



BOARD OF ZONING APPEALS
MEETING MINUTES
THURSDAY, OCTOBER 6, 2022

CALL TO ORDER / ROLL CALL

Chairman Jim Hrivnak called the Board of Zoning Appeals to order at 6:30 p.m. Board Members present included: Mr. Hrivnak, Randy Duncan, and Ryan Brickner. Board Member Janice Hitzeman was excused. Staff present included: Claudia Husak, Planning Director; Pam Friend, Administrative Assistant; Jesse Shamp, Legal Counsel, and interested parties.

APPROVAL OF MEETING MINUTES

June 2, 2022 Meeting Minutes

[06022022 BZA Draft Minutes.pdf](#)

MOTION: Ryan Brickner moved to approve the Board of Zoning Appeals meeting minutes of June 2, 2022. Randy Duncan seconded the motion. Minutes approved.

VOTE: Y – 3 N – 0 Abstain – 0

August 4, 2022 Meeting Minutes

[08042022 BZA Draft Minutes.pdf](#)

MOTION: Randy Duncan moved to approve the Board of Zoning Appeals meeting minutes of August 4, 2022. Ryan Brickner seconded the motion. Minutes approved.

VOTE: Y – 3 N – 0 Abstain – 0

HEARING OF VISITORS FOR ITEMS NOT ON AGENDA

Chairman Hrivnak opened the floor for visitors to address the Board with issues not on the Agenda. Hearing none, Chairman Hrivnak closed the public comment portion of the meeting.

NEW CASES

VARIANCE REQUEST (2022-23V)

Applicant: Robyn Prewitt

Location: 454 Retreat Lane North

Zoning: PR - Planned Residence District

Request: Review and approval of a variance to The Retreat Development Text
Section 4.6 to reduce the rear yard required setback for fences from 30 feet
to 2 feet.

1. 464 Retreat Lane North - BZA Staff Report.pdf

2. Prewitt Fence Variance Application.pdf

3. Retreat Ordinance&Text.pdf

Claudia Husak, Planning Director, presented the Staff Report and talked about this unique circumstance in terms of a Development Text Variance opposed to a Zoning Code Variance, which is what the Board would typically review. The Retreat rules and regulations were adopted as an Ordinance in early 2020, which is the Development Text. In the spring of 2022, the homeowner applied for a zoning permit to build a fence on the subject property, which was approved by staff. The site drawing provided with the permit did not accurately reflect the intended fence location, which was discovered on a subsequent site visit. According to the property owner, she was advised by a member of staff that the Powell Zoning Code permits fences on the rear lot line and was also helped with the permit drawing dimensions. While the Powell Zoning Code does not restrict the location of fences beyond the front yard, this property is subject to The Retreat Development Text, which was adopted in 2020 and requires a 30-foot rear setback. The fence was installed immediately after the permit was issued. According to an updated drawing, the fence is 2.8 feet from the rear property line at the closest point.

Ms. Husak then reviewed the applicant's statements regarding the seven standards:

Whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property;

Applicant Statement: Allowing the fence to remain in its present location will benefit the property by adding 30 feet of useable back yard space. Conversely, by not allowing the variance, the useable space in the backyard will be significantly diminished thereby decreasing the property's value. The placement of the fence is in the existing tree line, thereby obscuring it from the view of the home and making it aesthetically pleasing.

Standard Met: Staff agrees there will be beneficial use of the property with the fence in the current location with maximum yards space retained.

Whether the variance is substantial;

Applicant Statement: The variance is substantial to the homeowner as it gives her an additional 30 feet of useable back yard and not substantial to the City or neighborhood, as the fence line abuts a wooded area directly adjacent to the rear areas of homes in a neighboring but separate subdivision. To the Applicant's knowledge, the neighboring subdivision does not have a similar fence setback requirement and the fence placement is in conformity with the City of Powell zoning regulations.

Standard Met: While an encroachment of 28 feet into the rear yard can be viewed as a substantial encroachment, staff agrees with the applicant. The requested variance does not constitute a substantial impediment to the City or the neighboring properties. The applicant is correct that fences in the Powell zoning ordinance are permitted in this location and this circumstance is unique to The Retreat. The neighbor to the west has a similar fence in a similar location, which was approved by the City and permitted prior to the updated Development Text.

