

MINUTES OF THE BOARD OF ADJUSTMENT

DATE: June 5, 2012

TIME: 1:30 p.m.

The regular meeting and public hearing of the Board of Adjustment was held on the above date and time in City Council Chambers with the following members and personnel in attendance: James Turner (Chair), Ed Alden, Terry Speake, Robert Sweere, Gabrielle White (Alternate), Alana Owen, Senior Planner, Thomas Rykowski, Assistant City Attorney, Duke McDonald, Assistant City Attorney, Sandy Goddard, Administrative Assistant. Absent: Matt Cologne

INTRODUCTION OF ZONING ORDINANCE AS EVIDENCE

The Zoning Ordinance dated March 7, 1995, and last amended April 18, 2011, was introduced into evidence.

APPROVAL OF MINUTES : The minutes of February 7, 2012 were approved unanimously

COMMUNICATIONS: None

UNFINISHED BUSINESS: None

SPECIAL EXCEPTIONS: None

VARIANCES:

1. Variance 558
(1137 South Pickwick Avenue)

Jacob McWay

Ms. Owen stated the purpose of the variance request by the applicant is to permit an eight (8) foot tall solid wood fence to be placed around the property, including within the required front yard along Fremont Avenue and within the side yard setback on the north and south sides of the property, pointing out the area on the overhead display map. The Zoning Ordinance states that open fences not exceeding fifty (50) percent screening and four (4) feet in height are permitted in front yards. The subject property is a double frontage lot with frontage on both Pickwick and Fremont Avenues. The front yard requirements must be met on both Pickwick and Fremont even though the Fremont frontage is the "backyard" for the residence that fronts on Pickwick. There was previously a fence surrounding the property however it was removed because it was in disrepair. The applicant was replacing the fence when it was discovered the previous fence was non-conforming and was not able to be replaced without approval of a variance.

As part of this application, the owner is also requesting a variance from Section 1305.B.3, of the Zoning Ordinance which states that fences not exceeding seven (7) feet in height are permitted within any yard except the front yard. Since the proposed fence is eight (8) feet in height, the fence would need to be outside the required side yard setback of five (5) feet rather than on the property line as proposed on the north and south sides of the property. Staff did speak with the applicant about considering moving the placement of the fence to just west of the existing tennis court and reducing the height to six (6) feet rather than eight (8) feet as proposed in order to minimize the requested variance. This would provide a setback for the fence of approximately twenty (20) feet which is just five (5) feet short of the required twenty-five (25) foot front yard setback. Reducing the height of the fence to six (6) feet would allow the fence to be placed around the property as proposed without the need for a variance from the side yard setback. Staff discussed this option with the applicant and he decided to proceed with the variance as originally requested. Staff is not in support of the Variance application as requested and Ms. Owen said she was available for questions or comments.

Mr. Sweere asked how this complaint came to the City, if the prior fence was eight (8) feet tall and if the replacement fence is being placed in the same spot where the prior fence was.

Ms. Owen said there was a complaint filed with the City regarding the fence and that's when it was discovered the previous fence was non-conforming and unable to be replaced. It was her understanding that the prior fence was eight (8) feet tall, and that it is being put in the same place.

Mr. Sweere referred to a letter received from someone in the neighborhood that seemed to suggest that the replacement fence is fifteen (15) inches closer to the street than the prior fence, asking if that is correct.

Ms. Owen stated they do not know if that is the case.

Mr. Sweere asked if the owner had replaced the fence picket by picket and post, one at a time, as opposed to doing the whole fence at one time, that would have been a repair or maintenance of the fence and his prior legal non-conforming use would have been authorized.

Ms. Owen stated there are provisions for replacing or repairing non-conforming structures and there is a threshold of seventy-five (75) percent. Ms. Owen said she had spoken with Chris Straw, Director of Building Development Services, who is not here today, and he indicated that had they been contacted prior to the fence being removed, there were ways that they could have worked with the property owner to do some maintenance. That was not how it was handled.

Mr. Sweere commented that it was because he either didn't know or didn't plan on having a complaint that we are here today, is that correct.

Ms. Owen said she can't speak as to how or why the applicant made the decision to take the fence down rather than consult Building Development Services first.

Mr. Sweere asked if he had replaced it one post and one picket at a time so that it was called to repair he would have a legal non-conforming use.

Ms. Owen commented that it was possible depending upon how it was done.

Mr. Sweere asked that the City's proposal with respect to the west fence would put it on the tennis court side of the pine trees that are there, is that correct. There are a row of pine trees between the street and the tennis court.

Ms. Owen said correct. The proposal is to move it as close as possible to the tennis court to provide as much of that front yard as possible.

Mr. Sweere asked how the public is served if we have the fence on the other side of the pine trees as opposed to where it is, in your view.

Ms. Owen said the idea is to come as close as possible to meeting the front yard setback. The reason for the front yard setback and the height of the fences being reduced within front yards and the open screening requirement is for safety reasons for adjacent properties, to reduce possible sight obstruction for adjacent driveways. Staff believes that moving the fence further away from the property line is moving in the direction of being in compliance with the Zoning Ordinance and providing for safety.

Mr. Sweere commented that the public would be served because they are moving the fence so there is less of a deviation from the ordinance; and it's fair to say that the actual safety of the public is not in any way enhanced by moving the fence to the other side of the pine trees that you can tell as a practical matter in that specific location.

Ms. Owen said correct and continued by adding that she is not certain you can say that, because you would have a better sight for the adjacent properties and their drive-ways if the fence is moved further to the east, away from the property line.

Mr. Sweere commented that if the applicant had not done anything, just left the fence there and let it continue to deteriorate, the public safety would not have been enhanced or there would be no additional detriment to public safety if they left the existing, falling down fence where it was.

