

**STEAMBOAT SPRINGS BOARD OF ADJUSTMENT MEETING MINUTES
MAY 21, 2009**

The regular meeting of the Steamboat Springs Board of Adjustment Public Hearing was called to order at approximately 6:10 p.m., on Thursday, May 21, 2009, in Citizens' Meeting Room, Centennial Hall, 124 10th Street, Steamboat Springs, Colorado.

Board members in attendance were Chairman James Moylan, Tom Effinger, Rick Pighini, David Levine and alternates Bryan Alkema and Warren Harner. Absent: Ryan Spaustat

Staff members present were City Planner Jason Peasley and Staff Assistant Tami Heskett.

APPROVAL OF MINUTES FOR APRIL 16, 2009

Changes:

Board Member Moylan –

On pg 1 strike absent: Warren Harner. Also change the start of the meeting from 6:02 pm to 6:01 pm. On pg 2 change the start of that agenda from 6:01 pm to 6:02 pm. On the 3rd pg put principle and principal both in quotes.

MOTION

A motion was made by Board Member Levine and seconded by Board Member Harner to approve the minutes of the April 16, 2009, meeting as amended.

VOTE

Vote: 5-0

Voting for approval: Moylan, Effinger, Levine, Alkema, and Harner

Abstaining due to absence: Pighini

Absent: Spaustat

PUBLIC COMMENTS

None.

Ski Trails Subdivision, Filing 4, Lot 2 #VAR-08-11 A Setback Variance to permit the addition of a roof to an existing structure that surrounds three snowmelt boilers located within two feet of the property line.

Discussion on this agenda item began at approximately 6:11 p.m.

STAFF PRESENTATION

Jason Peasley –

This is a complex application. What we're focusing on tonight is the roof structure that encroaches into the side setback. You will potentially hear other items that do not pertain to this application, but may have some impact on this application. There was some additional letters from Drew Johnroe that were handed out.

Dan Foote (City attorney) –

There were some problems with the grade of the driveway. There was a very large retaining structure that was in the setback. There's a boiler room that's also in the setback. At the time there was some concern regarding the driveway grade. I know that we didn't receive any objection from the property owner regarding the boiler structure. We did request from the applicant a site plan showing the location of the boiler room. The boiler is not a legally nonconforming structure. There was an opportunity to have it removed and we didn't take it so it's there for good as far as we're concerned. It doesn't mean that the property owner can't request that it be removed from his property. Tonight you ought to only focus on the roof structure alone. I don't think that it's a nonconforming structure, but is something else that's not mentioned within the code.

APPLICANT PRESENTATION

Michael Towers –

What had happened back when the house was being constructed we had received staff comments about the concerns about the boiler structure. They were removed from the list of staff's concerns. We were referred to Carl Dunham who had to make a ruling of whether or not the 3 sided wall and the boiler were actually structures. They ruled that the boiler was not a structure. They ruled that a 3 sided wall is a masonry fence and as long as it doesn't hold back more than 3 ft of dirt that it's not a structure. A shed is considered a structure according to the code. He passed around some pictures of the boiler. There's no difference between what the adjacent property owner's mechanical being well within the side setback and our boiler being in the setback. None of it was considered a structure at the time.

On pg 2 number 3 you will see that Dan was very thorough in what we went through. This was one of the things that the City did not require a variance for, which they waived administratively. There would have been no reason to not have included the boiler room as well along with the retaining wall. If you take this roof off then you have a masonry wall and it's 3 sided and covered up where the motors were. That's where we put all of our meters. This is no difference

BOA Meeting Minutes
5/21/09

than according to what your code says. Your code is silent on mechanical items and they aren't considered structures.

When you're settling a law suit you're really coming out of an item that both parties are arguing over. Back then it wasn't a nonconforming structure and it's not listed in the settlement agreement like the retaining wall is since it wasn't considered to be a structure at the time. They knew that wall was going to be there. The reason why we're here today is because we want to put a roof on it. Now that it has a roof on it it's considered a structure.

We were exceeding the noise ordinance according to Michael Roberts. We didn't realize that this was going to happen. I had asked Michael Roberts 'what do we need to do to resolve this issue'? Michael Roberts wants everything moved. That's not going to happen since it costs a lot of money to move it. That's the reason why it wasn't moved.