Whether the character of the neighborhood would be adversely affected or whether adjoining properties would suffer an adverse impact as a result of the variance;

Applicant Statement: The character of the neighborhood would not be adversely affected nor would any adjoining properties suffer an adverse impact. The variance, if granted, affects the rear area of one home that is not visible from the front area of the neighborhood and directly abuts a wooded area separate from any other homes or neighborhoods. The existing placement of the fence renders it almost invisible. Further, comments from the neighbors have indicated that the fence is aesthetically pleasing and does not adversely affect the neighborhood or adjoining properties.

Standard Met: The variance will not adversely affect the neighborhood or adjoining properties. While the City has received complaints from the HOA, those are centered on an issue irrelevant to this variance request and have been upheld by staff and legal interpretation. Due to the large size and heavily wooded nature of the site, the fence will not visually or physically affect the neighborhood from the public right-of-way. Staff has not received any complaints from adjacent property owners.

Whether the variance would adversely affect the delivery of governmental services (e.g., water, sewer, garbage);

Applicant Statement: The variance would not adversely affect the delivery of governmental services as it is located at the rear of the property abutting a wooded area and no governmental services run through the area where the fence is placed.

Standard Met: The requested variances will not adversely affect the delivery of governmental services.

Whether the property owner purchased the property with knowledge of the zoning restriction;

Applicant Statement: Ms. Prewitt was aware of the 30-foot setback requirement. However, in their recommendation letter to the City of Powell regarding the new fence, The Retreat HOA ARC specifically omitted any objection to the placement of the fence regarding the 30-foot setback and only objected to the fence based upon the failure of the fence to conform to the footprint of the home. The measurements for the fence contained in the materials submitted to the ARC clearly indicated the fence would not conform to the 30-foot setback. Likewise, in approving the fence application submitted by Ms. Prewitt to the City, the City approved the application with the dimensions of the fence clearly indicating that there would not be a 30-foot setback as to the placement of the fence (copy of approved certificate attached). Relying on the ARC's implied waiver of the 30-foot setback requirement and the City's approval of her application, Ms. Prewitt presumed the setback did not apply to her fence.

Standard Not Met: The applicant has stated that they were aware of the zoning requirements, at the time of permit submission but unaware of the applicability to the desired fence. The applicant purchased the home after The Retreat HOA changed the rules applicable to fences.

Whether the property owner's predicament feasibly can be obviated through some method other than a variance;

Applicant Statement: There are no other feasible remedies other than to grant a variance. The fence has already been constructed and installed. Requiring Ms. Prewitt to remove the fence from its existing location and reinstall it in accordance with the 30-foot setback requirement would result in an approximate \$20,000.00 hardship to her.

Standard Not Met: The applicant would need to remove a substantial portion of the fence and have it reconstructed through the middle of the yard where mature trees are located. It is feasible to meet the text requirements although not practicable nor pragmatic.

Whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance;

Applicant Statement: Yes, spirit and intent of the zoning requirement would remain intact. The homeowner complied with all requirements for obtaining a permit to build her fence. The fence certificate provided space for the City to inform the homeowner of any setback requirements and it failed to do so. If the City does not grant the variance, the homeowner will have no choice but to relocate the rear area of her fence, thereby correcting the City's mistake at her own expense.

This would be a substantial injustice to the homeowner. Therefore, the only appropriate justice for her is to grant the variance and allow the fence to remain in its present condition.

Standard Met: Staff agrees that the spirit and intent of the zoning requirement would be observed and substantial justice done by granting the variance.

Chairman Hrivnak invited the applicant to give their presentation. The following were sworn in by Chairman Hrivnak and gave testimony in support of the application:

Curt Knapp, 1160 Dublin Road, Suite 500, Columbus, OH 43215, attorney for the applicant, testified in support of the variance request.

Robyn Prewitt, 464 Retreat Lane North, Powell, OH 43065, the applicant, gave testimony in support of the variance request.

Vinita Bahri-Mehra, Esq. 444 Retreat Lane North, Powell, OH 43065, submitted an email to the applicant in support of the variance.

Chairman Hrivnak opened up the public comment portion regarding this application. The following were sworn in by Chairman Hrivnak and gave testimony in opposition of the application:

Dan O'Brien, 560 Cardinal Hill Lane, Powell, OH 43065, testified as President of the Homeowners Association in The Retreat, in opposition to the variance.

Shawn Carroll, 509 Retreat Lane North, Powell, OH 43065, Chair for the Architectural Review Committee in The Retreat, in opposition to the variance.

