



## MEETING MINUTES

# Board of Zoning Appeals

Thursday, June 25, 2020

### CALL TO ORDER

Ms. Cooper called the meeting to order at 6:30 p.m. and made the following comments:

“Good evening and welcome to the June 25 virtual meeting of the City Board of Zoning Appeals. The Ohio Legislature passed several emergency laws to address the pandemic, including the ability for public entities to have virtual meetings. We appreciate this ability to maintain our continuity of government. For the present time, we are holding our meetings online and live streaming those meetings on YouTube. You can access the livestream on the City’s website. To submit any questions or comments during the meeting, please use the form under the streaming video on the City’s website. These questions and comments will be relayed to the Board by the meeting moderator. We want to accommodate public participation to the greatest extent possible and welcome your comments on cases. Please use a valid name and address when submitting your comments and refrain from making any inappropriate comments. This is not a perfect system, but we will do our best in these difficult times. We appreciate your patience.”

### ROLL CALL

Board Members present: Mr. Deschler, Ms. Herbert, Ms. Cooper, Mr. Nigh

Staff present: Ms. Husak and Ms. Martin

### MOMENT OF SILENCE

A moment of silence was observed in honor of recently passed BZA member, Satya Goyal.

### ACCEPTANCE OF DOCUMENTS

Ms. Deschler moved, Ms. Herbert seconded to accept the documents into the record.

Vote on the motion: Ms. Herbert, yes; Mr. Nigh, yes; Mr. Deschler, yes; Ms. Cooper, yes.

(Motion carried 4 – 0)

### APPROVAL OF MINUTES

Mr. Deschler moved, Ms. Herbert seconded to approve the April 23, 2020 meeting minutes as submitted.

Vote on the motion: Ms. Cooper, yes; Mr. Deschler, yes; Mr. Nigh, yes; Ms. Herbert, yes.

(Motion carried 4 – 0)

The Chair briefly explained the rules and procedures of the Board of Zoning Appeals and swore in any staff or member of the public who planned to address the Board during the meeting.

### CASE:

#### 1. Smith Residence, 5588 Caplestone Lane, 20-101V, Non-Use (Area) Variance

Ms. Cooper stated that this is a request for approval of a Non-Use (Area) Variance to allow two sections of fence to encroach into the required 5-foot, side yard setback to connect to an existing fence along the

property line. The site is in Earlington Village, west of Caplestone Lane, approximately 325 feet southwest of the intersection with Dublinshire Drive.

### **Staff Presentation**

Ms. Husak stated that this a request for review and approval of a Non-Use (Area) Variance under the provisions of Zoning Code Section 153.231(H) to allow a variance to the side-yard setback to permit a proposed fence to connect to an existing fence. The site is located on the north side of Caplestone Lane and backs up to Dublinshire Drive. The property at 5588 Caplestone Lane is located within the Woods of Dublinshire neighborhood, which was platted in 1992. The Woods of Dublinshire is located within Subarea B1 of the Earlington-Brandon Subdivision. The applicant is proposing a new 3.5-foot open fence on the 0.58-acre site and is meeting the required north and east setbacks, but is proposing to connect to an existing neighboring fence that is located on the property line. The existing fence is on Lot 7; the Smith fence would be on Lot 6. The existing fence, maintained by the neighboring property, predates the City's fencing regulations. Zoning Code Section 153.080(B)(1)(a) states that, "The open fence may be located only within the buildable area of the lot." In this instance, the fence is required to be set back five feet from the side property line, per the Fence Code, which was adopted in 2000 and per the setback requirements in this subdivision. Staff has evaluated this application against the appropriate criteria, and does not find that the variance criteria is met. This is an action by the applicant, and there are different ways it can be avoided. The applicant is able to meet the rules in place. Therefore, staff is recommending that the variance request be denied.

### **Board Questions**

Ms. Herbert stated that in the applicant's statement, he indicates that City Planning staff member, Mike Kettler, stated that the purpose of the five-foot setback is to restrict the footprint, so that neighbors would have the aesthetic of open yards with no obstructions. Is there a response to that aesthetics argument, as it relates to this property?

