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BEFORE THE CITY OF POWELL, OHIO  
BOARD OF ZONING APPEALS

- - - - -

IN RE: :

Board Meeting :

- - - - -

Proceedings before Chairman Ed Cooper and  
Board Members Robert L. Hiles, III, and Joseph  
Jester, taken at the offices of Powell Village  
Green, 47 Hall Street, Powell, Ohio, on  
Wednesday, February 20, 2008, at 6:30 o'clock  
p.m.

- - - - -

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1 APPEARANCES:  
 2 J.C. DeBoard & Co., LPA  
 3 5878 North High Street  
 4 Worthington, Ohio 43085  
 5 By Ms. Susan N. Hayes,  
 6  
 7 On behalf of Applicant  
 8 W. Martin McCutcheon.  
 9 Wiles, Boyle, Burkholder  
 10 & Bringardner Co., LPA  
 11 300 Spruce Street  
 12 Floor One  
 13 Columbus, Ohio 43215  
 14 On behalf of the City Law  
 15 Director.  
 16  
 17 ALSO PRESENT:  
 18 Ms. Susie Ross, City Clerk  
 19  
 20  
 21  
 22  
 23  
 24

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1 -----  
 2 PROCEEDINGS  
 3 -----  
 4 CHAIRMAN COOPER: Good evening. I  
 5 hereby call to order the Board of Zoning  
 6 Appeals meeting for February 20th, 2008, for  
 7 the City of Powell. Roll call, please.  
 8 (Role call conducted.)  
 9 CHAIRMAN COOPER: Being there are no  
 10 minutes to approve this evening, we'll move on  
 11 to the application for appeal.  
 12 The applicant is W. Martin  
 13 McCutcheon of 1060 Cheliway Court, Woods of  
 14 Powell North subdivision. This is a planned  
 15 residential district, and the appeal is of the  
 16 Zoning Administrator's and City Engineer's  
 17 denial of a zoning certificate for a fence  
 18 proposed to be located in a drainage easement.  
 19 Will all those who intend to  
 20 testify this evening please raise their right  
 21 hand.  
 22 -----  
 23 Thereupon, all potential witnesses  
 24 were duly sworn by Chairman Cooper.

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1 INDEX  
 2 MCCUTCHEON HEARING:  
 3 Witnesses Page No.  
 4 W. Martin McCutcheon  
 5 Ms. Hayes - Direct 12  
 6 Mr. Close - Cross 16  
 7 Crystal McCutcheon  
 8 Ms. Hayes - Direct 23  
 9 David Betz  
 10 Ms. Hayes - Cross 37  
 11  
 12  
 13  
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 15  
 16  
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1 -----  
 2 CHAIRMAN COOPER: Mr. Martin, or  
 3 whomever, you've done this before; would you  
 4 like to do it again, or your counsel?  
 5 MS. HAYES: Do you want us to do an  
 6 opening, or?  
 7 CHAIRMAN COOPER: No, please. Go  
 8 ahead and open up. Please identify  
 9 yourselves.  
 10 MS. HAYES: My name is Susan Hayes.  
 11 I'm an attorney for the McCutcheons, and  
 12 we're, of course, here on an appeal of a  
 13 zoning certificate that was denied under City  
 14 Code 1145.34.  
 15 We believe the evidence presented  
 16 here will certainly show that the purpose  
 17 behind that code is to protect the public  
 18 health, welfare, and safety. It gives the  
 19 right to not have fences within an easement  
 20 unless the utility approves it and there's a  
 21 concurrence of both the -- I guess it's the  
 22 Zoning Administrator, who, I assume, is Mr.  
 23 Betz, although his title is different, I think  
 24 it's Development Director, and the City

