



**BOARD OF ADJUSTMENT
AGENDA
SEPTEMBER 28, 2021
6:15p.m. – COUNCIL CHAMBERS**

CALL TO ORDER –

PLEDGE OF ALLEGIANCE –

ROLL CALL OF MEMBERS –

APPROVAL OF MINUTES FOR – May 26, 2020

EXPLANATION OF PROCEDURES OF THE BOARD – CHAIRPERSON

PUBLIC HEARINGS –

VAR2021-0001, Steve Nelson and Terri Naes, 6260 Johnson Way, to construct a ten-foot-tall, solid fence along the Southwest (rear) property line when Section 4-7-2-1 of the LDC restricts fence height to six feet. (APPLICATION WITHDRAWN)

OTHER ITEMS –

1. ELECTION OF OFFICERS
2. CHANGES TO BOARD OF ADJUSTMENTS

ADJOURNMENT –



SUMMARY MINUTES OF BOARD OF ADJUSTMENT ACTION HELD
MAY 26, 2020

Board of Adjustment meeting minutes are not an exact transcript and represent key points and the basis of discussion.

1. **CALLED MEETING TO ORDER**– By Tom Aljinovich at 6:15 P.M.
2. **PLEDGE OF ALLEGIANCE**
3. **ROLL CALL OF MEMBERS**
Tom Aljinovich, Chair; Kathleen Drulard, Vice Chair; Russ Rizzo, Secretary; Barbra Coffman; Alan Albrandt; Richard Derryberry; Meredith Kapushion

THOSE ABSENT

None

ALSO PRESENT: Rob Smetana, City Planning Manager; Jacob Nitchals, Sr. Planner; Jonathan Moore, Planner I; Emily Grogg, Sr. Ass't. City Attorney; Brad Moloney, Deputy City Attorney; Rachel Morris, City Attorney; Stephanie Wallace, Administrative Specialist/Recording Secretary.

4. **APPROVAL OF MINUTES FOR** – January 28, 2020. The minutes stand approved with minor typos corrected in the 1st paragraph.
5. **PUBLIC HEARINGS**
Ms. Grogg stated these applications were submitted prior to the acceptance of the new Land Development Code (LDC), 2020 that was approved by City Council on May 18, 2020. These applications will be heard under the former LDC, 2008, which was in place at the time the applications were received. Both applicants agreed to having their requests heard concurrently.

PATRICIA HERRICK – VAR2020-0001 – 11765 W. 53rd Place

JAMES CILLESSEN – VAR2020-0002 – 11766 W. 53rd Place

The public hearing was opened.

Mr. Aljinovich entered into the record the staff report for VAR2020-0001 and VAR2020-0002 dated May 26, 2020, affidavit of mailing, and posting log.

Todd Rutherford, with Outdoor Design Group, Inc., spoke on behalf of the applicants. He gave a presentation with slides for both variance requests. He explained there were trees that were removed with the new development coming in that helped with screening to Mr. Cillessen and Ms. Herrick property.

Theodore Wells, Esq., with Allen & Curry Professional Corporation, spoke as the representative for Mr. Cillessen and gave additional information on the reason for the request of a variance to the Board. He stated the request is to regain the quietness and openness that was once agricultural land behind them. . He discussed the issue of the Wannamaker Ditch, which has

prevented them from doing more landscaping to mitigate the privacy and noise. He commented that this will have no impact on their neighborhood due to the location of the two properties. As for the Haskins Station there are currently no homeowners, it is vacant land and the small area of open space would not be affected. He stated the unique circumstance is from the Wannamaker Ditch, change in use and the minimal impact this fence would provide.

Mr. Rutherford stated that the wall could be a benefit to the future residents of the Haskins Station, because both applicant properties sit up higher and could be some privacy for them as well.

It was noted that both applicants, Ms. Herrick and Mr. Cillessen, as well as Mr. Wells, were participating in the hearing virtually from the same location and that Mr. Wells and Mr. Rutherford were the representatives for the applicants. Mr. Rutherford was participating virtually from a separate location.

Mr. Aljinovich opened the hearing for comments from the public.

PUBLIC COMMENT

IN FAVOR

None

IN OPPOSITION

None

COMMENT FROM STAFF

Mr. Moore stated there are no comments at this time.

