

**VILLAGE OF DOWNERS GROVE
ZONING BOARD OF APPEALS MINUTES
JULY 23, 2003**

Call to Order

Chairman White called the meeting to order at 7:35 PM.

Roll call

Present: Mr. Baker, Mr. Benes, Mr. Domijan, Mr. Lukas, Mr. Sleeter, Ch. White

Absent: Mr. Gray

A quorum was established.

Minutes

Mr. Lukas moved to accept the minutes of the July 25, 2003 meeting as presented. Mr. Benes seconded the Motion.

AYES: Mr. Lukas, Mr. Benes, Mr. Baker, Ch. White

NAYS: None

ABSTAIN: Mr. Domijan, Mr. Sleeter

Chairman White declared the minutes accepted as submitted.

Meeting Procedures

Chairman White explained the procedures to be followed for the meeting, reviewing the variation petition before the Board. He said that the Board has the authority to either grant or deny the variation petition, and the Board's decision is the final decision. Chairman White then opened the public hearing for Case V-06-03 and asked anyone in the audience who intended to testify in this public hearing to rise and be sworn in.

.....

PUBLIC HEARING: V-06-03 A petition seeking relief from the provisions of Section 28-1301 Fences of the Zoning Ordinance pertaining to an open design fence located within the Carpenter Street front yard of the subject property. The property is located at the northeast corner of 67th and Carpenter Streets, commonly known as 6845 Carpenter Street, Downers Grove, IL 60516 (PIN No. 09-20-113-024); Owners, Timothy & Stacey Salman; Petitioner, Stacey Salman

LEGAL NOTICE: VILLAGE OF DOWNERS GROVE NOTICE OF PUBLIC

HEARING - Notice is hereby given that a public hearing will be held by the Zoning Board of Appeals at 7:30 p.m. on Wednesday, July 23, 2003 in the Committee Room of the Village Hall, 801 Burlington Avenue, Downers Grove, Illinois, on a petition seeking relief from the provisions of Section 28-1301 Fences of the Zoning Ordinance pertaining to an open design fence located within the Carpenter Street front yard of the subject property. The property is located at the northeast corner of 67th and Carpenter Streets, commonly known as 6645 Carpenter Street, Downers Grove, IL (PIN 09-20-113-024) and is legally described as follows:

Lot 15, Block 13 in Downers Grove Estates being a subdivision of the West Half of the Northwest Quarter of Section 20, Township 38 North, Range 11, East of the Third Principal Meridian in DuPage County, Illinois, commonly known as 6645 Carpenter Street, Downers Grove, IL 60516 (PIN 09-20-113-024)

Individuals with a disability requiring a reasonable accommodation in order to participate in any meeting should contact the Community Response Center (630) 434-CALL(2255) prior to the meeting. Wheelchair access may be gained through the side (south) entrance of Village Hall. All interested persons should attend this hearing and will be given an opportunity to be heard. The hearing may be continued from time to time without further public notice. Zoning Board of Appeals, William White, Chairman. Published in the Downers Grove Reporter, Friday, July 4, 2003.

Petitioner's Presentation

Timothy and Stacey Salman, owners and petitioners, made their presentation. Mr. Salman said that they bought the house last year and wanted to build a fence. They followed the process, applied for a permit and a Code Enforcement officer came out to view the lot. The officer noted that the fence could not be six feet tall past the front setback of the house. The fence was built; however, the contractor had set the air conditioners in the wrong place, and Mr. Salman removed them. Mr. Lou Hayes of the Code Services Department then came out to look at the air conditioners and discovered the problems with the fence.

Mr. Salman said they were unaware that the front portion of the fence had to be an open design fence. He said that their fence designer called it a "capped double-rail cedar picket fence," but there was apparently "mis-terminology" on the request for a permit. The contractor had built the fence six feet tall all the way to the corner, which they rectified right away after Mr. Hayes told them that certain portions were too tall. Mr. Salman said they built the fence to what they thought was Code. Had they known the Code, they would have chosen a different fence all together. He said he is not attempting to get away with anything, and the fence does not cause a visibility hindrance. He referred to photographs submitted with their petition as evidence that the fence was not a hindrance. Mr. Salman said they do not understand why they would have to rebuild the fence, and they are asking for a variance to keep the fence the way it is.

Mr. Sleeter asked whether the contractor misunderstood what was needed, or where the error occurred.