12-13 months into this we find out that we're 6" and 12" long in a triangle. The survey we had taken does not show the boiler over the property line. I was the one lowering it and moving it into its place. I have offered to move the boiler, but 19 months later nothing has been resolved. We're trying to work to resolve this, but we haven't been able to get an answer from Michael Roberts.

Having not been able to get an answer and one of the things that Michael Roberts did mention was that from his porch the boiler was hideous to look at. We could have put mufflers in to help solve the audio problem, but it still wouldn't have solved the visual problem. I had a roof put on the 3 sided structure. My liability at that time with not coming to you with whether I did the right thing or not, but we were certainly looking at that I didn't want to get a letter from Michael Roberts saying that my contract expired and you have to do something about it. We took quick action to get it done.

This is under 120 sq.ft. and so a building permit is not required for this structure. Now that this building has a roof on it now it's considered a structure and that's why we're here today. We've eliminated the noise problem and the site problem. The roof is a free standing structure and is not part of this boiler in any way. The boiler itself is completely separate from the roof itself. We may have messed up a little bit by not getting a survey taken to make sure that it's on my property and not Michael Robert's property. He's ignored my letters in order to resolve this issue. These were legally placed at the time since they were not considered a structure at the time. This wasn't a structure until the roof was added.

BOARD QUESTIONS

Questions for Staff

Board Member Harner –

Was there a variance granted for the original structure since it was placed within the setback?

Dan Foote –

BOA Meeting Minutes
5/21/09

No variance was granted.

Board Member Harner –

Isn't the variance purview of this board although it was before I got here that granting the ability to put something inside the setback isn't that under the purview of this board?

Dan Foote –

Correct.

Board Member Harner –

So the City never brought any of this information to this board for approval or disapproval?

Dan Foote –

No and it's not up to the City or staff to bring a variance to the board, that's the property owner's responsibility.

Board Member Harner –

The property owner failed to request a variance for this particular structure?

Dan Foote –

Correct.

Board Member Effinger –

We have a copy of the stipulations and I looked at that and that's a copy. I looked in there and I couldn't find anything in there that showed where the structure was located?

Dan Foote –

That was an indication that the boiler room was not a high priority in this litigation.

Board Member Effinger –

Without it in there then it is truly illegal.

Dan Foote –

It is illegal, but we issued a certificate of occupancy for the property knowing that the location of the boiler structure and so that foregoes any action from us.

Board Member Effinger –

Is there a clause in that occupancy permit that says, but the boiler is ok? Is there anything that mentions in writing or anything at all that this is ok?

Dan Foote –

There are some memorandum's from Planning staff, but none of these were pertaining to this issue since it wasn't very important at the time.

Board Member Effinger –

BOA Meeting Minutes
5/21/09

Do you think that it would have been smarter for us to do a variance for the whole thing first and then the roof?

Board Member Harner –
Is that not the correct process?

Dan Foote –
No and even if this were taken before the Judicial Court they may have still not made the property owner move the structure.

Board Member Effinger –
That's what I was looking for. When I was reading the packet I was thinking that there was going to be a District Court decision that says that the boiler can stay right where it is and we don't care where it is. If it's over the line then it can stay there. That puts it in a different light. It puts it as a legal nonconforming structure that the court said was ok. That's good once the court says it's ok. The court hasn't said that and now we're giving a variance for a roof that's floating in space since the underneath part is illegal.

Dan Foote –
I agree that it is an awkward situation.

Board Member Effinger –
I wish that they had just said that the boiler was ok, because then I would have no problems with this. Now this is getting kind of weird. Maybe we should grant a variance for the structure first and then the roof.

Board Member Moylan –
That's not before us. The application is for the roof.

Board Member Levine –
If there was no building around this then would the boiler itself be considered a structure just because of how big it is and that it's a box that's big and huge?

Jason Peasley –
Technically yes. The Building Department doesn't consider it a structure. You don't need a building permit to put it on your property.

Board Member Alkema –
Has he exhausted all of his other means of a variance or can he apply for an administrative variance if it's less than 10%?

Jason Peasley –
No, he doesn't have that option. It's too great within the setback.

Board Member Alkema –

BOA Meeting Minutes
5/21/09

Can we make any decision as a Board in what looks to me to be more of a property line dispute than a variance to a structure? Isn't that what's at the root of this?