Page 6	Page 8
<p>1 Engineer.</p> <p>2 What we will show is that code also</p> <p>3 indicates that if they are not in concurrence,</p> <p>4 which in this case you will see that all the</p> <p>5 utilities are in agreement and have given</p> <p>6 approval for placement of the fence in the</p> <p>7 location of the easement. If they're not in</p> <p>8 concurrence, they have to give reasons or</p> <p>9 bases for why they're not in concurrence.</p> <p>10 And the reason for that, we believe,</p> <p>11 is that they cannot act arbitrarily in</p> <p>12 approving some and denying others. The</p> <p>13 evidence before this Board will show that in</p> <p>14 the exact same, similar circumstance, it has</p> <p>15 been approved. You have not had a condition</p> <p>16 of appeal because the Engineer and Zoning</p> <p>17 Administrator have approved in circumstances</p> <p>18 very similar if not the same to the</p> <p>19 McCutcheons' situation.</p> <p>20 So we will be able to present to you</p> <p>21 each of the reasons why in this appeal are</p> <p>22 just not factually accurate and the decision</p> <p>23 to deny them the right to place the fence in</p> <p>24 this location is arbitrary, and that it is</p>	<p>1 CHAIRMAN COOPER: However you want</p> <p>2 to do it.</p> <p>3 MR. HILES: However you want to</p> <p>4 present it. We'll get all yours and then</p> <p>5 we'll go with Mr. Betz.</p> <p>6 MR. MCCUTCHEON: I'm Martin</p> <p>7 McCutcheon, Powell, Ohio. And basically, when</p> <p>8 I made an appeal --</p> <p>9 MR. JESTER: Can you come up here,</p> <p>10 please?</p> <p>11 MR. MCCUTCHEON: Okay, sure.</p> <p>12 MR. JESTER: Thank you.</p> <p>13 CHAIRMAN COOPER: We are being</p> <p>14 recorded, so it's a little easier that way.</p> <p>15 MR. MCCUTCHEON: Yeah, no problem.</p> <p>16 That's fine.</p> <p>17 Basically, when I went through the</p> <p>18 appeal process the first time, you know, we're</p> <p>19 back here again, so I guess first and foremost</p> <p>20 it was for the safety of my daughter; I think</p> <p>21 I made that clear before.</p> <p>22 If you guys had a chance to go up to</p> <p>23 my yard, it is sloping in the back, and it</p> <p>24 slopes into a retention pond, quite large</p>
<p>Page 7</p> <p>1 actually a safety violation for this family,</p> <p>2 which, again, the purpose of the 1145.34</p> <p>3 speaks to, that it would assure residents of</p> <p>4 personal preference in landscape and safety</p> <p>5 issues.</p> <p>6 CHAIRMAN COOPER: Mr. Betz?</p> <p>7 Or do you want to go ahead and</p> <p>8 finish with your presentation? Just give us</p> <p>9 your side of the case, your points.</p> <p>10 MS. HAYES: Okay. So we're not</p> <p>11 going with the normal course of things of him</p> <p>12 presenting what the issue is, or?</p> <p>13 CHAIRMAN COOPER: We already know</p> <p>14 what the issue is, we've been here before on</p> <p>15 this, we've read the packet, and we'll let Mr.</p> <p>16 Betz talk when you're done.</p> <p>17 MS. HAYES: We can certainly address</p> <p>18 it that way. Do you want Mr. McCutcheon just</p> <p>19 to remain here, or does he need to --</p> <p>20 MR. HILES: Mr. McCutcheon, are you</p> <p>21 going to make a statement?</p> <p>22 MR. MCCUTCHEON: I will.</p> <p>23 MR. HILES: Okay, you can make your</p> <p>24 statement.</p>	<p>Page 9</p> <p>1 retention pond, and my concern is that I've</p> <p>2 got a daughter that's 11 months old, 11-1/2</p> <p>3 months old -- well, she'll be a year old next</p> <p>4 week. But she's walking now, and if she goes</p> <p>5 out there and stumbles and rolls down the</p> <p>6 hill, she's in a retention pond. And that's</p> <p>7 first and foremost, and I would have to say</p> <p>8 that's really the biggest fear I have, period.</p> <p>9 So, you know, that's what I look at.</p> <p>10 When I look at what we've already been</p> <p>11 through, what I did was approach the utility</p> <p>12 companies, so that all the utilities in that</p> <p>13 easement. I presented you guys a packet</p> <p>14 before we got started here and there's a</p> <p>15 letter from each utility company that's there,</p> <p>16 stating as long as I place the fence where I</p> <p>17 applied for it, then they're okay with that.</p> <p>18 AEP was one, the cable company was</p> <p>19 one of the others, and Verizon was the third</p> <p>20 utility.</p> <p>21 And also, a big part of the city's</p> <p>22 concern was that the pipe, which is</p> <p>23 manufactured by Hanson, could be damaged. And</p> <p>24 within that packet, you also have a letter</p>