Mr. Salman said that the contractor called the fence that they installed a “picket fence,” and it has a capped double rail. He said they were unaware of the requirements for an open design fence.

Mr. Baker asked who applied for the permit. Mr. Salman said he applied for the permit, and he does not know why the contractor did not know the Code. The permit was obtained before the fence was built. They had someone from the Village’s Code Services Department come out prior to installation and walk the lot with them.

Mrs. Salman said she submitted a plat of survey with the permit petition and she stated “picket fence” on the application. She said that she was the motivator behind the type of fence they chose because they have two small children. They are on a busy street and need the fence because of the children. She thought they had followed the procedures properly.

Mr. Salman distributed additional pictures to the Board. He said he does not see how the fence hinders anything in the neighborhood. If he knew he had to build it at two different heights he said he would not have built it at all. He thinks it should stay the way it is.

There being no further questions, Chairman White asked Ms. Browne to present the Staff’s report.

Staff Presentation:

Ms. Browne said the petitioner is seeking approval of a variation regarding portions of their newly constructed fence, which does not meet the requirements regulating open design fences located within a required front yard.

Ms. Browne said that the proposed variance is being sought under the provisions of Section 28-1802(l) of the Zoning Ordinance which authorizes the Board to “...to permit variations of any provision of Section 28-1301, if, in the opinion of the Board, a literal enforcement thereof would do manifest injustice or would be contrary to the spirit and purpose of such provisions regulating fences, or to the public interest.”

The subject property is located on the northeast corner of 67th Street and Carpenter Street. The lot has a width as measured from east to west of 50.02 feet, a depth ranging between 144.72 feet as measured on the west and 144.79 feet as measured on the east, with a total area of approximately 7,240.65 square feet.

Ms. Browne described the subject property as improved with a two-story brick and frame residence which has an attached garage that faces southward towards 67th Street, but which is accessed via a driveway intersecting Carpenter Street. The house has a width as measured at the south of 29.95 feet and has a depth as measured along the westerly line of 72.46 feet.

Regarding zoning, Ms. Browne stated that the subject property is located within an R-4, single-family residential zoning district. This zoning district has a minimum front yard setback of 25 feet. However, on corner lots, the provisions of Section 28-1102(a) guarantees a minimum buildable width of 30 feet

on corner lots, which has the effect of reducing the front setback along the longer front yard to 15 feet. The house sited on the subject property was built consistent with these requirements.

Following inquiries of the Code Enforcement Staff including an on-site visit by a Code Enforcement officer, Ms. Browne said the petitioner applied for and was issued a fence permit on May 22, 2003.

The permit drawing prepared by the petitioner showed that there was to be a four foot tall “picket fence” constructed in the area to the north of the house which would project into the required front yard along the Carpenter Street frontage of the subject property which was to be set back three feet from the Carpenter Street property line. Ms. Browne indicated that the term “picket fence” is typically understood to be of an open design with pointed vertical members with an appreciable space between the vertical members. The permit drawing also noted the section of the new fence that was to run along the northerly property line was to commence three feet east of the west property line and was to be a four foot tall “picket fence.” The four foot tall section along the northerly property line was, according to the permit drawing, to run eastward for a distance of 12 feet. The fence along the remaining 35 feet of the north lot line and along the east lot line for a distance of approximately 55 feet south of the northeast lot corner was specified to be a six-foot tall fence.

Ms. Browne explained that the provisions of Section 28-1301(g)(1)(i) provide, “Open-design fences of no more than four (4) feet in height are permitted within required front yards and on corner lots within required side yards abutting street.” Open Design Fences are defined by Section 28-1301(e) as follows: “Open design fences shall be constructed in such a manner that no vertical member shall exceed a width of six inches, and the ratio of open area to closed shall be 1:2, with the open area distributed uniformly over the entire fence surface.”

Ms. Browne stated that when the Village’s building inspector went out to inspect the fence, he found that the north to south section of fence located just east and parallel with the Carpenter Street property line had been installed as non-open design fence with an open area to closed area ratio of one inch of open area for every six inches of closed area. In addition, the fence installed along the north lot line from approximately three feet east of the west property line east to the east property line had been installed as a six-foot tall fence, which was made up of a five-foot tall section of fence topped with a one-foot section of lattice. Once the Village became aware of the inconsistency with the Ordinance requirements, the property owner was informed, and they then filed the variation request.

