



## STAFF REPORT

March 12, 2009

To: Board of Zoning Appeals  
Fr: Diane Wicklund, AICP, Principal Planner  
Re: Application No. NW-BZA-2900 (LE)

### APPLICATION INFORMATION

**Applicant & Property Owners:** Mark and Rebecca Gillett

**Requested Action:** Variance from the 40 ft. maximum building height requirement

**Purpose:** To allow the construction of a portion of the house to be 45 ft. tall with a 2 ft. tall ornamental railing on top.

**Legal Description:** Part of the NW quarter of Section 22, Township 13, Range 22.

**Site Address/Location:** 11909 Homestead Lane

**Existing Land Use and Zoning:** Residential; RUR, Rural

**Existing Improvements:** Single family house under construction and two accessory buildings

**Site Size:** 72 acres

**Proposal:** This is a request to allow a portion of the house to be 45 feet tall with a 2 ft. ornamental railing on top in the RUR zoning district where the Regulations allow a maximum height of 40 ft.

The applicant is currently constructing a single family home on site at the 40 ft. maximum height. The applicant applied for a building permit showing a 44 ft. tall home and the Planning Department denied the building permit because it did not comply with the maximum 40 ft. height requirement. The applicant then revised his buildings plans and submitted plans showing a 40 ft. tall home, which was approved.

The applicant is seeking a variance in order to construct a portion of the house (penthouse) at 45 feet tall with a 2 ft. ornamental railing on top. Currently, a portion of the house is constructed with a flat roof. The applicant wishes instead to reconfigure the flat roof with a pitched roof that will increase the height to 45 feet tall. The portion of the roof that is overheight would represent about 5% of the roof/house area. The applicants have stated in their narrative that past zoning regulations do not appear to have addressed the issue of a Romanesque Victorian style home with a raised roof section. Staff believes that the 40 ft. height limitation was adopted for several reasons, however, the primary concern was that in some circumstances, firefighting equipment may not be able to reach over 40 ft. in height.

The subject property is 72 acres and has two accessory buildings. The site is accessed from Homestead Lane, a two-lane paved road. A long driveway accesses the house and accessory buildings.

The house is setback from the street about 1,200 ft. *Please refer to the applicant's narrative.*



*Aerial Photo of Subject Property*

## **BACKGROUND INFORMATION**

**Zoning History:** The property was zoned RUR, Rural, as part of the county-wide rezoning which occurred in 1994.

**Comprehensive Plan:**

This site is within the Rural Policy Area of the *Rural Comprehensive Plan*. This policy area allows for low density residential use on minimum 10 acre lot sizes and agricultural uses. At 72 acres, the use and size of this property is consistent with the policies of this Plan.

**General Character of the Area:**

The surrounding area can be characterized as large lots (10 acres or more) with homes and vacant and/or agricultural uses. RUR, Rural zoning surrounds the subject property on all sides. The subject property and the property directly to the south have very dense tree cover.

**Infrastructure:**

A. *Existing Water:* The site is located within Rural Water District No. 6. There is an 8-inch water line along Homestead Lane.

B. *Existing Sewers:* The site is not in a sewer district. The property has a septic system which will serve the house that is currently under construction.

C. *Existing Transportation:* Homestead Lane provides access to the site. Homestead Lane is a paved, two-lane, county-maintained road and is adequate for the residential development of this lot.

D. *Existing Public Safety:* Police protection is provided by the Johnson County Sheriff's Department.

E. *Existing Fire Protection:* This area is served by Johnson County Fire District # 3. The nearest fire station is located near 127<sup>th</sup> and Gardner Road, approximately 2-½ miles to the southeast. ***See the attached letter from the Fire District.***

F. *Existing Storm Water Drainage:* Stormwater detention is not a requirement of this application.

*Summary:* Staff believes that adequate infrastructure exists for the development of this lot.

**STAFF ANALYSIS**

*In this Section, staff describes its analysis, including background information, special factors, etc. for the BZA to consider. The analysis is organized by the requirements set out in the Zoning and Subdivision Regulations. According to the Regulations, the BZA may recommend in specific cases a variance from the specific terms of the Zoning Regulations which will not be contrary to the public interest where, due to special conditions, a literal enforcement of the provisions of the Regulations will, in an individual case, result in unnecessary hardship for the applicant and provided that the spirit of the Regulations shall be observed, public safety and welfare secured, and substantial justice done. Per K.S.A. 19-2962, a request for a variance may be granted in such individualized cases, upon a finding that all of the following conditions/criteria have been met:*

