

DRAFT

**VILLAGE OF UPPER NYACK ZONING BOARD OF APPEALS
RESOLUTION**

Property Address: 113 Castle Heights Avenue, Upper Nyack (the “Property”)
County Map No.: 60.17-02-41
Zoning District: R-10
Applicant/Owner: Gregory Cooper and Ilana Davidson
SEQRA Classification: Type II (6 NYCRR 617.5c11) No further SEQRA review required
Date of Public Hearing: March 7, 2023 and June 13, 2023

DESCRIPTION OF THE APPLICATION:

This is a two-part application in which the applicants, Gregory Cooper and Ilana Davidson (the “Applicants”), are: (1) appealing the determination made by the Village’s Code Enforcement Official (the “CEO”), dated January 20, 2023 finding that a fence constructed on the Property without a fence permit is not a “Deer Fence”¹ as that term is defined in the Village of Upper Nyack Zoning Law (the “Zoning Law”), and, if the CEO’s determination is affirmed, (2) requesting an area variance to permit the fence to remain as constructed.

MATERIALS REVIEWED:

1. Project Narrative (undated);
2. Zoning Board of Appeals submission checklist;
3. Zoning Board of Appeals application with supplemental pages addressing area variance factors;
4. Letter of Village CEO, Roy Wanamaker, dated January 20, 2023;
5. Property deed;
6. GML 809 Statement;
7. Fencing photographs; and
8. *Survey of Property for Greg Cooper*, prepared by Atzl, Nasher & Zigler, PC, stamped Received March 3, 2022, with the location of the proposed fencing marked in yellow (the “Property Survey”).

No members of the public attended the hearing or submitted correspondence objecting to the fence or opposing the grant of the requested variance.

DESCRIPTION OF THE PROPERTY AND THE FENCE:

The Property is on the south side of Castle Heights Avenue in the Village’s R-10 Zoning District. It is improved with a single-family residence, frame shed, walkways, driveway and related improvements. The Applicants have installed a fence parallel to the east (side) and south (rear) property lines in the Property’s rear yard; no portion of the fencing is located within the “Required Front Yard” or the “Front Building Setback.”

¹ Terms that are capitalized and in quotation marks are defined in the Zoning Law. Deer Fence is defined in the Zoning Law as “Fence, Deer.”

DRAFT

The Applicants constructed the fence out of pressure treated wood and stiff hog wire. The fence is eight (8) feet in height and is separated into two sections. The lower section measures six (6) feet in height and is constructed of a wooden frame within which the stiff hog wire is installed. The upper section consists of the wooden support posts topped by a wooden arbor that is intended to be used to grow vines. The top of the arbor measures eight (8) feet above the grade. The fence's vertical posts currently extend above the arbor, but the Applicants have stated that the portion of the posts extending above the arbor will be removed such that the arbor will be the top element of the fence.

The Applicants have explained that vines will be grown from the arbor down the structure of the fence so that when the vines reach maturity the fence will have the appearance of a green wall and the visual impact of much of the fence structure will be obscured by the vegetation.

PHOTO A: Fence Segment



The Applicants have explained that they have had a significant issue with deer eating vegetation in the yard and, therefore, the eight (8)-foot-tall fencing is needed to preclude the deer from accessing the rear yard. However, they prefer the design of the fencing as proposed and depicted in Photo A rather than traditional deer fencing (thin metal posts with small gauge mesh fencing) because the arbor provides them with the ability to grow wisteria and other vines from the fence enhancing the aesthetic appeal of the yard.

INTERPRETATION REQUEST:

Pursuant to Zoning Law §6.3, “Fences,” other than “Deer Fences” may be a maximum of six (6) feet in height (Zoning Law §6.3.1), and “Deer Fences” may measure a maximum of eight (8) feet in height unless located in a “Required Front Yard” in which case they may measure a maximum of six (6) feet in height (Zoning Law §6.3.3). Although Zoning Law §6.3.1 allows certain decorative elements of fencing to exceed six (6) feet in height, no such decorative elements are proposed here.

DRAFT

Zoning Law §2.1.40² defines “Fence, Deer” as “A small opening (typically 1 to 1.5 inches) mesh Fence and its supporting posts.” The CEO found that the Applicants’ fence did not meet this definition because of the horizontal members included on the top of the fence.

The Board affirms the determination of the CEO. The definition of “Fence, Deer” is clear that it is limited to small gauge mesh fencing and its supporting posts only. The proposed fencing does not meet this definition. As shown in Photo A, the fence has horizontal supports at the bottom and top of the bottom section of the fence, and the arbor is a substantial horizontal element that is not contemplated by the “Fence, Deer” definition. Notably, the arbor feature is located more than six (6) feet above the “Finished Grade.” Accordingly, the Board finds that the Applicants’ fence is not a “Fence, Deer” and thus is subject to Zoning Law §6.3.1’s six (6)-foot height limitation applicable to “Fences” generally.

