

**Village of Upper Nyack  
Zoning Board of Appeals Meeting  
Tuesday, March 7, 2023, 7:30pm**

**MINUTES**

A meeting of the Zoning Board of Appeals of the Village of Upper Nyack was held on the above date and called to order at 7:33 p.m. by the Chairman, Thomas Englert.

**Other Board members present:** Steve Lubeck, Paul Curley, Meg Fowler and Beth Wittig.

**Also present:** Noelle C. Wolfson, Esq., Consulting Attorney, and Janet Guerra, Board Secretary.

**7:33 p.m.:** Review of the minutes of the meeting of February 7, 2023.

The Chairman asked if there were comments on the draft minutes. Two typographical errors were identified and will be corrected.

**Motion to approve the February 7, 2023 Minutes with the typographical error corrections.**

**Motion:** Paul Curley

**Second:** Beth Wittig

**VOTE:** 5-0

**7:35 pm:** Gregory Cooper and Ilana Davidson, 113 Castle Heights Avenue, County Map 60.17-02-41. Application for an interpretation of the building inspector's notice of determination dated January 20, 2023 regarding Village of Upper Nyack Zoning Law §2.1.39 (Fence, Deer); and after the fact area variances from the requirements of same regarding installation of perimeter deer fencing on a property improved with a single-family residence in the Residence R-10 district.

**Representing the Applicant:** Greg Cooper, Illana Davidson, homeowners

Mr. Cooper presented photographs of the fencing and explained that the fence is 8 feet tall and intended to be deer fencing. The applicants are new residents. They were not aware of the requirements for a fence permit before they installed the fence. The fence was constructed in October/November of 2022.

It is the applicant's understanding that deer fencing needs to be 8 feet tall to be effective in excluding deer from the yard. The applicant explained their experience with deer eating vegetation.

Member Fowler asked if all sections of the fence measure 8 feet in height. Mr. Cooper explained that the fence height varies, but it is approximately 8 feet. The applicant's intention is to make the fence a maximum of 8 feet in height. It was clarified that the top of the arbor is or will be at 8 feet in height and that the posts extending above that area in the photographs will be removed.

Mr. Cooper explained that the design of the fence, particularly the arbor on the top of the fence, is intended to allow vines to grow along the fence to give it an effect of a “green wall” which will buffer the visual impact of the fence structure.

There was a discussion about whether the fence complies with the newly added definition of deer fence in the Village’s Zoning Law. There was also a general discussion about the precedential value of the Board’s interpretation of the Zoning Law and the grant of a variance.

The Chairman read the definition of deer fence into the record as follows: “Fence, Deer: A small opening (typically 1 to 1.5 inches) mesh Fence and its supporting posts.”

There was a discussion about the type of fence construction this entailed. Mr. Curley asked about the drafter’s intent in this provision. Consulting Attorney Wolfson, who indicated that she was a part of the drafting committee, explained that deer fences were intended to be limited to small gauge mesh fencing and vertical support posts.

The Board members discussed the definition and the structure of the subject fence. It was the consensus of the Board that the subject fence did not meet the definition of a deer fence in the Village’s law because the top arbor portion of the fence was more substantial than a supporting post.

There was a discussion about whether the fence could be reconfigured to be a maximum 6 feet in height with mesh deer fencing meeting the Zoning Law’s definition installed to extend above the 6-foot fence. The applicant advised that such a modification to the fence is possible, but it would not be as attractive as the existing fence and is not the desired option.

There was also a discussion about simply reducing the fence to 6 feet in height without additional mesh fencing above, but the applicant expressed concern that such a fence would not be effective in excluding deer from the yard.

Considering the interpretation that the subject fence does not qualify as a deer fence under the Village Zoning Law’s definition, there was a discussion about the nature of the variance needed if the fence is to remain. The first option would be to consider a variance from the definition of deer fence such that notwithstanding structural deviations from the definition, other types of fencing could be classified as deer fencing by variance. The second option is to apply the general limitations on fencing to all fence structures that do not meet the definition of deer fence. As applicable here, that would require the applicant to seek a variance to permit an 8-foot fence where a maximum 6-foot fence is permitted (see Zoning Law Section 6.3.1). The Board members agreed that the nature of the variance should be as described in the second option.

There was a detailed discussion about the design and layout of the fence in the context of the statutory area variance standard as follows:

The statutory area variance standard requires the Board to weight the benefit to the applicant against the detriment to the health, safety, and welfare of the Village by the grant of the variance

considering the 5 factors set forth below. The Board members evaluated the subject fence according to this test as follows:

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 grant of the variance.

It was the consensus of the Board that no detriment would be created by the grant of this variance because: (1) the fence is located in one side yard and in the rear yard on the property and is not within the front yard or front building setback on the lot. Therefore, the fencing will not be readily visible from the public street. The fence is setback from the rear property line by approximately 11 feet and the applicant has indicated that the neighbors to the east of the property do not object to the fence in its existing location; and (2) the fencing is generally transparent and attractive in its design. Based on the applicant's representations vines will be grown on the fence which will buffer the view of the fence structure.

2. Whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue other than the 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 front yard and front building setback. 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 variance is substantial.

The requested variance is numerically large in that the request is for a 2-foot deviation from the permitted fence height in Section 6.3.1. However, because of its location and design, it is not expected to have a substantial negative impact on the surrounding community.

4. Whether the proposed variance will have adverse environmental or physical impacts.

No such impacts are expected to occur if the fence is permitted to remain.

5. Whether the hardship is self-created.

The hardship here is self-created since the applicants erected the fence in a manner contrary to the Village Zoning Law without the required permits, however, this factor is not outcome determinative.

Following the discussion of the variance standard there was a further discussion about the height of the fence. Mr. Cooper confirmed that the posts that extend above the arbor feature of the fence would be removed. There was a discussion about the best way to depict the as-built height of the fence for the record. Board Member Wittig suggested that the applicant take photographs of the fence in various locations along its length with a tape measure extended from the grade to

the top of the fence to depict its height. The applicant agreed to supplement its submission with such photographs for the next meeting.

**Motion to open the public hearing**

**Motion:** Beth Wittig

**Second:** Steve Lubeck

**VOTE:** 5-0

There were no members of the public present at the meeting to comment on this application.

Taking the above into account and for the reasons described in the evaluation of the five factors, generally the Board members were of the view that the benefit to the applicant by the grant of the variance – the ability to allow the existing fence to remain as it is currently configured – outweighed any detriment to the community by allowing it to remain.

There was a discussion about the next procedural steps, and it was the consensus of the Board to have its counsel draft a resolution addressing the interpretation and variance for consideration at the Board's April meeting. There was a discussion about conditions that should be included in the proposed variance resolution. Conditions to be included in the draft resolution are: (1) the applicant must remove the posts that extend above the arbor; (2) the variance is limited to the fence that was presented at the meeting in the location depicted on the survey submitted in support of the application. No additional fencing is permitted pursuant to this variance and if the existing fencing is removed then the variance shall expire, and any subsequent fencing must comply with the zoning law unless an additional variance is granted; and (3) the variance should be subject to the typical expiration provisions.

**Motion to direct the Board's counsel to draft a resolution consistent with the discussion at this meeting and to adjourn the hearing to the April 11<sup>th</sup> meeting.**

**Motion:** Beth Wittig

**Second:** Meg Fowler

**Vote:** 5-0

**8:14 pm Motion to adjourn the meeting.**

**Motion:** Paul Curley

**Second:** Meg Fowler

**VOTE:** 5-0