

STATE OF TEXAS
COUNTY OF HIDALGO
CITY OF MCALLEN

The McAllen Zoning Board of Adjustment and Appeals convened in a Regular Meeting on Wednesday, November 1, 2023 at 4:32 p.m. in the McAllen City Hall, Commission Chambers with the following present:

Present:	Jose Gutierrez	Chairperson
	Ann Tafel	Vice-Chairperson
	Hiram A. Gutierrez	Member
	Juan Mujica	Alternate
	Alex Lamela	Alternate
Absent:	Hugo Avila	Member
	Rogelio Rodriguez	Member
	Pablo Garcia	Alternate
Staff Present:	Issac Tawil	City Attorney
	Austin Stevenson	Assistant City Attorney III
	Benito Alonzo	Assistant City Attorney I
	Michelle Rivera	Assistant City Manager
	Edgar Garcia	Planning Director
	Norma Yado	Chief Building Official
	John Gutierrez	Supervisor Plans Examiner
	Rodrigo Sanchez	Senior Planner
	Omar Sotelo	Senior Planner
	Hilda Tovar	Planner II
	Samantha Trevino	Planner I
	Jessica Puga	Technician I
Carmen White	Administrative Assistant	

CALL TO ORDER –Chairperson Jose Gutierrez

1. MINUTES:

- a) Minutes for the meeting held on October 18, 2023.

The minutes for the meeting held on October 18, 2023 and were approved. The motion to approve the minutes were made by Vice-Chairperson Ann Tafel. Mr. Hiram Gutierrez seconded the motion, which carried unanimously with four members present and voting.

2. PUBLIC HEARINGS:

- a) Request of Ariel Olivares on behalf of Eduardo C. Longoria for a special exception to the City of McAllen Zoning Ordinance to allow an encroachment of 14 feet into the 20 feet front yard setback for an existing metal carport measuring 15 feet by 20 feet, at Lot 1, The Rocks Subdivision, Hidalgo County, Texas; 8218 North 23rd Lane. (ZBA2023-0093) (TABLED: 10/18/2023)

The applicant requested the item to be tabled until the next meeting.

Chairperson Jose Gutierrez asked for an Executive Session. City Attorney Issac Tawil

stated anytime the Board has a desire to consult with counsel over any subject matter on the agenda under 551.071 of the Texas Government Code, it would be appropriate to recess to an Executive Session. It was recommended take a motion to that affect at this time.

Mr. Hiram Gutierrez moved to recess for an Executive Session. Mr. Alex Lamela seconded the motion. The Board voted unanimously to recess for an Executive Session with five members present and voting.

The Board recessed at 4:33 p.m.

The Board reconvened at 4:48 p.m.

- b) Appeal of Sharybak I LLC, Appealing of the decision made by the Building Official of setback encroachment at Lot 1, Sharybak 1 Subdivision, Hidalgo County, Texas; 5001 Expressway 83. (ZBA2023-0084)

Mr. Garcia stated for the public, this was not a variance request it was an Appeal. There was a decision made and the applicant believed the decision was made in error.

Mr. Garcia stated the subject property was located between Expressway 83 and Colbath Road, approximately 300 ft. east of North Taylor Road; property was zoned C-3 (General Business) District. There was C-3 District to the north, east, and west of the property, and there was I-1 (Light Industrial) District to the south.

Planning and Zoning Commission preliminarily approved this plat on July 26, 2022. At this point, there was no setback drawn out note on the plat but it did have a proposed setback noted at 60 feet or greater for easement or approved site plan. There was also a note on the plat at that time stating all setbacks are subject to increase for easement or approved site plan.

For this approval, staff did issue comments to the project engineer-requesting wording be included in the front yard setback plat notes specifically stating in line with existing structure or whichever is greater applies due to the McAllen Code of Ordinances (MCO) Sec. 138-367 (a).