PUBLIC COMMENT WAS CLOSED

QUESTIONS FROM THE BOARD

Mr. Rizzo asked for clarification from Mr. Wells on his comment about preventing the applicant from other means of mitigating the issue. As well as clarification on the adjacent open space. He stated the presentation made it sound like the Haskins Station homes were going to be at the property line. The staff report indicates that it abuts open space and the closest house would be 60 feet from the fence line.

Mr. Wells commented that the Wannamaker Ditch plus the easement abuts their property line about 15 feet which prevents his client Mr. Cillessen from planting trees or shrubs, due to the ditch needing a clear right of way. He commented that directly east of Mr. Cillessen's house there is a sliver of land, which is approximately 16 feet from the Cillessen property line to the adjoining property line of the Haskins Station. He stated it would be smaller than a two-lane road.

Mr. Rutherford confirmed what Mr. Wells stated.

Ms. Drulard asked staff if the location of the Haskins Station development was originally open space or if it was rezoned.

Mr. Moore commented that it was not previously designated open space and it was rezoned. Mr. Nitchals stated the southern portion was zoned PUD-I and the northern portion was zoned PUD-R, which was part of the nearby Skyline Estates development. The Skyline Estates Filing No. 1 Subdivision Plat, recorded on December 9, 1999, indicated the adjacent tract of land was for future residential development.

Ms. Kapushion asked if the applicant could speak to the safety concerns of the ditch and access. Also, to speak on the variance height requested and the practical difficulty to not meet the LDC.

Mr. Wells spoke on the safety concerns that the applicants have, mainly his client Mr. Cillessen. The concern is the water flow, the fence height, an open fence and the potential of children drowning. He stated this was not a concern before, because it was agricultural land and not a housing development there in the past 29 years. Mr. Wells and Mr. Rutherford concurred that a 4-foot fence would not provide enough privacy.

Mr. Aljinovich asked for clarification on what he heard, as far as the request for an 8-foot fence would provide more safety from the ditch than a 6-foot fence.

Mr. Rutherford responded it is equal for safety and privacy.

Mr. Albrandt also discussed the height of the fence and the reason for going from a 4 foot to an 8-foot fence is a significant increase. He asked why the applicants could not go with a 6-foot open fence, then they would not have to request a variance. This would allow for the screening and safety, because it was stated the property is taller than the adjacent property.

Mr. Wells commented that it would not have the privacy effect, because of how the sloping from the property. As for the safety concern, an 8-foot solid fence would have significant safety value over a 6 foot partially open fence. As the fence would be on the west side of the Wannamaker Ditch.

Mr. Albrandt stated that there has to be something unique to this property that allows us to grant a variance. The desire to have privacy from the construction is not unique; an explanation of how this property is different is needed.

Mr. Wells stated the big difference is the radical change from agricultural use of the adjacent property to a 477 unit residential development immediately behind.

Mr. Albrandt commented that it was stated that it has been zoned that way for at least 20 years and when buying property there is no guarantee that there will not be something built behind.

Mr. Wells stated that if the point is the zoning at the time it was rezoned in 1999, which is approximately 10 years after the Cillessen's purchased their property. We believe the unique condition to this property is the change in use and the turn on the canal that is on the property. Building this fence would not negatively impact anyone else.

Mr. Albrandt stated there has to be something unique to this property that we could not find anywhere else. To block views of neighbors or future development is not unique.

Mr. Derryberry asked the applicants if they are familiar with the development plans of the Haskins Station, for example, on the other side of the development and if they are they going to be putting up fences in the back yards.

Mr. Wells stated he will refer to Mr. Rutherford, but he knows they have specified for a split rail fence.

Clayton Stewart, with Outdoor Design Group, stated that the adjacent properties will have a 3 or 4 foot split rail fence, so very little screening or protection.

Mr. Aljinovich asked staff, and referred to Exhibit 1 of the staff report, if there is a 4 foot and a 6 foot wrought iron fence on the other side of the ditch on Mr. Cillessen's property and if those would stay in place with this request.

Mr. Moore responded and referred to page 19 of the slide. On the northeast side of her property, Ms. Herrick constructed a 6-foot-tall solid cedar fence. On the south of Mr. Cillessen's property, there is a 6 foot wrought iron fence. To the east there will be a 4-foot split-rail fence from Haskins Station and with the approved plan they will be adding trees to provide buffering.

