

# Agenda

## Beavercreek Township Board of Zoning Appeals Hearing

10/20/21  
7:30 p.m.  
2195 Dayton-Xenia Rd.  
Beavercreek, OH 45434

### Note taker:

T. King, Admin. Professional

### Agenda Topics

Roll Call

Case #853 – Variance Application  
(Lot Size/Lot Width)

Minutes

Adjourn

**- PUBLIC HEARING NOTICE -  
BEAVERCREEK TOWNSHIP  
BOARD OF ZONING APPEALS  
CASE #853**

The Beavercreek Township Board of Zoning Appeals (BZA) will hold a public hearing in the Community Room on the lower level of the Beavercreek Township Fire Station #61, located at 2195 Dayton - Xenia Rd., on Wednesday, October 20, 2021, scheduled to begin at 7:30 p.m.

The purpose of the hearing is so the BZA may review and act on a variance request (Case #853) made by Mark Andrew Peed. The nature of the request is to seek a variance from the requirement that no lot shall be created within an Agriculturally zoned district which is less than five (5) acres. The applicant is also seeking a variance from the requirement that the lot width of Agriculturally zoned lots shall not be less than two-hundred and fifty (250) feet. The applicant is seeking a variance from the requirements of Articles 16.05(1) and 16.05(2) of the Township Zoning Resolution.

The property is located at 1105 Ankeny Rd. in the unincorporated area of Beavercreek Township and is zoned R-PUD (Residential Planned Unit Development). The Greene County Parcel I.D. # is B03000200360004000.

This notice was processed for publication by Associate Zoning Administrator Max McConnell in accordance with state requirements. The BZA action is the final determination on the request, unless otherwise appealed to the Court of Common Pleas.

Anyone wishing to view the application may contact the Community Development & Risk Department at 937-306-0065, Monday through Friday, 8:00 a.m. to 4:30 p.m., to make arrangements.

## Staff Report: Board of Zoning Appeals Case #853

### Introduction

The Community Development and Risk Department received an application for a BZA variance from applicant Mark Peed. The applicant is seeking to create two non-conforming parcels out of a parcel which currently conforms to the Zoning Resolution. The parcel in question is located at 1105 Ankeney Road and is identified as Parcel #B03000200360004000. The Township Zoning Resolution, Article 16.05, contains minimum lot sizes and minimum lot widths for the parcels zoned A-1 Agricultural. The minimum lot size is 5 acres, and the minimum lot width is 250 feet. The lot split proposed by the applicant will require variances from both requirements.

### Context

Article 22.07 of the Township Zoning Resolution details the powers and duties of the Board of Zoning Appeals. Subsection 6a of that Article deals specifically with the granting of variances. In this section, it is stated clearly that “no variance of the strict application of this Zoning Resolution shall be granted by the Board of Zoning Appeals until and unless the Board finds...” and then proceeds to list 8 criteria which must be met for the Board to grant a variance request. Staff believes that this variance request does not meet each of the criteria listed in Article 22. Additionally, Staff believes that the creation of non-conforming parcels, especially those zoned A-1 Agricultural, will contribute to misunderstandings in the community about the requirements for obtaining zoning permits for buildings constructed on these parcels.

### *Criteria Not Met*

Two particular criteria listed in Article 22.07 are the focus of this Staff Report. First, criteria (ii) states that “The variance to be granted is the minimum variance possible and *other alternatives for resolving the conflict between the applicant’s plan and the requirements of the Zoning Resolution are impractical or infeasible.*” The applicant did provide a justification letter with the application, which provides responses to each of the eight criteria listed. The applicant’s response to criterion (ii) failed to address the ways in which alternative solutions are impractical or infeasible. In fact, Staff suggested to the applicant a solution which would allow for the proposed lot split **without** the need to create a non-conforming parcel. The applicant could simply re-zone the parcel to either R-1AA or ES-2.5 zoning districts and there would exist no need for a variance for lot size or lot width. The very existence of this solution means that criterion (ii) has not been met. As such, it is the duty of the Board of Zoning Appeals to refuse to grant this variance request pursuant to Article 22.07(6)(ii) of the Township Zoning Resolution. The second criterion not met is (vii) which states that “The granting of the variance is for a compelling reason and *not simply because the applicant’s plan conflicts with Zoning Resolution requirements when reasonable alternatives are available.*” Having determined that reasonable alternatives are available, Staff consulted the applicant’s justification for criterion (vii). The applicant claims that they will be able to “enjoy the same benefits as other nearby neighbors” but offers no examples of such benefits that would not be enjoyed should the applicant instead re-zone the parcels to a conforming zoning designation. Staff can only guess at the purported benefits but conclude that this likely refers to the perceived benefits of Agricultural zoning in Ohio townships. In the following section,

