

**Zoning Board of Appeals
July 26, 2023 Regular Meeting**

STAFF REPORT

Subject: ZBA 23-0019; 3380 Nixon Road

Summary:

BRE Nixon Road Associates, property owner, is requesting a 7.08-foot variance from Section 5.17.3(b) Dimensional Tables for Residential Zoning Districts to reduce the required rear yard setback from 34.85 feet to 27.77 feet. The subject property is proposed to be rezoned to R4D, Multiple-Family Dwelling District in conjunction with the Owl Creek Phase 2 Site Plan project.

Background:

The subject property is the Owl Creek residential development on the east side of Nixon Road north of Barclay Way and south of M14/US23. There are currently three multi-family apartment buildings on the site; this variance is requested for a proposed fourth building.

Description:

The required rear yard setback is 30 feet plus 1.5 inches for each foot of building height over 35 feet and each foot of building length over 50 feet. The new proposed apartment building is 59.75 feet tall and 64 feet wide. The resulting required rear yard setback is 34.84 feet. The proposed building extends 7.08 feet into the required rear yard setback.

This proposal is part of site plan SP23-0012 Owl Creek Phase 2 and REZ23-0006, which proposes to rezone the parcel from the current R4A to R4D with conditions. The condition is that the height limit is capped at 75' instead of R4D's 120-foot maximum height.

Standards for Approval- Variance

The Zoning Board of Appeals has all the power granted by State law and by Section 5.29.12, Application of the Variance Power from the Unified Development Code (UDC). The following criteria shall apply:

- (a) *That the practical difficulties are exceptional and peculiar to the property of the person requesting the variance and result from conditions which do not exist generally throughout the City.***

The applicant had the following response regarding practical difficulties involved with this application:

“The situation is unique to this property. In relation to this property, the City previously requested a voluntary donation of a portion of the property (which the applicant donated/granted). Subsequent to the donation, the City also amended

the Zoning Ordinance to remove the ability for landowners to average side yard set-backs, which was not anticipated at the time of the donation. As a direct result of the previous donation to the City, there is now a conflict with the side-yard set-back requirements which did not exist at the time of the donation.”

Staff comment: This application is for relief from a required rear yard setback, not a side yard. Further, the ability to flex side yard setbacks was not eliminated from code; it was moved from table 5.17.3 to text section 5.18.3.C and was also expanded to apply not only to multiple-family residential zoning districts, but also to mixed use, nonresidential and special purpose zoning districts.

- (b) That the practical difficulties will result from a failure to grant the variance, include substantially more than mere inconvenience, inability to attain a higher financial return, or both.**

Applicant response: “Failure to grant the variance would cause great inefficiencies in design and use of a limited resource beyond mere inconvenience or inability to attain a higher financial return. Without a variance, development of the property would result in lower efficiency in density. Without the variance, this balance of density can only be achieved by higher building height (which is permitted by right), but is not desired by applicant or the City. Further, a failure to grant the variance would essentially impose a penalty upon the property owner for previously donating a portion of the property to the City Parks department.”

- (c) That allowing the variance will result in substantial justice being done, considering the public benefits intended to be secured by this Chapter, the individual hardships that will be suffered by a failure of the Board to grant a variance, and the rights of others whose property would be affected by the allowance of the variance.**

Applicant response: “Granting the variance will allow the placement of the building over an existing, previously constructed parking surface located on the property promoting efficient use of existing infrastructure while minimizing the increase of impervious surfaces and avoiding an unintended penalty to the property owner for previously donating a portion of the property to the City. Granting the variance will enable expansion of the Owl Creek complex, creating a more vibrant residential community, without affecting the rights of any neighbors or other property owners.”

- (d) That the conditions and circumstances on which the variance request is based shall not be a self-imposed hardship or practical difficulty.**

Applicant response: “When the property owner donated the land to the city, side yard setback averaging was allowed. It was only after the donation that side yard setback averaging was removed as a consideration in the zoning ordinance. The removal of side yard setback averaging by the City has resulted in this potential non-conformance. Had the petitioner been made aware of the future change in the

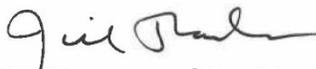
zoning ordinance, petitioner would have revised the limits of land donated to the city to preserve his right to construct the new building as currently proposed without needing any variance. Further, the design of the proposed improvements represent a desire to accommodate an appropriate density/height desired by the City, rather than achieving density with a taller structure by-right. The variance is not self-imposed practical difficulty, but represents a desire to conform with City development goals.

Staff comment: See (a) above.

- (e) A variance approved shall be the minimum variance that will make possible a reasonable use of the land or structure.**

Applicant response: "The building location is a result of locating the structure over the geometry of an existing, previously constructed surface parking lot. Working within the confines of existing infrastructure produces the non-conformance and subsequently requested variance. In addition, the requested variance encroaches upon the side yard setback by the minimum distance possible with no practical impact on anyone. The petitioner asks that this request be viewed in practical and equitable terms."

Respectfully submitted,


Jill Thatcher, City Planner