AREA VARIANCE:

Considering the above, the Applicants are seeking a variance from the requirements of Zoning Law §6.3.1 which restricts “Fences” other than “Deer Fences” to a maximum of six (6) feet in height to allow the existing fence, which measures eight (8) feet, in height to remain.

Pursuant to Section 12.3.3.2 of the Zoning Law:

In making its determination [on an application for an area variance], the ZBA shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination, the ZBA shall consider: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions of the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the ZBA, but shall not necessarily preclude the granting of the area variance. The ZBA, in the granting of an area variance, shall grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

Here, the Applicants have explained that the benefit sought by the grant of the variance is permission to keep the previously constructed fence in its current location at eight (8) feet in height so that deer are excluded from the Property’s backyard. The Board considers the five

² At the time the CEO’s determination was made, the definition of “Fence, Deer” was codified at Zoning Law §2.1.39. By Village of Upper Nyack Local Law 1 of 2023 the definition of “Fence, Deer” was renumbered to Section 2.1.40, but was otherwise unchanged.

DRAFT

factors to determine whether the proposed variance will cause a detriment to the health, safety and welfare of the community and whether the benefit sought by the Applicants outweighs such detriment.

1. Whether an undesirable change will be produced in the character of the neighborhood or a detriment to the nearby properties will be created by the granting of the area variance. Granting the requested variance will not cause an undesirable change in the character of the neighborhood or a detriment to nearby properties. The fence is located behind the existing residence and no portion of the fence is in the “Required Front Yard” or “Front Building Setback” on the lot. The small portion of the fence that is visible from Castle Heights Avenue is setback therefrom by more than 40 feet. The fencing is generally transparent due to its open frame and wire construction, and therefore it does not create a substantial visual barrier from any location. Based on the Applicant’s representations, vines will be grown from the arbor on the fence, which will obscure the fence structure and improve the aesthetic of the fence giving it the aesthetic of a green wall. No adjoining property owners or members of the surrounding community attended the hearing or otherwise objected to the location or manner of construction of the fencing.

Although members of the Board expressed concern with the aesthetic of the portion of the support posts extending above the arbor, the Applicants indicated that it was their intention to remove such posts so that the arbor would be the tallest element of the fence.

2. Whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance. Although other methods of excluding deer from the Property are feasible, the fence is currently existing, it is attractive, and it is located outside of the “Required Front Yard” and “Front Building Setback.” Although it is possible for the Applicants to lower the horizontal members of the fence so that they are a maximum of six (6) feet in height and then install fencing meeting the definition of “Fence, Deer” under the Zoning Law above such structure, both the Board members and the Applicants were of the view that this configuration would be less attractive than the fence as presently constructed, given the manner in which it is constructed and situated on the lot. Therefore, although alternatives may be feasible, the fence is attractive and, as described above, allowing it to remain is not likely to have negative impacts on the surrounding community.

3. Whether the requested area variance is substantial. Although the requested variance is numerically large in that it will be a two (2)-foot, or 33 percent, deviation from the permitted fence height as provided in Zoning Law §6.3.1, due to its location in only a portion of the rear and side yard outside of the “Required Front Yard” and “Front Building Setback” and its open manner of construction it is not expected to have a substantial negative impact on the surrounding community.

4. Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district. The ZBA finds that it will not for the reasons described in response to factors one and three above.

DRAFT

5. Whether the alleged difficulty was self-created. The ZBA finds that the need for the variance is self-created as it stems from the Applicants’ desire to retain the fence it constructed before obtaining the required permit in a manner that exceeds the permitted fence height in the Zoning Law. However, because the fence will not otherwise negatively impact the surrounding community, the Board finds that the self-created nature of the need for the variance does not require its denial.

Weighing and balancing the above factors, the Board hereby finds that the benefit to the Applicants, here the ability to keep the fence in the yard as constructed to exclude deer from the Property’s backyard, is a significant benefit, and that there is no corresponding detriment to the health, safety and welfare of the community by the grant of the variance given the location and design of the fence.

Determination: For the reasons provided in this Resolution, the ZBA hereby GRANTS the requested area variance from the requirements of Zoning Law §6.3.1 which allows “Fences” other than “Fences, Deer” to be a maximum of six (6) feet in height to allow the existing fence to remain at a maximum of eight (8) feet in height, subject to the following conditions:

1. The Applicant shall remove the portion of the vertical posts that extend above the arbor.
2. The fencing may only be placed in the area indicated with yellow highlighter on the Property Survey.
3. This variance permits the Applicant to maintain only the fence as depicted and described herein. Any change to the fence materials or manner of construction shall require further review and approval by the Zoning Board of Appeals unless it is in strict compliance with the Village Zoning Law.
4. Pursuant to Zoning Law §12.4.9.1.1 this variance shall expire if no building permit is issued within one (1) year of the date that this Resolution is filed in the Office of the Village Clerk or if a Certificate of Compliance is not issued within two (2) years of the date of such filing.

DATED:

VOTE: Motion to Approve Resolution:
Second:
Vote:

Village of Upper Nyack Zoning Board of Appeals

Thomas Englert, Chairman