Mr. Aljinovich stated he does not see a practical difficulty for this property. He asked Mr. Moore for clarification that the 6-foot cedar fence currently exists on Ms. Herrick property and there is a 6-foot wrought iron fence on Mr. Cillessen's property, would these stay. To the west of the ditch there is a 4-foot wrought iron fence.

Mr. Moore confirmed the location and presence of the fences Mr. Aljinovich was referencing and that to his knowledge the fence along Mr. Cillessen's property line would be replaced with a wall.

Mr. Rizzo asked for clarification. Regarding the proposed 8-foot stone wall fence, where and what kids would we be protecting from the ditch?

Mr. Wells responded that the fence and ditch are parallel and close together, so it would be shielding the kids from the Haskins Station.

Ms. Coffman asked if there was a problem with kids from the current development getting into the ditch, prior to the Haskins Station.

Mr. Wells stated he was not aware of any kids coming in, but that there will be an increased risk with the new development.

Ms. Herrick addressed the safety issue of the ditch and living there with small children since October 1996. She discussed the water current, the drop-off from her property, and depth of an unsecured grate from the ditch.

PUBLIC COMMENT WAS CLOSED

DISCUSSION FROM BOARD

Mr. Rizzo asked about the property to the south of the subject properties, stating it looks like it is located in unincorporated Jefferson County. Whether children would still be able to access the ditch from that property.

Mr. Moore responded that Mr. Cillessen owns the adjacent property to the south and staff is currently aware that Mr. Cillessen has approached the County with a request to increase the height of the fence on that property as well. The ditch could be accessed from there currently.

Ms. Drulard stated she is having a hard time seeing a practical difficulty or special circumstance. Although she is sympathetic to the situation. She commented that she does not see how they could address the issue of the 8-foot fence at this time.

Ms. Kapushion stated she does see a special circumstance with the presence of the ditch and that it's unique to the property, but she struggles with the request for a variance with the fence height and a solid fence. The 6-foot wrought iron seems to be serving the purpose. She believes there are some other options, including new trees that will be put in with the new development to help with privacy.

Ms. Coffman also agreed with having a hard time with finding a special circumstance to grant the variance.

Mr. Albrandt reiterated that he cannot find something unique to these properties. He stated they could have a 6-foot fence.

Mr. Derryberry stated he is sympathetic to the applicants; however the Land Development Code restricts what the Board of Adjustment can approve. He states he is struggling to find a practical difficulty to grant a variance.

Mr. Rizzo and Mr. Aljinovich concurred with the Board on being sympathetic, but struggled with finding a practical difficulty.

PUBLIC COMMENT WAS REOPENED

Mr. Aljinovich reopened the hearing for comments from the public at the request of Mr. Cillessen.

Mr. Cillessen stated he is disappointed with what he is hearing as well as the technical difficulties. He expressed his concern with the adjacent construction and the safety of the kids. He stated there isn't really open space. He is willing to compromise with maybe a shorter solid fence.

Mr. Aljinovich asked Mr. Cillessen if he was in agreement with a 6-foot fence, instead of an 8 foot fence.

Mr. Cillessen responded yes, but it would have to be a 6-foot solid fence.

Mr. Rizzo asked for clarification from staff, who determines if it is "open space" and if it was not open space what flexibility they might have.

Mr. Moore referenced the definition of open space and that this area is odd, because the immediately adjacent open space to the subject property is privately owned public open space, but it connects to public open space.

Mr. Rizzo referenced Exhibit 1 and wanted more clarification about the space adjacent to Mr. Cillessen's property and whether it is a residential area with some open space or if it is truly useable open space.

Mr. Moore responded that it is a little of both. It is designated as open space and people could potentially use it. Staff is not able to make the determination that it's not open space in this case.

Mr. Aljinovich referenced Exhibit 1 and asked if there was going to be a home east of the split rail fence.

Mr. Moore stated that the Exhibit depicts a lot for a single-family home, and the home will be built within the lot lines.

Ms. Kapushion stated her concern that there is no access to the public if it is designated open space, but it looks like it is walled off by public homes.

Mr. Moore stated the open space continues to the east and north of the Haskins Station. Just to the north of Ms. Herrick's property, it opens to the Van Bibber Creek Trail Open Space.

Ms. Kapushion asked if this was not a quasi-municipal entity that was developing the open space and instead was a private company, what would that land be designated as?

Mr. Moore responded that if it was private, then it could be designated so that only people within the neighborhood could use it, as is sometimes seen with a dog park or a pocket park.