Mr. Owen said there would not have been any change.

Mr. Turner stated they could open the public hearing and let the applicant have a chance to speak.

Mr. McWay was sworn in by Mr. Turner.

Mr. Jacob McWay, 1137 S. Pickwick, Springfield commented that his wife and two (2) of

his four (4) children are with him today. The house was purchased last summer and it is a unique property as it is a large double frontage lot, especially within the city limits of Springfield. The home when it was purchased was in disrepair. They are committing all liquid resources to the restoration of the property as it stands right now. The attempt to restore the fence is what brings them here today. Mr. McWay stated they did not realize there would be a problem replacing the existing structure. The eight (8) foot fence already existed along the entire backyard of the west property which is the Fremont side, at least eighty (80) percent of the backyard north property line and also at least fifty (50) percent of the backyard south property line. One of the adjacent property owners on Fremont to the south said that the fence has been on the property for nearly fifty (50) years. The original eight (8) foot fence was in severe disrepair and considered it a safety hazard and felt obligated to address it from a liability standpoint. It needed to be addressed from a safety standpoint because it was leaning severely on both the north and southwest sides and from a property value standpoint, both theirs and the neighbors. Mr. McWay stated this is a major investment. The whole project is going to cost over \$15,000 and before a problem was discovered they were already \$8000 into the project. It is seventy-five (75) percent complete on Fremont and west border and north border. To remove it will cost additional funds and another fence will have to be built so there will be thousands of dollars of additional investment over a very significant investment already. In addition, the cost of this meeting is \$1000.

Mr. McWay referred to the display showing the backyard, stating this is a backyard; it is not a front yard for any purpose. He doesn't feel this twenty-five (25) foot ordinance really contemplates the property of this type. There is no such thing as two front yards. Research was conducted for two front yards on the internet and one site said page two front yards does not exist and expanded the search to Google and not one referenced a house with two front yards, it just doesn't exist. The original plat was drawn in 1903. It has never been combined with lots or parcels, it is the original layout. The house was built in 1922 on Fremont where it is and always will be the edge of the backyard. It's our back yard. It's really not possible as discussed before to move the fence outside the twenty-five (25) foot zone because of the existing fence support structure. We can't build on top of it obviously. Moving the fence further in the property really forces us to see our property for another purpose that we don't choose to do. It is essentially taking away part of our yard, roughly 2,250 square feet. That is a large piece of property. Residents he has spoken with, the ones adjacent to them, say there is no problem with the fence. Pictures of the fence were shown and Mr. McWay gave a descriptive overview, stating the fence is in the same place, the same height. The other pictures showed the fence leaning into the other garden, and the deteriorated state of the fence which was ensnarled with vegetation and a picture showing the measurements of the fence. Across Fremont, there is not a house that faces the fences. In one of the letters from the neighborhood there was the mention of an obstruction; the fence has been there the whole time. The second comment was about being able to back out of the driveway. The average car is fourteen (14) to sixteen (16) feet long, and the average person driving the car sits 5 feet back from that point so they are maybe ten (10) feet from the back of the car. This fence is nineteen (19) feet back from the street. It's not causing an obstruction. He commented that he can go all over town and see people's backyards looking at the right to put fences up when their houses face other streets, showing examples on

Fremont, Kickapoo, and National and stated they should have the same right as everyone else to build back the fence for the safety of their children, their property and privacy. A four foot fence exposes his children to safety issues. Mr. McWay commented that a criminal element could reach over and take one of his daughters. That's not ok. One of the kids could climb over the fence easily and get into the oncoming traffic on Fremont. That doesn't seem reasonable, but it's a real possibility. Mr. McWay stated there is no doubt in their minds that the improvements that are being made to the house and the property and the structures will increase the value and improve the neighborhood for everyone else. Mr. McWay stated that they are the ones taking the risk to do this and should be allowed to have the fence and if they are not allowed to do this, it will permanently damage the property value of their home and their livability. The home probably would not have been purchased if there was not a privacy fence in the back yard. Mr. McWay commented they are the ones who would be harmed by this issue because they are the ones taking the risk, investing in the property. Mr. McWay said he appreciates the opportunity to make their case and hope that it comes to a positive and feasible common sense solution.

Mr. Turner referred to Mr. McWay's statement that the lot was originally platted as the lot now exists, and clarifying that there never was a separate lot on Fremont Street.

Mr. McWay said that is correct.

Mr. Turner asked about the trees inside the fence line, how much distance is there between the fence and the trees and the trees and the tennis court.

Mr. McWay said a foot or two between the trees and the fence and maybe eight (8) to ten (10) feet between the trees and the tennis court fence.

Mr. Turner asked if the City had tried to talk about relocating the fence inside the tree line.

Mr. McWay said correct, next to the tennis court.

Mr. Turner asked if that would leave space to utilize the tennis court if you did so.

Mr. McWay stated it would.

Mr. Turner commented that to some degree the trees are the permanent fixture that is still there, and locating a fence on either side of those, if you have the permanent fixture, no one is going to suggest you cut down the trees, so we can work around that it appears, to some extent.

Mr. Alden noted that he can see where the driveway is on the south property on Fremont, but not on the property to the north. Mr. Alden inquired as to the proximity of the driveway to the north to the subject property.

Mr. McWay stated they share a driveway between the two homes.

Mr. Sweere commented that as he understands it, there are two parts to the Variance request. One is the location and the second, the height. You can have, under the ordinance, a maximum seven (7) foot fence. Mr. Sweere asked if Mr. McWay had looked at the seven (7) foot option as opposed to the eight (8) foot option.

Mr. McWay stated that the most economical standpoint is to trim the fence down, but they are trying to maintain the original characteristic of the property.

