

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

BEFORE THE CITY OF POWELL, OHIO

BOARD OF ZONING APPEALS

- - - - -

IN RE: :

W. Martin McCutcheon:

- - - - -

Appeals proceedings before Board
Chairman Ed Cooper and Board members
Robert Hiles and Joseph Jester with David
Betz, Director of Development, taken at
the City of Powell Board of Zoning
Appeals, 47 Hall Street, Powell, Ohio, on
Wednesday, August 22, 2007, at 6:30
o'clock p.m.

- - - - -

INDEX

1		
2	Witness	Page No.
3	Mr. Martin McCutcheon	
4	Mr. Joseph Jester - Examination	11
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		

1 - - - - -

2 P R O C E E D I N G S

3 - - - - -

4 CHAIRMAN COOPER: I would like
5 to call the hearing of August 22nd to
6 order.

7 May we have the roll call,
8 please.

9 MS. ROSS: Ed Cooper?

10 MR. COOPER: Here.

11 MS. ROSS: Robert Hiles?

12 MR. HILES: Here.

13 MS. ROSS: Joseph Jester?

14 MR. JESTER: Here.

15 CHAIRMAN COOPER: The first
16 order of business is to approve the
17 minutes of the last hearing. You have
18 indicated you have all had time to review
19 the minutes.

20 Any changes?

21 MR. HILES: No.

22 MR. JESTER: No changes.

23 CHAIRMAN COOPER: Do I hear a
24 motion to approve?

1 MR. HILES: So move.

2 MR. JESTER: Second.

3 MS. ROSS: Ed Cooper?

4 MR. COOPER: Yes.

5 MS. ROSS: Robert Hiles?

6 MR. HILES: Yes.

7 MS. ROSS: Joseph Jester?

8 MR. JESTER: Yes.

9 CHAIRMAN COOPER: The order of
10 business this evening is an application
11 for appeal. The Applicant is W. Martin
12 McCutcheon of 1060 Cheliway Court, Woods
13 of Powell North subdivision.

14 This is a planned residential
15 district. The appeal is of the Zoning
16 Administrator's and the City Engineer's
17 denial of a zoning certificate for a fence
18 proposed to be located in the draining
19 easement.

20 Anyone who is planning to
21 testify this evening, please raise your
22 right hand.

23 - - - - -

24 W. MARTIN MCCUTCHEON

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

DAVID BETZ

first duly sworn, as hereinafter
certified, testify and say as follows:

- - - - -

CHAIRMAN COOPER: Anyone who
will be speaking this evening, I ask that
you please state your name and address
before speaking, as we are recording this
hearing.

If the Applicant would like to
step forward and give us a presentation of
their request.

MR. MCCUTCHEON: Thank you.

My name is Martin McCutcheon of
1060 Cheliway Court here in Powell, Ohio.
Hopefully, you have had an opportunity to
read the appeal.

CHAIRMAN COOPER: We all have.

MR. MCCUTCHEON: Basically,
that's my case. My big case for this is,
as you guys keep hearing in the
background, her safety and welfare.

I do want to fence the property
because, if you notice, behind it is a

1 retention pond. And what we have seen
2 happen in the past, especially this year
3 with young children, that's my main
4 concern.

5 Basically, what we look at since
6 they have this lot plan up here is if you
7 look at the back corner of the house, what
8 they are wanting me to do is move nine
9 feet off the back of it, which will
10 actually take it from one corner of the
11 house 22 to 25 percent away from my back
12 yard.

13 You know, is it a hardship;
14 yes, it is for me. I am paying taxes on
15 it and I'm keeping it up.

16 We have an irrigation system in
17 to water the lawn. I feel it's my
18 responsibility to take care of this so,
19 yes, I would like to fence it.

20 If you pull that off the lawn,
21 that gives my daughter that much less of
22 an area to play in. That is my big
23 concern.

24 Again, looking through the

1 appeal itself, these guys are allowing me
2 one foot onto the easement now. It was
3 ten feet and they said we'll back it down
4 to nine because an excavator, which is who
5 would be working in that area, that's
6 about all the area they would need to get
7 into the pipe.

