

**BOARD OF ZONING APPEALS
MUNICIPAL CENTER COUNCIL CHAMBERS**

May 11, 2010

6:00 p.m.

COMMISSION PRESENT:

Chairman Henry Evans; Alderman Carole Hinely; Mr. David Klevan; Mr. Ron Poe; Mr. Tony Salvaggio;

DEVELOPMENT STAFF PRESENT:

Mr. Jerry Cook, Director of Economic and Community Development; Mr. Alan Strain, Attorney; Mr. Wade Morgan, Chief Planner; Ms. Carmen Richardson, Secretary.

Interested Individual(s) present:

Mr. Brandon Wellford – 3366 Hollow Creek Road, Germantown, TN 38138

Mr. Floyd Allen Black – 3407 Crestwyn Drive, Germantown, TN 38138

Ms. Marian S. Black – 3407 Crestwyn Drive, Germantown, TN 38138

Mr. Reggie Garner – 2877 Rue de Jordan Cove, Germantown, TN 38138

Chairman Evans called the meeting to order and established a quorum.

ROLL CALL: – Ms. Boyd – absent; Mr. Poe – present; Mr. Salvaggio – present; Ms. Sherman – absent; Mr. Klevan – present; Alderman Hinely – present; Chairman Evans – present

Chairman Evans reminded those in attendance that the Board of Zoning Appeals is a Quasi-Judicial body and as such, the latitude for acting on applications is somewhat limited by State Statute and City Ordinance. He also reminded those appearing before the Board that the meeting is recorded and they would need to identify themselves, give their address and be sworn in for the record. He then swore in the staff.

Chairman Evans stated that he would like to make note that the motions made in all meetings are of an affirmative nature. He stated this does not necessarily mean that the motion will be approved, but that the language will be in an affirmative nature when the motion is made.

Approval of March 9, 2010 Minutes

Mr. Poe made a motion to approve the minutes from the March 9, 2010, meeting that was seconded by Mr. Klevan.

ROLL CALL: Mr. Poe – yes; Ms. Boyd – absent; Alderman Hinely – yes; Mr. Klevan – yes; Mr. Salvaggio – yes; Ms. Sherman – absent; Chairman Evans – yes

MOTION PASSED

SUBJECT: 3393 Crestwyn Drive – Request a variance to allow a fence on a lot without a principal structure in the “RE-1” Residential Estate zoning district.

BACKGROUND:

DATE SUBDIVISION APPROVED: Winchester-Forest Hill Estates subdivision was approved by the Shelby County Commission in 1968. On June 6, 2000, the Board of Mayor and Aldermen (BMA) approved on the third reading the annexation of 1,450 acres of land from unincorporated Shelby County into the City of Germantown. The variance request is within the annexation area.

DATE PRINCIPLE STRUCTURE APPROVED/BUILT: Vacant land.

PREVIOUS VARIANCE REQUESTS: None.

DISCUSSION:

NATURE OF VARIANCE REQUESTED: The specific request by the applicant is to allow fencing along the southern border of a vacant lot. The applicant also proposes to place an agricultural gate on the existing driveway, to connect with the existing fence in the front yard. The existing fence in the front yard setback is located 4.5' from the edge of the pavement and is approximately 3.8' in height. It was built prior to annexation and is considered a legal, nonconforming structure.

SPECIFIC SECTIONS OF ZONING ORDINANCE: The specific request is a variance from §23-12(6) of the Code of Ordinances, which states, "accessory buildings, structures and other accessory items and uses are not allowed on lots that do not have a principal building." A fence is considered an accessory structure.

APPLICANT'S JUSTIFICATION: The applicant is requesting the variance due to an extraordinary and exceptional situation of the property that results in peculiar and exceptional practical difficulties. According to the applicant, he would like to complete the fencing along the property lines to use the property for horse riding.

