

## ZONING BOARD OF APPEALS MINUTES OF DECEMBER 14, 2010

Meeting called to order by Chairman Markwardt at 5:01 p.m. in the 1<sup>st</sup> Floor Conference Room, Suite 108, City Hall Plaza.

**PRESENT:** Richard Kenyon, Dean Markwardt, 1<sup>st</sup> Alternate Kenneth Bargender, 2<sup>nd</sup> Alternate Scott Noble and Ed Gerl (arrived at 5:03 p.m.)

**ALSO PRESENT:** Planner/Zoning Administrator Miller, Director of Planning and Economic Development Angell, Deputy Clerk Panzer, Rob Popowich, Richard Welton and Krista Popowich

**ZB10-015** Motion by Kenyon, second by Bargender to approve the minutes of November 9, 2010 as submitted.

### **Motion carried**

Deputy Clerk read the Appeal of Rob and Krista Popowich. Appealing a code interpretation by the City of Marshfield Zoning Administrator that fences in the side yard do not have setbacks and can be placed up to the property line. Applicant believes a fence falls under the definition of a detached accessory structure in Sec. 18-02 and should be subject to the setback requirements of an accessory structure. All accessory uses under Sec. 18-04 (2) (d) require a 3 foot setback from all interior property lines.

### Background

The Applicant's neighbor, located at 304 W Jefferson St, has placed a snow fence along the property line adjacent to their driveway. This snow fence has been placed at this approximate location for the past three years. The Applicant has asked staff to request that the neighbor move the fence to give them more room to get in and out of their vehicles. Currently, the Applicant feels the fence is a safety issue.

Each year, after the snow fence has been installed, the Applicant has asked staff to require the neighbor to move the fence back away from the property line to give them room to get out of their vehicle. Staff has informed the Applicant that the City does not require setbacks for side yard fences. Furthermore, temporary snow fences from November through April do not require a permit. Staff has denied the request to require the neighbor to move the fence with the basis that there is nothing in the Zoning Code that would allow staff to require the neighbor to move the fence. Staff's position is that this is a dispute between neighbors and as long as the fence is on her property, the City cannot intervene.

### Applicable Ordinance Section(s)

1. Section 18-04 (11) (b) (1) of the Municipal Code states the following for residential boundary fences: "*Boundary fence*. A solid or open fence may be located up to the property line in side yards or rear yards and shall not exceed six (6) feet in height. The applicant is solely responsible for installing the fence within the boundaries of their property, notifying digger's hotline and verifying the presence of any utility easements.
2. Section 18-04 (11) (e) (1) (b) of the Municipal Code states the following regarding exemptions from building permits: "*Exemptions from permit*. Snow fencing shall be permitted in all districts not exceeding four (4) feet in height provided it is removed between May 1 and November 1 of each year. Decorative fences not exceeding 36 inches in height are exempt provided they do not present a hazard to pedestrians on any public or private sidewalk. Other fences exempt from permits include dog runs/kennels and garden fences."
3. Section 18-02 of the Municipal Code defines detached accessory structures as the following: "*Accessory Structure, Detached* means an accessory structure which is not physically connected to the dwelling. A minor attachment does not render an accessory structure as attached. Examples of minor attachments include, but are not limited to, decks 18" or less above grade, arbors and fences, and similar open unenclosed structures such as breezeways

- over the pedestrian pathway between structures and no wider than 5-feet.”
4. Section 18-02 of the Municipal Code defines structure as the following: “*Structure* means anything constructed, installed or portable, the use of which requires a location on a parcel of land, or attachment to something having a permanent location on the ground. It includes a movable structure, fences, billboards, swimming pools, poles, pipelines, transmission lines, tracks, and street graphics.”
  5. Section 18-04 (2) (d) of the Municipal Code states the following regarding accessory structure side and rear setbacks: “*Accessory structure side and rear setbacks.* All accessory structures shall be set back at least three feet from all interior lot lines. In those instances where the rear lot line is coterminous with an alley right-of-way, the accessory building shall not be closer than three feet to such rear lot line, except when the driveway enters from an alley, a minimum setback of 20 feet shall apply.”

### **Analysis**

The Applicant is appealing the decision of the Zoning Administrator to not enforce setbacks for fences located in the side yards. The interpretation of the Zoning Code by the Zoning Administrator is that fences, located in the side yard, do not require setbacks. The interpretation of not requiring setbacks for fences in the side yard is what is being appealed.

The Applicant contends that a fence should be considered an accessory structure and points to the definition of a detached accessory structure as an example. All accessory structures do require a 3 foot setback from all side and rear property lines.

The Zoning Administrator is basing his interpretation of not requiring setbacks for fences and specifically snow fences in this instance in the side yard on the following:

- Sec. 18-04 (11) (b) (1) of the Municipal Code which states that boundary fences can be placed up to the property line.
- Fences are not defined in the Zoning Code as an accessory structure. The definition of detached accessory structures use “arbors and fences” as an example of a minor attachment, not as an example of an accessory structure.
- Staff is not aware that any setbacks have ever been enforced for fences located in the side yard, along an interior property line.
- Fences have separate permits from accessory structure permits.
- Snow fences would be held to the same standards that a boundary fence would except that they can only be up during certain times of the year and can only be 4 feet in height. Additionally, property owners are not required to take out a permit to put up a temporary snow fence.

Rob and Krista Popowich’s driveway is less than 3’ from the lot line and if their driveway were built today a 3’ setback would be required.