8 The big concern is -- I guess,
9 is it a 48-inch pipe that runs along
10 there, guys?

11 MR. BETZ: Yes.

12 MR. MCCUTCHEON: I am assuming
13 it's concrete, because I couldn't find
14 that anywhere. That's what they are
15 wanting me to stay away from in case they
16 ever need to get to it.

17 Like I said, it's my
18 responsibility to maintain and care for
19 the property. All I am wanting to do is
20 utilize it by putting a fence out there.

21 In doing this, as I stated in
22 here, I would be more than willing to pay
23 any extra costs if we would damage the
24 pipe installing it, which would be really

1 tough to do, but it's possible. I would
2 be willing to pay for any damages.

3 If by any chance they need to
4 get into that 48-inch pipe, I am willing
5 to incur the additional cost. If somebody
6 has to tear down this \$8,000 fence, I'll
7 pay for them to tear it down.

8 CHAIRMAN COOPER: They will be
9 happy to tear it down for free.

10 MR. MCCUTCHEON: The fourth
11 thing is, you know, I am allowed to put as
12 many trees in that area as I want as long
13 as I don't put in willow trees. If you
14 know what a root ball does to any drainage
15 easement, any piping, anything
16 underground, it will do a lot more damage
17 than my two-foot footers on top of the
18 pipe would do to it. I am just trying to
19 reason.

20 You know, it makes more sense
21 for me to put a fence up than to put
22 several trees out in the area. Within the
23 appeal I put approximate weights on root
24 balls, on mature trees at their mature

1 rate.

2 Fifth, like I said, there are
3 already permanent structures on this
4 easement. You have power lines there.
5 You have cable lines. You have a power
6 box that sits on top of it.

7 If your concern is to get to
8 that pipe immediately, my fence should not
9 be a concern compared to any kind of power
10 or cable that runs over top of it. All I
11 am asking for is to utilize what I am
12 taxed on. If it incurs any extra cost to
13 this city, I am willing to pay for it.

14 All I am trying to do is to
15 protect that little thing that you guys
16 keep hearing scream. That's my main
17 concern, and I want to utilize what I am
18 paying for. I don't have any other way to
19 put it.

20 CHAIRMAN COOPER: Okay.

21 Anything else?

22 MR. MCCUTCHEON: I think you
23 guys will see copies of the fencing.

24 CHAIRMAN COOPER: We have

1 everything. We will probably ask you some
2 questions. I just wanted to make sure you
3 had an opportunity to speak.

4 MR. MCCUTCHEON: Yes.

5 Basically, what I did was I received three
6 different quotes. I went with the guy I
7 felt more comfortable with. It's not an
8 ugly structure. It was approved by the
9 management company that manages the
10 property.

11 Everything is in line. It had
12 to be done before they could actually
13 apply to the City for the process of
14 building it.

15 Really, that's all I can ask.
16 It's in your hands as far as a decision to
17 be made. The process hasn't been easy, so
18 all I can ask is just to be fair. And I
19 understand, regardless of which way we
20 roll.

21 CHAIRMAN COOPER: Thank you,
22 sir.

23 MR. MCCUTCHEON: Do you
24 gentlemen have any questions for me?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

- - - - -

EXAMINATION

BY MR. JESTER:

Q. You mentioned -- I was out there yesterday. I saw that the electric and cable and telephone are running over that, which is their easement and their right to do that.

A. Sure.

Q. I wanted to be sure I understood that right.

A. Yes, I understand that. What I am saying is if you have a construction company that's coming into that pipe, that is much more of a concern to them than my fence would be to sit there. That's all I'm saying.

Q. I guess, to finish my question, is your fence going to sit on the electric and the power?

 I kind of drew it out of here. It looked to me -- I tried to look down the line yesterday from the sewer top to the culvert.