The final plat was approved at the Planning and Zoning Commission meeting of December 20, 2022. The Board approved the subdivision under consent with written staff comments requiring the removal of a 60 ft. setback line on the plat and requiring language referencing the City's Zoning Ordinance. On December 21, 2022, the City received a Mylar for review before recording. At this point, the setback line had been removed and the front yard setback note now read as follows: In accordance with zoning ordinance, or greater for easements or approved site plan, or in line with average setback, *whichever is greater applies* (emphasis added).

The initial site plan application was submitted September 16, 2022, and at that time, the setback was not delineated on the plan. Staff issued comments on the site plan on September 27, 2022 and noted the lack of a setback notation. After a few more rounds of reviews, the applicant submitted a site plan with a proposed 60-foot front yard setback on November 18, 2022. The fifth site plan submittal was the first one where the building was shown at 60 ft. Comments for that review were sent out December 12, 2022 wherein the

language on the plat regarding existing average setback was noted. This was the last site plan reviewed; the proposed 60 ft. setback was not approved at this time.

The initial building permit application for Sharybak I Subdivision was submitted on December 8, 2022 and was issued out on April 3, 2023. In that approved building permit, conditions were noted which needed to be complied with, including minimum setback requirements. For the front yard setback, the condition read as follows: Proposing: 60 ft. or in line with existing structure, or approved site plan, or greater for easements, whichever is greater applies. In that same section there was, a condition stating no structure would be permitted within any setbacks or easements.

On July 27, 2023, notice was posted on Sharybak I's jobsite noting an encroachment into setbacks. In addition, on August 9, 2023 an email was also sent by the Building Permit Department to the applicant letting them know of the encroachment as well. The Planning Department received a complete Zoning Board of Adjustment and Appeals application on August 17, 2023.

At this time, Mr. Garcia handed to each Board member a copy of the Section 138-367(a). Mr. Garcia stated Section 138-367(a) of the Code read when 50% or more of the frontage on the block was improved with buildings that had a front yard greater than the required front yard then no new building should project beyond the average front yard so established.

For the front yard setback, the plat states "In accordance with zoning ordinance, or greater for easements or approved site plan, or in line with average setback, whichever is greater applies."

The applicant was appealing the decision of the Building Official of setback encroachment of the plaza. The setback for this property was the average of the already existing buildings as required by MCO Sec. 138-367 (a). It was customary for a developer, engineer, or contractor to provide calculations for their proposed setback when the average setback clause had been triggered. As of the writing of this memo, there have been no official submittals by the applicant to determine the average setback.

Ginther Estates, the lot to the west, has a noted setback of 75 ft. or greater for easements.

Shary Gateway, the four lots to the east, has a noted setback of 75 ft. or greater for approved site plan or easements.

As such, the average setback before Sharybak I was recorded was at least 75 ft. Staff calculations, based off submitted building permits, but without the benefit of a survey, have calculated the average to be approximately 77.75 ft. If the construction on Sharybak I is accurate to the submitted building permit, there was a 17 ft. 9 in. encroachment into the average setback set by MCO Sec. 138-367 (a).

Staff fielded calls regarding the encroachment from a neighboring property owner concerned with sight obstruction of their existing buildings.

Staff was recommending disapproval of the request as the structure on Sharybak I was within the average setback and no calculations have been submitted by the applicant.

Chairperson Gutierrez asked staff when was the last time staff reached out to the applicant to come to an agreement concerning the measurements. Mr. Garcia stated it had not been discussed or reached out to them at least one month.

Vice-Chairperson Tafel asked for clarification on the original plat showed 60 foot on theirs, and was removed and then put back in. Mr. Garcia responded no, it was recorded without that 60 foot. What was done on the plat notes was 60 foot or in line with greater, or in line with the average, or greater for approved site plan or greater for easements whichever is greater applies.

Board member Mujica asked staff in his statement earlier that there was another property that perhaps could also be encroaching and was that constructed after the 50% was established.

Mr. Garcia stated by the building records that would have triggered the 50%, he responded no. It would have to comply with the plat, which was 75 feet.