Staff will not only rebuff this idea and therefore prove that criterion (vii) is not met but also show why this perception is misguided. Additionally, Staff will explain how the creation of nonconforming lots such as those proposed by the applicant contribute to this misunderstanding, which contributes to difficulties for both citizens and Staff.

#### *Ohio Revised Code and Agricultural Activity*

In Ohio, townships operate under a “permissive” form of government. What this means is that townships can only exercise powers expressly granted to them by the Ohio Revised Code. This differs from municipalities, like the City of Beavercreek, which essentially have all powers not expressly prohibited by the Ohio Revised Code. It is important to recognize that the Township operates under strict legal guidelines in many areas. One such area is the regulation of land for Agricultural purposes. Ohio Revised Code 519.21 governs the powers given to Townships regarding where and for what reasons the Township can regulate use of land for such purposes. For the most part, townships are given little to no authority to do so. On smaller lots, townships may regulate some minor aspects such as building setbacks. Staff regularly encounters misunderstandings by Township residents relating to this inability to restrict agricultural uses. Many residents, mistakenly, believe that simply having an agricultural zoning designation eliminates the requirement for them to obtain local zoning permits. As confirmed in the Memo written by Township legal counsel Dawn Frick, the reality is that only parcels on which an agricultural use is present are exempt. If no agricultural use, as defined by the Ohio Revised Code, exists on the property then that property is subject to all local zoning requirements regardless of local zoning designation. In fact, parcels zoned other than A-1 which contain an agricultural use *are* exempted by R.C. 519.21 despite not having the associated local zoning designation. It is the *use*, not the *zoning*, which determines if local zoning regulations apply.

#### *Nonconforming Lots and Enforcement Challenges*

Staff communicates with several residents each year who did not obtain a required permit because they mistakenly believed they were exempt from those requirements. This frequently leads to frustration from the resident, who genuinely believe they are within their rights. Staff has also worked with residents who do engage in agricultural uses and informed them of their exemptions even if not zoned A-1 Agricultural. This often presents its own set of challenges, such as allowing for two primary residences on one parcel. However, it is important to apply the standards of R.C. 519.21 equitably throughout the Township. Staff discourages the creation of nonconforming lots of record, in part because of the confusion caused by having lots zoned agricultural on which the observed use is purely residential. While not all residents may agree, it is Staff’s position that obtaining permits is one of the many necessary measures taken by the Township to promote sustainable, equitable, and safe growth and development. The creation of nonconforming lots of record such as those requested by the applicant, in Staff’s view, serve only the purpose of confusing any future property owner. Staff wishes to avoid these challenging enforcement situations whenever possible in the future.

#### **Recommendation**

Staff *strongly* recommends against granting the proposed variance. The application does not meet the requirements for the granting of variances set forth in Article 22.07(6). The applicant can achieve the desired lot split by simply rezoning the parcel to an appropriate zoning designation, such as those suggested by Staff. The applicant will lose no existing benefits of being zoned agricultural IF both created

parcels engage in agricultural use. If no agricultural use is planned, then no benefits existed in the first place. Allowing the creation of nonconforming lots, *especially when reasonable and feasible alternatives exist*, creates unnecessary code enforcement challenges for Staff and frustrations for potential future owners. Please, support Staff's policy of discouraging nonconforming lots and send this matter to the Zoning Commission where it belongs.