**Brandon Wellford, Property Owner/Applicant
3366 Hollow Creek Road
Germantown, TN 38138**

Mr. Wellford started out by saying this request is to relocate a fence along the southern boundary of the property. Mr. Wellford advised that since the subdivision was created in the 1960's it was recorded as a separately platted lot. He also advised that until last year, this lot was commonly owned with the property that lies to south (lot #26). Mr. Wellford stated that he is proposing to re-install a three rail horse fence which is identical to the fence that's on the other three sides of the property. He said that he purchased the lot last August and would now like to relocate the fence. He also stated two reasons for his request. One is if the southern fence (located approximately thirty feet from the boundary line) is not moved, about nine thousand square feet of the lot is physically separated and cannot be used as a pasture area. The other reason is from a topographical standpoint. When the lot is developed in the future, there's a drainage ditch along the northern boundary that frequently floods onto the lot. He said there's a difference in elevation of about six feet from the lowest spot of the lot to where the fence is located *and* there is also a ten foot difference between the neighbor's house to that lowest area of the lot. Again, said Mr. Wellford, any future home would need to be pushed toward the southern side of the lot where the fence would interfere if it is not relocated along the southern boundary of the property.

Mr. Wellford then made reference to the existing driveway that is on the southern side of the property. He said that easement agreements have been offered to his neighbor so that he [neighbor] could continue to use the driveway and access buildings that are located in the rear of his yard. Mr. Wellford said that although he has extended the offer twice, his neighbor has refused to sign the agreement each time. Mr. Wellford further advised that if the fence is installed, his neighbor will still have other means of access to the rear of his lot from another driveway that is located on the southern side of his house.

Mr. Klevan asked how close is the property line to the principal structure on lot E. Mr. Wellford answered by saying that he did not know the exact distance. Mr. Klevan said that it looks like it is right on the roof line. Mr. Wellford replied and said that it is not on the roof line; there's a site fence that may screen out the heating and air system which is adjacent to neighbor's house. According to Mr. Wellford,

there's probably at least three to four feet between the neighbor's fence and where this fence will be located.

Mr. Poe asked does the neighbor to the south have a fence along the property line. Mr. Wellford replied by saying that he does have a fence, but it's just a screening fence for his heating and air systems. Mr. Poe asked does it extend along the full property line; Mr. Wellford said no, just a small area next to the house.

Mr. Poe then asked Mr. Wellford if he and neighbor have discussed the easement issue. Mr. Wellford said yes, they have discussed it numerous times and has even met with the neighbor and his attorney. Mr. Poe asked was there a difference as to where the boundary line is and is there a disagreement to that. Mr. Wellford responded by saying no; again, he has told the neighbor that he would be happy to continue letting him use the driveway, but he would need to have a written easement agreement in place because of the significant liability of letting someone else onto your property. Mr. Wellford said that because his neighbor runs a commercial business with vary large moving vans (over twenty-five thousand gross vehicle weight) is even more of a reason for formalizing everything. He said that he has also offered him a right of first refusal to buy the lot in the future. Per Mr. Wellford, all efforts have been on his part in trying to make this work with his neighbor.

Mr. Salvaggio asked Mr. Wellford what happened to the original fence that was on the south property line. Mr. Wellford said that it was recently taken down; he did not realize the fence contractor that he had hired did not secure a permit. His intent was to relocate the fence from the north side of the roadway to the south property line so that the nine thousand square foot area was not physically separated from the rest of the lot.

Floyd Allen Black, Neighbor (Lot E)
3407 Crestwyn Drive
Germantown, TN 38138

Mr. Black began by stating that he and his wife originally purchased lots E where the house, barn and shop are located and lot C back in April, 2006. Mr. Black advised that he is not only a real estate agent, but he also operates a small moving company. Unfortunately, said Mr. Black, he ran into some difficult financial times and lost lot C to Regions Bank. The bank foreclosed on the property and sold it "where is" and "as is" at an auction.

Mr. Black stated that the road that comes in off of Crestwyn and goes back to his barn and shop is the only access; there is no other driveway from the inside of the property. He said that basically, the road in legal terms would be considered a "permanent easement of necessity." It is the only way that he has to access a two thousand square foot structure with electricity, gas, telephone, etc. And, said Mr. Black, it is the only way the fire department can access the structure if it happens to catch on fire, such as the barn down the street did last year.

Mr. Black then stated that Mr. Wellford did offer/send a contract. He said that in the contract, it asked him to share the maintenance cost which he agreed to do. Mr. Black said but also in the contract it says that he [Mr. Wellford] has ninety days at any point and time to change his mind and to no longer allow him access. Mr. Black stated that this is the reason why he refused to sign the agreement. Mr. Black said that they even tried to work everything out through a mediator, but it was just not possible.