Ms. Husak responded that every lot within the City has setback requirements to retain the open yard aesthetic. That is the reason the fence code was revised in 2000.

Ms. Cooper stated that the neighbor's fence is on the property line. Is the request to attach to that fence rather than having a five-foot pass-through between the fences?

Ms. Husak responded affirmatively.

Ms. Cooper inquired if they are meeting the rear setback.

Ms. Husak responded affirmatively.

Ms. Nigh inquired if staff has received similar requests in the past to tie-in to a neighboring fence and if they were granted.

Ms. Husak stated that there were fence tie-ins that pre-dated the 2000 Code revision, many of which since have been removed. Although some requests have been received to tie into nonconforming fences since 2000, she does not recall any the Board has granted recently.

Mr. Nigh inquired if the neighbor's fence were to fall into disrepair and needed replacement, would they also be required to observe the five-foot setback requirement.

Ms. Husak responded that the City nonconformity rule allows 25% of the existing fence to be repaired, but they would not permitted to remove the entire fence and install a new and different fence in its place.

Mr. Nigh inquired if a new homeowner would be permitted to remove the fence attachment and install a new fence section on the property line.

Ms. Husak responded that they would not.

Mr. Deschler inquired what other options were provided to the applicant.

Ms. Husak responded that staff member, Mr. Kettler, who issues fence permits, discussed with Mr. Smith the need to meet the five-foot Code requirement.

### **Applicant Presentation**

Aaron Smith, 5588 Caplestone Lane, Dublin OH, stated that Mr. Kettler did indicate that the fence proposal originally submitted could not be approved. It would need to be revised to leave a five-foot gap from the neighboring fence.

Mr. Nigh inquired if there is a utility right-of-way that runs along the neighbor's fence line.

Mr. Smith stated that there is none depicted on their plat.

Ms. Husak responded that if there is a utility right-of-way, it would be a private utility, as none is indicated on the public system.

Nicole Clum, 5588 Caplestone Lane, Dublin OH stated that the primary purpose of this fence is to ensure the safety of their toddler and dog and for privacy. As stated in their application, the five-foot setback would create a gap between the fences that would be unsightly and difficult to maintain. It would also invite people to cut-through their property from Dublinshire. This gap would line up with a clearing on Dublinshire creating an inviting cut-through path. This has occurred already without providing a gap between two fences. Staff has indicated that their request does not meet the criteria, because, physically, a fence could be built leaving a five-foot gap between it and the neighbor's fence. In the past, BZA has approved other requests wherein the applicant physically could have built as the Code required, but could not build as desired without a variance. A recent example is Case No. 20-050V, the Boggs residence. They are making a similar argument. Staff also has indicated that the criteria is not met because a fence is not required for residential properties. The Board has approved previous variances for structures that were not required for the property, such as Case No. 20-065V, the Carpenter property; garages are not required. Unlike the previous variances, this variance would actually meet the purpose of the Code requirement, which is to create an open aesthetic. As a point of clarification, their fence would be built to meet, not tie-in to the neighbor's fence.

### **Board Questions for Applicant**

Ms. Herbert inquired if their neighbors are supportive of their request.

Mr. Smith responded that their neighbors have indicated that they are supportive and have no concerns.

Ms. Herbert requested clarification of the feature on Dublinshire that created the impression of a pass-through to and through their yard.

Ms. Clum stated that the trees are cleared at the end of their property, lined up with where the five-foot gap would be. That five-foot gap creates the illusion of a public right-of-way. Pass-through traffic has already occurred without creation of an apparent public right-of-way, so they are concerned about privacy and safety.

Ms. Cooper inquired if they own the property where that gap would be.

Mr. Smith responded affirmatively. Their property extends nearly to Dublinshire Road.

Ms. Cooper stated that they would have ability to plant additional trees between the fence and the rear easement, for privacy purposes.

Ms. Clum stated that while they could plant trees on their property, it does not diminish the illusion of a public right-of way.

Ms. Cooper inquired if on the other side of their home, there would be no fence on the neighbor's property.

Ms. Clum responded that is correct; they do intend to adhere to the five-foot setback on that side.