Cecelia Weinkauff, 494 Retreat Lane North, Powell, OH 43065, testified in opposition of the variance.

Jonathan Dotson, 595 Retreat Lane North, Powell, OH 43065, testified in opposition to the variance.

Chairman Hrivnak closed the public comment portion of the hearing and invited the applicant to respond to the public comment.

Mr. Knapp, the applicant's attorney gave testimony in response to the opposing statements.

Ms. Prewitt, the applicant gave testimony in response to the opposing comments.

Chairman Hrivnak reopened the public comment portion regarding the application. The following gave testimony in response to the applicant and her representatives comments:

Mr. Carroll, Mr. O'Brien and Mr. Dotson gave additional testimony in opposition with regards to the applicant and her attorney's rebuttal comments.

Chairman Hrivnak, again closed the public comment portion for the application and asked the applicant if they had further comment. They stated no and Chairman Hrivnak turned the matter over to the Board for discussion and comments.

Jesse Shamp, Legal Counsel for the City of Powell reminded the Board they do have a quorum with three Board Members present but would need a unanimous decision to approve the variance.

Board Member Duncan said the drawings are just one part of the application and asked about the fence permitting process. What are the requirements for the submission for the permit? He would think there would be elevations and a scaled drawing required.

Ms. Husak said the application from the fence contractor had details in terms of height and materials. She agrees there are dimensions lacking and that is the crux of the oversight on everyone's end. The HOA did not have those dimensions, nor did the City. It was approved by a visual representation, which is what would typically be done. She said it is difficult when there is an exception in a subdivision that the permit reviewer is not aware of and as the zoning administrator, she too was unaware and signed off.

Chairman Hrivnak asked Mr. Shamp and Ms. Husak with regard to the Development Text adopted by the City, which is part of the Ordinance, when the zoning administrator considers circumstances that require deviation is it within the zoning administrator's authority to grant a permit that is slightly different.

Ms. Husak said there are allowances in the Development Text for the administrator to interpret certain requirements. Some of the comments tonight were about what the footprint of the house means and that is an interpretable statement. She along with staff and Counsel have interpreted that to mean wherever the fence is located as long as it is behind the house it is within the footprint of the house. A numerical value as in a 30-foot setback is not up to interpretation. She added any party can request a variance for a zoning requirement, whether it's in the Zoning Code or the Development Text, it does not matter because ultimately it is a Zoning Ordinance.

Chairman Hrivnak asked in regards to an issuance of a permit with an attached drawing, how does that relate, if there is an item in conflict with the drawing and the Development Text, the permit being issued with the attached drawing, which takes precedent.

Mr. Shamp said once a permit is issued, a permit holder has due process rights, whether or not there may be a mistake on some portion of the drawing or in the text, but if there is a mistake that's been made then a variance would need to be granted. Any person can request a variance, knowledge of it is just one of the seven factors the Board is to consider.

Board Member Duncan stated his thoughts are that it appears the permit was granted whether the drawing quality was where it should be so the homeowner had the right to build the fence. The argument that it's changing the character of the neighborhood is hard for to accept when the neighboring property has a similar fence.

Board Member Brickner went through the seven standards: he feels reasonable return is met; he believes it is substantial; he feels whether the character of the neighborhood is adversely affected is more of an opinion and is up for interpretation; he feels standard is met because it will not affect delivery of government standards; he feels the homeowner purchased the property with knowledge of the deed; he feels it would be expensive to move the fence causing a hardship for the homeowner; and the spirit and intent would be observed and substantial justice done by granting the variance.

Ms. Husak addressed standard number five because there is some confusion on the part of the homeowner's acknowledgement as to what authority the Zoning Administrator has to waive those requirements. It stated in the Development Text and the HOA letter that the City Administration can vary from the standards. You could go either way on it because it is a very unique zoning statement in the Development Text.

Chairman Hrivnak also went through the standards: he feels reasonable return is met; he thinks the 30 feet to 2 feet is substantial, however when you look at the photos of the property he doesn't see a big difference whether it's in either location, so he feels that standard is probably met; he does not feel the character of the neighborhood is adversely affected whether the fence is 30 foot or 2 foot and it would be difficult to tell the difference from the street either way as the fence is transparent and does not block your view; no government services are affected; the owner purchased the property and was aware but did get a permitted approval; he feels the owner's predicament could be obviated, however, at a substantial cost; he agrees the spirit and intent of are met whether the fence is 30 foot or 2 foot back.