Ms. White said Mr. McWay had mentioned he felt the fence had been in place for, quote, "approximately fifty (50) years", and inquired as to whether there is any information the City can provide that can tell how long the fence had actually been there other than opinion.

Mr. McWay stated that would be the testimonial of the neighbors.

Mr. McDonald commented that if the Board is done with questioning, the City has some questions for Mr. McWay.

Mr. Turner asked if Mr. McDonald would like to hear the other people who may speak, or go ahead with his questions.

Mr. McDonald commented he wanted to go ahead with his questions for Mr. McWay as he is the principal witness; so we are talking about a fifty (50) year old fence.

Mr. McWay said yes.

Mr. McDonald stated that we are talking about a 100% tear down.

Mr. McWay said yes.

Mr. McDonald commented the fence goes back to 1970.
Mr. McWay said yes.

Mr. McDonald commented that Mr. McWay stated he started replacing the fence without a building permit.

Mr. McWay said yes.

Mr. McDonald verified with Mr. McWay that he didn't come to the City to get a building permit.

Mr. McWay said not until they found they had a problem and they did not know it was necessary.

Mr. McDonald told the Board that he has other legal points and other questions to make so that we can deal with things in a package. It makes sense to point out that the Zoning

Ordinances, as Alana Owen testified from the beginning, were passed in 1995. Mr. McWay is asking the Board for a 100% tear down for a fence that has existed since 1970. Under Zoning Ordinance 5-1306.2.D, he had to get a building permit. When he did not do that he violated the Zoning Ordinance. When that happened, under Zoning Ordinance 5-1704, that ordinance violation terminated his right to continue a non-conforming use. The other point to make is that because he is asking the Board to authorize a 100% reconstruction, the Board has no authority to do that under 3-3502. All the Board can do is ok a reconstruction of 75% or less, so what he is asking for, the Board does not have authority to do. What that brings us to is all he can do at this stage is ask for a variance on the design and the height. He can ask for a variance on the four (4) foot fence, and for the screening, but even then, he has to meet every single criterion before the Board again has authority to grant the variance.

Mr. McDonald then went to Mr. McWay's answers in the application to the criteria that the Board is to consider on whether to grant a variance; question A asks about physical surroundings, shape and topographical condition, etc., and you answered yes, because of safety and property concerns. Mr. McDonald further questioned Mr. McWay to imagine standing on the tennis court, looking toward Fremont, and imagine you have a four (4) foot fence with 50% screening and as you look around your property, you consider the physical surroundings. What is it about having that four (4) foot fence with 50% screening that works a hardship on you because of those physical surroundings.

Mr. McWay commented it is the safety factor; he believes his children being exposed to harm is a major concern. There is no privacy any place anymore. The fact that the fence has been there for fifty (50) years is a characteristic of the neighborhood.

Mr. McDonald confirmed with Mr. McWay's that his answer is for the children's safety.

Mr. McWay said from a safety concern there is that, as well as the fact that the property is not secure with a four (4) foot fence. Because this has been delayed, as an example, last weekend they were told that children were playing in their yard coming in through the back because the project is stalled. Those are examples of the types of things that are concerns.

Mr. McDonald asked Mr. McWay to imagine being on the tennis court, still looking at the four (4) foot fence with 50% screening and imagine the shape of the property. Mr. McDonald asked what is it about the shape of the property that would make that fence a hardship.

Mr. McWay said he doesn't really understand the question.

Mr. McDonald asked Mr. McWay to consider the shape of the property; it's a rectangle, and there is a four (4) foot tall fence with 50% screening; Mr. McDonald asked what is it about the shape of that property that would make that fence a hardship.

Mr. McWay commented that he doesn't believe it is the shape of the property; it's the fact that there is no fence. A four (4) foot fence is not a fence from the standpoint of

privacy and safety.

Mr. McDonald asked about the topographical condition of the property, same question.

Mr. McWay said it is flat, easily accessible.

Mr. McDonald stated just like every other property in the neighborhood.

Mr. McWay said true and everybody else is able to have privacy fences in their backyard.

Mr. McDonald stated that the conditions that apply to the property are similar to the conditions of every other property being discussed in the neighborhood. He referred to answer E, and the response in the application.

Mr. McWay said his wife just reminded him that because of the size of the lot, there is difficulty seeing the kids back there where they are at, so the property is unique in that because of the distances, we can't have the same level of safety and security for the children with that little fence like somebody else might be able to have.

Mr. McDonald asked to move to part E of Mr. McWay's response; the alleged hardship has not been created by any person presently having an interest in the property and the answer was no.

Mr. McWay asked if he had not understood the question correctly.

Mr. McDonald commented that possibly he hadn't and was welcome to modify the answer and didn't mean to suggest how Mr. McWay was to testify.

Mr. McWay stated they initiated the project, didn't understand the code issues, so if that's what the question is implying, then said they are being transparent here.

Mr. George Marino, 1151 S Pickwick, commenting that he is Mr. McWay's neighbor to the south. He has lived in his home for twenty-five (25) years, he and his wife. Her family lived in that house twenty (20) years prior to that, so we are going back forty-five (45) years, give or take. That fence was put up when Dr. D'Houbler bought the house approximately 1965. The fence has been there since then. No one, to his knowledge, has ever voiced a complaint about the fence to either Dr. D'Houbler or to Mr. McWay. Mr. Marino stated that if you have traveled up Fremont on the west side of that fence in the last three (3) to five (5) years, you would be able to see that the fence has deteriorated continuously. The question was asked if the fence was a hazard to the public and yes it is, because it was leaning to the sidewalk. The fact that Mr. McWay has four (4) young children; Mr. Marino stated that he thinks a four (4) foot fence that far from the house is ridiculous. Mr. Marino stated he does not care what the ordinance says and as a parent of five (5) children, which are now adults, he is unable to see why the City is in such a toot about this fence when there has been a fence of the same size, the same dimension, for fifty (50) years, and they haven't done anything about it then.

