’x10’ livable space and an 8’x12’ enclosed porch (8’x 22’ total area). This area has been recently removed. The request is to expand this area to be an 11’x 26.5’area. The area is comprised of a bathroom, breakfast room. There is also a proposed 5’x5.5’ porch entrance. (See Exhibits: 1A-B, 6B-D, 23A-E)

Based upon the above findings, Sections 5.02, 5.754(A), 15.03, and 21.01 (D) of the Clearcreek Township Zoning Resolution force the applicant to request a non-conformance hearing.

SEC. 5.02 No building shall be erected, converted, enlarged, reconstructed or structurally altered, nor shall any building or land be used which does not comply with all of the regulations established by this Code for the zone in which the building or land is located.

SEC. 5.754 PRINCIPAL STRUCTURE, REQUIRED YARDS FOR LOTS EXCEPT PANHANDLE LOTS:

- A.** There shall be front yard having a depth of not less than fifty (50) feet, provided, however, no front yard depth shall be required to exceed the average of the minimum depths of the existing front yards on the lots adjacent on each side, if each of such lots are within the same block and within one hundred (100) feet of a building.

SEC. 15.03 No existing building or premises devoted to use not permitted by this Code in the zone in which such building or premises is located, except when required to do so by law or order, shall be enlarged, extended, reconstructed or structurally altered, unless the use thereof is changed to a use permitted in the zone in which such building or premises is located.

SEC. 21.01 (D) NON-CONFORMING USES:

The Board shall have the power to authorize the completion, restoration, reconstruction, in whole or in part, extension, or substitution of non-conforming uses; taking into consideration the nature of such uses in relationship to the character of adjacent uses, lot size, set back lines, traffic conditions, terrain and all other factors which, in the opinion of the Board, are pertinent to such completion, restoration, reconstruction, extension or substitution.

Background on non-conforming uses:

Before a review of the application can be performed it is helpful to outline non-conforming use provisions provided by our Clearcreek Zoning Resolution, the Ohio Revised Code, a book named “Ohio Planning and Zoning Law,” and a book named “Ohio Rural Zoning Handbook.”

The authors of “Ohio Planning and Zoning Law” state that non-conforming uses were lawfully in existence on the effective date of a new zoning ordinance or an amendment to it. Formally legal, they become illegal under the new ordinance or amendment. Four types of non-conforming uses exist: 1. Non-conforming buildings or structures, 2. Conforming uses of non-conforming buildings, 3. Non-conforming uses of conforming buildings, and 4. Non-conforming uses of land. Ohio courts refer to them collectively as non-conforming uses.¹

Section 519.19 of the Ohio Revised Code is labeled *Non-conforming Use of Buildings and Land Not Affected by Zoning*. It states that the lawful use of any dwelling, building, structure, or any land or premises as existing and lawful at the time of enactment of a zoning resolution or amendment thereto may be continued although such use does not conform with such resolution or amendment, but if any such non-conforming use is voluntarily discontinued for two years or more, any future use of said land shall be in conformity with sections 519.02 to 519.25 of the Revised Code.

In any township zoning resolution, the board of township trustees shall provide for the completion, restoration, reconstruction, extension, or substitution of non-conforming uses upon such reasonable terms as are set forth in the zoning resolution.² Section 21.01(D) of the Clearcreek Zoning Code addresses this requirement of ORC 519.19. The Clearcreek Township Board of Zoning Appeal’s role is to pass judgment on non-conforming uses and decide on a case-by-case basis how the use will impact the Township accordingly.

Authors of “Ohio Planning and Zoning Law” contend that whatever the ability of a landowner to change the use, governments clearly have the right to require that any changes to a non-conforming use come before them for consideration. In this sense local governments begin to handle non-conforming uses like conditional uses. No case has been found which holds that owners

¹ S. Meck & K. Pearlman, “Ohio Planning and Zoning Law”, 7.1, [CD-ROM] (West Group: 1998).