1 A. Right. If I could come up, I
2 could kind of show you approximately where
3 it's at.

4 Q. Sure. It looked to me like they
5 ran on that same line.

6 CHAIRMAN COOPER: Dave, do you
7 have your pointer?

8 MR. BETZ: Sure.

9 CHAIRMAN COOPER: Maybe you
10 could show us all at the same time.

11 MR. MCCUTCHEON: If you look,
12 probably about two feet to three feet off
13 that line -- about two feet off is where
14 the pipe -- if you look down the line,
15 that's where it probably is. According to
16 the lot plan it's not exactly there, but
17 that's a good estimate.

18 The fence will be actually
19 behind it. It's going to be on the
20 property line here to where the piping is
21 more inside of it, about a foot and a half
22 to two feet. So it's going to sit on the
23 back edge of the pipe away from the house.

24 BY MR. JESTER:

1 Q. What about the utility lines?

2 A. The utility lines are inside of
3 it right offset of the center line of the
4 pipe.

5 MR. HILES: Toward your house?

6 MR. MCCUTCHEON: Yes.

7 BY MR. JESTER:

8 Q. I saw the pipe, but when I saw
9 that utility stuff in there I wondered why
10 that wasn't questioned. I was surprised
11 that wasn't questioned at the same time.

12 A. This shows where the lines
13 actually are. My property line is back of
14 where the fencing would be. The fencing
15 will be away from where the power and
16 cable lines and telephone lines are.

17 Q. Is it going to be where those
18 trees are?

19 A. Where those trees are.

20 Q. Are you going to take the trees
21 out?

22 A. Actually, I am not allowed to
23 build close to this -- any closer from the
24 edge of my house. That's part of the

1 rules in this subdivision. It will come
2 off the corner of my home, which is here,
3 and go back. (Indicating)

4 It will not get into these
5 trees. It will go back behind these
6 trees.

7 Q. The power, especially if
8 anything goes wrong, that could tear it up
9 too, not just this pipe.

10 You have got your power line;
11 that's my question. If they are close to
12 that or underneath that, they may tear it
13 up just as much as the pipe stuff.

14 A. The people putting in the fence
15 itself?

16 Q. No. If something happened to
17 one of those utilities and they have to
18 dig in there, which happens frequently,
19 they also could tear up your fence. It's
20 their easement too.

21 A. Sure, absolutely. I am willing
22 to take that chance. I have no problem
23 paying for the additional cost.

24 Q. That's where I come from. It

1 isn't just the pipe; it's all the
2 utilities too.

3 A. I understand now.

4 MR. JESTER: That's my question.
5 I really thought you had it well marked
6 yesterday.

7 MR. MCCUTCHEON: Thank you.
8 Anything else?

9 CHAIRMAN COOPER: Not at the
10 moment.

11 Thank you, Mr. McCutcheon.

12 Do we have a Staff report?

13 MR. BETZ: Yes. The Applicant
14 did submit a zoning certificate
15 application. You have copies of it as
16 part of your packet, as well as his appeal
17 materials that were submitted.

18 We initially denied this zoning
19 certificate because the fence is proposed
20 to be located within the drainage
21 easement. The following reasons were
22 given for denial.

23 The proposed fence is located
24 over or runs parallel to a 48-inch

1 concrete storm pipe. You can see the
2 storm pipe along the back of the property
3 line.

4 I also wanted to show you the
5 engineering drawings for the subdivision.
6 This is the lot and you can see the storm
7 line located in the back. (Indicating)

8 To the back is the retention
9 basin. That also shows the ten-foot
10 easement.

11 The next page down from the
12 engineering plans shows the depth of the
13 pipe, which is two and a half to three and
14 a half feet below the ground level. The
15 installation of the fence post over the
16 pipe could potentially damage the pipe.

17 The second reason was a minimum
18 of a five-foot clearance from the edge of
19 the storm pipe in this particular instance
20 to the structure is required by our City
21 Engineer such as to allow unrestricted
22 access to enter the storm pipe should the
23 need arise for maintenance purposes.