In the intervening time, the petitioner advised Staff that they had requested the fence contractor to modify that portion of the fence located within the Carpenter Street front yard that exceeded four feet in height. The modification has been completed and was confirmed by an on-site inspection.

Ms. Browne noted to the Board that the petitioner has, in addition to the application and drawing, submitted photographs along with a letter providing the circumstances, which the petitioner believes to be pertinent for the Board to consider in its deliberations on their petition.

Ms. Browne summarized that the petitioner desires approval of a variance which would permit them to keep the portions of their fence which had been erected in a manner not consistent with the applicable

provisions of the Zoning Ordinance which limits fences that are located within a required front yard to be of an open design limited to no more than four feet in height, per Section 28-1301(e) and Section 28-1301(g)(1)(i).

Ms. Browne reminded the Board that the provisions of Section 28-1802(l) authorizes the Board "...to permit variations of any provision of Section 28-1301, if, in the opinion of the Board, a literal enforcement thereof would do manifest injustice or would be contrary to the spirit and purpose of such provisions regulating fences, or to the public interest."

She indicated that in its deliberations, the Board should consider and determine what factors exist, if any, which satisfy the applicable conditions that are necessary to approve a variation according to the standards specified under Section 28-1802(l) and to specify for the record, the basis for the Board's action on the proposed variation petition.

Chairman White said the problem is not the width of the boards, but the fact that there is insufficient space between the boards.

Mr. Sleeter asked if this particular regulation covers only front yard setbacks, and Ms. Browne said that was correct. Mr. Sleeter noted that while technically the subject yard is a front yard, it functions as a back yard.

Ms. Browne said that in terms of the intent of the regulations, fences in front yards are required to be open design and no more than four feet in height so as to not obstruct vision at intersections and where driveways meet the sidewalk, and also to provide an open feeling to the area. The drafters of the Ordinance apparently wanted to make reasonable accommodations for fences in front yards, but specifically excluded certain types of fences such as chain link and stockade fences.

Mr. Baker said that he has inquired to the Code Enforcement Department regarding certain projects for his own home, and noted they were very clear on the instructions.

Mr. Baker asked if the contractor should be aware of the Code requirements. Ms. Browne said any contractor should be aware of the requirements, or should ask specifically what the requirements are. She noted that it is ultimately the homeowner's responsibility to rectify any violation that is discovered; whether they seek compensation from a contractor who has made an error is a private matter.

Mr. Benes said there seems to be technical differences in the open fence definition and the understanding of what is a "picket fence". He said it seems the Code Enforcement officers need to explore what type of fence petitioners are putting in place.

Ms. Browne said she did not feel it was appropriate to try to place blame on anyone in this situation. The intent is to determine whether the variation request to allow a non-open-design fence at this particular location is appropriate or inappropriate. The circumstances as to how the fence came to be constructed in its current condition are not directly at issue. The Board should review the criteria for

granting a fence variation, and determine whether this type of fence will be in conformance with those criteria.

Mr. Benes asked for clarification that they are only looking at the portion of the fence that is four feet in height. Ms. Browne said that the variation pertains to the non-open design fence portions that are located within the required front yard.

Chairman White asked if any other types of fences are defined in the Code, or is it only open design fences. Ms. Browne said that the Ordinance only defines an open-design fence, but that the definition specifically excludes chain link fences.

Ms. Browne also noted that that Mr. Lou Hayes from the Code Services Department was present to answer any questions that the Board may have.

Mr. Benes said he could see that the citation was correct.

Mr. Lou Hayes, Code Enforcement Officer for the Village of Downers Grove for the past two years, said no citations were written. He explained the process that is followed when a fence permit is requested. The applicant is given an instruction sheet, and if the lot is a corner lot, a Code Enforcement Officer is required to visit the property and give the owners specific instructions. Mr. Hayes said that he was not the officer who visited the site initially, but noted that any other officer would have told the owners that it would have to be an open design fence; that is standard operating procedure for a fence in a front yard. He referred to the site plan that accompanied the permit application, which showed how the petitioners indicated the fence was to be installed.

Mr. Hayes said he was contacted by Mr. Salman to discuss the location of the air conditioning units, at which time he noticed that the fence was already installed and was not in conformance with the regulations. He said that he told Mr. Salman that there were two sections of fence that had to be cut back from six feet in height to four feet in height. He also told Mr. Salman that they are required to have an open design fence in the required front yard.