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1 from Hanson stating that it's virtually  
 2 impossible for anybody to damage a pipe with a  
 3 hand tool. And actually, as it was stated to  
 4 me, with a hydraulic tool with less than 3,000  
 5 psi would be tough to do, also.  
 6 But basically, what you guys have  
 7 there is a four-foot diameter pipe with a  
 8 five-inch wall all the way around it. I mean,  
 9 you're talking five inches thick of concrete  
 10 that's reinforced with rebar, which was the  
 11 big concern.  
 12 So that's where the letter came  
 13 from, Hanson, which is the pipe manufacturer.  
 14 They have a facility here in Columbus. The  
 15 gentleman had actually also put in there an  
 16 invitation if anybody would like to take a  
 17 walk through their facilities to see how it's  
 18 produced, he would entertain that.  
 19 I guess, also, your utility, where  
 20 you guys would allow me in the easement one  
 21 foot, basically where you're allowing me to  
 22 put my fence in the easement, the utility  
 23 company will not allow me to do that, which is  
 24 the cable company, because they have a

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1 one-foot buffer there. And if you look at  
 2 their one-foot buffer, well, I can't go back  
 3 to where you're asking me to come back nine  
 4 foot and place my fence, because they wouldn't  
 5 have that one-foot buffer.  
 6 And also, if I move back to that  
 7 nine-foot level, the city actually has a power  
 8 line that runs in my back yard, and it comes  
 9 out of the easement onto my property line.  
 10 Now, that's according to where Miss Utility --  
 11 I don't know if it's Miss Utility or who it is  
 12 that marks it, the city's power line actually  
 13 comes out of the easement about a foot.  
 14 So what I'd be getting into there,  
 15 even if I come out of the easement and placed  
 16 my fence, I would be cutting into a power line  
 17 that the city lights our streets with.  
 18 So, you know, like I said, first  
 19 and foremost is my daughter's safety. The  
 20 utility companies have stated they have no  
 21 issue with me putting the fence where I would  
 22 like for it. All I'm asking is, you know, to  
 23 allow me to do so, them stating they had no  
 24 problem, no issues with this. So I'm leaving

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1 it up to you guys once again to hopefully take  
 2 a look at that.  
 3 CHAIRMAN COOPER: Okay.  
 4 -----  
 5 DIRECT EXAMINATION  
 6 BY MS. HAYES:  
 7 Q. Martin, if I could ask you, one of  
 8 the other issues was that the city would not  
 9 be burdened with the cost of removal or  
 10 restoration of the fence, and I think you  
 11 addressed that last time, but if you would for  
 12 the record, again, indicate what your proposal  
 13 is in that regard.  
 14 A. If the city has to remove the fence,  
 15 so be it, at my cost. If it is an extra cost,  
 16 you know, I'm willing to absorb that.  
 17 The excavating companies I've talked  
 18 to, that's what my career's been around; the  
 19 ones I've talked to that deal with a 48-inch  
 20 diameter pipe aren't concerned about any  
 21 aluminum fence that's going on top of this,  
 22 because to them, it's no issue. If they tear  
 23 out a tree, it's more of an issue for them.  
 24 If they're going to have an excavator there,

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1 no effort to them to rip this thing out.  
 2 Speaking of the excavation process,  
 3 for one joint of that pipe, it takes at least  
 4 a 40-metric-ton machine to move one joint of  
 5 that pipe. And a 40-metric-ton machine is 10  
 6 to 12 foot wide, and it also has an overhang  
 7 on the back end when you swing that excavator  
 8 around, which is an additional 3 foot. If you  
 9 put that over top of the pipe and you're  
 10 digging it out, if you allow me to put my  
 11 fence out of the easement, the 10 foot back  
 12 from my property, they're still going to have  
 13 to remove it.  
 14 So I'm willing to absorb the cost if  
 15 it's any extra, as opposed to putting it out  
 16 of the easement and then you'd still have to  
 17 tear it down at someone else's expense.  
 18 Q. And, Martin, would you please  
 19 explain why you have knowledge of that  
 20 equipment.  
 21 A. Yeah. I've spent 15 years in the  
 22 equipment business as a sales rep and a sales  
 23 manager for a Caterpillar dealer. And  
 24 currently I work for an auction company that's