Dan Foote –

If the applicant were requesting a variance for the actual boiler pad that the structure sits on then I suppose you could make a decision on that, but you would probably have to deny it. The roof itself is not encroaching onto the property owner's property. That wouldn't change the property owner's decision to take Judicial action and whether the City would take enforcement action or not.

Board Member Alkema –

You're separating out that the roof is not a part of this structure. Since it's not a part of the structure then it's not on the adjacent property owner's property.

Dan Foote –

That's something that you might hear from Drew Johnroe is that's a ridiculous position that the City ought to not have taken. You might be right.

Board Member Pighini –

Is the only purpose for the roof for the noise and the visual impact or are we trying to protect the boiler too?

Dan Foote –

You'll have to ask the applicant.

Board Member Harner –

The roof is in place so it has been constructed without a variance or a building permit.

Dan Foote –

Correct.

Jason Peasley –

On pg 5 staff is recommending approval of this variance in that it meets all of the applicant's criteria for approval.

Board Member Alkema –

Does that recommendation still stand after all of these articles that we just received tonight?

Jason Peasley –

Yes.

Questions of Applicant

Board Member Alkema –

I'm a little bit confused. Are you arguing that it's not on the adjacent property, but that it's on the easement that you do have a right to?

BOA Meeting Minutes
5/21/09

Michael Towers –

We haven't gotten what we paid for and I still haven't gotten an easement that I have rights to.

Board Member Alkema –

I think that the Board has to focus only on what's before us as a variance.

Michael Towers –

That's what you see is just the stone area.

Board Member Alkema –

We've had 2 surveys is that correct?

Michael Towers –

Both surveys agree that the roof is 2 feet from the property line.

Jason Peasley –

He pointed out the roof from the supplemental material that was handed out in the survey done by Landmark.

Board Member Levine –

Is anyone taking the position that the roof is less aesthetic?

Michael Towers –

At some point Michael Roberts was very frustrated with me. I would have no problem with removing the roof. My neighbor did say that they liked the roof. It is more aesthetically appealing and solves the noise issue. What's the best thing going forward?

Board Member Effinger –

On the 3 sided structure, how tall from the dirt to that first ledge?

Michael Towers –

It stands a little bit over 4 feet.

Board Member Effinger –

And it wasn't a structure?

Michael Towers –

No, it's a masonry fence.

Board Member Effinger –

You did get an easement 20' wide on each side of the property line?

Michael Towers –

20' along the entire property line.

BOA Meeting Minutes
5/21/09

Board Member Effinger –
Is it this property line that had the easement on it?

Michael Towers –
Yes.

Board Member Effinger –
Even though you didn't put any soil nails along this property line?

Michael Towers –
We did. Those soil nails stuck into his property and that's what we got the easement for.

Board Member Effinger –
Specifically for the soil nails?

Michael Towers –
Correct.

Board Member Effinger –
It actually says soil nails, it doesn't say nonexclusive easement or anything like that? It just says for soil nails?

Michael Towers –
It does mention a list of things, but it didn't list the boiler at the time. He just wants the boiler and motors removed.

PUBLIC COMMENTS

Michael Roberts –
I'm representing the property adjacent to Michael Towers. I object to the variance being requested tonight. I think that the issues and legalities are quite simple. I would maintain that the roof can't be removed from the existing structure. It needs to be reviewed as a single structure. There was some additional material that was handed out at the beginning of the meeting and that included a letter from Landmark Consultants indicates that the metal enclosure of the boiler are encroaching onto my property. My main objection tonight is that the City doesn't have the authority to authorize the building or improvement to a structure on another person's property. Because of the encroachment this is not a legal use. The addition of the roof increases the nonconformity.

Board Member Pighini –
What we're looking at here is just whether the roof is going to be a foot away from your property. All that we can say is whether the roof is there or not. Would you be happier for us to take that roof off? What it's going to come down here for us is 2 things. The roof is staying or it's coming off. That's all that we can judge.

Michael Roberts –
Yes, I would like to see the roof come off.

BOA Meeting Minutes
5/21/09

Board Member Harner –
I find this counter intuitive.

Michael Roberts –
I feel that the roof and structure are not separate entities.

Board Member Pighini –
When we make a ruling those 2 structures will be separate entities. All that our ruling will do is to take the roof off. The walls will be there until you and Michael Towers fight in a court somewhere else. Until that time that roof will be off and you will be looking at and listening to that thing until you can figure out which court and where in the world you're going to get rid of those walls. That's the way that it's going to be. We're going to be coming down to 2 things either the roof is staying on or coming off. That's all that we're going to be able to do. The rest is going to be up to you and what you can do somewhere else. Until that time that roof is going to be on or off. I want you to understand that's what you're arguing for.