24 One benefit of where this pipe

1 is located is where the open space is.
2 That whole area where the retention basin
3 is is a drainage easement, so we don't
4 have to stay just ten feet over on that
5 side. We could go further over if we
6 needed to for the swing of the arm or
7 whatever to maintain or get in there to
8 maintain the pipe.

9 The City also wouldn't want to
10 be burdened with the cost of removal or
11 restoration of the fence. The Applicant
12 has already said he would take that
13 responsibility.

14 The City Engineer did approve
15 that the fence could be one foot inside
16 the easement. That would maintain the
17 five feet distance between the fence and
18 the storm pipe.

19 Those are the reasons why we
20 denied it as applied for and did allow it
21 to be one foot within the easement.

22 CHAIRMAN COOPER: The Applicant
23 brought up an issue about trees versus a
24 fence.

1 Would you care to address the
2 tree issue?

3 MR. BETZ: We do allow trees in
4 a drainage easement. Now, we do have
5 provisions in our code for an over-lot
6 drainage in case the drainage easement is
7 for a drainage swell, a ditch, or a
8 stream. So we do have certain
9 requirements for keeping those types of
10 areas in the drainage easements open but
11 not for areas where there may be pipe and
12 not have to worry about over-land
13 drainage.

14 MR. HILES: This is all --

15 MR. BETZ: This is all for the
16 pipe itself.

17 CHAIRMAN COOPER: The question
18 is that this is a shared area.

19 There are electric lines, cable,
20 and telephone lines running through there,
21 correct?

22 MR. BETZ: Yes. It appears that
23 those are right at the edge of that
24 drainage easement. The plat itself does

1 not show any other utility easement there.

2 CHAIRMAN COOPER: They are all
3 shared within that easement.

4 MR. HILES: I have a question on
5 the cost.

6 When the City says they don't
7 want to have the burden of the cost and
8 the home owner says he would be
9 responsible for that, does that alleviate
10 the City?

11 What would the City's cost be?

12 If they have to go in there and
13 tear out his fence and he knows it's
14 within their easement, there should be no
15 cost to the City.

16 MR. BETZ: The issue is
17 approving the permit to allow a fence
18 within the easement. It could legally put
19 it back on us without having some other
20 review authority like yourself do it and
21 possibly as part of the approval process
22 require it to be removed and reinstalled
23 at the sole expense of the owner at the
24 time that happens.

1 It needs to be something that's
2 a recordable document too so it's passed
3 on to future home owners.

4 CHAIRMAN COOPER: So this would
5 be a -- if that were the situation, it
6 would be a deed restriction that would
7 apply to any future owners of this
8 property. They would have to agree to
9 this fence situation before they even
10 bought the place.

11 MR. BETZ: It would be part of
12 the purchase of the property.

13 CHAIRMAN COOPER: Just like when
14 this property was purchased, there was a
15 ten-foot easement there.

16 MR. BETZ: Exactly.

17 MR. MCCUTCHEON: Excuse me.

18 CHAIRMAN COOPER: Yes, sir.

19 MR. MCCUTCHEON: Not to speak
20 out of turn, but would it be easier if I
21 put something -- say, if I would agree to
22 remove the fence if I were to ever sell
23 the home?

24 MR. HILES: That's what they are

1 saying. If the decision would go that way
2 to you, there would need to be something
3 recorded this evening to say that that
4 would need to be carried over.

5 MR. JESTER: Dave, is he already
6 okayed to go one foot within the easement?

7 MR. BETZ: As far as we are
8 concerned, yes.

9 MR. JESTER: Would we have to
10 vote on that tonight?

11 MR. BETZ: No. We have the
12 authority to approve that.

13 MR. JESTER: It's nine feet we
14 are talking about?

15 MR. BETZ: Exactly.

16 MR. JESTER: According to the
17 Applicant that was not satisfactory.

18 MR. BETZ: Exactly.

19 MR. MCCUTCHEON: You guys do
20 have within your packets some pictures of
21 other locations where it has happened. I
22 had a lot of difficulty trying to get any
23 information for allowing things for
24 easements, but I do have a copy where it's

1 been allowed where a fence has been built
2 on top of an easement.