Chairperson Gutierrez asked who was representing Sharybak I LLC. Mr. Rene Ruiz, attorney representing Sharybak I LLC, owner of the project. Phillip and Joe Bakke, principals of Sharybak I LLC, Raul Garcia and Angelica Neira, Civil Engineers from Halff & Associates and Mo Verdecanna with Alamo Architects stated his address is P.O. Box 831294, San Antonio, Texas 78283.

Mr. Ruiz stated that the Planning and Zoning Commission had the authority to approve any setbacks, even if it is contrary to that which was required by the Zoning Ordinance if it was shown on the plat. He stated their project was approved for a 60-foot front setback as the Planning and Zoning Commission had the authority to do. Mr. Ruiz stated the Zoning Board of Adjustment and Appeals had the authority to hear an appeal of an administrative official and authority to reverse the notices of violations of encroaching setbacks. The notice that they had received up until the agenda packet was posted was encroaching setbacks. It did not mention front, rear or side setbacks or what it should be or is over in writing by the staff. Mr. Ruiz read from Chapter 212 of the Texas Local Government code regarding the process for plats stated, "The Planning and Zoning Commission shall approve conditionally approve or disapprove a plat within 30 days after the date that the plat is filed". "If the Planning and Zoning Commission conditionally approves a plat, the Planning and Zoning Commission shall provide the applicant a written statement of the conditions for the conditional approval that clearly articulates each specific condition for the conditional approval and each condition specified in the statement must include a citation to the law". At this time, Mr. Ruiz handed out to each Board member a packet to go over it with him.

Mr. Ruiz stated under tab #1 was the plat that was submitted with the initial subdivision application. On general footnote #4, it stated proposing 60 foot or greater for easements or approved site plan. The plat went to Planning and Zoning Commission on July 26, 2023. At the meeting, they had approved that plat subject to staff's comments and recommendations.

Mr. Ruiz referred the Board to tab #2. The plat that they had first stated with was approved subject to these comments, "Proposing 60 foot or in line with existing structure or approved site plan or greater for easements or whichever greater applies". Staff's comments stated, "Please revise plat note #4 as shown above prior to the final". He stated that whenever a plat is conditionally approve a plat per the law staff are to submit a statement with the

reason for the change and a legal citation. He stated the legal citation was 138-356 which read "front yard setback shall be a minimum of 15 feet". He stated that Planning and Zoning Commission had approved the preliminary plat subject to this language on July 26, 2023.

Tab #3 - Engineers and staff were reviewing the site plan. Attached was an email from a city planner asking to indicate where the front yard setback on the site plan. Their engineers emailed the architect to show the 60-foot front yard setback on the site plan. The architects noticed they were 36 inches over the 60-foot front yard setback. Engineers asked staff if it would pose an issue in which staff responded, yes, a variance would be needed.

Tab #4 – Mr. Ruiz stated their preliminary plat was approved subject to staff's comments, then he stated their belief that their site plan was approved as well. It clearly showed a 60-foot front yard setback which he stated staff had asked them to put the 60-foot front yard setback back on the site plan.

Tab #5 - On the building permit application submitted December 5, 2022, it showed a 60-foot front yard setback.

Tab #6 – On December 20, 2022 the final plat was placed for approval by the Planning and Zoning Commission. Mr. Ruiz stated on Tab #4, it showed the highlighted note that staff had them put the language referencing "60 foot or in line with existing structure or approved site plan or greater for easements or whichever greater applies" back in July. Mr. Ruiz stated Planning and Zoning Commission granted final approval of the plat subject to staff's comments.

Tab #7 – at the bottom of the numbered page 2 of 4, it stated..."In accordance to with Zoning Ordinance or greater for easements or approved site plan or in line with average setback whichever is greater applies" revisions needed. "Remove setback line annotation from plat prior to recording". Mr. Ruiz restated their belief the plat had been approved with a 60-foot front yard setback.