Michael Roberts –
I do understand.

Board Member Harner –
You're position seems kind of intuitive to me. Could you explain to me why you want to look at ugly boilers and why you want the noise?

Michael Roberts –
It's my feeling that there are other solutions than leaving the roof there. I don't believe that the boiler belongs there.

Board Member Harner –
Those discussions are out of the purview of this discussion.

Board Member Levine –
Are there any other problems besides noise and visual? Do you have any problems with the gases or anything like that?

Michael Roberts –
We've expressed concerns to the City about the safety issues. There's never been any kind of an inspection done.

Board Member Levine –
You're not getting a steam cloud that covers the enclosure are you?

Michael Roberts –
I haven't been living there, but I haven't gotten any complaints about steam.

Board Member Harner –

BOA Meeting Minutes
5/21/09

What are the safety issues?

Michael Roberts –

Ventilation, gas leakage in an enclosed space. It hasn't received any mechanical engineering approval.

Board Member Moylan –

Other than the letters going back and forth is there any litigation pending between you and Michael Towers?

Drew Johnroe (attorney for Michael Roberts)–

Those considerations relate to the fact that this is an addition to a structure that's incorporated into a structure, which becomes subject to a structure. The roof is not the structure. It becomes incorporated into the entire building. It is encroaching onto Habitat's property and needs to be removed. To approve an addition to an illegal structure for this Board to do is inappropriate. There's no question that not only does the foundation intrude on Habitat's property, but the mechanical aspects on the back side also intrude on Habitat's property. To authorize someone to put a roof on a house that's on my property is contrary to anything of Planning or analysis in law or otherwise.

There is no dispute that it is on our property. That survey that was performed by Landmark was consulted with Skidge Moons before it was submitted to make sure that they were on board with this. When the survey was submitted as part of the application it was intentionally omitted that the structure itself was on our property. When the original improvement location was provided to the City as a stipulation that had this boiler located on Michael Tower's property rather than Habitat's. How can there be a stop when there's a misrepresentation to the City back when that stipulation was made? They just put the boiler on the application rather than the structure. This is a structural alteration on a structure that's in nonconformity. The survey that I included in this packet was done, because I hadn't seen the stipulations about why it was omitted and there's no doubt that this is on our property. This is worse than a nonconforming structure. It's an illegal structure. The easement that was agreed upon by both parties has nothing to do with this boiler. Not until we had the survey and the stipulation to the City did the City even realize that this was being built on someone else's property. Would you really think that the City would say that it's ok for you to build something on somebody else's property? Was the adjacent property owner ever even given a notice about this structure being built?

Board Member Moylan –

These are good arguments, but they should be made down the road in court and not here.

Drew Johnroe –

I disagree. I believe that the BOA would be acting beyond it's authority in approving a roof on a structure on our property.

BOA Meeting Minutes
5/21/09

Board Member Moylan –
We haven't approved anything yet.

Drew Johnroe –
He passed around some pictures. It's an application for a variance for a roof on this 3 sided structure. To separate the roof from the structure can't be done.

Board Member Moylan –
We have received a 3 page document from Drew Johnroe titled 'Application Form Full of Variance 08-11'. This is a document for surrounding property owner for an application received January 25, 2009. Surrounding property owner notification public hearing dated Thursday April 2, 2009.

Drew Johnroe –
Approving a structure on somebody else's property is a bigger intrusion than just making a modification on a nonconforming use. We can't approve an addition to a nonconforming use, but we can do it to an illegal use. With respect to the issue of the building permit, I've talked to Carl Dunham and a building permit is required. A building permit is and will be required. According to him in order to get permission Michael Towers has not done that.

Board Member Moylan –
We don't pass upon the actions of Carl Dunham or the Routt County Planning Department.

Board Member Pighini –
The code is 120 sq.ft. Let's stick with the roof since that's what we're here for and care about.

Drew Johnroe –
I disagree that it's the roof.

Board Member Pighini –
In this form it's the roof.

