



**BOARD OF ZONING APPEALS  
MEETING MINUTES  
APRIL 6, 2023**

**CALL TO ORDER/ROLL CALL**

Chairman Hrivnak called the Board of Zoning Appeals meeting to order at 6:30 p.m. Board Members in attendance included Jim Hrivnak, Randy Duncan, Don DePalma, Ryan Brickner, and Tyler Herrmann. Staff in attendance included Claudia Husak, Planning Director; Elise Schellin, Development Planner; and Peyton Kaman, Zoning Technician.

**HEARING OF VISITORS FOR ITEMS NOT ON THE AGENDA**

Chairman Hrivnak opened the floor for visitors to address the Board with items not on the agenda. Hearing none, he closed this portion of the meeting.

**APPROVAL OF MEETING MINUTES**

February 2, 2023 Meeting Minutes

[02022023\\_BZA\\_Draft\\_Min.pdf](#)

MOTION: Board Member Duncan moved to approve the Board of Zoning Appeals Meeting Minutes of February 2, 2023. Board Member DePalma seconded the motion.

Chairman Hrivnak requested a roll call for passage: Randy Duncan, yes; Don DePalma, yes; Ryan Brickner, yes; Tyler Herrmann, yes; and Jim Hrivnak, yes.

**VOTE:**            Y – 5            N – 0            AB – 0

Motion passed with a vote of 5-0-0.

**STAFF ITEMS**

**NEW CASES**

- a.     VARIANCE REQUEST (2023-06V)
  - Applicant:     Douglas W. Hill
  - Location:       9158 Liberty Road
  - Zoning:         R - Residence District
  - Request:        Review and approval of a variance to code sections 1145.34(b)(1) and 1145.34(d) to allow a six-foot privacy fence along the northwestern property line.

- 1. [Hill Property Fence Application.pdf](#)
- 2. [Hill Fence- BZA Staff Report.pdf](#)

Peyton Kaman, Development Technician, presented the Staff Report and reviewed the standards for a variance and Finding of Facts. Staff is recommending the Board not approve either variance to Code Section 1145.34(b)(1) or Code Section 1145.34(d).

Doug Hill, 9158 Liberty Road, the applicant, was sworn in by Chairman Hrivnak and thanked the Board for hearing his request. He apologized for not getting the permit ahead of time and explained he inherited the property from his grandparents who had donated land for Adventure Park, the Powell Pool and various biking trails with the agreement that the property would continue as agricultural use and is why he believed it would not need any special permitting to change the split-rail fence.

His reasoning for the 6-foot fence is because, unfortunately the residents at the apartment complex to the west routinely throw scraps of food onto his property drawing not just deer but raccoons and other rodents. He expressed his concerns with the property owner, who they have known for a long time, but who has not been responsive. Furthermore, trespassers are coming from the direction of the apartment complex and cutting through his yard to access Liberty Road. He pointed out his view is of the garages, unsightly shed, and broken-down mower. In December, his 7-year old son was harassed while he played in the yard by someone at the apartment complex. He feels the best evidence for the 6-foot fence is there have been no issues since the fence went up. He pointed out there is 500-feet of sidewalk in front of his property that does not have an easement. He said their privacy is limited due to the apartment complex and a path in the rear of the condos.

Board Member Herrmann asked why the 6-foot fence is necessary vs. the allowable 5-foot fence. Mr. Hill feels the expense to take the fence down now that it is up and the fact they have not had any issues since the fence went up insures the harmony for not only his family but for the neighboring apartment complex.

In addition, Board Member Herrmann asked Mr. Hill when the fence went up and if he had spoken with the other neighbors in the condos. Mr. Hill responded the fence went up in December and that he has spoken with several residents of the condo units who did not seem opposed to the fence.

Board Member DePalma asked any negative comments regarding the fence have been received from other neighbors. Mr. Hill said not from the condo residents only those from the apartment complex.

Planning Director Husak discussed an email was received in support of the fence from someone at the Brookehill Condos, which was given to Board Members prior to the meeting. No other supportive communication has been submitted to the City, but that she believed residents of the Abbots Gate apartment complex are in attendance. She explained the notification requirements in regards to the public notice process and said when an apartment complex is within the 250 feet of a subject property the notice goes to the property owner or the management company depending on who is listed on the auditor's site, a sign regarding the public hearing is placed on the subject property and there is also public notification placed on the City of Powell website.