² Baldwin’s Ohio Revised Code Annotated, Township Zoning Inapplicability of Township Zoning, Sec. 519 [CD-ROM] (West Group: 1998).

of non-conforming uses have an uncontested right to change their property without being required to have it reviewed at a hearing.³

Legislation restricting the expansion or extension of non-conforming use is desirable from the standpoint of bringing land use into conformity with a community's planning goals. If non-conforming uses are to be allowed, it is reasonable to allow owners some flexibility to expand their uses to remain competitive.⁴

The Ohio Supreme Court has addressed the question of whether or not governments shall allow extensions of non-conforming uses in a case specifically involving a proposed extension of a non-conforming use. The Court held that restrictions were allowed in the extension of a non-conforming use "where it does not appear that such restrictions have no real or substantial relation to the public health, safety, morals, or general welfare."⁵

The author of "Ohio Rural Zoning Handbook," states that non-conforming structures are those buildings, fences, or billboards that do not conform to the yard or height provisions of the zoning resolution, and views these non-conforming uses as roadblocks to the generalized application of the zoning code. These structures must be allowed to remain as they are, but should not be altered or enlarged to increase the degree of non-conformity.⁶

Review of Application:

Expansion of non-conforming use hearing:

1. Nature of such use in relationship to the character of adjacent uses:

The applicant states: "Residential & horse farm (OSR) & (OSR-1)."

The following issues need to be considered:

- In this area, the properties are described to the center of the Road Right-of-Way. The Road Right-of-Way is in the form of an easement across the majority of the front of the properties. Zoning measures the front yard setback from the lot frontage not the front of the property. (See Exhibits: 7, 8)
- **SEC. 3.48** **Lot, Frontage**: The frontage of a lot is the length of the boundary of a lot that is coincident and in common with that of the road right-of-way of a public street, road or highway that it abuts.
- **SEC: 3.642** **Right-of-Way**: A strip of land acquired by easement, reservation, dedication, road establishment, prescription, eminent domain, fee simple or condemnation for public access and intended to be comprised of road pavement, drainage elements and possible presence of utilities.
- **SEC. 3.74** **Yard, Front**: The open space extending across the front of a lot between the lot frontage and the closest vertical support for the building, other than the projection of the usual eaves and overhangs not to exceed three (3) feet, steps, wheelchair ramp. For a lot that has frontage on more than one street, the required front yard shall be provided on all streets.
- Subject property Account number 0101001:
 - 2390 Old Route 122

³ S. Meck & K. Pearlman, "Ohio Planning and Zoning Law", 7.5, [CD-ROM] (West Group: 1998).

⁴ S. Meck & K. Pearlman, "Ohio Planning and Zoning Law", 7.7, [CD-ROM] (West Group: 1998).

⁵ State ex rel. City Ice & Fuel Co. v. Stegner, 120 Ohio St. 418 syl., 166 N.E. 226 (1929).

⁶ T. Jacobs, Ohio Rural Zoning Handbook, (Ohio Department of Development, 1991), 47.

- 4.537 acres in size.
- Construction year of house is 1910.
- Total Living Area is 1,480 sq. ft.
- Zoning classification is Residence Zone “R-1”.
- Legal non-conforming because single family dwelling is approximately 18’ from Old Route 122 instead of the required 50’ setback.
- (See Exhibits: Location Map, 1A-B, 7, 8)
- Three zoning classifications exist within 500 feet of the subject property: OSR-1, R-1 and B-1 (See Exhibit: Location Map). Exhibit 9 identifies properties by account number.
- Account number 0108758:
 - 2454 Old Route 122
 - 4.832 acres in size.
 - Construction year of house is 1968.
 - Total Living Area is 1,134 sq. ft.
 - Zoning classification is Residence Zone “R-1”.
 - Setback for single family dwelling is approximately 158’ from Old Route 122 Road Right-of-Way.
 - (See Exhibits: Location Map, 8, 9, 10A-B)
- Account number 0111961:
 - 2546 Old Route 122
 - 93.13 acres in size.
 - Construction year of house is 1915.
 - Total Living Area is 3,560 sq. ft.
 - Zoning classification is Open Space Rural Residence Zone “OSR-1”.
 - Setback for single family dwelling is approximately 1,646’ from Old Route 122 Road Right-of-Way.
 - (See Exhibits: Location Map, 8, 9, 11A-B)
- Account number 0106828:
 - Old Route 122
 - 47.82 acres in size.
 - No single family dwelling.
 - Zoning classification is Open Space Rural Residence Zone “OSR-1”.
 - (See Exhibits: Location Map, 8, 9, 12)
- Account number 0141210:
 - 2316 Old Route 122
 - 10.0398 acres in size.
 - Construction year of house is 1910.
 - Total Living Area is 1,536 sq. ft.
 - Zoning classification is Open Space Rural Residence Zone “OSR-1”.
 - Setback for single family dwelling is approximately 13’ from Old Route 122 Road Right-of-Way.
 - (See Exhibits: Location Map, 8, 9, 13A-B)