Drew Johnroe –
With respect to the criteria for 1 legal use, it's not legal use to put an addition on an illegal use. The hardship has been created by the survey and intentionally doesn't show where the entire structure is. With the respect to the injury to the adjoining property owner, the problem with having someone else's structure on your property when you're trying to sell it. The contract fell through in February of this year and to think that this created a problem due to the noise. I would submit that the roof does not stand alone and is part of a structure. You would create a precedent to say that every component of a house is separate. It doesn't make any sense.

Board Member Effinger –

BOA Meeting Minutes
5/21/09

Do you think that by approving this variance for the roof, do you think that helps to justify or make a building more substantial and hard to move?

Drew Johnroe –

It's not a variance for a roof. The application says that it's an addition to an existing structure. Our problems with it are not only does it trespass, but it's dangerous.

Board Member Effinger –

The roof does?

Drew Johnroe –

It's integrative as part of a structure.

Board Member Effinger –

Let's say that we approve this variance. Do you think that would make it harder for you to argue that that building needs to move?

Drew Johnroe –

I don't know if it has any effect at all.

Board Member Effinger –

The roof would be hanging there if you had the building removed?

Drew Johnroe –

I don't know how there's a roof variance. The variance is for structure and that's how I read this application.

Board Member Effinger –

Do you think that when the building moves then the roof is going with it? What problem I'm having with this is that nobody has decided where the building is going to go yet. I have a hard time with a variance of just a roof. What I needed we don't have. I can't justify the building should be there. I don't see how that wasn't a structure originally.

Drew Johnroe –

I don't either. I don't think that the City had the right to tell someone even if it was on their property and not ours to not give notice to an adjoining land owner. When we bought this land it's not in our title, because the property owner previous to us didn't know that it was on his property. To move it from our perspective is regardless if this approved or not. When we sell the property to have a boiler on our property is just not feasible.

Board Member Effinger –

I think that I understand what's going on. The City told us that they basically are out of it because they stipulated that the building is going to stay.

Drew Johnroe –

BOA Meeting Minutes
5/21/09

They're not going to be out of it.

Board Member Effinger –

Even though they don't say anything about the building. The only thing you guys have with the City involved is that roof.

Drew Johnroe –

I disagree. There's an indemnification agreement within that stipulation that when and if we do something about this that the City will be a party and that Michael Towers will be indemnifying the City for attorney fees and costs as a result of the improper location. I don't think that the City was thinking about this boiler at the time.

Board Member Effinger –

The City never mentions the boiler.

Drew Johnroe –

The City did an agreement that wasn't in good reason.

Board Member Effinger –

It was in the setback and they knew that it was in the setback. They didn't realize that it was over the line.

Drew Johnroe –

I think that it was represented to them that it wasn't over the line. It's on our property and I don't think that it makes much sense to put the roof on since it is illegal.

Board Member Harner –

Are you aware of the content of the easement that Michael Towers has paid for?

Dan Foote –

Until tonight I wasn't aware of the easement.

Drew Johnroe –

There's no right for Michael Towers to have his structure on our property.

Board Member Levine –

From this picture can you show me where we went from plus 2' to minus 6.5"?

Drew Johnroe –

I don't know where the plus 2' came from. There may have been a mistake. The mechanical intrudes on our property.

Board Member Effinger –

There's a letter from Skidge Moon explaining exactly what he did.

Jason Peasley –

BOA Meeting Minutes
5/21/09

If you would refer to the supplemental material handed out the 2 give or take feet is this hashed area, which is the roof. You can see the grey metal that is part of the boiler is the part that encroaches.

Drew Johnroe –

Looking at the picture on the overhead, you can see the backside of the structure and the metal from the boiler is encroaching on our property.

Board Member Harner –

That's the exhaust system of the boiler?

Michael Roberts –

It's part of the metal and not exclusively the exhaust.

Drew Johnroe –

I understand that an increase in nonconformity in your criteria, but an increase in the illegality has an even larger impact.

Board Member Moylan –

Whether we grant or deny this variance request how does it advance the ball? If it doesn't advance the ball one way or another you will still have this issue between Michael Towers and Michael Roberts about the part of the structure and the mechanicals that are on Michael Robert's property. Unless you come to some sort of an agreement that someone writes a check and you do another survey the land and include that on Michael Tower's property. What we do here is not going to effect that.

Drew Johnroe –

In the long term as I see the progression on the part of Habitat it does. We're going to have to move on this. We took noise meters out there with our purchaser and we're getting these noise measurements that are outrageous. What we think will happen is that if they have to mitigate that situation then a building permit may be necessary and they may make them come within the process of getting variances so that we can be heard. It has been denied from my perspective. If you approve it then it's just part of what's going on. It makes things a little bit more immediate.