Rob Popowich referred to pages CD18:16 and CD18:5 of the Municipal Code and read the definition of a structure and the definition of an accessory use or structure. He also referred to page CD18:20 of the Municipal Code which talks about accessory structure side and rear setbacks. He pointed out that in the beginning of the Municipal Code it says if there is a disagreement you have to go by Miriam Webster’s dictionary. He believes a fence falls under the definition of a detached accessory structure and should be subject to the setback requirements of an accessory structure and therefore require a 3 foot setback from all interior property lines.

Zoning Board members reviewed property photos that Rob Popowich took before and after the last snow fall.

Rob and Krista Popowich expressed concerns about safety issues of the fence. They are having a hard time getting in and out of their vehicles with the fence there. They are afraid their children will fall into the fence and harm themselves.

Richard Welton, owner of the property located at 306 West Jefferson Street, said he bought the house several years ago with the anticipation of moving into Marshfield. This all started about the second year that his daughter moved into the house and it was all over the leaves. This is nothing more than harassment of his daughter and her husband.

Rob and Krista Popowich believe the fence is being put up as a harassment tactic by their neighbor to inconvenience them, or to try to get them frustrated so they move out.

Richard Welton pointed out that the fence posts are on the opposite side of where they should be. The finished side of the fence should be facing his property and the post side of the fence should be facing his neighbor's property.

Rob Popowich said the fence serves no purpose as a snow fence the way it is. If it were setback to 36" it would still do the same job as it is doing now, but would allow us to get in and out of our vehicles without falling into the fence. He could then remove the snow without the risk of damaging her fence and being liable for replacing it. He is not asking that his neighbor take down her fence, he would just like her to move it back.

Richard Welton said the fence is not really a snow fence. The first part of the fence is, but the last 20 or 30 feet is nothing more than a wire fence.

Bargender agreed with Mr. Welton. A snow fence belongs out in the open where it can catch snow. It can't catch snow between houses. The fence that leads from the sidewalk to the snow fence is not a snow fence. It is a little wire fence about table height. This fence has no purpose for snow and it definitely creates a hazard. The metal posts of this fence have sharp tops. This fence could cause great bodily harm to anyone if they are walking on the sidewalk and would happen to slip and fall to the south. This fence could create great bodily harm to the Popowich family if they are walking along the property line and slip and fall. This fence creates a hazard and should be removed.

Richard Welton said he isn't so sure it is so much defining what a fence is as it is the health and safety of people that are walking by. The fence means nothing as far as he is concerned. When you have steel posts 4' high and you have kids running around there or adults running around there and there is ice and snow it is all health and safety.

Rob Popowich said last year Mr. Miller talked about making an amendment to the ordinance. He asked if this would be a proper time to look into doing something like that too for preventative maintenance for future problems.

Richard Welton asked what the legal issue is if his grandson falls and loses his eye. Where does the ball stop? Does it stop with the lady next door or does it stop with the City's ordinance?

Director of Planning and Economic Development Angell said there a lot of different sections of the code that need to be updated because the code is 30 years old. We have received approval from the Council to start moving forward with that process, but in all likelihood that will not start until July of next year and it

will probably take a year to 18 months to complete. It is a lengthy process. This would be something that we could potentially look into or we could ask for the Plan Commission to provide further clarification and look at it sooner if they so choose to do so. That would then be a recommendation to the Council and they would ultimately make that decision. This body, the Zoning Board of Appeals, just reviews the appeals; they don't review any of those amendments.

Rob Popowich said he has no problem with most of the way that the code is set up. He understands that most properties are not in conflict. We live in an older neighborhood. The property lines are very shallow. Unfortunately, the way the code is being interpreted would be for more modern lots and developments and that puts us at risk, because the property line is so close and she has the fence right on the line. We have no choice but to be here right now and try to get this resolved. We are concerned for anybody that comes onto our property that may get harmed if they fall, including the mailman.

Deliberations were held.

Director of Planning and Economic Development Angell reminded the board that the appeal is the item they are considering and they should keep in mind how their decision will affect the overall community. He recommended talking with the City Attorney if the board wants to enforce the health and safety side of this issue to see how we can do that.

Planner/Zoning Administrator Miller pointed out that if the neighbor wanted to put up a 6' boundary fence in the same location and came in for a permit, we would issue her a permit to do that, based on how the fence permits have been issued and how the code is interpreted. The fence can be placed up to the property line.

Chairman Markwardt said a wooden fence would prevent the falling hazard. Although it could still create snow build up and be impeded to opening the doors and the inconvenience and hazard part of that would still be there.

Planner/Zoning Administrator Miller said there are going to be issues between neighbors and there is a difference between public and private nuisances.

Kenyon reminded the board that the health and safety is not what we are considering. We are appealing the decision not to enforce fence setbacks from property lines. The City of Marshfield has fence ordinances. If we grant this appeal, we will have to tell everybody who has built a fence in the City of Marshfield that they have to come in 3' off their property line. He does believe the fence as it is built is a danger, but it is not in what we are talking about today.

**ZB10-016** Motion by Kenyon, second by Gerl to deny the appeal of Rob and Krista Popowich.

The basis for denial is that City ordinance defines a boundary fence and a snow fence more explicitly than the broader definition of an accessory structure as it relates to the property line.

Vote on motion **ZB10-016**; All Ayes.

**Motion carried**

**ZB10-017** Motion by Gerl, second by Bargender to refer this portion of the code back to the City Staff and the City Attorney to come up with a better definition of a snow fence and placement of a snow fence.

**Motion carried**

**ZB10-018** Motion by Gerl, second by Kenyon to recommend that City Staff, City Attorney and the Police Department address the safety issue of this fence at this residence at the present time.

**Motion carried**

Motion by Kenyon, second by Gerl to adjourn at 6:18 p.m.

**Motion carried**

Lori A. Panzer  
Deputy City Clerk