Ms. Herbert inquired who owns the Dublinshire property where the clearing exists.

Mr. Smith responded that he believes a portion of it belongs to their neighbor.

Ms. Herbert stated that she does not believe it is realistic to plant additional trees in an already heavily wooded and shaded area; they may not thrive.

Mr. Deschler inquired if a five-foot gap between fences is the intent. Where else in the City does that condition exist?

Ms. Husak responded that she believes that the intent is to discourage fences. If the neighbor had not already built to the property line, there would be a ten or twelve-foot gap between these two fences. Many previous fence requests have been discouraged by this factor.

### **Board Discussion**

Ms. Herbert stated that there are two points of contention – special conditions and owner action or inaction. She does not find the City’s argument that the criteria has not been met to be persuasive. In the past, the Board has considered historical, pre-Code requirements and conditions of the property. The purpose of the Fence Code is to provide, “assurance of safety and security, improvement of the visual environment and a neat and orderly appearance.” Maintaining a five-foot gap between the fences would be unattractive. Creating a public pathway on their property to Dublinshire would be a safety concern. In regard to the criteria regarding action or inaction – she is in agreement with the applicant. In most cases, the applicant could have just not built the garage or house and have provided windows that met the Code requirement. In this case, the situation is not due to the applicant’s inaction or action. If the neighbor had built their fence five feet behind the shared property line, ten feet would remain between the fences, which would be much easier to maintain.

Mr. Deschler agreed; if the neighboring fence were not on the property line, this would not be an issue. He agrees with Ms. Herbert that, aesthetically, creating a gap between the fences would look horrendous. His concern is if this property is sufficiently unique to avoid setting a precedent for future homeowners.

Ms. Herbert stated that she thought of that as well. However, in the over four years in which she has served on the Board, this type of request has not been reviewed previously.

Ms. Cooper stated that she also is concerned that this lot is not sufficiently unique to warrant the variance. This is a very large lot, which they will be able to fence.

Mr. Smith stated that although it is a very large lot, there is very little of the rear lot that is grass and could provide a play area for their child. Most of the lot is wooded.

Ms. Cooper noted that, typically, there is a no-build zone, as well. Perhaps they could increase the gap between the fences to seven feet.

Mr. Smith responded that there is a 90-foot, no-build zone off the back of the property. Extending that gap to seven feet would further contract the grassy area available. That side of house also has access to their front yard and provides a path from the garage to the backyard. The other side of the house is densely wooded.

Mr. Nigh stated that a 73-foot by 75-foot fence would be a large area, and there would appear to be another 90 feet extending beyond that.

Ms. Clum responded that is the no-build zone.

Mr. Smith stated that much of that is wooded, and they are not permitted to remove any of those trees on their property to create a larger grassy play area. The grassy area is very limited. That is the reason they are trying to maximize the space.

Mr. Nigh stated that the issue for him is not whether it would look better with the variance, or whether the Code, in this case, makes sense. The Board’s task is to determine if the criteria has been met, and he is having difficulty confirming that it has.

Mr. Smith responded that there are several conditions unique to their property, which they believe would warrant a variance being granted.

Ms. Herbert stated that she agrees with the homeowner on that statement, as well as on the premise that the variance would meet the purpose and intent of the Fence Code. The neighbor's fence, which predates the Fence Code, appears to be very well maintained. She would support approving the variance.

Ms. Cooper stated that she is having difficulty seeing a need for the variance due to the amount of space and privacy that currently exists. She understands their concern about creating a preferential pathway, but she does not believe that will happen, given the density of the lot.

Ms. Clum responded that it has already occurred without creating a faux walkway.

Mr. Smith stated people are cutting from Dublinshire Drive through their neighborhood.

Ms. Clum stated that people already walk along the fence line. If we create the perception of a pathway from Dublinshire through the neighborhood, that occurrence will increase.

Mr. Nigh noted that if the neighbor were to remove and rebuild their fence, there would be an even larger gap and perception of a pathway.

Mr. Smith stated that as he understands the Ohio Fence Law, a fence built on a joint property line is joint property, so the neighbor could not take down the existing fence without their approval.