- Account number 0115533:
 - Old Route 122
 - 1.022 acres in size.
 - No single family dwelling.
 - Zoning classification is Residence Zone “R-1”.
 - (See Exhibits: Location Map, 8, 9, 14)
- Account number 0121797
 - Old Route 122
 - .107 acres in size.
 - No single family dwelling.
 - Zoning classification is Residence Zone “R-1”.
 - (See Exhibits: Location Map, 8, 9, 15)
- Account number 0115525:
 - 2366 Old Route 122
 - .98 acres in size.
 - Construction year of house is 1900.
 - Total Living Area is 2,920 sq. ft.
 - Zoning classification is Residence Zone “R-1”.
 - Setback for single family dwelling is approximately 0’ from Old Route 122 Road Right-of-Way.
 - (See Exhibits: Location Map, 8, 9, 16A-B)
- Account number 0110205:
 - Old Route 122
 - 4.9475 acres in size.
 - No single family dwelling.
 - Zoning classification is Open Space Rural Residence Zone “OSR-1”.
 - (See Exhibits: Location Map, 8, 9, 17)
- Account number 0104469:
 - 2315 Old Route 122
 - 2.008 acres in size.
 - Construction year of structure is 1.
 - Total Living Area is 7,550 sq. ft.
 - Zoning classification is Neighborhood Business Zone “B-1”.
 - Setback for single family dwelling is approximately -13’ from Old Route 122 Road Right-of-Way.
 - (See Exhibits: Location Map, 8, 9, 18A-B)
- Account number 013449:
 - 2275 Old Route 122
 - 2.6369 acres in size.
 - Construction year of house is 1990.
 - Total Living Area is 1,665 sq. ft.

- Zoning classification is Residence Zone “R-1”.
- Setback for single family dwelling is approximately 312’ from Old Route 122 Road Right-of-Way.
- (See Exhibits: Location Map, 8, 9, 19A-B)
- Account number 0113182:
 - 2395 Old Route 122
 - 91.415 acres in size.
 - Construction year of house is 1900.
 - Total Living Area is 1,660 sq. ft.
 - Zoning classification is Open Space Rural Residence Zone “OSR-1”.
 - Setback for single family dwelling is approximately 521’ from Old Route 122 Road Right-of-Way.
 - (See Exhibits: Location Map, 8, 9, 20A-B)
- Account number 0311642:
 - Old Route 122
 - 35.012 acres in size.
 - No single family dwelling.
 - Zoning classification is Open Space Rural Residence Zone “OSR-1”.
 - (See Exhibits: Location Map, 8, 9, 21)

2. Lot size:

The applicant states: “4.573 acres”

The following issues need to be considered:

- The subject parcel is 4.537 acres in size. (See Exhibits: 1A, 4A-C, 5)
- The minimum lot size for the Residence Zone “R-1’ is 1 acre.
- See Exhibit 9 which identifies properties within the 500’ Notice area:
 - Two (2) parcels are below one acre. (See Exhibits: 15, 16A)
 - Five (5) parcels are greater than one acre and less than five acres. (See Exhibits: 10A, 14, 17, 18A, 19A)
 - Five (5) parcels are above ten acres. (See Exhibits: 11A, 12, 13A, 20A, 21)