Mr. Aljinovich commented that he understands what Ms. Kapushion is saying. Currently, Mr. Cillessen has a 6-foot wrought iron fence and is allowed, because you could see through it. He could not put up a 6-foot solid fence, because of the open space.

Mr. Moore responded that this is correct because the primary reason is to keep people out, but still allow the feeling of the open space. He responded to Ms. Kapushion that a 6-foot fence could be allowed abutting a privately designated park or open space.

Ms. Kapushion stated it is concerning that based on the type of developer that has changed the adjacent property owners' rights and ability to build something.

Mr. Albrandt commented that he understands where everyone is going, so we could possibly allow a solid fence for Mr. Cillessen's property, but then what about Ms. Herrick property.

Mr. Derryberry acknowledges Mr. Albrandt's point for Mr. Cillessen, but not for Ms. Herrick. He asked if they could say the unique configuration of the open space constitutes a special circumstance, because it is not a traditional open space.

Mr. Rizzo stated he could understand the frustration from the homeowner.

Ms. Kapushion stated that she is sympathetic to Mr. Derryberry's suggestion for a special circumstance, but not for an 8-foot solid fence. Maybe the applicants would be willing to resubmit for a 6-foot solid fence and we could give some guidance to staff.

Ms. Grogg stated that the applicants are allowed to amend the request tonight, if they want and the Board could grant a variance with conditions and it could be a 6-foot height variance.

Mr. Albrandt asked if the discussion is about both of the properties or just the Cillessens' property.

Mr. Aljinovich stated to keep it clean it would be both the properties with a conditional variance; if that is the way the Board is leaning.

Mr. Albrandt stated it is hard to make the argument.

Mr. Moore clarified that these are two individual properties, any additional rights the Board grants to the property owner, runs with the land. Therefore, two separate motions would be needed.

Mr. Rizzo stated to the Board that it needs to be made very clear as to what we are carving out as an exception and what's not. He asked staff to make it very clear on what this open space is and how accessible it is. So that the Board is not making decisions based on bad information as well.

Mr. Derryberry commented that philosophically speaking if the Board is talking about how it will be looking at these situations in the future. Then he is a little less comfortable with making a distinction about the ownership of the property since that is beyond what the Board could do. He would be more comfortable saying that functionally the property is not truly an open space, because of lack of access.

Mr. Rizzo and Mr. Albrandt concurred with Mr. Derryberry.

Mr. Moore referenced a map from the Haskins Station development to clarify the open space area.

Mr. Aljinovich commented that based off of the map presented, he feels they were off on what they were thinking and is unconcerned with what Mr. Rizzo, Mr. Albrandt, and Mr. Derryberry was saying.

Ms. Kapushion stated the map helped to better understand. She commented that if there was an exception, it would have to be very limited to the specific circumstances of this particular property and the proximity to the private property. She stated it prevents the Board from getting into a messy situation in determining the public open space and the private open space. She commented that this becomes problematic when trying to figure out a solution that fits both properties. She asked if either applicant intends to modify their application.

Mr. Cillessen and Ms. Herrick agreed to modify their applications to a 6-foot solid fence.

Mr. Albrandt asked if they needed to address the variance requests simultaneously or separately. He stated he is torn if the Board is going to use the argument of proximity to the new residences that will work for Mr. Cillessen's property, but not Ms. Herrick's. The Board could also consider that it's not open space, and then both properties are the same.

Mr. Rizzo stated clearly when we zoom out and look at the broader picture it is open space with trails. He commented that the north property owner is on open space that hasn't been accessible before and now is. The south lot is different with the 15-foot sliver of open space that he is sure people will not be recreating on. He stated he is uncomfortable with the south property owner having to adhere to the open space fence rules, when they have a neighborhood in their backyard. It is difficult, because we want to treat them equally as they are asking for the same thing. However, logically the north property is adjacent to open space so the fence rules would apply, but he couldn't argue that the pace adjacent to Mr. Cillessen's property is open space.

Mr. Derryberry stated we do have to be thoughtful about both north and south lots. He asked if there are any thoughts on the character of the neighborhood if the fences would be different. If we grant a variance for the south lot to have a 6-foot solid fence and we tell the north lot that we would not grant a variance, then they end up with a 4-foot fence next to a 6-foot fence.

Mr. Albrandt commented that it would depend. They could have different fences next to each other and some of those houses have no fence.

