

**MINUTES  
BOARD OF ZONING APPEALS  
JANUARY 25, 2005**

A regular meeting of the Board of Zoning Appeals was held on January 25, 2005 and called to order by Chairman Ed Cooper. Bob Hiles and James Hrivnak were present. Also present were David Betz, Director of Development; Shawn Leininger, Development Planner; and Dawn Nauman, Clerk of Council.

Complete transcripts of this hearing may be purchased by contacting Runfola Reporters.

**APPROVAL OF MINUTES**

The minutes of December 9, 2004 were tabled until the next meeting.

**APPLICATION FOR APPEAL OF A DECISION OF THE ZONING ADMINISTRATOR**

**Applicant:** Michael Bagenstose  
**Location:** 229 Glenworth Court  
**Zoning:** PR, Planned Residence District  
**Request:** Approval of an Appeal of the Decision of the Zoning Administrator denying issuance of a Zoning Certificate for a fence.

Chairman Ed Cooper swore in the applicants, Staff and select audience members to speak during this meeting.

Jeffrey Mackey, Attorney for the Applicant, was present to discuss this issue on behalf of the property owner. He thanked Staff for providing him the information necessary to assume this representation, as he was only recently involved. He said this is an issue of a fence that the property owner says was erected in compliance with the private deed restrictions which were in effect in their subdivision. He said he understands that they applied for a permit to install such a fence after it was installed, and it is his understanding that it was objected to solely on the basis that the fence did not comply with the private deed restrictions as amended. He said their argument is that they complied with the deed restrictions and the amendment of the deed restrictions was defected and they do not expect the Village (sic) of Powell to be a party to trying to enforce defective deed restrictions. He said the property owners are here to testify this evening. Mr. Bagenstose said they will wait until after Staff gives their report to speak.

An unidentified resident began to question the process. Mr. Betz said that there will be opportunity for public comment later.

David Betz, Director of Development reviewed the list of exhibits to be used by Staff:

- Exhibit A** Staff's written testimony.
- Exhibit B** A copy of Ordinance 92-26, the approved Development Plan for Falcon Ridge subdivision Section 1, which includes information regarding how deed restrictions and covenants are part of the development plan. Included in Exhibit B is also a draft of the deed restrictions being reviewed at that time.
- Exhibit C** A letter to Michael Bagenstose dated November 18 regarding the denial of the zoning certificate.
- Exhibit D** The Falcon Property Owner's Association Amendment regarding fencing. (11 pages)
- Exhibit E** Staff's initial zoning violation later regarding the fence, dated October 26.
- Exhibit F** A letter from Falcon Ridge Homeowner's Association denying approval of the fence dated July 14, 2004
- Exhibit G** Four pages of the deed restrictions and covenants for Falcon Ridge regarding the ability of the municipality to provide enforcement of the deed restrictions. (page 10)
- Exhibit H** Photographs handed out tonight taken today of the property.

Mr. Betz read Staff's testimony into the record (Exhibit A). He reviewed the plot plan as submitted with the zoning certificate application. He identified the fence location according to the application. He said the fence is at or near the location identified. He reviewed the photographs (H).

Mr. Mackey said that his clients felt they went through the proper procedure. He reviewed to Staff's Exhibit F, and said Mr. and Mrs. Bagenstose said they have never seen that denial. He presented Bagenstose Exhibit A

which identifies the association amendment recorded with the County Recorder's office. He said that deed restrictions are intended to be binding and his client intends to live up to their obligations, however, the deed restrictions specifically say in Section 5 that such restrictions can be amended "by a duly executed and recorded instrument signed by the owners of not less than a majority of the lots in the subdivision." He said the amendment that was recorded was signed by one representative of the Homeowners' Association and did not meet those requirements.

Chairman Cooper asked if what Mr. Mackey is saying is that they only recorded the cover page and not the required signatures. Mr. Mackey said that seems apparent, because the stamp from the Delaware County Recorder's office indicates that only one page is recorded. He said if they want to amend the deed restrictions, they must do so consistent with their own rules and regulations. He said the deed restriction amendments are not effective until properly recorded. Additionally, the deed restrictions that are still in effect indicate in article 5 that if there is any dispute between the lot owners and the association, the matter shall be submitted to a single independent arbitrator selected by the association. He said the association is in control of the situation if there is a dispute between the two, that must be submitted to arbitration and the association chose not to do that. He said that deed restrictions are strictly construed in terms of the language that they contain. They can be amended, but this restriction was not amended properly, and that Staff has indicated the only reason this application for a fence was denied was based on the amendment, not the original deed restrictions. He said if the amendment is invalid, then the denial was incorrect.