Board Member Moylan –

If we disapprove it then it's in the same situation that it's in right now.

Drew Johnroe –

No, because if you disapprove it then he's going to have to do something and will have to shut that boiler down until he comes into compliance. He will get a stop order, which has been avoided by making this application. We were complaining to the City about the noise. I would appreciate if you denied this since it doesn't help us progress any faster.

Michael Roberts –

BOA Meeting Minutes
5/21/09

The reason why this has become complicated is because the placement of the original structure was done without addressing or bringing it to the BOA.

Michael Towers –

I would like to alter my application to change the words that say ‘structure’ to ‘3 sided masonry fence’. If we were here to discuss one thing such as lets remove the boiler and he has repeated over and over that he is not separating the boiler from the structure. You all have recognized and the survey recognizes that the roof is not part of this property. I did not mean when I said that the roof structure was not supported by the walls I meant that it was not supported by the boiler itself. The boiler itself is not integrated into the walls or the roof. If we remove the boiler we still have the same thing, which is a 3 sided structure. Michael Roberts has mentioned that there is a noise problem. It existed before he closed on his property. The issues as far as safety is concerned there are no safety issues. This is not a concealed combustible place. It’s an open air structure. I think that at this point in time what we’re going to end up doing is that we’ll go back to looking at Landmark’s survey where it shows that we’re 6 inches over his line that we shorten the exhaust pipes and move it a little bit closer to the road and now it’s off his property.

Board Member Pighini –
Why hasn’t that been done?

Michael Towers –
To do it is a couple of thousand dollars.

Board Member Pighini –
Why not do that before you come here, because then you’re not on his property?
Then we’re just talking about a structure.

Michael Towers –
We haven’t heard an answer from him and to go along with that plan and have him still not satisfied. It doesn’t make any sense until he tells us what he wants. Why was this not considered a structure before? If we were to take the 3 walls and straighten them out and have them block the view of the boiler then it’s nothing more than a masonry fence. All of the gas meters and everything inside the fence was inspected. Jason Peasley asked me to provide another survey that only showed the hashed marks where the roof is and not where the boiler is since that’s not what this application is about. It was meant to show what are we dealing with and to not include the items that we aren’t dealing with. As far as the building permit was concerned someone had mentioned that 120 feet was the exception. The structure itself calculates out to be 6.5’. We’re below the threshold of 120’. The indemnification is for just the driveway. If there is any litigation then the City is going to be bearing their own costs from a legal perspective. Why was the boiler not included on Skidge Moon’s survey? We were under a stop order. This boiler does not sit on his property it cantilevers over his property.

BOA Meeting Minutes
5/21/09

Board Member Pighini –

Is the fact that when that roof is off are we above the noise level? Is that the issue?

Jason Peasley –

Correct.

Board Member Alkema –

Is the boiler at any point tied into the driveway that was litigation? Was it required because of the grades of the driveway was that why the boiler was required? You can't just take the boiler and let it go away and snow plow.

Jason Peasley –

Because of the grades it is required to have some kind of snow melt for the driveway.

FINAL APPLICANT COMMENTS

BOARD DELIBERATION

Board Member Pighini –

I think that this whole application is premature. I don't think that we have any right to deal with any of this until they come to the issue about the boiler. If I build a garage and I get a setback for my garage and I park my car in the garage yet the end of my car sits in my neighbor's property then that's a problem. I believe that we're prematurely here. I think that these people need to go to court and they need to figure it out whether they're moving the boiler in or whether they're taking the building down. We're premature here until that issue is resolved. I don't think we have the right to make a decision. The structure itself houses the boiler. Like I said, if that were a garage and I pulled in my car and the car is in the neighbor's yard then that's an issue. Even if the tires aren't touching the ground there that's still an issue that needs to be resolved.

Board Member Alkema –

I concur with Board Member Pighini's comments. I'm surprised that the City thinks that we can resolve this issue. They haven't been able to so for us to only look at the roof I think that we've had these discussion and we talked about the roof and how it affects everything. Now we're into a property line and whether this is a structure or not. The fact that a variance for a roof and would we grant this variance if some of these other mitigating circumstances weren't here. If a roof was put in without a building permit and after the fact variance and that's what where we're getting away from the fact. I don't think that this is a decision for the Board. If we have to render then we have to just look at the roof and are we going to grant a variance on if this thing has permission after the fact built. That's what's before us. I really don't think that we should go forward on this, but if we have to grant it after the fact then I say that we should deny this.