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1 Industrial Auctioneer, and all we auction is  
 2 heavy equipment. As a matter of fact, I spent  
 3 about four hours today on two of these  
 4 machines that size.  
 5 So I have a little bit of knowledge.  
 6 I'm not saying I'm an expert, but I do know  
 7 enough about them to know the size and what  
 8 these guys deal with every day.  
 9 Q. And, Martin, one of the reasons was,  
 10 again, that this was parallel to the pipe  
 11 rather than perpendicular, which I think in  
 12 review of the applications that have been  
 13 allowed to place fence in easements over the  
 14 years, both parallel and perpendicular have  
 15 been allowed.  
 16 A. Right.  
 17 Q. I guess an argument for  
 18 perpendicular was that -- there's not an  
 19 argument for damage, because we have the same  
 20 issue; you might be putting it in on top of  
 21 it.  
 22 A. Right.  
 23 Q. Maybe access; we've already  
 24 addressed the access issue. When you had

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1 reviewed those applications, though, were  
 2 there other properties within Powell that had  
 3 had the same circumstance that you have?  
 4 A. Absolutely. And I can't remember,  
 5 is it 24? 26 Watson Way was a fence that is  
 6 identical to the situation that I've asked  
 7 for. It was approved by the City of Powell,  
 8 by Dave Betz.  
 9 And basically there's a retention  
 10 pond behind this house, and if you guys still  
 11 have the packets, I don't know if we've  
 12 redistributed them, of the picture of the pipe  
 13 that's coming out with a fence over top of it  
 14 with a retention pond behind it. It's exactly  
 15 like my home, and they placed in fence  
 16 directly over top of the pipe. I believe it's  
 17 -- you know, I can't really read this, but I  
 18 think it's about 72 foot, it travels over the  
 19 length of that pipe.  
 20 And if you actually look at it and  
 21 footers wise, I don't believe it's within  
 22 spec, to where at least we would build our  
 23 fence within spec, because it has to have a  
 24 footer at least two foot deep and it doesn't

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1 have one. So just trying to do things right.  
 2 Identical situation.  
 3 Q. Martin, in their packet, you're  
 4 talking about this photo; is that correct?  
 5 A. Yes.  
 6 Q. Show them this photo.  
 7 MR. MCCUTCHEON: Okay. In your  
 8 packet, that's what the picture looked like,  
 9 yes. And that's running directly up under  
 10 that fence line.  
 11 Thank you all.  
 12 CHAIRMAN COOPER: Thank you.  
 13 MR. CLOSE: Mr. Cooper, if I could  
 14 ask a him a couple questions, please?  
 15 CHAIRMAN COOPER: Yes, sir.  
 16 -----  
 17 CROSS-EXAMINATION  
 18 BY MR. CLOSE:  
 19 Q. Mr. McCutcheon, would you concur  
 20 that you're not --  
 21 CHAIRMAN COOPER: Would you please  
 22 identify yourself for the record.  
 23 MR. CLOSE: I'm sorry. Mike Close  
 24 as the Law Director for the City of Powell.

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1 Q. Mr. McCutcheon, you would agree,  
 2 would you not, that you're not denied all use  
 3 of the land by the denial of this variance;  
 4 you just can't put the fence as far back on  
 5 your property as you'd like?  
 6 A. Correct.  
 7 Q. You would also agree that when you  
 8 bought the property, that this easement was  
 9 already there?  
 10 A. Correct. And let me address that  
 11 for a second, because we discussed this  
 12 before. We found out about three days  
 13 beforehand, and my wife will probably discuss  
 14 that in a few minutes, because at the time we  
 15 went into the contract to build the home, my  
 16 wife was not pregnant. We didn't know we were  
 17 having a daughter. So at the time period all  
 18 this occurred, when we found out we're  
 19 pregnant and we're getting ready to close on  
 20 the home, then we applied for the process. So  
 21 that's when we found out.  
 22 MR. CLOSE: Thank you, sir. That's  
 23 all the questions I have, Mr. Cooper.  
 24 CHAIRMAN COOPER: Thank you, sir.