**MEMORANDUM**  
**ATTORNEY CLIENT PRIVILEGED COMMUNICATIONS**

TO: Max McConnell  
CC: Alex Zaharieff  
FROM: Dawn M. Frick  
DATE: October 6, 2021  
RE: Variance Standards

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I was asked to provide you with additional information with respect to the standards for granting of a variance. In particular, if there were other alternatives available, does that preclude the granting of the variance.

The Ohio Supreme Court has delineated two standards depending on the type of variance at issue: (1) the “practical difficulties” standard for granting a variance that relates only to area requirements, and (2) the “unnecessary hardship” standard for granting a variance that relates to a use variance. *Burlington Coat Factory of Texas, Inc. v. Howland Twp. Bd. of Zoning Appeals*, 2019-Ohio-2173, ¶ 10. In adopting the lesser “practical difficulties” standard for area variances, the Supreme Court stated: “[w]hen the variance is one of area only, there is no change in the character of the zoned district and the neighborhood considerations are not as strong as in a use variance.” *Burlington Coat Factory of Texas, Inc. v. Howland Twp. Bd. of Zoning Appeals*, 2019-Ohio-2173, ¶ 11.

The factors to be considered and weighed in determining whether a property owner seeking an area variance has encountered practical difficulties in the use of his property include, *but are not limited to*: (1) whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance; (2) whether the variance is substantial; (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance; (4) whether the variance would adversely affect the delivery of governmental services (*e.g.*, water, sewer, garbage); (5) whether the property owner purchased the property with knowledge of the zoning restriction; (6) whether the property owner's predicament feasibly can be obviated through some method other than a variance; (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance. *Burlington Coat Factory of Texas, Inc. v. Howland Twp. Bd. of Zoning Appeals*, 2019-Ohio-2173, ¶ 13 citing *Duncan v. Village of Middlefield* (1986), 23 Ohio St.3d 83, 491 N.E.2d 692, at the syllabus (emphasis added); see also *Stickelman v. Harrison Twp. Bd. of Zoning Appeals*, 2002-Ohio-2785, ¶¶ 13-14, 148 Ohio App. 3d 190, 192–93, 772 N.E.2d 683, 685–86. The above factors are not exclusive factors to be considered and the *Duncan* court stressed that “no single factor controls in a determination of practical difficulties,” and that the factors should be “considered and weighed.” *Stickelman v. Harrison Twp. Bd. of Zoning Appeals*, 2002-Ohio-2785, ¶ 28, 148 Ohio App. 3d 190, 195–96, 772 N.E.2d 683, 688 citing *Duncan* at 86, 491 N.E.2d 692. Consequently, a variance may be denied even if some factors weigh in favor of a landowner or are inconclusive.

These *Duncan* factors address the first criteria set forth in Article 22 of the BTZR as to whether the applicant has encountered practical difficulties if the variance is not granted. Some of the other BTZR criteria are also generally encompassed in the *Duncan* factors. However, there are additional criteria under Article 22 of the BTZR, which the BZA must address. For example, in BTZR Article 22.07, Section 6(a), the BZA must also find that the variance is the minimum variance possible and other alternatives for resolving the conflict between the applicant's plan and the requirements of the Zoning Resolution are impractical or infeasible. As is set forth in 6(a)(vii), the BTZR requires the BZA to consider whether the granting of the variance is for a compelling reason and not simply because the applicant's plans conflict with the Zoning Resolution requirements when reasonable alternatives are available.

In the instance of the application for Mr. Peed, it is not complete and does not provide "justification of variance" which addresses the criteria in the BTZR or such that the BZA can address the *Duncan* factors or the criteria in the BTZR. For example, the BZA could not determine whether rezoning to another zoning classification could resolve the conflict, rather than granting a variance? Simply because a party wants to have property remain zoned agricultural, particularly if there is not an agricultural use on the property, is not a compelling reason. While many residents desire to have their property zoned agricultural because of a belief that a township can do little to regulate that property, in reality, the limitations contained in R.C. 519.21 are limitations as to agricultural "uses" or "buildings or structures incident to the use of any land for agricultural purposes. *See* R.C. 519.21(A), which provides:

Except as otherwise provided in divisions (B) and (D) of this section, sections 519.02 to 519.25 of the Revised Code confer no power on any township zoning commission, board of township trustees, or board of zoning appeals to prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures incident to the use for agricultural purposes of the land on which such buildings or structures are located, including buildings or structures that are used primarily for vinting and selling wine and that are located on land any part of which is used for viticulture, and no zoning certificate shall be required for any such building or structure.