Board Member Harner –

BOA Meeting Minutes
5/21/09

I would like to thank Dan Foote for researching this and finding some guidance for us. Unfortunately we have none. I secondly I see this as a catastrophic failure of the process. There should have been a variance request for the boiler itself with the endorsement from City Council based upon the litigation that was going on prior to this. If this were located properly then this would have not been much more than an open and close issue. I don't know off the top of my head what the deviated noise standards are for the noise, which I think is the key issue here. It might also be the exhaust fumes. We have the situation of this being in place before the current owner with the knowledge that it was there before purchase. I think it's an entirely confusing issue, but it is a complete failure of process. I think that we have no business deciding this tonight.

Board Member Effinger –

We've learned over the years that the way to look at an after the fact variance is to look at it as if it weren't there before. By looking at it that way we get a chance to look at it the way we should be looking at it. What happened was that he built a fence and then he put a roof on it. If he would have come in and asked for a variance for this fence with a roof on it in that spot ahead of time before building it then I don't think that we could have possibly approved that, because it's not a minimum relief and there's a lot of other issues. There are plenty of other places that I know of where they could put that within the setbacks. We should look at it as though it weren't built yet. I think that if we grant a variance with a roof then we'll be granting a variance for the entire structure. I don't care about the boiler and I think that the boiler can be moved. I'm not able to grant a variance for that structure inside the setbacks when there's plenty of places to put it if it were done right. This is a case a lot like other cases where you piece meal something together then you get what you want. If you propose the whole thing then you wouldn't get what you wanted. That's what's been done. If they would have mentioned that structure and the boiler in the court documents and said that it was ok to be there then I might have a different opinion. They did not mention it. Nobody has made any kind of deals. I think that we should look at it as if it weren't already built and if it's proposed just like that inside the setbacks then we shouldn't be approving something that's inside the setbacks.

Board Member Levine –

I think that this is unfortunate that this is going to go back to a 3 sided fence. With the what we have now it makes for a really nice picture. I would like the City to come up with proposals like this. The boiler really should be outside and not be inside. It's much better to have them outside. From what I've heard tonight this thing needs to come back to a 3 walled structure.

Board Member Moylan –

What one of my problems is, is that I see this as an improvement to a very bad situation. I'm very concerned about the fact that we exalt form over substance. I think in the final analysis that what we do as a Board we are required to make a decision on this. I don't think that the decision can be to not decide it. I think that Board Member Effinger's comment is well taken. We have been faced with these decisions in the past and we do look at them as if we were looking at them for the

first time as if they weren't already there. Under those circumstances if you applied the criteria that was set forth within the ordinance then I don't believe that they meet even 1 or 2 of the ones that have amenity on in order for the variance to be granted.

ANALYSIS OF APPROVAL CRITERIA

Criteria for Approval	Staff Finding
1) <i>Legal Use.</i> The property is in full compliance with all requirements of the zone district.	Consistent. Accessory structures are permitted by right in the RN-1 Zone District.
2) <i>Equal Enjoyment.</i> The variance will not constitute a grant of special privilege.	Consistent. The variance will not grant a special privilege given that the boiler and surrounding structure were legally placed per the District Court settlement.
3) <i>Hardship.</i> Strict enforcement of the provisions of the CDC would result in unnecessary hardship	Consistent. Due to the need to mitigate the noise impacts of the boiler and come into compliance with the City Noise Ordinance, a structure is needed to shield the boiler exhaust. Any structure to mitigate the noise will require a setback variance.
4) <i>Hardship not Self-imposed.</i> Special circumstances of the subject property are not the result of the actions of the applicant.	Consistent. The hardship imposed by the need to mitigate the boiler noise by the addition of a roof structure is a hardship that has been imposed by the fixed location of the boilers and surrounding structure per the District Court settlement.
5) <i>Injury to Adjoining Property Mitigated.</i> The variance will not permanently injure or adversely impact adjacent property; or the applicant has accurately assessed the impacts of the proposed variance and has agreed to mitigate those impacts.	Consistent. The proposed roof over the boilers is intended to mitigate the visual and noise impacts of the boiler to adjoining properties.
6) <i>Minimum Relief.</i> The request is the least possible.	Consistent. The proposed variance is the minimum necessary to mitigate the visual and noise impacts of the boiler. The roof structure has the same footprint as the surrounding stone structure and is less than 2 feet in height over the existing, legal stone structure.
7) <i>No Increase in Nonconformity.</i> The variance does not expand the scope of any nonconforming use.	N/A
8) <i>Special Circumstances.</i> The variance is necessary because of special circumstances of the subject property.	Consistent. The proposed variance is necessary due to the particular circumstance of the placement of this boiler per the District Court settlement and the need to mitigate the