Before asking for a vote, Chairman Hrivnak asked legal counsel asked if the procedures allow for the Board to table until the next meeting. Mr. Shamp said only at the request of the applicant.

MOTION: Board Member Duncan moved to approve application case 2022-23V to move the rear yard setback from 30 feet to 2 feet. Board Member Brickner seconded the motion. Motion passed.

VOTE: Y – 3 N – 0

At 7:35 p.m. the Board took a short recess. Chairman Hrivnak called the meeting back to order at 7:40 p.m.

Case 2022-13ADM

Board of Zoning Appeals Codes Updates

1. [BZA Code Update Memo.pdf](#)
2. [Proposed BZA Code Updates_Clean.pdf](#)
3. [Proposed BZA Code Updates_Redline.pdf](#)

Chairman Hrivnak said the Board had previous discussions and worked with staff on areas in the BZA Code for updates. Staff and Legal Counsel also reviewed the Code and tonight we are reviewing the proposed redline version, which will then go to the Planning & Zoning Commission for recommendation to City Council.

Ms. Husak informed the Board that the draft went to the Development Committee and they were in support of the changes. As the Chairman mentioned ultimately the deciding authority is City Council based on a recommendation from the Planning & Zoning Commission. Further, Ms. Husak stated the Development Committee had requested a couple of minor changes. On page 3, Section 1127.08 suggested that the public hearing would be scheduled on the City calendar and the Development Committee felt as though that was not finite enough and left it up to interpretation or if the City calendar would change it would not be so predictable for an applicant. Staff discussed with the Law Director's office changing it to be "in accordance with the published application deadline to the next regularly scheduled meeting and also not to exceed 30-days within receipt of the application". She said staff's concern is that is someone submits an

application early and we wouldn't have a regularly scheduled meeting that they would be eligible for potentially until later in the month.

Chairman Hrivnak stated he has wrestled with this before because assuming the meeting is on the 2nd of the month, and as of the 30th of the month before there are no applications and the meeting is cancelled, and then an application comes in on the 1st. Now it is longer than 30-days so he is concerned this change could cause trouble with the 30-day requirement.

Ms. Husak agreed and said it's an administrative function that she and Elise have talked about adjusting the application deadlines.

Chairman Hrivnak said a deadline means they can turn it in any time prior to that so they could turn it in further than 30-days, but not far enough for development staff to make a presentation.

Board Member Brickner asked if they could change it to 14 days, but Ms. Husak said that would not work because they publish the agenda 14 days prior to the meeting and the packet 7 days prior to the meeting.

Ms. Husak said the intent was to give staff time, especially variances for homeowners and contractors, there is a lot of work involved to get an application to a reviewable state. She does not want to go 45 days because that seems excessive. Staff will work on the language to get it to where it makes sense for all parties and respond to of the concerns of Development Committee.

Chairman Hrivnak suggested it could say "it will be at the next regular scheduled meeting no less than 15 days and no more than 45 days", which gives you an opportunity to move it to the next meeting.

Ms. Husak stated they do sometimes have applicants that contact them so close to the deadline. In fact the one the Board will be seeing at the November meeting is one that the applicant's permit was denied on a Thursday and they were informed they would need to request a variance. The deadline was Monday, they worked on it over the weekend and turned it in Monday. She does understand where the Development Committee is coming from in terms of a predictable deadline, it does make sense. Further, she talked about the various committee meetings including the addition of the Community Diversity Advisory Committee that are on the City calendar it would make it difficult to find time to add a meeting.

Chairman Hrivnak agrees that a standing meeting is much easier for the Board, as well as staff. He just does not think the 30 days and a standing meeting can coexist and feels legal should take a look at it. He asked if there were any other items that came up in Developments review.

Ms. Husak stated one of the things they are not changing but did come up as a discussion point and will need to be looked at with the entire code update was whether or not Conditional Uses in and of itself should be laying with the Planning & Zoning Commission. Jesse, Yaz and she talked about municipalities that have Conditional Uses with the BZA and others that have them completely with the Planning & Zoning Commission. Powell is on a divided track depending on where and what it is, so there were some questions at the Committee level as to whether that should be consolidated but no decision has been made.

Chairman Hrivnak did not realize that some go to Planning & Zoning and some to the BZA. He asked Ms. Husak if the Conditional Use arises when the property is first developed or after it is developed and approved.