Mr. Black advised that basically, the reason he operates his business from his home is because he has to tend to his diabetic mother-in-law through out the day. He then stated that the gross vehicle weight for the large trucks/vans mentioned by Mr. Wellford is indeed twenty-six thousand pounds. However, the trucks are never loaded when they cross this road; the empty vehicle weight on these trucks is thirteen thousand, six hundred pounds. Mr. Black said that they have been accessing and using that road with no

problems. He said that Mr. Wellford also wants to put up a locked gate, again denying him and fire department access. Mr. Black reiterated that Mr. Wellford purchased the property from Regions Bank, he bought it “where is” and “as is.” He further stated that the road has always been there; it is the only access that stretches to the rear of the property. It is not possible to drive on the other side of the property as suggested.

Alderman Hinely asked Mr. Black if a piece of property is sold, doesn't whatever is on that property go with it? Mr. Black said that anytime there is a road that is being used for a specific purpose of accessing another structure, it is considered a “permanent easement of necessity.”

Alderman Hinely then asked what would happen if someone bought the lot and built a permanent home. Mr. Black answered by saying that it depends on which way they face their home; I always assumed that if anyone were to build there, that they would use that road that's also an access. Mr. Black advised that this once was a horse pasture with a barn, stable and all. Alderman Hinely asked wasn't the road and the barn part of lot C. Mr. Black said no—the barn and shop are part of lot E; the road does a ninety degree turn to the left. According to Mr. Black, part of the road is on lot E and part of the road is on lot C. With Mr. Salvaggio's help in clarification, Mr. Black agreed that most of the road is on lot C.

Mr. Evans asked Mr. Black when did he purchase these two lots. Mr. Black replied that it was in April, 2006. Mr. Evans asked was his business already operating, or did he start the business after he bought the property. Mr. Black said that the business was already operating. Mr. Evans asked as is now, or as a business. Mr. Black said as is now. Mr. Poe asked was it at this location. Mr. Black said no, not at this location. Mr. Evans advised that we have an issue as to whether or not you can legally operate that business at that address. Mr. Black said that basically, all that he does is park two trucks there. Mr. Evans asked if this is his business address. Mr. Black advised that he does not have people who come and go from his house because his business is done by phone. When Mr. Evans stated that someone has to drive the trucks, Mr. Black responded by saying that someone gets in the truck to leave from there and go to a job.

Mr. Cook advised Mr. Black that a business cannot be operated from a property that is zoned residential; this is considered a home based business which is against City Ordinance. Mr. Cook further stated that operating a home based business does have a direct bearing on the use of the driveway.

Mr. Poe asked Mr. Black did the previous fence that was taken down match the fence that is on all three of the other sides. Mr. Black said yes, it was actually on the south side of the road on lot C; it is still there lying on the ground. Mr. Poe then asked was it there when Mr. Black bought the lot. Mr. Black said yes it was. Mr. Poe wanted to know if a driveway could be constructed parallel to Mr. Black's boundary line, (lot E), clearing his principal structure. Mr. Black said no because there is only about 10 feet clearance between the property line and the side of his home; it's even less when you consider the four central air and heating units. Mr. Poe then asked Mr. Black what would impede his ability to get to the barn coming from the south side of his home. Mr. Black responded by saying there is a large oak tree and another fence that basically comes out at the end of his driveway in front of his garage; it runs the property line between him and neighbor on the other side. Mr. Black added that the driveway goes all the way to the back behind the barn, separating his property from Judge Joe Brown's property. He said that there are waterlines to the pool, a large tree, gas and electrical lines from the back of the property.

Marian S. Black, Neighbor (Lot E)
3407 Crestwyn Drive
Germantown, TN 38138

Ms. Black advised that she also lives on lot E. She said that her husband forgot to mention the reason for them not putting water lines on the proposed driveway is because every time somebody accidentally goes off the roadway, they drive on one of the main pipes, messing up the irrigation system. Ms. Black then

stated that because her mother has water on the brain, she cannot walk to the barn, which is where her items are kept. She further stated that if the barn were to catch on fire and a fence is built, there would be no access and her mother's belongings would perish.