If property is zoned agricultural, but is not used for an agricultural purpose, the applicable provisions of the BTZR still apply to the property.

Thus, with regard to the applicable test and criteria for granting an area (not use) variance, while no one *Duncan* factor is determinative, those factors only go to determining if there is a practical difficulty. The *Duncan* court held that the factors to be considered in granting an area variance "include but are not limited to" those set forth in that case. Thus, because the criteria set forth in Article 22.07(6)(a), specifically provide that "no application of this Zoning Resolution shall be granted by the Board of Zoning Appeals until and unless the Board finds" the criteria set forth in that section, it is appropriate for the BZA to consider the *Duncan* factors and the BTZR criteria in Article 22.07.

APPLICATION FOR VARIANCE  
BOARD OF ZONING APPEALS  
Beavercreek Township, Ohio

Application No. 853

Variations expire one (1) year after issuance, unless actual construction has taken place or is underway, except as provided elsewhere in the Zoning Resolution. Changes to approved plans and conditions may require further approval of the Board of Zoning Appeals. The Zoning Administrator must be notified prior to the implementation of any changes. Failure to do so could result in the revocation of the Variance.

Name of Applicant ANDREW MARK PEED

Mailing Address 1105 ANKENY RD. XENIA, OH 45385

Phone Number  Home 937-479-7959 Business CELL

Name of Owner of Subject Property (if not applicant) \_\_\_\_\_

Mailing Address \_\_\_\_\_

Phone Number Home \_\_\_\_\_ Business \_\_\_\_\_

Location Description: Subdivision Name \_\_\_\_\_

Book \_\_\_\_\_ Page \_\_\_\_\_ Parcel B03 0002 0036 006 4000

Other Designation \_\_\_\_\_ Lot No. \_\_\_\_\_

Nature of Variance (General description): I HAVE A 5.394 ACRE LOT THAT I WANT TO SPLIT INTO 2 LOTS. ONE WILL BE APPROX. 2 ACRES, AND THE OTHER WILL BE APPROX 3.5 ACRES.

The following must be provided:

1. Eleven (11) sets of plans drawn to scale must accompany this application. Plans must show dimensions and shape of the parcel, the size and locations of existing buildings, the locations and dimensions of proposed buildings or alterations, and any natural or topographic peculiarities of the parcel in question.
2. Justification of Variance: The applicant must address eight (8) specific criteria which the Board of Zoning Appeals has to consider when granting a variance. (See attached.) Please attach these comments on a separate sheet and submit with the application.
3. If applicant is not the owner of the subject property, an affidavit to act on behalf of the owner is required.

I CERTIFY THAT THE INFORMATION CONTAINED IN THIS APPLICATION AND ITS SUPPLEMENT IS TRUE AND CORRECT.

Andrew M Peed  
Applicant's Signature

9-28-2021  
Date

## ANDREW AND MARY PEED

1. IF STRICT CONFORMANCE TO THE REQUIREMENTS OF THE ZONING RESOLUTION WERE FOLLOWED, I WOULD NOT HAVE THE SAME BENEFITS OF NEARBY PROPERTIES WITH LESS THAN 5 ACRES AND LESS THAN MINIMUM REQUIRED ROAD FRONTAGE.
2. THIS IS THE MINIMAL VARIANCE TO ACHIEVE MY OBJECTIVE, WHICH IS TO CREATE 2 LOTS SIMILAR TO OTHER LOTS ON ANKENY RD.
3. GRANTING OF THE VARIANCE WILL CONFORM TO THE GENERAL USE OF PROPERTIES ON ANKENY RD. THERE ARE 2 PROPERTIES ACROSS FROM MY LOT THAT ARE 1 ACRE AND APPROX. 2.5 ACRES, BOTH ZONED A-1.
4. THERE ARE ONLY 2 ADJOINING PROPERTIES, ONE IS MY BROTHER'S, AND THE OTHER IS SCHOOL PROPERTY THAT IS ZONED COMMERCIAL.