Mr. Marino questioned why the fence is an issue now.

Mr. McDonald said he would be happy to answer that question. While the fence was remaining, it was a non-conforming use and the City was perfectly willing to let it be. When you do a 100% reconstruction of a non-conforming use the law favors having non-conforming uses go away. They don't get to hang around.

Mr. Marino asked where the City was fifty (50) years ago.

Mr. Rykowski addressed the Chairman stating it would be appropriate at this time really to confine the testimony to the Board, and the Board to request questions where appropriate and allowed by the rule by Mr. McDonald, who has accurately relayed the correct law on a point; this is not an argument between people who have differing opinions. They should present their evidence and the Board should have questions properly handled rather than this, which this will also likely prolong the hearing.

Mr. Marino apologized to the Board for becoming emotional, adding that he has gotten to know the family and meet their children and stressed the fact that if he had children of their age and the fence was that far away from the house, he would do the same the thing that Mr. McWay did. He would replace a bad fence that was in terrible disrepair to protect the children and stay within the conformity of what it was.

Mr. Arthur Kyle McClure, 1219 E Catalpa, which is east of Weller referring to the map, stated he would like to speak in support of granting the variance to the McWays for the fencing of their property and commented he has an interest as a neighbor just around the corner from the back and side fencing on Fremont Street. Mr. McClure stated his concern for his son who plays in the McWay's yard almost on a daily basis and continued by saying he has closely considered the standards for the variance set forth in the City's codes. Mr. McClure states that one of your most important considerations in the matter is letter F, which states in 3-3503 of the standards, that the granting of a variance will not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood in which property is located or diminishes or impairs the value thereof. Mr. McClure went on to say that in this situation, not only is the variance not detrimental to the public welfare, it is fundamental to sustaining the safety of the many children who play in the double lot yard as well as those pedestrians who walk on the sidewalk and the drivers on the street. He stated the restoration of the fencing is a vast safety improvement for the home and neighborhood. The fence was not only unsightly before but appeared to be potentially unsafe and in danger of falling over. This all goes to answering the considerations regarding public safety in letter G of the standards as well. Four children in a household who each have 2 or 3 friends by on the way home from school or on a summer day evening, as many as 12 to 16 children often are playing in the yard that can accommodate them. An active back yard that can be observed from the busy street would obviously be a significant distraction to the drivers. Mr. McClure stated that is why we see so many similar high fences without setback along Fremont and National in areas where residents have side and back yards that front the busy street. Mr. McClure said it is important the fence be the height which deters anyone in the yard from attempting to climb over the fence into a busy street.

Because it's so far from the house, it would be difficult to see anyone coming on to the property without permission from the back or sides. It's also important that the fence height deter anyone from entering onto the property for the purpose of trespass, theft, or worse. The placement of the restored fence is historically consistent and because the entire property is now restored to the full vibrancy of being a young family's home the height on the street front and sides seems appropriate to keep those in the yard safe from unnecessary observation or invasion of any kind. Mr. McClure stated there has been a tall fence in precisely that spot as long as he can remember and its' restoration at the requested height will be an improvement to the surrounding values in the context of the entire property being restored to full usefulness and maintenance, especially considering the fence and the immediate surrounding area has been in disuse and disrepair, with little landscaping, maintenance for probably more than a decade in this sense the variance is more of a grandfathering in the terms of basic framework of what has existed there for many years. Mr. McClure believes there should not be any significant negative impact then in terms of impairing an adequate supply of light and air to adjacent property or substantially increasing congestion in the public streets or in increasing the danger of fire or the spread of fire in fact the McWays are reducing those risks. The fencing variance allows the McWays to maintain the safety of their backyard which is a very different place than the front yard. They should not be penalized for making a custom incremental safety and aesthetic choices because they purchased a home where the back fence fronts a street, especially considering that's always how the property has been utilized. That's never been a front yard for a house on Fremont. This will be an improvement, consistent with the neighborhood and in fact contributing to its revitalization which is consideration for related in letter H. In this case, the family being able to fully restore the property and custom way that proves most safe and useful for them and actually enhances public safety ultimately should have a positive effect on surrounding properties rather than a negative one.

Mr. John Wersh, 1243 East Loren Street stated that the previous speaker covered what he wanted to say, but his family lived at Meadowmere and Fremont just two streets down from 1960 to 1988. He stated he grew up in that house and that fence was originally put there by the Heer family. He remembers when Dorsey Heer lived there. There was a fence there in 1960, because he used to go down and play there. There was a little summer house back there where he had a club house. The fence has been there since 1960 because he played in it. This is just this gentleman's backyard and it has nothing with this ordinance. Is there an ordinance on the books that covers someone's back yard, sure there is. Mr. Wersh said he believes this should be a grandfather issue and considered as this person's backyard, not the front yard.

Ms. Molly Brown, 1048 S Pickwick, stated her husband and her daughter Emma have accompanied her today; who is a friend of Avery McWay. Ms. Brown supports the McWays in allowing the variance and would like to discourage the notion of trying to move the fence behind the tree line. She believes that would actually harm public safety by having that row of trees where unscrupulous people that would want to lurk behind there and just give them someplace to hang out which doesn't seem like a very good thing in terms of public safety.

Mr. Matt Miller, 1308 S Pickwick commented that he supports the variance.