Chairman Hrivnak opened the floor for public comment and swore in the following who gave testimony regarding the matter:



Joe Borghese, 291 Penny Lane, property manager and resident of the Abbots Gate apartment complex gave testimony in opposition to the 6-foot privacy fence. He said most residents of the apartment complex are over 70 years and are not the ones trespassing. He said there is nothing he can do about trespassers cutting through the complex onto Mr. Hill's property. He said some tenants were tossing apples and carrots near the fence, but once the complex owner notified them they stopped. He didn't realize Mr. Hill could see the shed area, but he cleaned up around the shed on Monday. Also, there are only 9 dogs in the complex. His son was yelled at because one of the neighbors saw him shooting a BB-gun at deer. He feels the fence was put up out of anger and it has created a hardship for tenants sitting on their decks. He said they respectfully ask the variances not be granted and Mr. Hill take down the fence.

Sue Newell, 188 Penny Lane, resident of the Abbots Gate apartment complex gave testimony in opposition to the 6-foot privacy fence. She has lived there for 8 years and admitted she is the one who put the food on the neighbor's property, but that nobody ever said anything so she thought it was ok. Since being notified not to put food out, she has stopped. She does not believe the fence gives Mr. Hill privacy or safety and feels it was done out of anger.

Carolyn King, 288 Penny Lane, resident of the Abbots Gate apartment complex gave testimony in opposition to the 6-foot privacy fence. She feels the fence is not giving the Hill's privacy as is able to look over the fence from her deck. Also, it doesn't feel right because you have the 120-feet of fence and then the split-rail. What this comes down to is Mr. Hill's son was using a BB-gun and someone said something to him that made Mr. Hill angry and then the fence went up.

Brenda Borghese, 291 Penny Lane, resident manager and resident of the Abbots Gate apartment complex gave testimony in opposition to the 6-foot privacy fence. Before the fence went up residents had a beautiful view all the way to Liberty Road. Part of the resident's lifestyle is looking out over the land and enjoying it. It's a statement for Mr. Hill to put this 6-foot fence in front of where these ladies live. Mr. Hill's son to pointing a bb-gun towards the apartments, trying to hit deer is not acceptable in her opinion. She feels that's what caused fence to go up.

Board Member Herrmann asked Mr. Borghese for clarification on where the car headlights shine when someone is backing out of their garage. Mr. Borghese said when backing out of the garage no headlights shine in the direction of Mr. Hill's home.

Board Member DePalma asked what the purposes of the adjacent parking spaces are. Mr. Borghese said one space each is assigned to the tenants in addition to the garage space. He said the spaces are rarely used because the tenants park in their assigned garage. Board Member DePalma said so it is possible that someone could pull in there with the headlights on. He also asked Mr. Borghese when the trash around the shed was cleaned up. Mr. Borghese said they cleaned up around the shed on Monday.

Chairman Hrivnak closed public comment and invited Mr. Hill, the applicant to come forward and respond to the testimony just given.

Mr. Hill said in conclusion, all his complaints were just acknowledged by Mr. Borghese, the trespassing, trash and food dumping. Mr. Borghese literally pours his corn out every single day but said their intent is not to feed the deer, ducks, raccoons, etc. He added you can clearly see pulling into a parking space or backing into a garage does shine the headlights into his home.

He has a good relationship with the Brookehill condos because they don't throw food into his yard nor do they trespass on his property. He doesn't know if the trespassers live in Abbotts Gate apartments, but trespassing does happen. Now with the fence up he sees them cutting through by the office complex to the north almost every day. It's disappointing for him to hear they want to be good neighbors. Mr. Borghese acknowledged he was on the emails to the property owner asking for help, but nothing was done until notice of this meeting went out.

Chairman Hrivnak opened public comment up for new evidence. Mr. Borghese gave additional testimony in regards to the email chain between Mr. Hill and the Abbotts Gate property owner.

Chairman Hrivnak closed public comment for the application and asked the Board for their comments. He reminded them of what the Board is responsible with regard to approving or denying a variance.

Board Member DePalma said the property manager mentioned seven or eight dogs live at Abbotts Gate, but there are others being walked on the property. He went to the property and noted more than a lawnmower and leaves, there was an overturned trash can, tarps, a filter, balls and pumpkins. He would not want to look at this daily and was surprised it took notification regarding this meeting before it was cleaned up. He does not believe it's a private property owner's responsibility to provide a pastoral view to neighbors. If it was a city park or public land he might agree, but not a private property owner trying to shield, protect and have peaceful enjoyment of their property. He does not believe whether the fence height or the type of construction presents a negative impact to the rental occupants or that the character of the adjacent property is negatively affected in anyway by the fence. Further, Mr. DePalma said although the fence does not comply with the current intent of zoning requirement, he believes for the reasons Mr. Hill listed, this would provide substantial justice if approved. He is not opposed to leaving the fence the way it is, as he believes changing it presents a hardship to Mr. Hill due to the expense.