3. Set back lines:

The applicant states: “~18’0” (18.17’) to front edge of porch.” (See Exhibit: 7)

The following issues need to be considered:

- The front yard setback for the single family dwelling is approximately 18’ from the Old State Route 122 right-of-way. All other setbacks will meet the zoning requirements. (See Exhibit: 7)
- The setbacks for the existing single family dwelling (See Exhibit: 7):
 - Northern rear yard setback is approximately 239’
 - Eastern side yard setback is approximately 231’
 - Southern front yard side yard setback is approximately 18’

- Western side yard setback is approximately 62'
- The proposed setbacks for addition (See Exhibits: 6A-D, 7):
 - Northern rear yard setback is approximately 230.5'
 - Eastern side yard setback is approximately 231'
 - Southern front yard side yard setback is approximately 18'
 - Western side yard setback is approximately 62'
- Staff was unable to use Section 5.754 to average the front yards and issue a zoning permit.
 - The parcel to the west has a single family structure with a 0' front yard setback.
 - The parcel to the east has a single family structure with a 158' front yard setback.
 - $(0'+158')/2 = 79'$, this is greater than the zoning minimum.
 - If the zoning minimum is used instead of the exceeded dimension $(0'+50')/2 = 25'$. This is still greater than the existing setback for the subject property.
 - (See Exhibit: 8)
- Here are the regulations for Single Family Dwellings and Accessories for the R-1 Zone:

SEC. 5.754 PRINCIPAL STRUCTURE, REQUIRED YARDS FOR LOTS EXCEPT PANHANDLE LOTS:

 - A. There shall be front yard having a depth of not less than fifty (50) feet, provided, however, no front yard depth shall be required to exceed the average of the minimum depths of the existing front yards on the lots adjacent on each side, if each of such lots are within the same block and within one hundred (100) feet of a building.
 - B. For a lot that has frontage on more than one street, the required front yard shall be provided on all streets.
 - C. Side yard: There shall be a side yard of ten (10) feet minimum on each side, except for lots with more than one (1) front yard, in which case the minimum side yard shall be ten (10) feet on the side, if any, not fronting on a street.
 - D. Rear yard: There shall be a rear yard having a depth of not less than forty (40) feet, except for lots with three (3) front yards, in which case the minimum rear yard shall be ten (10) feet.
- Exhibit 9 identifies properties by account number:
 - The average single family dwelling front yard setback along the northern side of Old Route 122 is $(13'+0'+18'+158'+1,646')/5 = 367'$. (See Exhibit: 8)
 - If the zoning minimum is used instead of the exceeded dimensions $(13'+0'+18'+50'+50')/5 = 26.2'$.
 - The average single family dwelling front yard setback along the southern side of Old Route 122 is $(312'+-13'+521')/3 = 273'$. (See Exhibit: 8)
 - If the zoning minimum is used instead of the exceeded dimensions $(50'+-13'+50)/ = 29'$.

4. Traffic conditions:

The applicant states: "Good."

The following issues need to be considered:

- The single family dwelling use is the primary use for the property. The use will not change with the establishment the addition.

- Thus the 10.062 Average Trip Rate for a Weekday, 10.149 Average Trip Rate for a Saturday and 8.733 Average Trip Rate for a Sunday, as per the 6th Edition of the Trip Generation, from the Institute of Transportation Engineers, 1987 would still be applicable.

5. Terrain:

The applicant states: “Flat.”

The following issues need to be considered:

- The topography runs from 974’ to 966’ across the property. (See Exhibit: 22).

6. Other factors you consider important to the judgment of your case:

The following issues need to be considered:

- Demolition has already occurred to remove the 8’x22’ rear of the house.
- The foundation has been poured for the footprint of the addition.
- See Staff Photos Exhibits: 23A-E