Mr. Savage, 1152 S Fremont, stated that they are the south property next to the McWay property and have lived there for 47 years, have lived with the fence and the neighborhood for 47 years and love it. They have no objection to the fence. When the McWay family moved in they asked Mr. Savage if he would mind if they put a fence on the side, which they never had before. There were trees and shrubs and a small wire fence and Mr. Savage told Mr. McWay it would be better than taking care of the yard himself. Mr. Savage commented the ordinance seems to be a little backward as far as he is concerned. He believes that everything was grandfathered in what they put in. The old fence should have been taken down a long time ago and it should be replaced especially on the Fremont side.

Mr. Alden commented that Mr. Savage' driveway is about the same distance to the south of the eight (8) foot fence as the driveway on the property to the north. Mr. Alden asked Mr. Savage if he sees any hazard as he is traveling south on Fremont coming toward his driveway, coming in to his driveway, or if there is a hazard backing out of the driveway to go north on Fremont.

Mr. Savage said they have been doing it for 47 years, no problem.

Ms. Carol Chalfant, 1145 S Fremont, pointed out that her driveway is directly across from the fence so she looks at the fence everyday and this fence is a huge improvement over the fence that was there and wants to support the variance.

Ms. Carol Ann Chilton, 1244 S Fremont; Ms. Chilton brought one of the old boards from the fence as a display for the Board and stated that the new boards look better. Ms. Chilton wanted to speak to several of the issues, one being about grandfathering this situation. Yes there has been a fence there and it wasn't quite eight (8) feet tall and that backyard does go the length along Fremont and the newer fence is pretty. It is solid instead of having as much space as the old fence had. The fact that this is *their* backyard, it is in everybody else's front yard, especially to the north. Ms. Chilton asked to speak to this issue because she lived in that house for about twenty years and in that time, Pete D'Houbler was repairing the fence, putting in some new pieces and he had to reduce the size of that fence down to comply with the ordinance, which was the four (4) feet and some space in between the boards. The folks who live on the north side of that house where these folks live (McWay) this is the view (pointing to the display board) out the bedroom windows, and the bathroom window and the family room windows and the living room window and the front porch. The issue of safety for children; she taught school and shares the parents concern about safety for children, but my dad grew up next door to this house on the other side. The house immediately south of this subject property here also had a fence. It was just as big. It was the whole corner of the block there and it had a little wire fence and there was never a big fence on the adjacent property there. The big fence has always been on the one we are talking about today. The issue for the people on the north is that the appraisal of the property, what a house is worth and who is going to buy it is determined by how attractive the place is of course. Along the front porch and down the side of your house, you have this tall fence and it is

not real pretty and people don't want to have to look at this. Other fences that have backyards fenced in on National, they aren't fencing off somebody else's front yard, they are just back fences. Ms. Chilton commented that she thinks that all children should be safe, but doesn't believe that is the issue. Ms. Chilton indicated that if you want your children safe, you might keep them closer to the house and possibly build a little fence up closer to the house because you can't see them back there anyway. Ms. Chilton commented that is not enough of a reason to have a fence there that affects property value next door. The reason you have ordinances is so they can apply fairly to everybody, and she believes there is a good reason for this ordinance and part of it is to protect neighborhoods and neighbors. If you apply a rule, it had better be applied fairly to everybody. This is an issue where you make a variance, or whatever you call it in this instance, and then everybody else is also in danger of having a big fence put up that obscures their view from the front of their house too. Ms. Chilton stated she walks by the property all the time because she moved a block down the street and the row of trees that is behind the fence and if they could be integrated in a way that these folks aren't hurt, they can be helped out a little and that fence doesn't have to wrap around the property where it isn't supposed to be. The Tennis court is about the same distance away from the street as the front porch of the house is on the north. Ms. Chilton commented that if you don't want anyone to look at you, you might consider planting some bushes or trees that won't devalue the adjacent properties. The fence that did exist there was higher than this. When the new fence was put in, the fence that started out there first was taller than this one and when Dr. D'Houbler put this fence in it was nicer but it still obstructed air and light. Putting aside the safety and beauty, it seems that if you have a rule and it's to protect people from one another from unintentional damage that it should be applied fairly to everybody. Ms. Chilton stated she does not believe this property is so unique that it makes it a hardship on these people not to be able to enjoy their property. It is unique in that it's big and they have enough space to enjoy what they have without making something detrimental to some of the other neighbors. When Dr. D'Houbler put the fence up he had to go along with the ordinance that protected the essential character of the neighborhood and the person who complained about that ten (10) foot fence going in didn't press the issue about what fronts Fremont.

Mr. Turner closed the public hearing.

Mr. McDonald commented that he would like to address a legal point that was not covered and a couple of people mentioned it. Whether what the McWay's see as a back yard is in fact a front yard, for that we go to the definition section and it states lot, front of; and it states the front of a lot shall be considered to be that side of the lot which fronts on a street. On the same page there is another definition that says, Lot-line, Front; in the middle of that definition it says on a through lot which is what we have here; both lots lines abutting the streets are the front lot lines so we have two front yards here. If you want to hear the City's closing remarks we can do that but probably the McWay side should have that opportunity before the City does. Mr. McDonald asked for clarification from Mr. Rykowski.

Mr. Rykowski stated the Board may hear closing arguments, usually statements at their

discretion, and usually in the manner in which evidence was presented, but it is up to the Board.

Mr. Turner asked Mr. McDonald to understand correctly, that if a lot fronts on a street, it is a front yard no matter what.

Mr. McDonald said that was correct, while encouraging the Board members to look at the Ordinance definitions.

Mr. Turner asked if all the lots were the same size and stretched between two streets, then they would have two front yards in that case.

Mr. McDonald said he misheard what he said.

Mr. Turner stated if the lot ran through and you had two front yards and it was a subdivision that is platted that way now with all the lots that means that people could not put a backyard fence in on their lot line ever.

Mr. McDonald stated they could come for a variance.