Tab #8 – Mr. Ruiz shows the plat was recorded on March 23, 2023.

Tab #9 – Building permit which showed on permit condition #40 stating proposing 60 foot or in line with existing structure or approved site plan or greater for easements whichever greater applies. No reference to any average setback or any reference to Section 138-367(a).

Tab #10 – Mr. Ruiz stated they started vertical construction in January 2023. It was in July 2023 they posted the notice at the site. It was reposted the same day stating they were allowed to continue work. He stated they received miscellaneous violation stating they were encroaching setbacks but did not specify if it was front, side or rear setbacks.

Mr. Ruiz reiterated application was submitted on August 16th. Staff write-up stated application was accepted on August 17th.

Mr. Ruiz stated the City Ordinance 138-367(a) is called to front yard setback which is defined term.. The words were not on the recorded plat. It said in line with average setback. It did not say in line with average front yard setback. He stated there was a City ordinance for signs. It stated if a property had signs, as their neighbors have, you measure setbacks from the right of way to the edge of the sign closet to the curb.

Mr. Ruiz concluded by stating their engineers and architects submitted a plat proposing a 60-foot setback. The Planning and Zoning Commission conditionally approved subject to staff's comments. The only comments referenced to 138-365 to a 15-foot front setback. Staff recommended approval subject to its conditions noted. There were no notes specifying Ordinance 138-367(a) or the calculations that were required to invoke Ordinance 138-367 or the use of the words 'front yard'. The site plan was approved for a 60-foot setback. The building permit was issued. It did not include the language "in line with average setback". It stated "in line with existing structures". Mr. Ruiz stated his belief that structures include signs.

Board member Hiram Gutierrez questioned if Section 138-367(a) referred to the setbacks being set by buildings. He asked Mr. Ruiz even though Section 138-367(a) talks about buildings, signs count as setting the setbacks. Mr. Ruiz stated his belief that signs do count. The ordinance stated you measure setbacks from the right of way to the signs. Mr. Gutierrez asked where the authority of the Planning and Zoning Commission to waive setbacks came from. Mr. Ruiz referenced Section 138-366 of the City code.

Chairperson Jose Gutierrez asked if there was anyone present in favor of the Appeal. There was no one in favor of the Appeal other than applicant and their consultants.

Mr. Raul Garcia, of Halff Associates, 5000 West Military Highway, McAllen, Texas 78503. He stated he has worked on City of McAllen projects with staff for 23 years. Mr. Garcia stated that on this project specifically they submitted site plans and went through five iterations of adjusting the site plan to meet the requirements including moving the building back to be at the 60 foot setback. At that point, they were given the approval to continue their design. In January, they received a notice from the City to start construction. He stated had he known that the setback had to be 75-foot setback or greater, he would have adjusted plans from the beginning.

Chairperson Jose Gutierrez asked if there was anyone else present to speak in favor of the Appeal. There was someone else in favor of the Appeal.

Mr. Phillip Bakke, 207 Roosevelt Avenue, San Antonio, Texas 78210. He stated this was not their first project in McAllen. They make it a practice to hire the best consultants with Halff Associates and Alamo Architects. He felt they acted in accordance with the law. If they had been instructed to observe other setbacks they would have had time to adjust prior to the construction and not towards the end of construction.

Chairperson Jose Gutierrez asked if there was anyone else present to speak in favor of the Appeal. There was no one else to speak in favor of the Appeal.

Chairperson Jose Gutierrez asked if there was anyone present in opposition of the Appeal. There was one present to speak in opposition of the Appeal.