Mr. Aljinovich stated to Mr. Cillessen that the Board has to follow the ordinance for open space and what we can and cannot do. He asked Mr. Moore what the rules would be if a solid 6-foot fence could be constructed between the house and the ditch.

Mr. Moore responded that the current requirement that a fence could only be a 4-foot solid fence with 2 feet of open lattice only applies if it is built within the setback adjacent to open space. The side setback for both properties is 10 feet. As long as a fence is constructed 10 feet back from the property line, it could be a 6-foot solid fence by right.

Mr. Aljinovich asked that in this case they could build an 8-foot solid fence then.

Mr. Moore stated that anything over 6 feet would require engineering and a permit, but the code would allow that an 8-foot fence once its setback to 10 feet. He commented that the Wannamaker Ditch has a 20 foot wide easement on both properties and he could not speak to what they would allow, but that is it unlikely that they would allow that tall of a structure on their easement.

Mr. Cillessen stated that he spoke to Neil with Wannamaker Ditch and they are fine with him replacing the wrought iron fence. He feels that none of this will work if Ms. Herrick's request does not also get approved. He stated that he appreciates the consideration of his request, but he feels it would only be right to approve Ms. Herricks as well.

MOTION:

It was moved by Mr. Albrandt that VAR2020-0001, Patricia Herrick, 11765 W. 53rd Place, to construct a six-foot-tall, solid fence along the East (side) property line when Section 6.5.8(A) of the LDC restricts fence height to six feet and requires all fences over 48 inches in height and adjacent to open space be at least 50 percent open for the portion above 48 inches, be approved.

This motion is based on Findings No. 1 through 8 on page 9 of the Staff Report. The special circumstance is that these are two similar properties adjacent to the open space narrowing to the point of not meeting the true definition of open space.

DISCUSSION OF MOTION VAR2020-0001

Mr. Albrandt stated he feels there would be just as much screening if there was open lattice on the top, as long as it is not 8 feet, he is good with the motion.

The following votes were cast on the motion:

Those voting Yes: Drulard, Rizzo, Coffman, Derryberry, Kapushion, Albrandt, Aljinovich

Those voting No: None

Those absent: None

The motion passed.

MOTION:

It was moved by Mr. Albrandt that VAR2020-0002, James Cillessen 11766 W. 53rd Place, a six-foot-tall, solid fence along the East (side) property line when Section 6.5.8(A) of the LDC restricts fence height to six feet and requires all fences over 48 inches in height and adjacent to open space be at least 50 percent open for the portion above 48 inches, be approved.

This motion is based on Findings No. 1 through 8 on page 11 of the Staff Report. The unusual special circumstances of this property is that it is required to meet the open space requirement when there is a narrow spot that could not be considered as open space.

DISCUSSION OF MOTION VAR2020-0002

The following votes were cast on the motion:

Those voting Yes: Drulard, Rizzo, Derryberry, Kapushion, Albrandt, Aljinovich

Those voting No: None

Those absent: None

The motion passed.

Technical difficulties: Coffman

Mr. Aljinovich stated to Mr. Cillessen and Ms. Herrick that their variance was approved and they need to make sure to contact Mr. Moore to finalize everything.

8. OTHER ITEMS

Elections for June 2020 to June 2021:

Nominations for Chair - Kathy Drulard nominated Richard Derryberry. Russ Rizzo nominated Tom Aljinovich

Vote for Richard Derryberry -

Those voting Yes: Drulard, Kapushion

Those voting No: Rizzo, Coffman, Albrandt, Derryberry, Aljinovich

Tom Aljinovich passed for Chair

Nominations for Vice Chair - Kathy Drulard and Russ Rizzo nominated Richard Derryberry

Vote for Richard Derryberry -

Those voting Yes: Coffman, Drulard, Kapushion, Rizzo, Albrandt, Derryberry, Aljinovich

Those voting No: None

Richard Derryberry passed for Vice Chair

Nominations for Secretary - Russ Rizzo and Kathy Drulard and nominated Meredith Kapushion

Vote for Meredith Kapushion -

Those voting Yes: Coffman, Drulard, Kapushion, Rizzo, Albrandt, Derryberry, Aljinovich

Those voting No: None

Meredith Kapushion passed for Secretary

Next Meeting: No meetings scheduled at this time

9. ADJOURNED at 8:16 P.M.

Tom Aljinovich, Chair

Russ Rizzo, Secretary

Stephanie Wallace, Recording Secretary