3 MR. BETZ: Is that the one in
4 Grove City?

5 MR. MCCUTCHEON: No. It's here
6 in town.

7 MR. BETZ: There have been
8 several in Powell that we have allowed in
9 easements. In a similar situation it just
10 is a distance away from the pipe or it
11 crosses the pipe perpendicular.

12 CHAIRMAN COOPER: I think we
13 have those here.

14 MR. BETZ: There are several
15 examples throughout the City where we have
16 done that, but it's on a case-by-case
17 basis.

18 As you recall that was added to
19 the code in 1998 to allow the City
20 Engineer and Zoning Administrator to have
21 that authority, because we had several
22 cases coming into this body where a lot of
23 the cases were okay to let them in, but
24 the City Council then wanted us to have

1 the authority to make those decisions on a
2 case-by-case basis.

3 MR. JESTER: Are there any
4 questions or anybody concerned that there
5 are some in the past that continues on?

6 MR. BETZ: We have never had any
7 other issues come up since, you know,
8 fences within these woods where we have
9 been able to identify how they could come
10 in and not cause problems for maintenance
11 personnel in the future.

12 CHAIRMAN COOPER: In the code I
13 believe it also says -- correct me if I'm
14 wrong -- that any actions taken prior to
15 has no bearing on this particular
16 situation.

17 MR. BETZ: That's true.

18 CHAIRMAN COOPER: Mr.
19 McCutcheon, you were aware of this
20 easement when you purchased this property
21 recently, correct?

22 MR. MCCUTCHEON: Actually at
23 first we were not.

24 The big issue is we went in

1 contract for this house in January of '06,
2 not this past one but the last January.
3 We had issues with some permitting and
4 things like that but we didn't have a
5 child. She wasn't around at that moment,
6 so all of this stuff happened since that
7 time frame.

8 I became aware later that, yes,
9 there was an easement, but I didn't know
10 that until we applied before we closed on
11 the home.

12 CHAIRMAN COOPER: But you were
13 aware before you closed on the home that
14 this easement did exist?

15 MR. MCCUTCHEON: Right.

16 CHAIRMAN COOPER: Do any of you
17 gentlemen have any comments or questions?

18 (No audible response)

19 CHAIRMAN COOPER: I am going to
20 move as we normally do to approve the
21 appeal, because we try to keep it in the
22 same context.

23 Are we doing this right?

24 MR. BETZ: Always make your

1 motions in the positive.

2 CHAIRMAN COOPER: That's what I
3 thought.

4 I will make a motion that the
5 appeal be approved.

6 MR. HILES: I will second that
7 motion.

8 MR. JESTER: I have a question.
9 Is it appropriate for me to have
10 a question?

11 MR. BETZ: Absolutely.

12 MR. JESTER: Going back to
13 the -- and I guess I am not clear on
14 that.

15 The cost of it, shouldn't that
16 be in this motion?

17 CHAIRMAN COOPER: No. We are
18 looking at whether the appeal is to be
19 approved or denied.

20 MR. JESTER: That rather ignores
21 the question of whether he is responsible
22 for --

23 CHAIRMAN COOPER: It would
24 depend on the vote whether or not that

1 issue would come up.

2 Clear?

3 MR. HILES: The Staff, can you
4 clarify the voting for us, please?

5 MR. BETZ: Yes. The motion was
6 to approve the appeal. If you approve the
7 appeal, he can build his fence as he has
8 submitted.

9 MR. HILES: Right.

10 CHAIRMAN COOPER: I believe the
11 question is that that after the vote we
12 would make any adjustments, as we
13 discussed, to the deed restrictions or the
14 replacement of the fence; is that correct?

15 MR. BETZ: He testified in the
16 hearing that they would be willing to pay
17 for removal. We would work with him prior
18 to the issuance of the permit to make the
19 paperwork, correct.