Rafael de la Garza, 6600 North 23rd Street, McAllen, Texas 78504. He stated that in the report indicated applicant never calculated what the setbacks should be. Why did they choose 60-foot setback? Counsel referred to 15 feet in Section 138-366. Second, on page two of the report from McAllen staff indicated there were five iterations of the initial site plan that was submitted. On the fifth iteration from December 12, 2022 specifically stated in the first paragraph that there was a 60-foot indication, the last site plan review the proposed 60-foot setback was not approved at this time. In addition, a final plat was submitted and

as of December 21, 2022 stating at this point the setback line had been removed and the front yard setback now read as follows: "In accordance with Zoning Ordinance or greater for easements or approved site plan or in line with the average setback" and in italicized *whichever is greater applies*. The operative word was whichever is greater. Mr. de la Garza stated that the property owner to the west and the east of the subject property hired him. They had sent a letter to the applicant back on June 26, 2023 stating that they were encroaching on the front setback. Nothing happened. In addition, his client had approached the people doing the construction adjacent to the building on the west and the east and indicated the same thing to them before July 2023.

Chairperson Jose Gutierrez asked if there was anyone present in opposition of the Appeal. There was someone else present to speak in opposition of the Appeal.

Mr. Miguel Ramirez, 1900 Sabinal Street, Mission, Texas. Mr. Ramirez stated he was a resident and developer for commercial and housing developments in McAllen. He stated he always has complied with the ordinances. He stated he has never requested a variance because one can always engineer and design to comply with the ordinance. The rules and procedures are the backbone of the community in McAllen. Before building, one has to know what the ordinances are. There were five reviews where staff let developer know 60 was not right. At the end, Halff Associates were notified to erase the line because it was not correct. He stated his belief the construction affects his four developments. Mr. Ramirez stated that as soon as they poured the foundation he informed the general contractor that it was not right. The general contractor called Halff Associates. Mr. Ramirez sent a letter to them regarding the issue.

Chairperson Jose Gutierrez asked if there was anyone present in opposition of the Appeal. There was no one else present to speak in opposition of the Appeal.

Chairperson Gutierrez and Board member Mujica mentioned to legal it was stated earlier that the Planning and Zoning Commission had the authority to override whatever setback found in the ordinance.

Legal counsel suggested going into an Executive Session to discuss the details of the question.

Chairperson Jose Gutierrez moved to recess for an Executive Session. Mr. Hiram Gutierrez seconded the motion. The Board voted unanimously to recess for an Executive Session with five members present and voting.

The Board recessed at 5:42 p.m.

The Board reconvened at 5:56 p.m.

Board member Mujica commented on the due process that goes through a number of people. During the process, there are questions that arise by different people and decisions are made. Somewhere along the way, a miscommunication happened. It is the best interest of our City to keep our Ordinances in place, and the safety and welfare of our citizens all the time. The ordinances and statutes are there for a reason and need to be complied. There was verbiage that was installed within the approvals and they were not followed.

Following discussion, Mr. Juan Mujica moved to disapprove the appeal as staff's recommendation. Vice-Chairperson Ann Tafel seconded the motion. The Board voted unanimously to disapprove the appeal with five members present and voting.

3. FUTURE AGENDA ITEMS:

a) 612 East Pineridge Avenue

b) 812 South 26th Street

ADJOURNMENT

There being no further business to come before the Zoning Board of Adjustment and Appeal, Chairperson Jose Gutierrez moved to adjourn the meeting.



Carmen White, Administrative Assistant



Chairperson Jose Gutierrez

ZONING BOARD OF ADJUSTMENTS & APPEALS
ATTENDANCE SHEET
11-1-23

PRINT NAME

PHONE #

ADDRESS:

Rene Ruiz	2106218071	PO Box 831294, SATX 78283
RAFAEL DE LA GARZA	956 2429 1223	6600 N 23rd McAllen
PHILIP BARKER	210 387 0263	207 ROOSEVELT AVE SAT 78210
JOE S BARKER	210 316 1054	
Raul Garcia	(956) 445-5235	5000 W. Military Hwy #100, McAllen, TX
Angelica Neira	956 4455262	5000 W. Military Hwy #100, McAllen TX
BRYAN "Mo" VERDEGALIN	210-227-2612	15125 FLORES, SATX 78014
Miguel Ramirez	956 2275446	5025 W Expressway 83