Mr. Rykowski stated that if you had platted it that way, you would have to go through the platting process and then any variances would have to be taken care of. You are proposing a particularly unique situation that doesn't apply. Mr. McDonald has correctly stated the law, which is one of the points he wanted to address. We do provide regardless of the definition of the owner that lots particularly as they are here front onto streets. Theoretically, in the future some owner of that property could split it in two and make two separate tracts. The problem and the reason we define them like that and not the unique situation you are talking about which would have a subdivision where everyone had to face one street and not have the option of going both ways; the very reason we have the front lot yard definition, which was addressed by the last speaker in opposition, is because someone's backyard becomes someone's front yard. Mr. McDonald has correctly given you the correct definition and we do consider regardless of what a person may be in this particular situation that that is a front yard, just as much considering the rights of the people who front on Fremont, as opposed to those who front on Pickwick.

Mr. Turner asked Mr. McWay if he had anything else.

Mr. McWay said he had a couple of comments in terms of the notion of the house to the north and the fence running along there. The part that is actually in the twenty-five (25) foot variance limit has lots of vegetation in front of it so it's not a material eyesore as potentially was said. Mr. McWay stated that implying that they should build some sort of corral for their children up close to their house is not a reasonable solution and they don't believe that is something that would make sense to anyone. Mr. McWay stated it is their property and they should be able to use it to allow their children to explore all the way to each corner and be safe.

Mr. McDonald commented to recap what has transpired so far, we are talking about a fifty (50) year old fence, a 100% replacement. The fence, from testimony that has been given, goes back to 1965. We brought the Zoning Ordinance in 1995 so as of that date that fence was a non-conforming use and it could stay there. When Mr. McWay started building a complete 100% replacement, he put himself in a position to ask for a variance that the Board has no authority to grant under 3-3502. The other thing he did was in starting to build without a permit, he put himself in violation of the Zoning code itself. The moment he did that he forfeited his opportunity to continue a non-conforming use and the rule is Zoning Ordinance 5-1704.L.2. The lady that spoke in opposition to the fence, put her finger on a point, this is not just about safety, this is not just about obstructing viewpoints when you are backing out of a driveway, that is really for the building code, that's more for the safety pocket of City law, if you will. A planning and zoning pocket of City law has to deal with how a City should look and feel, and believes one of the neighborhood speakers was correct when she said that sitting on her front porch or looking out her front window or looking out the bathroom window, she doesn't want to see a fortress, she wants to see a front yard. As for children's safety, yes we want all children to be safe but someone can grab children off a playground or walking down the street to the grocery store or walking to a neighbor's home. Going back to the criteria that you have to consider, you have to find that every single criterion under 3-3503 is true. Three (3) of those criteria do not bear out. If you have a four foot fence with 50% screening on this property and you look at its physical surroundings, it's shape, and it's topographical condition, there is no way to say that those physical features of the property create a hardship for a guy with a four (4) foot fence with screening. The next point was the conditions upon which the petition for a variance is based would not be applicable generally to other property within the same zoning classification.

Mr. McDonald said what we have is row after row of flat properties that are basic rectangles. They are all in the same category. The last point E that the City is focusing on, the alleged hardship, has not been created by any person presently having an interest in the property. Mr. McWay candidly said that they started building without a permit and has spent \$8000. But if we do that what we are saying is if you go out and get into an illegal activity, spend a lot of money on it, you can then come to the City and say I've got a financial hardship so let me continue violating the law, and that invites the kind of lawlessness that would make us all shudder.

Mr. Turner asked about section 3502 in the Zoning Ordinance which refers to a building when talking about the 75% rule.

Mr. McDonald apologized to the chairman stating he did not hear the question as there was talking in the audience that precluded him from hearing.

Mr. Turner stated that Section 3502 refers to building replacement if 75% destroyed. It doesn't refer to fences and other auxiliary type items.

Mr. McDonald said it refers to structures.

Mr. Turner stated it says non-conforming building. He is looking at 3-3502.G, which is

the only reference to 75% and that is with regard to buildings so a fence could be replaced based on this 100%.

Mr. McDonald said 3-3502.G you are correct, it does not say structures where it also says non-conforming building.

Mr. Turner stated that we could consider the fact that they can reconstruct the entire fence, and we could grant a variance for them to do that.

Mr. McDonald commented that the Board can grant a variance if the applicant has met all the criteria for a variance, yes sir.

Mr. Speake commented that since being on the Board, he has tried to follow the City law because that is what they are supposed to do, what they swear to do. Mr. Speake questioned whether or not there is anything to what Mr. McDonald was talking about in the fact that if Mr. McWay took this fence down without getting a building permit that this variance would not apply.

Mr. Rykowski said the issue here on this fence, because he has heard a lot of people say this fence should be grandfathered in, this fence was grandfathered in, when in 1995 we passed a new zoning ordinance that regulated certain heights of fences. If you had something that did not comply, it's what we have been calling a legal non-conforming use, more commonly called grandfathering. The purpose under the law of a grandfathered item is because if you tell somebody you have to change it today, because we changed the law, it then becomes a taking and you have to pay, so we grandfather them in. But we limit what you can do with a use or a structure or a building because the intent of the law is to eventually make things go away. We see this throughout our city as we see residential areas become commercial and industrial and it's a process. The ordinance limits what you can do to a legal non-conforming structure to maintenance, which goes back to Mr. Sweere's earlier comments. Had they replaced a board at a time over the last fifty (50) years and maintained it that is correct. The issue the Board must consider as you look at a legal non-conforming use is whether or not it had reached such a state of deterioration that it had to be totally replaced. That's the issue we get to on the total replacements. The other issue that comes up is what they can put in now versus what they had then, so the fact that this have been here fifty (50) or sixty (60) years or one hundred sixty (160) years is really irrelevant. If it is a legally non-conforming use for one day or a hundred years, we still treat it the same way and that is a fact question you are going to have to get to. He commented he is not certain if he fully answered the question by Mr. Speake.