**Brandon Wellford, Property Owner/Applicant
(Returns to Microphone)**

Mr. Evans asked Mr. Wellford if he'd had any conversations with the fire department about accessing the proposed driveway and access to the rear property. Mr. Wellford said no, he had not. He said that he assumed that the fire hoses would be extended back, versus them driving a large fire truck to the rear area. Mr. Wellford however, did say that he would be happy to speak with the fire department about the matter at hand.

Mr. Poe asked Mr. Wellford about his willingness to work with Mr. Black regarding easement access. He questioned Mr. Wellford's easement agreement and the right to terminate in ninety days. Mr. Wellford explained the main point that we wants to maintain is flexibility. He said that he does not want to create a permanent easement, but will continue at this time to allow the Blacks to have access. He further stated that it restricts the future flexibility of the lot by being required to keep it for an extended period of time. He said that he is open to suggestions, but again he has been the one who's been making all of the effort up to this point.

Mr. Poe asked Mr. Wellford why he took the original fence down. Mr. Wellford said that he thought the contractor who he hired to do the work had obtained a permit and also, that he did not know a fence could not be erected on a vacant lot.

Mr. Evans said that because of several issues that need to be resolved, Mr. Wellford has the option of voting on the request tonight or to withdraw the request and hold it over until the next board meeting. With that, Mr. Wellford withdrew his request.

REQUEST WITHDRAWN BY APPLICANT

SUBJECT: 2877 Rue de Jordan Cove and 8429 Poplar Pike– Request a variance to allow a fence to be constructed on a lot without a principal structure in the “R” Low Density Residential zoning district.

BACKGROUND:

DATE SUBDIVISION APPROVED: The Chateau Gardens subdivision was approved in 2008.

DATE PRINCIPLE STRUCTURE APPROVED/BUILT: 2008.

PREVIOUS VARIANCE REQUESTS: None.

DISCUSSION:

NATURE OF VARIANCE REQUESTED: The specific request by the applicant is to build a fence on the undeveloped lot adjacent to the lot on which his dwelling is located. The applicant owns both lot 9 (dwelling) and lot 1 (vacant). The proposed fence will comply with the height and location requirements for fences.

SPECIFIC SECTIONS OF ZONING ORDINANCE: The specific request is a variance from §23-236(6) which prohibits accessory buildings, structures and similar items (which includes fences) on lots that do not have a principal building.

APPLICANT'S JUSTIFICATION: The applicant is requesting the variance based on the criteria of other extraordinary and exceptional situation resulting in undue hardship upon the owner. He explains that his home is built on lot 9 and he wants to extend the fence onto lot 1. The applicant states "the yard for my home is very small and because I own the lot next door I would like to go ahead and fence an area in to give me more usable space and keep my kids off of a busy road.

Mr. Reggie Garner, Owner/Applicant
2877 Rue de Jordan Cove
Germantown, TN 38138

Mr. Garner said after moving into the home, he assumed that he could fence in the lot next door. It was when he pulled a permit that he learned that he could not. He said that he was going to build a fence around the entire property, but then decided to wait and build a fence with each home. He advised that he spoke with his neighbor, because he is the only one that this will affect. Mr. Garner said that his neighbor is fine with it. Per Mr. Garner, it really does not obstruct anybody's view, nor does it look out of place. He said that he is doing it for his children because his backyard is very small. Mr. Garner said that his plan is to sell his home, selling the lot separately. He said that with today's economy, he does not see the other eight lots selling very fast.

Mr. Poe asked Mr. Garner if there was any specific wording that references the way that fences should be built. Mr. Garner said that he looked, but he didn't see anything. He really would rather for the fence to set back on Poplar Pike approximately ten feet so that it would look nicer and not block his neighbor.

PROPOSED MOTION: To approve a variance at 2877 Rue de Jordan Cove and 8429 Poplar Pike to allow a fence to be built on a lot without a principal building, subject to staff comments and the site plan submitted with the application.

Mr. Klevan motioned to approve a variance at 2877 Rue de Jordan Cove and 8429 Poplar Pike to allow a fence to be built on a lot without a principal building, subject to staff comments and the site plan submitted with the application; Alderman Hinely seconded the motion.

MOTION PASSED

Meeting Adjourned at 6:47 p.m.