Ms. Cooper stated that she is unsure if that law overrides the deed restrictions or the City's requirements.

Ms. Herbert stated that deed restrictions do not address that.

Ms. Cooper stated that there are regulations about the type of fence that may exert more control.

Mr. Smith stated that their proposal is consistent with the deed restrictions regarding height and type. The deed restrictions do not address ownership of a fence located on a joint property line.

Ms. Herbert stated that deed restrictions cannot run contrary to State law; that law supersedes.

Ms. Cooper stated that her concern is that the neighbor could tear down his fence and replace it according to Dublin law.

Mr. Smith stated that was the point he was attempting to make – State law prohibits his doing so. While the neighboring property owner could choose to remove the remainder of his fence, they cannot remove the portion on the property line.

Mr. Nigh inquired if Dublin would be able to require the entire fence to be replaced if more than 25% of the fence was in disrepair.

Mr. Smith responded that, since the portion on the property line is not considered solely the neighbor's fence, it would not be factored into that calculation.

Ms. Herbert stated that when she practiced zoning law many years ago, there were many cases about fences on joint property lines, such as in German Village. She inquired if the left side of a fence was in disrepair and constituted more than 25% of the fence, would the City require the rest of the fence to be replaced.

Ms. Husak stated that the City would consider the fence in its entirety to be 100%. The neighbor could repair and replace 25% of the entirety of the fence. If the section on the joint property line was the portion in disrepair, they would be permitted to repair it on the joint property line.

Ms. Herbert inquired if the portion on the joint property line was the only portion not in disrepair, would the neighbor be required to replace and move it.

Ms. Husak responded that they would not make them move that section. The amount of nonconformity cannot be increased. Only the new portions would be replaced/moved.

Mr. Deschler stated that, although aesthetically, leaving a five-foot gap would not be visually appealing, aesthetics is not a factor with this Code section.

Ms. Cooper stated that there can be the argument of unique circumstances on the property.

Mr. Deschler stated that is correct, and some good points have been made as to that situation. If the cut-through is an issue in the neighborhood, the homeowners can jointly submit a request to the HOA, and something can be done on the common area. He is concerned about setting a precedent here.

Mr. Nigh inquired from which angle the gap would be visible to the public. From the photographs shown, it would not appear to be very visible. He is having difficulty finding a unique situation exists for this property.

Ms. Herbert responded that the Code provides examples of situations that can be considered, such as the condition with the adjoining property. The Board has granted variances in the past, based on the historical characteristics of the property.

Ms. Cooper stated that she does recall a similar situation, where a property owner wanted to connect to an existing neighboring fence, and that variance was granted in a split decision. However, the property was near a school, and the volume of cut-through traffic occurring was well documented. Due to the depth of the setback and the wooded conditions here, a preferential pathway is less likely.

[Discussion occurred regarding the advantages of tabling the case to permit the applicant to collect corroborating evidence of the cut-through traffic condition.]

Mr. Smith stated that he believes it would be difficult to collect sufficient evidence to convince this Board.

Mr. Deschler stated that having the other homeowner present, of whom the Board could ask questions, or having information from the HOA Board about the cut-through traffic would be helpful.

Mr. Nigh concurred that having the additional perspective could be persuasive.

Ms. Clum stated that, unfortunately, she could not provide corroborating documentation of a significant volume of existing cut-through traffic. However, from the experience of having some cut-through traffic occurring, it is reasonable to anticipate it to become a greater issue after creating a clear public pathway. Because sufficient statistical data does not yet exist, that point remains a hypothetical discussion; however, there are reasons their variance request can be considered unique.

Ms. Herbert stated that Mr. Nigh and Mr. Deschler have indicated that just having the adjoining neighbor and corroborating evidence from the HOA would be beneficial.

Mr. Deschler stated that is correct. He would prefer to have some additional background and historical knowledge. It would bolster their argument of this being a unique safety issue based on their property location, rather than being an aesthetic argument.