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1 MR. JESTER: I respect very much  
 2 your child and the safety issue. I do very  
 3 much. And I know some other places, these  
 4 things have been done.  
 5 The utilities as I looked across  
 6 here, they kind of said we're not going to  
 7 have a problem with this, but you must meet  
 8 all of this criteria before. And it looks to  
 9 me like you've had more put on you after  
 10 they did this. I read it that way. And  
 11 they say with all the stipulations they have  
 12 down through here, Time Warner has, they all  
 13 have.  
 14 MR. MCCUTCHEON: Yeah.  
 15 MR. JESTER: And that really, to  
 16 me, we're looking at more here than what we  
 17 originally were looking at. Because we're  
 18 dealing with a pipe, I was concerned and have  
 19 been concerned about the utility. Now the  
 20 utilities are saying, homeowner, you better  
 21 have all this stuff in line before you expect  
 22 us to do that. Are we going to have a problem  
 23 with this?  
 24 MR. MCCUTCHEON: Oh, absolutely not.

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1 MR. JESTER: They're making it  
 2 difficult for you, very difficult.  
 3 MR. MCCUTCHEON: I can see your  
 4 concern there. But the contractor that puts  
 5 it in abides by those rules. And what you see  
 6 there is a standard letter for them. What you  
 7 see from Verizon is an identical letter to  
 8 AEP, with some different verbiage in there;  
 9 they've switched a few things around.  
 10 They did that because they normally  
 11 don't do this in this process, but they said  
 12 we have no issue with you doing this, so if  
 13 you could give us an idea of a sample letter,  
 14 give us an idea of a sample letter, we'll  
 15 write one for you. So that's where it came  
 16 from.  
 17 They usually don't do that. Verizon  
 18 usually doesn't go out and give anybody these.  
 19 I actually had to sign that copy and send it  
 20 back to them. And I've talked to our  
 21 contractor who has no issue with those  
 22 letters. He deals with them every day.  
 23 MR. JESTER: But you're going to  
 24 find yourself in some degree of difficulty if

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1 something goes wrong and these pieces aren't  
 2 met, these different stipulations you haven't  
 3 covered.  
 4 MR. MCCUTCHEON: I don't perceive it  
 5 as an issue. I'm sorry, I just -- I don't,  
 6 because our contractor understands he has to  
 7 abide by those rules. If we do damage  
 8 anything, we have to fix it.  
 9 MR. JESTER: Okay.  
 10 MR. MCCUTCHEON: And I believe  
 11 everybody that crosses a utility has to do  
 12 that. Doesn't matter if it's an easement,  
 13 what it states, if you dig and you hit a  
 14 utility, if it's marked by the utility marking  
 15 company, then it has to be within a certain --  
 16 Dave, you could probably help me out  
 17 here. But it has to be within a certain  
 18 footage of that marking. If it's outside of  
 19 the parameters of it, then the company that  
 20 marks that, it's their responsibility to pay  
 21 for it, not the contractor's.  
 22 MR. JESTER: Whose responsibility  
 23 is it to pay for it?  
 24 CHAIRMAN COOPER: I think you're

Page 21

1 talking about OOPS; is that correct?  
 2 MR. MCCUTCHEON: Right. If it's  
 3 outside like, I think, is it 4 or 6 foot  
 4 barrier of it --  
 5 CHAIRMAN COOPER: I had an  
 6 electrical line that they did, it was three  
 7 feet on either side, if I remember correctly.  
 8 So they're not guaranteeing where that line is.  
 9 MR. MCCUTCHEON: Right. They're  
 10 just saying from here, three feet here or  
 11 here; once you get to that point you have to  
 12 adhere to those rules.  
 13 MR. JESTER: I just think there's  
 14 been more added to it since the last time we  
 15 met. And I respect your point of view. I  
 16 really do.  
 17 MR. MCCUTCHEON: It's not a concern  
 18 of ours, and if we do have an issue, we will  
 19 take care of that. That's what I'm here for.  
 20 We're willing to take that burden. And it's  
 21 much more important for me to do that than it  
 22 is to not have it there. Thanks.  
 23 CHAIRMAN COOPER: Thank you.  
 24 MR. BETZ: Mr. Chairman?

