

**BOARD OF ZONING APPEALS
MUNICIPAL CENTER COUNCIL CHAMBERS
November 8, 2011
6:00 p.m.**

COMMISSION PRESENT:

Mr. Henry Evans; Ms. Elizabeth Boyd; Mr. David Klevan; Mr. Tony Salvaggio; Alderman Palazzolo; Frank Uhlhorn

DEVELOPMENT STAFF PRESENT:

Mr. Wade Morgan, Chief Planner; Mr. Alan Strain, Attorney; Ms. Carmen Richardson, Secretary.

Interested Individual(s) present:

Mr. Alan Akil – 2251 Kimbrough Woods Place, Germantown, TN 38139
Mr. Don Wood – 2241 Kimbrough Woods Place, Germantown, TN 38139

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

ROLL CALL: – Ms. Boyd – present; Alderman Palazzolo – present; Mr. Salvaggio – present; Ms. Sherman – absent; Mr. Klevan – present; Mr. Uhlhorn – 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 October 11, 2011 Minutes

Dave Klevan made a motion to approve the minutes from the October 11, 2011, meeting that was seconded by Frank Uhlhorn.

ROLL CALL: Ms. Boyd – abstain; Mr. Klevan – yes; Mr. Uhlhorn – yes; Mr. Salvaggio – yes; Alderman Palazzolo – yes; Ms. Sherman – absent; Chairman Evans – yes

MOTION PASSED

SUBJECT: 2251 Kimbrough Woods Place – Request a Variance to Allow Fencing to Exceed Six Feet in Height in an “R” Residential zoning district

BACKGROUND:

DATE SUBDIVISION APPROVED: Lot 23 in section A of the Kimbrough Woods Subdivision was approved by the Germantown Planning Commission in 1974.

DATE PRINCIPLE STRUCTURE APPROVED/BUILT: The principal structure was built in 1976.

PREVIOUS VARIANCES: None

DISCUSSION:

NATURE OF VARIANCE REQUESTED: The applicant is requesting approval of approximately 50 feet of existing fence that exceeds the 6 ft. maximum height limit. A 25 foot section is 6 ft., 4 in. in maximum height and a second 25 foot section is 6 ft., 10 in. in maximum height. The 6 ft., 10 in. section is approximately 8 ft. behind the front yard setback line.

The homeowner was notified by Code Compliance staff on September 29, 2011 of the violation, and filed a variance application on October 11, 2011.

SPECIFIC SECTIONS OF ZONING ORDINANCE: The specific request is a variance from §6-102(a) of the Code of Ordinances, which states, “the maximum height of any fence shall be six (6) feet.”

APPLICANT’S JUSTIFICATION: The applicant bases the variance request on the exceptional topographic conditions of his lot. He states “due to topographic conditions of subject property, a fence slightly higher than 6 ft. ordinance is necessary to provide adequate privacy between neighbors. Because the elevations of our lot as well as neighboring lot slope from back to front, we are asking for a variance up to 10 inches higher only on a portion of the total fence.”

STAFF COMMENTS:

1. The homeowner constructed a fence along the north lot line, which drops in elevation from the rear (west) to the front (east). Instead of having the fence follow the natural contour of the ground, he incorporated three large “steps” in the fence height. Those steps resulted in two sections of the fence, totaling approximately 50 feet in length, being greater than 6 feet in height. Photos of the fence are attached and the homeowner has included a sketch of the fence with his application.

Chairman Evans asked if there was anyone who would like to speak in favor of the variance request.

Alan Akil, Applicant
2251 Kimbrough Woods Place
Germantown, TN 38139

Mr. Akil began by advising that there is a section of the fence that exceeds six feet by 10 inches. Per Mr. Akil, the fence was erected to replace a previous fence that had been there years ago. He said the reason for the height of the fence is because of the elevation of the lot; the ground in the very back part of the lot is 104.71feet and as you get closer to the front its 101.92 feet resulting in an approximate three foot drop off. Mr. Akil said that when the fence was installed, he had the option of starting at six feet, but because the ground looked upwards towards the back of the lot, this caused the fence height to be brought down to four and a half or five feet which he felt was not enough privacy for him or Mr. Wood next door. Mr. Akil further advised that if you are standing in the back of his driveway on higher ground you can see over the fence right into Mr. Wood’s yard. He said from an aesthetic point, it is a nice fence constructed of clear western red cedar which is a fence board that contains no knots or holes in it. Again, per Mr. Akil, his decision for the height of the fence was based on the elevation of the lot and also on the fence company’s recommendation that the fence be smooth and more eye-catching across the top versus following the ground, causing it to appear uneven. Mr. Akil said in order to accomplish this, he had two options – he could go with a four foot fence in the back and six in the front or could keep the fence at six feet, which is what he did (slightly exceeding the six feet). Mr. Akil further stated that unless you go behind the gate into the driveway you would not know that the gate exceeds six feet.