Board Member Duncan reviewed the criteria for granting the variance and agreed with Staff that the first standard was not met because there was a path for the 5-foot fence approval. He does not agree with staff that 5-foot vs. 6-foot is substantial or that it is adversely affecting the adjoining properties. It's not affecting delivery of governmental services. He agrees that knowledge of the zoning restriction standard was not met as it is easy to find the restrictions online. He agrees that the predicament could be obviated by applying for the permit and he feels the last standard is a tough one because the spirit and intent was not met because the process was not followed, however he feels the variance request it is not substantial.

Board Member Herrmann asked staff whether the height of the fence caused it to not meet the beneficial use standard. Planning Director Husak responded they made the determination based on the applicant's own comments, which did not meet the standard. He talked about staff's opinion that the proposal is substantial due to the 6-foot height being significantly higher than the split rail fence, which was determined to be about 4-foot and he is weighing whether the 6-foot is significant when going from 4-foot. He asked about the determination of the neighboring properties being adversely affected, which Planning Director Husak stated that the 5-foot solid fence could have been approved through the permitting process by the applicant obtaining signatures from adjoining properties.



Board Member Brickner agreed with staff that the variance is substantial, so the standard is not met based on the height difference of the split rail. He doesn't believe the beneficial use is changed by the fence being there so he feels the standard is met. He agrees that the predicament could be obviated through some other method. He feels the substantial justice standard is a tough call because either party will be upset based on the final decision.

Chairman Hrivnak feels there are two questions that need to be addressed. First, should there be a variance granted for exceeding the 5-foot height, which he does see a unique need prohibiting a 5-foot fence of having the same effect as a 6-foot fence. The Code requires a 5-foot fence and he does not see evidence to grant a variance for a 6-foot fence. Secondly, is for a variance to allow a solid fence, which the Code requires obtaining approval signatures from adjoining properties. No approval signatures were obtained and based on the testimony from the tenants at Abbotts Gate, it is hard for him to recommend a variance for a solid fence. His decision is based on the request for the variance, which the Board can only make their decision on whether there are special circumstances at the property. He does not see any special circumstances based on the size of the property, the elevation change or anything that would indicate a variance is warranted.

Board Member Herrmann asked staff that since there seems to be some support from the Board, if they approved the solid fence variance but disapproved the height variance what would need to happen. Planning Director Husak said Mr. Hill would need to apply for a permit for the 5-foot fence and then figure out how to get it to that height. In regards to not approving either variance, per the Code, would the applicant then need the signature of the owner of Abbotts Gate or signatures of tenants or both? Planning Director Husak responded only the property owner's signature would be required.

Board Member DePalma asked should the property owner of the rental property been present and given testimony opposing the variance rather than the tenants? Planning Director Husak said anyone can come forward and give testimony regarding the application not just the property owners, however the approval signature would need to be obtained from the adjoining property owners.

Chairman Hrivnak asked staff to review the exact language in the Code as it pertains to the variance request before a motion is made.

Board Member Brickner moved to approve the variance to Code Section 1145.34(b)(1) to allow the fence height to be more than five-feet in height. Board Member Herrmann seconded the motion.

Chairman Hrivnak requested a roll call for passage: Don DePalma, yes; Ryan Brickner, no; Tyler Herrmann, yes; Jim Hrivnak, no; and Randy Duncan, no.

VOTE:            Y – 2            N – 3            AB – 0

Motion failed with a vote of 2-3-0.

Board Member Herrmann moved to approve the variance to Code Section 1145.34(d) to permit a solid fence. Board Member DePalma seconded the motion.

Chairman Hrivnak requested a roll call for passage: Brickner, yes; Herrmann, yes; Hrivnak, no; Duncan, no; and DePalma, yes.

VOTE:            Y – 3            N – 2            AB – 0

Motion passed with a vote of 3-2-0.

#### **OTHER BUSINESS**

CASE 2023-10ADM  
Board of Zoning Appeals Rules and Regulations

Planning Director Husak gave an update to the Board regarding Rules and Regulations for the Board of Zoning Appeals, which staff has been charged with by the Development Committee of City Council.



Planning Director Husak thanked the Board for going through the standards tonight and giving comment on the variances for the meeting. She announced two variance requests have been submitted for the May meeting.

Chairman Hrivnak complimented Peyton Kaman, Development Technician, for his presentation regarding the variance for the meeting.

#### **ADJOURNMENT**

Board Member Brickner made a motion to adjourn the meeting at 8:01 p.m. Board Member Duncan seconded the motion. By unanimous consent of the Board, the meeting was adjourned.

MINUTES APPROVED: May 4, 2023

	5-4-23		5/4/2023
Jim Hrivnak, Chairman	Date	Pam Friend, Administrative Assistant	Date