Mr. Hayes noted oftentimes fence companies come to the Department and have books showing the types of fences they carry to determine what is allowable and what is not. In addition, Mr. Hayes said that all the Code Enforcement Officers are instructed as to fencing types in order to remain consistent and to avoid having fencing contractors question the types of fences that are allowed to be installed.

Mr. Hayes said the issue here has to do with the portion of the fence that should be an open fence design. He also noted that the front posts exceed the four-foot height by a few inches, and will be required to be cut down further. In response to a question from the Board, Mr. Hayes said a “reverse board” fence is not an open fence design.

Mr. Hayes said that the term “picket” is generally understood to be an open design consisting of evenly spaced wood slats that have a pointed tip. By code, the space between the slats is required to be a certain width depending upon the width of the slat.

Ms. Browne agreed, and said that when staff speaks about fences, they consistently use the term “open design”, which is then clarified to the person making the inquiry that an open design fence must have an open to closed ratio of one to two, and with a height of less than four feet. It is a very common question asked over the phone, over the counter, by homeowners, by contractors.

Chairman White asked, if the Board were to grant the variation, whether Code Enforcement wants the Board to state specifically the reason it has chosen to grant the variation. Mr. Hayes said absolutely, they would want that information in case another individual wanted to question why this particular fence was allowed.

Mr. Salman said the original six foot height was the mistake of the fence company, and they came back and corrected it. He understands the yard is considered the front yard, and they know they are in violation. He is in the construction business and knows to obtain the correct regulations for each location.

Mrs. Salman said that she did not like how fences look when they are done at the setback line which is somewhere in the middle of the yard, and a fence at the setback line would not allow as much yard space to be utilized within the fenced-in area. In addition, they wanted the fence to be acceptable to the neighbors as well. She indicated that their driveway is the only driveway that exits onto Carpenter on that block. She also said that she thinks that opening the boards up to three inches of space to keep the six-inch slats could be hazardous to young children and is contrary to the original reason for the fence, which is to keep the children safe in the yard. She said that to bring the fence into conformance, they would have to have it taken down and rebuilt, which she believes would compromise the structural integrity of the fence components.

There being no further questions from the Board, and no one in the audience to speak either in favor of or in opposition to the petition, Chairman White closed the opportunity for further public comment.

Board Deliberation

Mr. Lukas said it sounded as though everyone was moving forward to do the proper thing, but when it came to an understanding of what a picket fence is, the problem developed. It was assumed that the fence would conform as an “open design fence”, and there was never a mutual understanding of what the fence would look like. He said that perhaps the applicant in the future should be required to submit a sketch, photograph, or catalog description of the fencing so there is no misunderstanding as to what is proposed. He did not feel they should ask the homeowners to change the fence as it is constructed, because he feels it is not harming any pedestrian or vehicular traffic. He said that to honor the open design definition as required would defeat the purpose of the fence, which is to contain the children in the yard. He said that in this case it appears to be a result of a communication problem, and because of that he would be in favor of granting the variation.

Mr. Sleeter said he came to somewhat the same conclusion but through a different train of thought. He said he understood the intent of the fence ordinance to be the protection of open intersections and to provide an open appearance to the neighborhood. This house is not being enclosed, and the fence is

not having any negative effect on traffic. He noted that the neighbors have agreed that the fence is acceptable, and in his opinion, this is within the spirit of the fence provisions in the Ordinance. There were no objections made by the neighbors.

Chairman White said he takes an opposite position. He sees great unfairness, but he is concerned that a miscommunication between a petitioner and staff is insufficient to override an ordinance. He said they could not set a precedent because of a perceived mistake in communication. The standard in the criteria is a “manifest injustice”. He does not know how the Board will consider the next similar case, and also is concerned about giving the proper guidance to Mr. Hayes and the Code Enforcement staff. Chairman White said enforcing the Ordinance is not in violation of the spirit of the Ordinance. He did not see a mistake in communication between a Village employee and a petitioner as a sufficient basis to grant the variation.

Mr. Sleeter said that the spirit of the fence ordinance is so that the vision is not blocked, and that the characteristics of the neighborhood are not negatively impacted. Under different circumstances he might agree with the Chairman’s opinion; however, in this case the fence is not blocking any view or creating a hazard.