Ms. Boyd asked Mr. Akil who his fence company was. Mr. Akil said "*Memphis Fence Company.*" Ms. Boyd then asked Mr. Akil why didn't they get a permit. Mr. Akil stated that a permit was not obtained because the fence was there when he purchased the house. Per Mr. Akil, some sections of the fence were rotten. He therefore approached Mr. Wood about replacing the fence and at one time, received an offer to pay for one-half the replacement cost. Mr. Akil explained that approximately two years had passed before the new fence was erected. He said because a fence was already there, he didn't feel like a permit was necessary.

Chairman Evans asked Chief Planner Wade Morgan if after a length of time the permit becomes void?

Mr. Morgan explained that typically, a non-conforming structure such as a removed fence has a one year period of time. He said if a fence is taken down and a year passes, then yes a permit is required; if less than a year, no permit is required if it is the same kind of fence, same height, same material and same location.

Chairman Evans asked Mr. Akil if his fence contractor at any point, tell to him that the new fence must be the same height fence and/or did they advise him that he did not have to have a permit. Mr. Akil said that they did not advise if he did not need a permit or needed a permit. They did ask him if there was a fence there before. Mr. Akil advised that yes there was, but has since been taken down. Mr. Akil stated this was knowledge that he did not have and certainly would have approached the City and applied for a permit.

Ms. Boyd asked Mr. Akil if the fence was taller as a result of adding the timbers. Mr. Akil said not necessarily. When he moved in there were timbers that were two high and at one point they got to be three high. He also stated that the timbers in the back of the lot were not high enough to contain the soil which washed away and created some of the rot in the fence. Per Mr. Akil, when he took down the fence, he decided to use brick, a more permanent material. He said based on the survey and the elevation of the lot starting at the lower ground, he thinks the contractor stair-stepped the bricks making them too high for the land.

Mr. Salvaggio asked Mr. Akil if there is a fence on the back property line. Mr. Akil said yes, there is. Mr. Salvaggio then asked Mr. Akil what is the height of the fence where the new fence intercepts; are they the same level. Mr. Akil said no, that actually the new fence at southwest corner is probably a couple of inches lower. He further stated that if the contractor had started at the front part of the gate with a six foot fence (smooth across the top), then the fence would become shorter, shorter and shorter resulting in a difference of a foot or more between that and the back fence. Mr. Salvaggio wanted to determine if the new fence is non-conforming. He asked Mr. Akil if his gate that goes to the southwest corner (where the two fences meet) is the same height as the old existing fence. Mr. Akil stated that the back fence that runs north and south along the back of the property is six feet tall. Mr. Salvaggio clarified by asking if Mr. Akil's new fence is higher, where the two fences meet. Mr. Akil said no, it is not. He stated that it's two inches shorter.

Chairman Evans asked if there was anyone who would like to speak against the variance request.

Don Wood, Neighbor
2241 Kimbrough Woods Place
Germantown, TN 38139

Mr. Wood advised that he is the neighbor to the north of Mr. Akil. Per Mr. Wood, this is a two prong problem. He said that if you are driving down the street of Kimbrough Woods Place and look to your left you will see Mr. Akil's beautiful house, then his lovely wrought iron gate, and then a brick post with two and a half feet of ugly fence that sticks up above and runs almost all the way down the south of Mr. Wood's house. Mr. Wood advised that the fence is less than ten feet from his house.

Mr. Wood said the second problem is the two hundred and seven boards that make up the fence, not allowing water to drain underneath it. Per Mr. Wood, this is a direct violation of water flow and he is being flooded because the water has no place to go. He said that prior to this fence being built there was a brick retaining wall that was much higher preventing the water from coming over. Now, said Mr. Wood, there is a fence on top of a brick wall and a brick wall that higher than the land. Per Mr. Wood, the problem involving the fence first started well over a year ago. He said that they could have put up boards and pitched a fence that would have matched the rest of the fence in Mr. Akil's yard, but that 's not what he wanted on that side.

Mr. Wood said that when he is walking down his hallway, all that he can see is a fence that is higher than the middle of his windows. He said unlike the Akils, he is very concerned about the height of the fence; he does not want that ugly thing sticking that high up above. Once again, Mr. Wood mentioned the two hundred and seven boards of the fence that do not allow proper water flow.