1. *The variance requested arises from such condition which is unique and which is not ordinarily found in the same zoning classification, and is created by the Zoning Regulations and not created by an action or actions of the property owner or applicant.*
2. *The granting of the variance will not adversely affect the rights of adjacent property owners or residents.*
3. *The strict application of the provisions of the zoning regulations of which the variance is requested will constitute an unnecessary hardship upon the property owner represented by the application.*
4. *Granting the variance desired will not be opposed to the general spirit and intent of the zoning regulations.*
5. *The variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare.*

*The BZA shall not have the power to act upon variances regarding uses permitted within zoning districts.*

*The BZA shall be limited to granting variances on matters including, among others, building height, setbacks, lot size and lot dimensions, as provided by the Zoning Regulations.*

#### *Applicable Regulations*

The following regulation is applicable to this variance request:

Article 9. Rural Districts.

Section 2. Rural District

D. Height, Area, and Bulk Regulations:

1. Height Regulations:

a. Maximum height of residences: forty (40) feet

#### **CRITERIA**

*a. The variance requested arises from such condition which is unique and which is not ordinarily found in the same zoning classification, and is created by the zoning regulations and not created by an action or actions of the property owner or applicant.*

The requested variance is based on the desire of the applicant to reconfigure a portion of the house at 45 ft. tall with a 2 ft. ornamental railing on top, which is 7 feet higher than what the regulations allow. While this property is larger than most of the similar zoned adjacent parcels, this is not a uniquely qualifying feature in that the tract could easily accommodate a conforming house that would be in keeping with the character of the neighborhood. The existing homes nearby appear to have all met the 40 ft. height requirement. The proposed house is approximately 13,293 sq. ft. in size and has a Victorian architectural style. The applicant is currently constructing a single family home on site at the 40 ft. maximum height. In addition, the house was engineered and built to higher standards in order to safely support the proposed roof. Therefore, this variance request is caused by the action of the property owner by wanting to construct an overheight residence and is not created by the regulations.

***This criteria is not met.***

b. *The granting of the variance will not adversely affect the rights of adjacent property owners or residents.*

All of the properties surrounding the subject property are zoned RUR, Rural, and are vacant and/or agricultural and residential (on large lots) and have the same development rights in terms of use and standards. The subject home is setback from the front property line (street) approximately 1,200 feet. The two closest homes are about 1,000 to the west and south. These homes appear to be constructed at or below the 40 ft. height requirement. The subject property is 72 acres in size and has very dense tree cover. The subject house sits in the middle of the tract. In addition, the height variance is only being requested for a portion (about 5%) of the house/roof area with the remainder (95%) of this house constructed at or below 40 feet. As such, granting the variance would not adversely affect nearby property owners because little if any of the house will be visible due to the setback from the road and distance from the other homes in the area. ***This criteria is met.***



*Surrounding View of Subject Property*

c. *The strict application of the provisions of the zoning regulations of which the variance is requested will constitute an unnecessary hardship upon the property owner represented by the application.*

The owner is currently constructing the home, at a height of 40 feet, which complies with the zoning regulations. The hardship to the owners, if the variance is denied, is that they would not be able to reconfigure the roof and would have to complete the construction of the house with the flat roof. Because this is a voluntary request for a variance and there is no apparent unique condition to the property that creates a burden on the owner, staff does not believe there is a hardship to the applicant. The applicant will still get to build and live in the home, in accordance with the building plans that were approved. ***This criteria is not met.***

d. *The variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare.*

The 40-ft. height limit was adopted by Board of County Commission Resolution 036-05 on April 21, 2005, as the result of recommendations from the county planning and codes staff, the County Planning Commission, and representatives from each of the three Rural Fire Districts. The primary concern was that in some circumstances, firefighting equipment may not be able to reach over 40 ft. in height.

Attached is a letter from Johnson County Rural Fire District # 3 stating that they have spoken with the applicant about a fire plan for the house and that they approve of the requested variance as long as the living space under the reconfigured roof is not used as a sleeping area. The Building Code Official stated that this living space is identified on the construction plans as a loft area and, as such, would not be used as a permanent bedroom/sleeping area. Both the Fire District and the Building Code Official have no concerns with the requested height variance. In this case, the additional height of the residence will not adversely affect the public health, safety, morals, convenience, prosperity, or general welfare because of the following reasons: (1) the portion of the roof that is overheight is only about 5% of the roof/house area; (2) the subject property is not in an established neighborhood and, as such, will not be incompatible with nearby property; (3) the subject property is 72 acres in size; (4) the closest homes are about 1,000 ft. away from the subject house; and (5) the subject house sits about 1,200 ft. from the road. ***This criteria is met.***

e. *Granting the variance desired will not be opposed to the general spirit and intent of the zoning regulations.*

The regulations establish development standards that are uniformly applied to, among other things, protect property values and the public's safety. In established neighborhoods, the building height limitation is an important tool in minimizing any adverse impact of structures on the landscape and in ensuring the compatibility of new structures with the surrounding neighborhood. This request does not violate the spirit and intent of the regulations because it represents only a 12 % increase in height from that required by the Regulations, and the portion of the roof to extend beyond the height requirement is only about 5 % of the roof/house area. ***This criteria is met.***

#### *Summary*

This request does not meet all five criteria as established above. Therefore, staff can not support the variance.