Rachel Bagenstose, property owner, said they specifically requested deed restrictions before they made an offer on this home because it was very important to them to be able to erect a fence because they have a dog and don't feel that invisible fencing is an option. She said those deed restrictions said that only wood fencing approved by the developer would be permitted. They understood they needed approval by the Homeowners' Association so they submitted their request on June 16, 2004 and they never saw a denial letter. She said had they seen it, they wouldn't be here today. She said she is unsure why, but they never received a copy. She said they proceeded with installing a fence because the deed restrictions say that if one does not receive any information back from the homeowners' association within thirty days, automatic approval should be assumed for whatever was requested. She said they erected their fence, and it met with the deed restrictions. She said they should have applied for a permit from the City, but they did after the fence was erected and it was denied.

Chairman Cooper opened this item to public comment.

An unidentified resident began shouting from the back. Mr. Betz reminded those wanting to speak to approach the microphone and provide their name and address. He noted that this particular person hasn't been sworn in, either.

Chairman Cooper swore in the following citizen that their testimony will be the truth.

Jim Bracken, 242 Glenwood Court, said he lives across the street from these property owners. He said there are a lot of problems here. First, they brought a property and at the time they bought it, they had an expectation of putting up a fence, and if he understands correctly, they put up a fence in accordance with the rules of the subdivision at that time, however, they never received approval to do it, and his question is, there is a lot of miscommunication here, he would assume they would send stuff certified mail, etc. Chairman Cooper asked to whom Mr. Bracken is referring. Mr. Bracken said he is referring to the letter they are saying they never saw until tonight. Chairman Cooper said that is up to the homeowners association. Mr. Bracken said the homeowners' association messed up on that. Chairman Cooper said he isn't saying that, but rather, up to the organization to determine how they would like to make delivery of notice. Mr. Bracken said that is all he wants to say is that at the time they brought the property, they were in compliance with what they did.

Mr. Mackey said the only testimony regarding the denial letter is from the Bagnestose's that it was never sent, and that is under oath. He said he has no testimony from anyone else that the denial letter was sent. He said that Mrs. Bagenstose forget to mention that there are other fences in the neighborhood that were constructed similarly to theirs. Mrs. Bagenstose said she thinks there is only one other fence that would be similar, although she understands that fences around pools are mandatory. She reiterated that when they moved in, they looked around and determined that the fence would be permitted.

Bill Little, Chairman, Falcon Ridge Homeowners' Association Architectural Review Board, was sworn in by Chairman Cooper. He said the Bagenstoses made request to the homeowners' association for approval on the 17<sup>th</sup> of June. The proposed fencing is different than what is erected. He said on the 14<sup>th</sup> of July, an email was issued to Maureen Brady, at the City of Powell, informing her that the requested fence was denied because it didn't meet the deed restrictions that were in place at the time. In between that period of time, he was contacted by a lawyer who said he was representing the Bagenstoses at that time, whom they never heard back from. He said when they issued the letter to Maureen, they put a copy of the letter in that mailbox following the procedure the Bagenstoses used to communicate with them. Chairman Cooper asked for clarification as to who Maureen Brady is. Mr. Betz said she is the permit coordinator. Mr. Little said that Barbara Pappas, the president of the Homeowners' Association (he noted that this is strictly hearsay) acknowledged that the Bagenstoses were "disappointed" that the fence was denied.

Chairman Cooper asked if it is correct that the fence was erected not per their original request? Mr. Little said what they originally proposed was a wrought iron-like fence that did not meet the deed restrictions. He said what they initially proposed and erected and two different things.

The email that Mr. Little referred to was labeled Exhibit I and the submittal to the Homeowner's Association was labeled Exhibit J.