Ms. Cooper stated that she is familiar with the clear area on Dublinshire, and she does not see a pathway conducive to becoming a public thoroughfare. That is one of the advantages of this wooded lot and the no-build zone. It is very private and not readily traversed. Therefore, if they could provide additional documentation that this is a problem, it would be helpful. The Board must be consistent in upholding the intent of the City's Fence Code. They could request that the case be tabled tonight, talk to their neighbors and their HOA representative, and provide additional documentation for the case to be considered at a future meeting.

Mr. Smith stated that he does not believe it is realistic to gather the kind of evidence this Board is requesting. They would prefer to have a vote at this time.

Ms. Herbert inquired if other members are requesting corroborating evidence of the homeowner's representation of this being a pass-through space.

Mr. Deschler stated that he is not certain what specific he is looking for, but it is for more than a self-serving homeowner's statement. An allegation does not satisfy the Code, although it could, with additional documentation.

Mr. Smith stated that he questions whether having the next-door neighbor provide anecdotal evidence of a cut-through would be sufficient for this Board to find in their favor. He does not think it is practical to provide hard evidence of such within the next month.

Mr. Deschler noted that an additional board member could be in place for the next meeting, which could make a difference in the vote.

Ms. Husak stated that City Council is on summer break, so they would not be appointing a new BZA member before their July 27 meeting. The applicant could choose to wait until the Board's August meeting.

Mr. Smith stated that he will have a week of vacation and would like to install the fence next week; they prefer not to have the case tabled.

Ms. Clum stated that the Board appears to agree that the five-foot gap would not be aesthetically attractive. Is the Code language regarding aesthetics and safety an "and" or an "or" requirement? If it is "or," then the decision could be based on the aesthetics criteria alone. If it is "and," then she understands the difficulty.

Ms. Herbert stated that the purpose and intent of the fence portion of the Zoning Code reads, "conservation and protection of the property, the assurance of safety and security, the enhancement of privacy and the improvement of the visual appearance, which includes the "provision of a neat and orderly appearance." The variance section of the Code states that, "in granting any variance, the BZA shall prescribe the appropriate conditions and safeguards to maintain the intent and spirit of the Zoning Code." Typically, the Board has looked at the intent of the Code. She believes the five-foot gap between the fences would be aesthetically unattractive. She has experienced a significant amount of cross traffic through her own backyard, as her home is located near a bikepath. That is a concern to her, although she has not documented that either. Fortunately, she does not live near a Dublinshire-type of thoroughfare. Therefore, she finds their argument convincing, and the City's argument very unconvincing that the criteria of "action and inaction" was not met, because applicants can always decide not to build a certain structure. In addition, this applicant is not responsible for the neighbor building their fence on their shared property line, and the Board is tasked to look at the adjoining properties when looking at "special conditions."

Ms. Clum stated that if the purpose and spirit of the Code is for aesthetics and for safety, she would argue that they have sufficiently met the criteria for the variance to be granted.

Ms. Herbert that she agrees, and it is consistent with the Board's purpose in granting Code variances.

Ms. Cooper stated that she does not believe the criteria under Zoning Code Section 153.231(H)(2) of A.1 "Special Conditions" has been met, which states: "That special conditions and circumstances exist which are peculiar to the land or structure involved and which are not applicable to other lands or structures in the same zoning district whereby the literal enforcement of the requirements of this chapter would involve practical difficulties." Unfortunately, all three of the criteria in that Section A must be met.

Ms. Herbert stated that examples are provided of the Special Conditions that could be considered, which are not exhaustive. They do reference adjoining properties, and the Board frequently has considered the historical characteristics as a special condition.

Mr. Deschler stated that the aesthetics issue would be common to any homeowner who would want to construct a similar fence, and that is where a precedential treatment of this case will impact future cases. To avoid that, there must be something more. He is prepared to vote on the case.

Mr. Deschler moved, Mr. Nigh seconded to disapprove the Non-Use (Area) Variance request.

Vote: Mr. Deschler, yes; Ms. Herbert, no; Ms. Cooper, yes; Mr. Nigh, yes.

[Motion carried 3-1.]

Ms. Cooper stated the next BZA meeting is scheduled for July 23, 2020, if an application is received.

**ADJOURNMENT**

The meeting was adjourned at 7:42 p.m.

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Chair, Board of Zoning Appeals

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Deputy Clerk of Council