	visual and noise impacts of the boiler.
9) <i>Consistent with CDC, Policies and Plans.</i> The variance is consistent with this CDC.	Consistent. The variance is consistent with the purpose and intent of the Community Development Code and adopted land use policies and plans.
10) <i>Previous Variance.</i>	N/A

RECOMMENDED MOTION

- Based upon the above analysis, **staff recommends approval** of this variance application for a 1.89 foot accessory structure side setback to construct a roof over the existing boiler and surrounding structure for Ski Trails Subdivision, Filing 4, Lot 2.

MOTION

Board Member Effinger moved to deny VAR-08-11 based on criteria 4, 6 and 9. Board Member Alkema seconded the motion.

DISCUSSION

Board Member Moylan –
 What about criteria 1?

Board Member Effinger –
 I think that if it wasn't there and he was proposing it then it wouldn't be an illegal use.

Board Member Levine –
 I think that it's really sad that this is going to go from camouflage to real ugliness. The legal arguments have been made and I probably wouldn't approve this as a shed next to that property line. It does look a lot better with that roof on.

Board Member Pighini –
 This would give them the opportunity to figure out what needs to happen, because it needs to be something else. What's going on there right now isn't working.

Board Member Harner –
 I think that this is an improvement to this property. I think that it's an improvement visually and sound wise. I was on the Mountain this afternoon to take a look at the property. I think that this Board and the City would be better served if we asked the applicant to withdraw the application at this point in time rather than deny the application. I know that we have a motion on the floor right now, but I think that it's inappropriate.

Board Member Pighini –
 I think that it's inappropriate and I think that it needs to be resolved before it comes again. I think that there are issues that need to be resolved before it comes back again. We could go forward and deny it, but there's issues that can be resolved.

BOA Meeting Minutes
5/21/09

Board Member Effinger –

The reason why I made the motion was because I believe that we need to stand by the code now with what they've done and then let them go back with a denial. This puts them right back where they were and they can solve the problems. They can come back for a true variance request for the real variance. I think that they came in here with the wrong variance. Then they can come back with a true variance request with everyone on board.

Board Member Pighini –

I still think that the whole thing is improper because like you said let's pretend that the building isn't there and then they ask for it. We're not asking them to take down the 3 walls and roof. We're asking them to take off the roof.

Board Member Effinger –

All that we're saying is that we're denying the variance for the roof. We're not telling them to take off the roof. This means to go back and work it out. If we give them the variance for the roof then they get the variance for the 3 walls as well. I think that it gives them the opportunity to go back and work on it.

Board Member Levine –

Can't we say that the roof has to be removed in a year or two?

Board Member Moylan –

We can't put conditions on it.

Board Member Pighini –

I think that we should let them work on it. I think that makes the most sense.

Board Member Harner –

That's why I made that suggestion.

VOTE

Vote: 5-0

Voting for approval of motion to deny: Effinger, Levine, Pighini, Moylan, and Alkema

Abstain: Harner (5 members vote with 5 member board)

Absent: Spaustat

Discussion on this agenda item ended at approximately 7:54 pm.

DIRECTOR'S REPORT

Jason Peasley –

We'll have to come back to you with a resolution of denial for approval. At the next BOA meeting we'll have an agenda item for you to vote on.

Board Member Moylan –

Usually isn't that mentioned within the motion?

Jason Peasley –

According to the code I think that we're supposed to adopt a resolution of denial.

ADJOURNMENT

Board Member Effinger moved to adjourn the meeting at approximately 7:58 pm. Board Member Alkema seconded the motion.

VOTE

Vote: 6-0

Voting for approval to adjourn: Effinger, Levine, Pighini, Moylan, Alkema and Harner

Absent: Spaustat