Mike Bagenstose said they originally submitted an aluminum, black wrought-iron like fence because they had seen fences like that around swimming pools in the neighborhood. The deed restrictions at the time they moved in and when they submitted the plans did not say anything about such fences, and that is why they thought they could submit that same type. Mrs. Bagenstose said that regarding the comment that they were disappointed, she said they never ever formally heard back from the association. She said they never got a letter, email, phone call, or knock on the door. She said they had a prior meeting with Mr. Little and another member of the association before they ever submitted a proposal in an attempt to identify their request. At that time, they were told "we typically don't approve fences." She said they said they understood that but said they were still going to submit a proposal because the deed restrictions said they are permitted. She said it is most likely a response to that meeting that they were disappointed, as they had moved into this neighborhood thinking they could erect a fence. They heard nothing back from the homeowners' association.

Mr. Hrivnak asked when they came to the decision to change from the wrought iron to the existing fence. Mrs. Bagenstose said that it was to meet exactly the requirements of the deed restrictions, which identified wooden fences. Mr. Hrivnak asked when that was. Mrs. Bagenstose said they erected the fence in early October. Chairman Cooper asked if it is correct that the fence meets the City's requirements. Mr. Mackey said he feels it also meets the original deed restrictions.

Chairman Cooper said he doesn't think there is any question as to whether the deed restrictions dated July 21, 1992 specifically allowed for fences. He said that the recorded date of the sale of this property is June 9, 2004. That same month, according to testimony, June 16<sup>th</sup>, they submitted a request to erect a fence. Regardless of whether or not you saw the letter, on July 14<sup>th</sup>, there was a letter that said the request was denied. He said it doesn't give any reasons why. He said he also finds it interesting that eight days later, with signatures of half of the people in the neighborhood, there was filed an amendment to the subdivision regulations denying fences to be erected. He said he doesn't have his legal counsel with him this evening and he isn't here to determine whether the amendment was filed correctly to make it enforceable, but it seems to him that by looking at the timeline that the owner did their homework prior to purchasing the property, saw the deed restrictions, saw that they were allowed to have a fence, and he questions how the homeowner is expected to check much further than the public record to see what is going on in the subdivision. He said a lot of people don't want fences in their neighborhood, but these deed restrictions clearly say that fence was allowed. He said he finds it interesting that the request was made, it was denied and then the regulations were amended almost immediately after that to not allow fences. He said he would be inclined to suggest that this homeowner should be grandfathered under the old subdivision regulations, again, he is not even addressing whether the amendment to the regulations are legal. He said he would think, in the process of purchasing the home that they did what they are supposed to do.

Chairman Cooper said that building the fence without permission is a whole different story. He personally would be inclined to override the Zoning Administrator's decision and allow this fence with a proper permit.

Mr. Hrivnak asked if there is any way to determine the amendments were properly filed. Mr. Betz said that the signatures that were not attached were given to Staff at the time as a separate document. He understands that those signatures were recorded after he mentioned she needed to do that, and while he doesn't know when it was, it was after they applied for the permit. He said the deed restrictions and covenants provided to staff was one day and the recording stamp shows one page.

Mr. Little said he is speaking for Mrs. Pappas. He said when she filed the original amendment, she came with the signatures and the recorder told her (he acknowledged this is hearsay) that it is not necessary for her to file those signatures. The recorder told her she would just be wasting the money. She asked if Mrs. Pappas is an officer of the homeowners' association, and when Mrs. Pappas said she is, the recorder didn't record the signatures. Mr. Little said that regarding the fence that was referred to that is similar, when the Bagenstoses submitted plans that did not comply with the restrictions, the homeowners' association thought at that time it was a good idea to review the opinion of the neighborhood on fences, particularly given the history of Chambers Glen, Retreat, and Liberty Hills, and the uproar that has occurred in those neighborhoods as a result of fences. He said they did request a fence and historically, people haven't wanted fences. When the request came forward, the homeowners' association tried to represent the neighborhood's desires. He said given that they involved an attorney, which has never happened in the history of the homeowners' association, they thought it was appropriate to follow things to the letter. The permit submitted to them did not meet the deed restrictions.

Mr. Little reviewed the process by which the determination was made that fences are not desirable within the neighborhood. He said almost 100 % of the residents had a lack of interest in having fences. As a result, the necessary signatures were received. Mr. Little said that the decision to not have fences was a result of trying to work with the applicant on how to have a fence. He said the discussions were "if you put a fence in, should it be a fence of this type of construction as opposed to what's allowed in the deed restrictions.