Mr. Speake commented that what he was getting at is the way he understood Mr. McDonald that technically he shouldn't be able to ask for this variance now. Mr. Speake questioned whether what the Board decides is actually the last letter of it or is what they decide now something that the Board didn't have the right to decide in the first place.

Mr. Rykowski stated in a broader sense nothing you do is the last letter. Any party aggrieved by your decision can appeal it to the circuit court for judicial review as

provided for by the statutes. It is provided that if you do not pull a permit on a legal non-conforming use, that you lose that status, and I have been involved in cases where people have built structures without any permits at all, and if we do not have the authority to go and enforce our laws and make them come down, in the case of Williams vs. City of Springfield Health particularly, we made a building come down. It was built entirely without permits, foundation, walls and everything, so it loses its non-conforming status at that point. That point may be a little moot here because this thing has really lost its character; it is completely gone away by what has been described to me as a completely deteriorated fence. You will have to make that call as to whether or not it was completely deteriorated beyond the point where it could be maintained as a legal non-conforming use. Mr. Rykowski stated he would like to research the exact point because whether or not you would make an error in deciding one way or the other based upon an inability due to saying basically you don't have the authority as to whether Mr. McDonald is wrong or right, he hasn't keyed in on that particular aspect. One of the things coming into this hearing was that we would have a lot of unique issues arising because of the nature and the history so the question is simply can we not do it; go ahead and make a decision or if necessary defer and brief it but staff does not believe that is going to be an issue. If there is an inability for you to make the call beyond what you are supposed to, that is what takes us back to what we say at each particular hearing where I remind the Board there are standards that you are to apply on the variance, not to make the neighborhood happy or not, but the standards are set forth in 3-3503 and I think they are set forth again in the applicants responses. What is unique is that there has been a lot of testimony given about this property and Mr. Rykowski said if the Board decided there is something unique about it, those are the standards that need to be looked at and apply those standards to your decision, not because of what everyone else has talked about here today necessarily, because the ordinance sets forth the grounds for your consideration. Mr. Rykowski said he will get with Mr. McDonald and get the citation but doubts he will have an answer, but cannot say the Board is prohibited from making a ruling at this time.

Mr. McDonald stated that he is confirming what Mr. Rykowski said. Once Mr. McWay started building the fence without a permit he lost his non-conforming use, but that is the only consequence of that. He can still get a variance from the Board if he meets the criteria of the variance.

Mr. Turner asked if Mr. McWay takes down the fence and comes to the City, applies for a permit to replace a deteriorating fence, will you look at it in any less favorable light.

Mr. McDonald stated that he is entitled to a variance if he meets the criteria. If we take any other position we are basically shoving the City Council aside and saying we are going to decide what we are going to do. When the City Council passes a zoning ordinance it implements city policy and that city policy stands and none of us have the authority to overrule that unless it is within their parameters.

Mr. Turner said we are talking about a do over here. If he does a do over, how would the City look at his request for a permit to replace the deteriorating fence.

Mr. Rykowski stated that the problem is, it could have been done over the years, and it is harsh and we have had a lot of rulings on it, the law of the legal non-conforming use is such that it is supposed to go away. They can be maintained. You are putting Mr. McDonald and Ms. Owen at a disadvantage as to what the Director might do, but a do over here, the fence is half-way down or more and it is partially replaced as I understand . The hearing can be continued because the problem is as Mr. McWay said, if you want a variance, there is a fee; as Mr. McDonald said we are given the rules by the ordinance that City Council generates, so to have us second guess what might happen I would suggest that since this did come before staff previously, maybe Ms. Owen could speak more to it. Their response to the eight (8) foot perimeter fence was dropping the sides of the fence to six (6) or seven (7) feet which was discussed and rejected by the applicant. If the applicant wants to talk to staff about trying to work something out now, we can take a ten (10) minute recess. The applicant has a burden to prove that he needs an eight (8) foot fence, not six (6) feet or seven (7) feet or a four (4) foot fence. He has a duty to show under the variance and your findings must be consistent or you would be subject to review.

Ms. Owen stated that they did discuss with the applicant the option of reducing the height to say six (6) or seven (7) feet; if the height of the fence was reduced to seven (7) feet along the side yards that would eliminate the need for a variance along the side yard. However, any fence within the front yard along Fremont, if it is within that twenty-five foot, would have to either meet the requirements of the ordinance which is no more than four (4) feet tall and no more than 50% screened or a variance would be required. Even Staff's suggestion of moving the fence in to the west side of the tennis court which appeared just measuring it roughly on our aerial was about twenty (20) feet, it may be less than that, would still require a variance. It would not eliminate the need for this process. It was just to reduce the required variance. It doesn't make this process go away.

Mr. Turner asked Mr. McWay if he was interested in a recess to discuss with the City any possible solutions.

Mr. McWay commented that he can't say that they shouldn't talk.

Mr. Turner called a recess till 3:10 p.m.

Mr. Turner called the meeting to order and asked if anyone wished to make a statement.

Mr. McWay stated he would like to proceed with the variance as is. Mr. McWay stated that in regard to not getting the permit, honestly, they did not know, and if they had known, they would have gotten the permit. Mr. McWay stated the moment they found out there was an issue, they called the City and stopped the project and came down to the City; Mr. McWay indicated they had not gotten any communication from the City yet, so they obviously had an intent to do things the right way. Mr. McWay went on to say that in any circumstance they are asking for a variance and they are going forward with their original request. Mr. McWay stated that another issue with moving it back is that it does create a maintenance issue because it puts it up close to another fence that is

already there and they already had difficulty clearing that whole area out.