Ms. Husak said it could be either way. It could be an additional use such as a development that is adding a daycare or kennel and might be unique circumstances related to noise or outdoor activity. Then depending on what district it is in that it either goes to Planning & Zoning or Board of Zoning Appeals.

Chairman Hrivnak said if it is in conjunction with the original application it goes to P&Z and if it is subsequent then it goes to Board of Zoning Appeals.

Board Member Brickner asked if the temporary sign that was discussed at a previous meeting would be considered a conditional use. Ms. Husak said that was because it referred to a sign that was off premise it would not be a conditional use.

Ms. Husak said there was a discussion about "factors vs. standards" and confirmed that the Supreme Court decision in the Duncan case was called factors, so that was changed throughout the document.

Ms. Husak also discussed that a court reporter is not required and are able to have staff clerk the meetings, which Chairman Hrivnak agreed is not needed since the meetings are recorded. Ms. Husak said not much is changing but they are trying to keep it with current practices. One of the things that is in the codified ordinances and she would like the Board to do is work on rules and regulations. She said this Board does a fantastic job but it would be good to have a document that is accepted by the Board, especially if a Vice Chair has to run a meeting then it would be a good resource, as well as a great resource for new members. Also, she foresees a training opportunity as they talk through the items.

Chairman Hrivnak agreed that he would appreciate a training opportunity even if it's just a refresher on what the Board does as the cases seem to be getting more difficult. He also discussed that there is not a Vice Chair of record and that should be done at an upcoming meeting.

Ms. Husak said hopefully they will have a new appointment to fill the vacancy on the Board by the end of the year. She talked about all the vacancies across most of the Boards. She said typically the first meeting at the beginning of the year should have a Chair and Vice Chair election as well as training.

Chairman Hrivnak asked if the small cell towers are part of the Board of Zoning Appeals or is it somewhere else in the Code. Ms. Husak said it is in the Utilities Code. Chairman Hrivnak asked if the placement of those is in their purview.

Mr. Shamp said no and actually it is highly regulated by the State. The best the City could hope to do is come up with some guidelines. What they have found in other cities is the providers want to be good neighbors so they are following the guidelines. There are very narrow circumstances from when you can prohibit them from putting up a 5G pod somewhere.

Chairman Hrivnak said they had talked about this previously and asked what the context of the discussion. Ms. Husak said she discussed that the wireless macro towers are under the purview

of the Board of Zoning Appeals depending on what Zoning District they are in. She said staff is working on guidelines for the small cell towers. Ms. Shamp said you can ask them to camouflage them better.

Ms. Husak informed the Board that City Council did just approve an Ordinance for an update to the property maintenance code, which allows staff to do a more robust code enforcement within the entirety of the City. If a party would object to the code enforcement interpretation an appeal could be filed with the Board of Zoning Appeals. She doesn't think the BZA has heard a Board of Building Code Appeals, but that is also something the BZA would be responsible for hearing. This is something that comes down to an interpretation by either the building or zoning official and did they apply the code correctly. It's a very narrowly defined subject matter. They are hoping to use the code to bring some properties up to the quality we would hope to see in the City. Chairman Hrivnak agreed before it was suggestive and Ms. Husak said it was hard to enforce and follow up on complaints.

Chairman Hrivnak asked if there was anything else to review and when this will become an Ordinance. Ms. Husak said they hope to have it in place by the first Board of Zoning Appeals meeting in January 2023.

STAFF COMMUNICATIONS

Ms. Husak announced there is an application on file for the next meeting. The 2023 meeting calendar will be included in the next packet.

Chairman Hrivnak did ask regarding the Ordinance that was approved for tonight's Development Text would it be codified into the Zoning Code so that years from now someone could find it. Ms. Husak said on the website there is a Development Toolkit under the business tab, which has a very robust map that has been curated by staff over many years. When you click on neighborhoods they are all different colors and when you click on a neighborhood it goes to a Development Plan. Typically in residential districts that are as old as The Retreat it does not have any specifics, newer ones do. There might be certain restrictions outside of the realm, like this fence. It has taught staff that you can't just look at the code you do have to look at the Development Plan map.

ADJOURNMENT

MOTION: Chairman Hrivnak moved to adjourn by all members signifying "I". Meeting was adjourned at 8:06 p.m.

MINUTES APPROVED: November 3, 2022

 2-2-23

Jim Hrivnak,
Chairman Date

 2/2/23

Pam Friend,
Administrative Assistant Date