Mr. Hrivnak asked when the fence was put in. Mr. Betz said the property owner's testimony is that it was installed in early October.

Mr. Bracken asked why didn't the fence pass the first time. He asked why it wasn't compatible with the deed restrictions. Mr. Little said that "deed restrictions are real important because of how they are written and the precedent and how you act." He said that the Bagenstose's request was for a different construction than what the deed restrictions allow, so as a board, they were trying to figure out how to respond. In the mean time, he gets a call from someone who says he is their attorney...."

Mr. Bracken asked if they reapplied to the homeowners' association when their permit was denied. Mr. Cooper said they did not. Mr. Bracken asked how that was legal. He said this is a non-conforming fence, and the homeowners' association says no, and they didn't reapply for a new fence, and "you're telling me it's a conspiracy." Mr. Cooper said he didn't say anything like that, and Mr. Bracken said he is just trying to understand the time line.

Mr. Cooper said he thinks the timeline has been reviewed. They bought the home in June 2004, applied for a fence in June 2004, were denied a fence July 14, 2004, and eight days later an amendment that is unclear whether it is enforceable was filed. Mr. Bracken said they should have reapplied. Mr. Cooper explained to Mr. Bracken that the Board is here to determine what is going to happen with this case.

Mr. Little said that the formal denial of this permit was forwarded to the City of Powell permit coordinator Maureen Brady, who manages this whole process. He said these homeowners file for a permit and the City never approved it. He clarified his comments as hearsay but said "they probably denied it." Mr. Cooper said the City did not approve it because they were under the impression that the amended deed restrictions wouldn't allow it. Mr. Betz indicated that was incorrect. Mr. Little said there was no amendment in place at this time. He said they applied for a fence which did not meet the deed restrictions. He said the reason identified in the July 14<sup>th</sup> letter from the homeowners' association is because it doesn't comply with the materials in the deed

restrictions. He said the permit then wasn't approved by the City and they erected a fence later on, and the City told them they were not in compliance, and then the applied.

Mr. Cooper said the homeowners' association does not need to endorse a zoning certificate. Mr. Little said that Mr. Betz has the deed restrictions and he is required to enforce them.

Mr. Hrivnak asked if it can be determined that the amendment was properly filed. Mr. Cooper said he thinks it was not filed originally but has been re-filed. Mr. Betz said he understands that the signatures were filed at a later date, but he is not sure what that date is, but it was after they received an application for a zoning certificate, which was in early November. Mr. Little said the recorder filed the document as a legal document. Mr. Betz said it is clear that one page was recorded. He said it is a fact that it did not include signatures. Mr. Hrivnak asked if that is the sole reason for the denial by the City. Mr. Betz said Staff denied it because they understood the amendment was done, so they denied the zoning certificate. **Mr. Hrivnak** asked, if the amendment had not been there, and the fence been erected, and the applicant applied for a zoning certificate, would Staff had approved it? Mr. Betz said yes, they would have had to approve it.

Mr. Hiles asked if the wooden fence being discussed right now would comply. Mr. Betz said it would comply with the Zoning Code regulations for height, size, spacing, and everything else with regard to fencing. It meets the code.

Mr. Hrivnak asked if it is Mr. Cooper's contention that the application to the homeowners' association has no bearing. Mr. Cooper said that the Board is considering a zoning certificate, not a building permit. He said the homeowner's association doesn't approve zoning certificates.

**MOTION: Mr. Cooper moved to approve the appeal application and determine that the Zoning Administrator erred by denying the Zoning Certificate, and the Board hereby grants the Zoning Certificate. Mr. Hiles seconded the motion.**

**VOTE: Y 2 N 1 (Hrivnak)**

Mr. Betz said that Staff will use the submittal from the applicant in order to process the Zoning Certificate.

Mr. Mackey asked to submit 4 items as part of the record, identified as Bagenstose A-D.

#### **ADJOURNMENT**

The Board adjourned at 7:45 p.m.

**DATE MINUTES APPROVED: April 7, 2005**

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Ed Cooper  
Chairman

Date