**Public Works Department:** No comments or concerns stated for this application.

**Environmental Department:** No comments or concerns stated for this application.

**Rural Fire District # 3:** Letter attached.

**Building Codes:** No comments or concerns stated for this application.

### Decisions to be forwarded to the BOCC

*Any decision of the BZA, which is contrary to the existing Zoning Regulations, shall not be effective until approved by the BOCC.*

## **RECOMMENDATION**

Planning staff recommends **denial** of the requested variance to allow a portion of the house to be 45 feet tall with a 2 ft. tall ornamental railing on top, in the RUR zoning district where the regulations allow a maximum height of 40 feet.

### Written Decision

Article 3, Section 5(G) of the Johnson County Zoning and Subdivision Regulations provide in part that “The BZA shall render its decision in writing within ten (10) days of the conclusion of the hearing.” Therefore, if the BZA decides to deny the requested variance, the following motion, and finding and conclusions, may be adopted as the written decision.

### Proposed Motion

I move that the Board deny Application No. NW-BZA-2900 (LE), for the reasons set forth in the Proposed Findings and Conclusions set forth within the staff report.

## **Proposed Findings and Conclusions**

### I. Preface

In its review of the subject application, the BZA has summarized the written reasons that form the basis of our decision, which appear below. It was not intended, nor should it be considered, that the summarized reasons are exclusive in nature, as the entire record of the proceedings regarding the application remain, and is, ultimately the supporting rationale of our decision.

### II. Findings and Conclusions (Denial)

1. A. FACT

The owner is currently constructing the home, at a height of 40 feet, which complies with the zoning regulations.

B. CONCLUSION

The conditions requiring the variance were caused by the actions of the property owner and not created by the Zoning Regulations.

2. A. FACT

The applicant is currently constructing a house at 40 feet and they want to reconfigure the pitch of the roof which would be 45 feet tall with a 2-foot ornamental railing on top. The property is about 72 acres in size. There are no topographical or other unique conditions existing on the property.

B. CONCLUSION

The property is not unique for the zoning district in which it is located and no topographical or other condition appears to exist that justifies the variance. The owner is currently constructing the house at 40 feet tall, which complies with the zoning regulations.

3. A. FACT

This is a voluntary request for a variance for aesthetic purposes and the enforcement of the Regulations does not appear to create a burden on the owner.

B. CONCLUSION

The request appears to be one of desire and the strict application of the provisions of the zoning regulations will not constitute an unnecessary hardship upon the property owner as they are currently constructing the home at the 40 ft. maximum height limitation, and the applicant will still get to build and live in the same home which originally received building permit approval.

Alternate Findings and Conclusions

If the BZA decides to approve the variance request, rather than deny it, the BZA should be prepared to summarize, for inclusion in the minutes of the meetings, its reasons in support of approval, which will serve as its written decision on the application.

Should the Board of Zoning Appeals decide not to follow the staff recommendation, and instead recommend approval, then staff recommends the following stipulation as a condition of approval:

1. That the proposed addition (penthouse) be constructed in accordance with the drawing attached hereto as Exhibit A, and said addition shall not exceed 45 feet in height with a 2-foot ornamental railing on top. If approved, the height variance shall only permit the proposed addition to the penthouse area to exceed the height limitation.
2. For life safety purposes, the penthouse room shall not be used as a sleeping area.

### Stipulations of Approval

*In acting upon a variance, the BZA may recommend appropriate reasonable conditions and safeguards which relate to the actual implementation of the variance allowed and which may include, but not be limited to, planting screens, fencing, construction commencement and completion dates, lighting, road access restrictions, and parking requirements which are reasonably related to the variance upon a finding that they are necessary to fulfill the purpose and intent of the Zoning Regulations. Staff may offer stipulations for the BZA to consider.*

Attachments: Vicinity Map  
Applicant's Narrative, Site Plan, and Attachments  
Rural Fire District # 3 Letter  
Building Elevation