20 CHAIRMAN COOPER: Incumbent for
21 any future owners would be the same thing?

22 MR. BETZ: Yes.

23 MR. JESTER: That's all I had.

24 CHAIRMAN COOPER: May we have a

1 vote, please.

2 MS. ROSS: Ed Cooper?

3 CHAIRMAN COOPER: No.

4 MS. ROSS: Robert Hiles?

5 MR. HILES: Yes.

6 MS. ROSS: Joseph Jester?

7 MR. JESTER: No.

8 MR. BETZ: The appeal has been
9 denied.

10 CHAIRMAN COOPER: The appeal has
11 been denied.

12 Thank you, sir.

13 MR. MCCUTCHEON: Could I say a
14 few things before I leave?

15 CHAIRMAN COOPER: Go ahead.

16 MR. MCCUTCHEON: Since I am a
17 taxpayer here and everybody ignores us,
18 they make it really difficult to even
19 think about working with this city. I'm
20 not finished with this case.

21 Just to prove a point, their
22 statement was if you don't buy the home
23 somebody else will come in and buy it and
24 pay our taxes. You know, that's great.

1 That is a great attitude to have.

2 I am just trying to protect my
3 daughter and I'm paying my taxes.

4 CHAIRMAN COOPER: Was it told to
5 you before you bought the property?

6 MR. MCCUTCHEON: Yes.

7 Absolutely, it was.

8 CHAIRMAN COOPER: Who told you
9 that?

10 MR. MCCUTCHEON: The
11 gentleman sitting in the row back there.
12 This is where he approved at 26 Watson
13 Way.

14 In the same instance they
15 approved the same process. You guys have
16 the pictures of it where it runs along the
17 pipeline.

18 CHAIRMAN COOPER: The vote has
19 been made. If you wish to carry this any
20 further, there is a process.

21 MR. MCCUTCHEON: I understand
22 what it is.

23 CHAIRMAN COOPER: Okay.

24 MR. MCCUTCHEON: I just really

1 wish that the City would cooperate with
2 their taxpayers a little bit more. They
3 would not provide it to me. I had to go
4 out and search neighborhoods and ask for
5 it.

6 CHAIRMAN COOPER: Thank you.
7 Any other Board business?

8 MR. BETZ: No, sir.

9 MR. HILES: Is there anything
10 more we need to know about Mr. Fisher?

11 CHAIRMAN COOPER: I don't
12 believe so, sir. I think if there is any
13 question about any other impending action,
14 Dave is going to rule on that.

15 MR. HILES: That's all we need
16 to know at this point in time?

17 MR. BETZ: That is correct.

18 CHAIRMAN COOPER: Do I hear a
19 motion to adjourn?

20 MR. JESTER: So move.

21 MR. HILES: I second the motion.

22

- - - - -

23 Thereupon, the proceeding was
24 concluded at 6:55 o'clock p.m.

CERTIFICATE

I, Patricia W. White, Court Reporter and Notary Public in and for the State of Ohio, do hereby certify that I reported the foregoing proceedings and that the foregoing transcript of such proceedings is a full, true and correct transcript of my stenotypy notes as so taken.

I do further certify that I was called there in the capacity of a Court Reporter, and am not otherwise interested in this proceeding.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Columbus, Ohio, on this 12th day of September, 2007.

Patricia W. White

PATRICIA W. WHITE, Notary Public - State of Ohio.

My commission expires May 30, 2012.

1 ORIGINAL

2 PROCEEDINGS OF: W. Martin McCutcheon

3 DATE OF DELIVERY: September 12, 2007

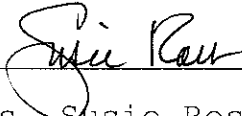
4 City of Powell
5 Board of Zoning Appeals
6 47 Hall Street
Powell, Ohio 43065
By Ms. Susie Ross,

7

8

9

10

 POWELL CITY CLERK
Ms. Susie Ross

11

12

13

14

15

16

17

18

19

20

21

22

23

24