Chairman Evans interjected to advise that our issue tonight cannot be absorbed with a drainage issue. He said that is something that should be worked out between neighbors. Chairman Evans said the issue that we have before us is simply the height of the fence. The drainage issue will have to be set aside; we can't address that as a Board.

Mr. Wood resumed by stating that the fence is offensive and is nothing but a problem. He advised that Mr. Akil suggested that he talk with some of the neighbors about the fence issues. Mr. Wood said why should they care, no one can see it but him; the whole thing is sitting in his side yard above everything else that is there. He said that it's ugly for the entire neighborhood and we don't want it.

Mr. Salvaggio asked Mr. Wood what exactly did he mean when he said the fence was "offensive?" Does this mean the entire fence as a whole, or the front corner where the post (inaudible). Mr. Wood said that he was referring to the front first board to the end of his house which is probably where Mr. Akil's garage would start. Mr. Salvaggio then asked is this fence substantially higher than the fence that was previously there; was the old fence as low as the brick. Mr. Wood said that the old fence was nowhere near that height.

After much discussion about the fence height (brick column being above or below the fence and/or whether the fence was ten inches above the top of the column), Mr. Akil said that he wasn't sure and that he hadn't really looked at it. He said the code compliance officer that came out to inspect the fence measured from the bottom of the board to the top of the board and came up with six feet ten inches, so he's really not sure what the column height is.

Mr. Uhlhorn asked Mr. Akil how much of a grade change is there behind the fence; how much of a drop is that from your lot/property line. Mr. Akil said that it is a gradual slope; not a real grade change. Per Mr. Akil, the lot slopes east to west, probably one foot if anything. Mr. Uhlhorn suggested that Mr. Akil take down sections of the fence and have the grade changed so that the water runs off in an appropriate manner (inaudible). Mr. Uhlhorn said the fencing contractor could have easily brought in a small amount of dirt to raise Mr. Akil's property on his side of the fence. At this time per Mr. Uhlhorn, the soil gradient could have been determined allowing the correct type of fence to be erected. Per Mr. Uhlhorn, it really is a question of does Mr. Akil wants to salvage his relationship with Mr. Wood and (inaudible) problem or look for the Board to give you a variance on the ten inches.

Mr. Akil stated that there are a couple of options now that Mr. Wood has expressed his concern that the fence is a (inaudible) that he looks at when he walks down his hallway. He further stated the reason that he even went through the expense of a three hundred dollar survey plus a hundred and fifty dollar application fee was because he received an email from Mrs. Wood stating that they don't have a problem with the fence, and that it's only a water issue. Per Mr. Akil, he and Mr. Wood talked and agreed to hire an engineer to address the water issue. He said that if he had known Mr. Wood's opinion of the fence, he

would not have gone through the expense and hassle of being here tonight. Mr. Akil said since this is an obvious problem with Mr. Wood, he doesn't know if he should ask for a variance or should he take the fence down and design a fence of their own or make some adjustments to the fence as was suggested.

Chairman Evans interjected and said the solutions to the issue are not for the Board to make; our decision tonight is to vote up or down for a variance request. He said if you choose not to have the Board to vote up or down tonight then you must ask that the item be withdrawn *and* will it still be non-compliant. Mr. Akil suggested that nothing be done to the fence until it can be decided from an engineering perspective what the solution is going to be for the drainage problem. Chairman Evans interjected once again by saying the drainage issue has nothing to do with the Board's decision tonight. Mr. Akil said that he understood. He stated that Germantown has a jurisdiction that may tell him that he can correct this violation without changing the fence. Mr. Akil said if that is the case, he should go ahead and have the variance approved in the event that he does not need to do anything with the fence. Chairman Evans said the decision is really yours to make—do you want to have the Board to vote on the variance, if so we will prepare to do that, but we have nothing to do with any discussions about the drainage.

Board members advised Mr. Akil that if he is voted down tonight, he would not be able to appear before the Board for another six months.

Mr. Klevan said that he will not be voting in favor of the variance request. He said that it's nothing personal and that his decision is based on being an aesthetically pleasing neighborhood. Mr. Klevan further stated that there are severe grade changes all over the City of Germantown; fence followed by grade is what keeps our neighborhoods and property values up.

Ms. Boyd said that she feels the same way and that she would not be voting in favor of the structure as well. She advised Mr. Akil to inquire about any additional fees/charges if he were to withdraw his request tonight.

Mr. Uhlhorn suggested that because the grade change is so slight, that if you pull a chalk line from the back corner to the front you may be able to resolve the problem.

Mr. Evans noted that we are not here to offer solutions and asked Mr. Akil if he wished to withdraw his request. Mr. Akil said yes. With that, the item was withdrawn.

ITEM WITHDRAWN

Meeting Adjourned at 6:36 p.m