ANDREW AND MARY PEED

5. THE GRANTING OF THE VARIANCE WILL NOT RESULT IN ANY CHANGE IN THE CHARACTER OF THE COMMUNITY.
6. GRANTING OF THE VARIANCE WILL NOT INFRINGE UPON THE RIGHTS AND QUIET ENJOYMENT OF THE ONLY ADJOINING PROPERTY OWNER, MY BROTHER, AND WILL NOT DIMINISH PROPERTY VALUES, ENDANGER THE PUBLIC SAFETY, OR PUBLIC NUISANCE.
7. MY COMPELLING REASON FOR THIS VARIANCE IS TO ALLOW MY NIECE TO BUILD A HOME NEXT DOOR TO HER PARENTS ON ONE PART OF THE LOT, AND MY WIFE AND I TO BUILD A HOME ON THE OTHER PART OF THE LOT, AND ENJOY THE SAME BENEFITS AS OTHER NEARBY NEIGHBORS.
8. THERE IS NO ECONOMIC GAIN ON MY PART BY GRANTING THIS VARIANCE.



**- PUBLIC HEARING NOTICE -  
BEAVERCREEK TOWNSHIP  
BOARD OF ZONING APPEALS  
CASE #853**

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10-9/2021

0000713142-01

MADDR1	MADDR3	OWN1	OWN2
1105 ANKENY RD	XENIA OH 45385	PEED ANDREW MARK	
1125 ANKENY RD	XENIA OH 45385	BURJA MELANIE J	& RADU C
1083 ANKENY RD	XENIA OH 45385	SMITH AARON J	& JENNY
1131 KATIE CIR	BEAVERCREEK OH 45301	DOWNEY DEBORAH ANN	
1051 ANKENY RD	XENIA OH 45385	BAHNS TIMOTHY K	& MARGIE J
1051 ANKENY RD	XENIA OH 45385	BAHNS TIMOTHY K	& MARGIE J
1167 ANKENY RD	XENIA OH 45385	PEARSON BRIAN J	& LAURA C
1110 ANKENY RD	XENIA OH 45385	SOWARD STEVEN K	
1070 ANKENY RD	XENIA OH 45385	MULLINS RACHAEL LYNN	
1110 ANKENY RD	XENIA OH 45385-9533	SOWARD STEVEN K	
651 DAYTON XENIA RD	XENIA OH 45385	GREENE COUNTY BOARD OF PARK	COMMISSIONERS
1122 ANKENY RD	XENIA OH 45385	TRAME JOSEPH A	& TERRI L TRUSTEES
1044 ANKENY RD	XENIA OH 45385	PEED DAVID JOHN	& LOIS ELAINE
1140 ANKENY RD	XENIA OH 45385	PIATKA JOHN	
1076 ANKENY RD	XENIA OH 45385	LINTZ MATTHEW D	& LAURA J



# BEAVERCREEK TOWNSHIP

COMMUNITY DEVELOPMENT &  
RISK DEPARTMENT  
[www.beavercreektownship.org](http://www.beavercreektownship.org)

851 Orchard Lane, Ste. B Beaver Creek, Ohio 45434-7220  
p. 937.306.0065 f. 937.426.8780

Receipt No. 253439

Zoning Permit:  
BZA Variance

## Receipt of Payment

Amount: \$300.00

Date: 10/05/2021

From: Andrew Mark Peed

For: BZA Variance Application

Re: 1105 Ankeny Rd., Xenia 45385 Parcel #B03000200360004000

Check# 6184

Cash

Total Due	\$300.00
Payment Received	\$300.00
Balance Due	\$0.00

### ROUTING

Zoning Dept.: \$300.00

Road Dept.: \$0.00

Received by: \_\_\_\_\_

Max B. McConnell