

**THIS DOCUMENT CONSTITUTES A PRIVILEGED COMMUNICATION BETWEEN A GOVERNMENTAL BODY AND ITS ATTORNEY AND MAY BE MAINTAINED AS A CLOSED RECORD IN ACCORD WITH THE PROVISIONS OF §610.021(1) RSMo. 2010.**

**MEMORANDUM**

TO: Olivette Planning and Community Design Commission

FROM: Paul Martin

DATE: January 28, 2021

RE: Proposed Accessory Use Zoning Changes

---

With the council's blessing and Mr. Trejo's assistance, I am proposing some changes to the city's accessory structure and accompanying site plan review regulations.

You may be aware of a recent neighborhood dispute over the construction of a proposed batting practice facility in a residential yard. The dispute brought to light a legal flaw in the accessory use section of the code and an accompanying inconsistency in the site plan review section. This memo explains the two issues and proposes corrective action.

A homeowner proposed erecting a facility that would permit him to engage in baseball batting practice with his sons. The facility would have required permanent attachment to the ground by way of four corner poles, with netting to be draped from the overhanging trees and secured to the poles. The facility would allow the owner and his sons to engage in batting practice while keeping their baseballs contained within the netting.

Section 400.1592 of the Olivette City Code regulates accessory uses and structures. Subsection B lists eleven different structures that are expressly permitted, subject to prescribed maximum dimensions and location limitations. Subsection C provides that any structure not expressly permitted in Subsection B, or that exceeds Section B's noted limitations, must be referred to PCDC for site plan and community design review.

The proposed batting practice facility is not enumerated in Subsection B as a permitted accessory structure, but it is also unlike traditional accessory structures, because it lacked any interconnecting elements (like fencing, beams, or a hard surface) between the corner poles. Because the proposed use did not involve traditional structural elements, the owner's building permit application was approved, in similar fashion to basketball goals and flagpoles. This led to objections from the owner's neighbors. The neighbors hired an attorney to challenge the approval of the building permit by appealing to the Board of Adjustment ("BZA"), and if necessary, to the St. Louis County Circuit Court.

The main thrust of the appeal was that nothing in the code permits the city any discretion in determining what is, or is not, a structure. Instead the code states simply that if something is attached permanently to the ground, then it is a structure. Since the poles of the batting practice facility were permanently imbedded into the ground, by code definition it was necessarily an “accessory structure”, and since this type of structure was not specifically permitted by the code, then it required site plan and community design review, which did not happen.

In my opinion, the neighbors were legally correct in their complaint, and the BZA was required to overrule the issuance of the building permit. The failure to do so would lead to the prospect of costly litigation, and almost certain reversal, if the matter was appealed to the court. I shared this opinion with the BZA, after which the BZA reversed the issuance of the building permit. The BZA also recommended that the council consider an appropriate code amendment to avoid similar issues from occurring in the future.

The city’s fundamental error in addressing the application was rooted in the exercise of discretion to approve a building permit for an accessory structure. That is, for years city staff has approved basketball hoops and flagpoles—which are not listed as permitted accessory structures but which are permanently connected to the ground—without requiring site plan and community design review. This made practical sense, as these “structures” are common and traditional in residential neighborhoods, and requiring PCDC review was overly burdensome for all concerned. But staff relied on this past use of discretion to grant administrative approval of the proposed batting practice facility. If not for the neighbors’ objections, this exercise of discretion, which is not authorized by the code, would have gone unnoticed.

In following up on BZA’s recommendation of an appropriate code amendment, I realized that it wasn’t absolutely necessary—having shown a light on the legal absence of discretion, that mistake was unlikely to be repeated. But the city would still be left with a rigid code provision that did not permit basketball goals and flag poles and that did not grant any discretion whatsoever to staff. This led to the following considerations.

First, the code should specifically recognize basketball goals and flagpoles as permitted residential accessory structures. Homeowners should not be required to suffer the cost and process of, and neither staff nor PCDC should be burdened with, the review and approval of such common residential amenities. Nor should the Zoning Administrator be put at legal risk for permitting such structures without explicit code authority to do so.

Second, as noted above, Subsection 400.1592.C requires that PCDC conduct site plan and community design review for any accessory structure that is not expressly permitted in Subsection B or that exceeds Section B’s dimensional limitations. The city could consider granting explicit discretion to staff in both cases or in either case.

I would recommend against granting staff the authority to permit accessory structures that are not expressly permitted in the code. This could put staff in an untenable position between an applicant and a disgruntled neighbor or neighbors, without any guidelines by which to judge whether an unspecified structure would qualify as a permitted accessory. The absence in the code of an accessory structure merits a fuller consideration of the circumstances by PCDC.

But staff could be granted discretion to permit minimal variations from the dimensional constraints of those accessory structures that the code specifically permits. For example, the code currently

limits play structures to a maximum area of 250 square feet. Depending on the size of the lot, the proposed location of the structure, the existence (or promise) of screening, and other unforeseeable factors, staff could be allowed to permit a minimal increase in area without requiring PCDC review. The purpose of this discretion would be to achieve the goals previously discussed, i.e., the savings of time, labor, and money by both the homeowner and the city.

By extension, PCDC may also want to consider granting staff the authority to require additional measures even if an accessory structure is permitted. For example, if a play structure was proposed to be located as close to a neighboring property as the code allowed, but still presented a significant risk of noise to the neighbors, staff might be allowed to require relocation or screening.

Finally, in exploring the accessory structure issue, we discovered an inconsistency between the required process for site plan review and the city's actual practice.

As noted earlier, applications proposing an accessory structure that is not enumerated in the code, or that exceed the dimensional requirements of the code, require site plan review in addition to community design review. Article XI of Chapter 400 addresses site plan review. Subsection 400.1090.A.2 provides that the Zoning Administrator shall review an 'SR' District application and approve, approve with conditions, or deny the application. Subsection 400.1090.A.3 further provides that the Zoning Administrator's action is subject to appeal to the Board of Adjustment. These provisions undoubtedly reflect a desire to expedite review for single-family residences.

But, these two subsections are not consistent with the process that the city actually uses for site plan review in the "SR" District; rather such review is undertaken by PCDC in the same fashion as site plan review for the "COR" District (found in Subsection 400.1090.B.) Consideration should be given as to whether the single-family review process should be changed to conform with the code, or whether the code should be changed to conform to the city's actual review process. Staff has recommended the latter.

Attached are draft changes to the relevant code sections for your consideration. The proposed changes to Section 400.1592.B add basketball goals and flag poles to the list of permitted accessory structures. The proposed changes to Section 400.1592.C grant discretion to city staff that is limited to the dimensional and location requirements that are listed for specifically permitted accessory structures. Finally, the proposed changes to Section 400.1090 include repealing Subsections A.2 and A.3 and enacting in lieu thereof five new subsections (A.2 through A.6). These new subsections mirror the process for site plan review in the 'COR' District, with the exception of reducing the PCDC's time restraint from 120 days to 60 days.

Please note that the proposed changes are intended only as suggestions for PCDC's consideration. They have been prepared from a "legal" perspective rather than a "land use" perspective, and PCDC should freely consider and amend, or even reject, these changes as the commission sees fit.

Copy: Zoning Administrator Carlos Trejo  
City Manager Barbara Sondag