Mr. Baker said he is somewhat in the middle of the road on this. He would agree with the Chairman in one case, in that a common understanding of what a picket is the intent of the Code. This fence does not meet that requirement, and enforcing the Code is not a manifest injustice. But given the miscommunication, it could be considered manifest injustice. He said that taking in the entire picture of it being a side yard adjacent to the house, that adds to his confusion.

Chairman White said his understanding of the Board’s task is to grant the variation if they believe that denying the variation is manifestly unjust. He indicated that to say “no” does not violation the spirit of the variation, and is not an injustice.

Mr. Benes said that the Code says “open design fence”. It does not say why it is open, just that it is open. Even though the yard is on the side of the house, it is still the front required front yard. It is not a side yard or a back yard. The problem is a difference of definitions of an open design fence between the petitioner and the Ordinance.

Mr. Benes said that as far as the Code Enforcement Department is concerned, before a permit is issued, they instruct the applicant about open fencing in front yards. A fence contractor knows the difference between open and closed fencing. Additionally, if someone questions this particular fence, they can say that the people obtained a variation. A permit is not provided with a variation. Each situation is a separate entity and has to be seen as such. That does not mean that every petition that comes in will be granted a variation.

Chairman White said he is concerned about people seeing that this variation was approved after the fence was constructed, and they might try to build something in violation of the Ordinance and finish before the violation is discovered by the Village by applying for a permit that meets the Code but building something else and claiming that it was a mistake.

Mr. Benes said if that occurs, the owners could be told to take it down. He said these owners had a permit before they put up the fence. The issue is whether the petitioner knows and understands what an open design fence is, and in this case, the owners' and contractor's sense of open design differs from that of the Village Code.

Mr. Domijan said he struggles with the legal definition of an open fence as it applies to a front yard seems to penalize this particular property and all properties that are corner lots. If this property were in the middle of the block this conversation would not be necessary.

Ms. Browne interjected that she did not think it penalizes a corner lot. The intent of the regulation is to have uniformity in setback of structures on a street and to protect the intersections of streets and driveways.

Ms. Browne added that due to the narrow width of most corner lots, the Ordinance allows an automatic reduction of the front setback on the longer street side in certain instances where the lots are of a certain width. Explaining further, she noted that 50-foot wide lots in the R-4 district have reduced front yard setbacks along the longer street frontage from 25 feet to 15 feet in order to ensure a 30-foot minimum buildable width.

Mr. Domijan said that by definition he believes corner lots are held to a different standard. In most cases the system seemed to work as it was intended, but in this situation it is not working.

Mr. Domijan continued this is a difficult position for the Board, wherein if the variation in this case is granted, it can cause problems in other cases. He said he did not know if there have been actual issues where a previous ruling from the Zoning Board was used to actually build a case for a variation. All variations are intended to stand on their own. If someone wanted to come in and put in a fence that did not meet the definitions as an open design fence, they would have to come to the Board and request a variation for their specific situation.

Chairman White responded that his personal opinion is that a court is not going to see whether the fence is built or not as a legitimate basis for making a distinction between whether the variation should be allowed or not.

Mr. Baker asked whether the issue of it being built already should be taken out of the picture.

Mr. Benes noted that variations are not free. This variation costs \$300.00, in addition to the cost of the permit for the fence. For someone else to try and do the same thing just because they like a specific fence, it will cost them at least as much.

Mr. Baker asked whether Code Enforcement could do anything differently in regard to open fence definitions. Ms. Browne and Mr. Hayes noted Code Enforcement has handouts for certain kinds of construction, including fences, so that the petitioner is aware of the permitting requirements before construction commences.

There being no further discussion, Chairman White called for a Motion.

Mr. Benes moved that in Case V-6-08, the Zoning Board of Appeals grant the variation as requested by the petitioner. Mr. Lukas seconded the Motion.

AYE: Mr. Benes, Mr. Lukas, Mr. Domijan, Mr. Sleeter
ABSTAIN: Mr. Baker
NAY: Chairman White

Chairman White declared the Motion passed with a vote of 4:1:1.

Mr. Baker said the reason for his abstention was that he did not want to set a precedent, and that he is in the middle of the road on this decision.

Mr. Salman thanked the Board for their decision and said he appreciated the process.

.....

There being no further business, Chairman White adjourned the meeting at 9:00 PM.

Respectfully submitted,

Tonie Harrington
Recording Secretary