Mr. Rykowski commented that as to the permit, if they had come and applied for a permit they may not have taken out the old fence but the issues about legal non-conforming and setbacks all probable would have come back up, and at that point we would have been looking at different issues. Was this structure too far gone to be replaced or not, so there are different issues that would have come up. I still wonder where the fence company was in all of this. As you begin to consider and deliberate you know the standards as they are set forth before you; 3-3509 says the Board of Adjustment may impose such conditions and restrictions upon the premises benefited by a variance as may be necessary to comply with the standards set on this article to reduce, minimize, or mitigate the effect of the variance upon other property in the neighborhood, and better to carry out the general intent of the Article. Failure to comply with any such conditions and restrictions shall constitute a violation of this Article. This is not an all or nothing deal to you. An appeal of a decision of the Director you may affirm, modify or reverse a decision because no decision has been made here by any officer of the City. Under 3-3509 you can fashion a remedy within the variance which might be just and appropriate in the circumstances or grant or deny the variance as you see fit based upon the evidence.

Mr. Alden commented that he has heard testimony from both sides; he did not hear anything to dissuade him from his original decision. The two basic questions before the Board are location and size. It is understood why the zoning ordinance is worded in such a way as to raise a red flag on double frontage lots. Since this property is a single lot and the home address faces Pickwick, the west side is clearly a rear yard. Any subdivision of the lot or development would reclassify the west side and any type of alteration to the fence would be addressed at the time of redevelopment. In this situation, there is no difference in this lot than a corner lot in regard to fence location and does not see a difference in this situation of an interior double frontage lot verses two perpendicular corner lots. Driving around the lot and seeing no safety concerns, the esthetic improvement of moving a solid tall fence, because he does not believe the four (4) foot fence or 50% screening visibility on the front yard fence applies here, fifteen (15) to twenty (20) feet back of the west boundary would be marginal and does not rate enough to deny the owner's full use of his rear yard. Mr. Alden commented that he does not like eight (8) foot fences, and particularly fences in which the support structures are on the outside of the fence on the north side, but appreciates the solid pickets to the outside along Fremont. Mr. Alden stated he would prefer it to be a six (6) foot fence with all the support structure on the interior, but since a large portion of the fence is already erected at a large major expense, and a vast majority of the citizens were to fall into the trap that Mr. McWay did in assuming that a dilapidated fence could be replaced with the same size and style, the extra two feet in height is not overwhelming and considers the burden of cost to change it now would be rather unfair.

Mr. Sweere commented that there is no sense in having a Board of Adjustment if they are not going to adjust. The Board needs to see if the squares of the ordinance can be fit into the round hole of the realities of life and this is a perfect case where we need to make the pieces fit. On the ballot, there are five findings, any one of which can support

the granting of a variance. Looking at the ballot it says the variance requested arises from a condition which is unique to the property; well we have a unique situation. We have a long time eight (8) foot fence. The next finding says the granting of the variance will not adversely affect the rights of adjacent property owners. Mr. Savage is ok with it and he is on the south of the property. The other neighbor that is adjacent at 1151, Mr. Marino, was also ok with it; 1128 Fremont hasn't appeared. The strict application of the provisions of the Land Development Code constitutes an unnecessary hardship upon the utilization of the property and that is what Mr. Alden was talking about. They have this eight (8) foot fence that they have put up in obvious good faith and they shouldn't be penalized for trying to do the right thing once they learned that they were in violation and came and paid \$1000 to try and make things right. This is a huge lot and it is utilized apparently by half the children in the neighborhood. Mr. Sweere stated it seems that makes an eight (8) foot fence appropriate at that location. It will not adversely affect the public health, safety or morals, and it will not oppose the general spirit and intent of the Land Development Code, which did not exist at the time this property, was improved. Mr. Sweere commented he will vote in favor of the variance.

Ms. White commented that she would like to add that if there is going to be a continuing issue with the double frontage lot that perhaps some work should be done on looking at the plating of the issue. It seems that when you have that kind of setup you are not going to have a front yard issue there at all. No one would consider the usage this property has had to be front yard usage at any time and believes that needs to be part of the Board's recommendations.

Mr. Speake commented that this case is a bit troubling. With the fact that there was a fence already there and even though being in the trades and on the Trade Board and Permits, he would probably have done the same thing as Mr. McWay did not realizing he had to have a permit to replace the fence. But the particularly troubling part is going and looking at subsection 3-3503, the Standards for the Variance, what we are supposed to look at and whether we grant a variance or not. Some of the language is questionable here, but there are the particular physical surroundings, shape, or topographical condition of the specific property involved which questions if this would result in an unnecessary hardship upon the owner as distinguished from a mere inconvenience, if the strict letter of the regulations are carried out. Is it an inconvenience that he can't put back an eight (8) foot fence or it is a hardship? Mr. Speake said it will not be detrimental to the public, but he would need to meditate on some of the findings for the approval of the variance because what we are adjointed with by the code and adding his concern that there might be a couple of the findings that are not being met.

Mr. Turner called for a vote.

Mr. Turner tabulated the votes and Variance 558 was approved unanimously by the Board.

OTHER BUSINESS:

Election of officers: Chair and Vice-Chair.

Mr. Sweere nominated to re-elect Mr. Turner as Chairman of the Board of Adjustment. Mr. Alden seconded the motion.

Mr. Turner was elected Chairman by a unanimous vote.

Mr. Alden elected Matt Cologna as Vice-Chair of the Board of Adjustment. Mr. Speake seconded the motion.

Mr. Cologna was elected Vice Chair by a unanimous vote.

With no further business, the meeting was adjourned at approximately 3:35 p.m.

Alana Owen
For Executive Secretary