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1 CHAIRMAN COOPER: Yes, sir?  
 2 MR. BETZ: May I ask a question?  
 3 CHAIRMAN COOPER: You certainly may.  
 4 MR. BETZ: That permit on Watson  
 5 Way, do you know the date it was issued?  
 6 MR. MCCUTCHEON: It was one I had  
 7 sent you all, I faxed in, asking you for  
 8 permission.  
 9 MS. HAYES: Actually it was 2005.  
 10 MR. BETZ: Thank you.  
 11 MS. HAYES: And we probably will  
 12 want to submit that because of how it was  
 13 handled. Again, with the City Engineer and  
 14 Zoning Administrator, was just notations as to  
 15 what they would do. Property owners would be  
 16 wholly responsible for any costs. Again,  
 17 same situation that Mr. McCutcheon has  
 18 indicated he would take responsibility for.  
 19 So I don't know if you want to mark it as an  
 20 exhibit?  
 21 CHAIRMAN COOPER: I'd like to see  
 22 that. And you want to mark it as an exhibit?  
 23 MS. HAYES: Yeah, I can have you  
 24 take a look. And actually, I will, too, give

Page 23

1 you the rest of the exhibits he talked about  
 2 and they have them in front of them.  
 3 -----  
 4 Thereupon, Exhibit A and B were  
 5 marked for purposes of identification.  
 6 -----  
 7 CHAIRMAN COOPER: Ms. Hayes, this  
 8 is -- okay, my question is answered.  
 9 -----  
 10 DIRECT EXAMINATION  
 11 BY MS. HAYES:  
 12 Q. Please state your name for the  
 13 record.  
 14 A. I'm Crystal McCutcheon.  
 15 Q. And, Crystal, I want you to explain  
 16 to them, there was questions asked of Martin  
 17 at the last hearing regarding, did you know  
 18 about the easement being there when you closed  
 19 on it; and I think the answer was yes. Could  
 20 you explain the circumstances of when you  
 21 closed.  
 22 A. We were notified three days before  
 23 our closing that there was an easement and we  
 24 wouldn't be -- our permit for the fence was

Page 24

1 denied. Our original plan was to place the  
 2 fence the day that we moved in.  
 3 As my husband stated, when we  
 4 originally put the contract in on the house, I  
 5 wasn't pregnant at that time. And there were  
 6 a lot of delays with the house, and then I was  
 7 pregnant, and three days before, I found out  
 8 that there was an easement across the back of  
 9 the property and there was an issue with the  
 10 fence.  
 11 I did not speak to Mr. Betz, but my  
 12 husband did, and he explained to my husband  
 13 the appeal process. We originally postponed  
 14 our closing and actually told our salesman we  
 15 wanted out of the contract, but we were  
 16 standing to lose a significant amount of money  
 17 by backing out at that point. Not only had we  
 18 placed a down payment that we stood to lose  
 19 that was around \$12,000, in addition to that  
 20 we had put thousands of dollars out of pocket  
 21 in the house already for things that were  
 22 beyond the corporate build.  
 23 So three days before, we told our  
 24 salesman that we wanted out of it because we

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1 had to have a fence. My husband went to Mr.  
 2 Betz, discussed with him what could be done,  
 3 and he said that we could appeal the process,  
 4 the permit.  
 5 And so, you know, he and I talked  
 6 about it, and we thought, well, you know, if  
 7 we present a fair argument, explain why we  
 8 have to have the fence, that it's the safety  
 9 of our daughter that's our chief and main  
 10 concern, and, you know, with my husband's  
 11 background in construction and knowledge of  
 12 pipes, and just present exactly what it  
 13 was, it really shouldn't be an issue. So  
 14 that was our thinking; that's why we moved  
 15 forward.  
 16 Q. Crystal, can you also explain other  
 17 considerations at the time of closing?  
 18 A. At the time of closing, we had  
 19 already sold our previous home. We were in an  
 20 apartment, and not a very nice place to live,  
 21 unfortunately. We made a bad choice in our  
 22 apartments. We had a three-month-old  
 23 daughter. We had to move. I mean, I was  
 24 under a great deal of stress. I wanted my

<p style="text-align: right;">Page 26</p> <p>1 daughter out of the apartment we were in; I 2 wanted her in the home. It was a very 3 stressful situation. 4 My initial thought was, if we can't 5 have a fence, we don't want this property. 6 But, you know, once we found out that we could 7 appeal the process and through due process, 8 you know, hopefully work this out to the right 9 end, we moved forward. 10 Q. After your discussions with people 11 who had knowledge about the appeal process, 12 was it ever your thought that it wouldn't be 13 approved? 14 A. No. No. I mean, I live in Powell. 15 I pay taxes. I've been in this area for some 16 time. I thought it was a good place to live. 17 I thought that people would be fair-minded, 18 would listen to -- you know, no one wants a 19 child to die. No one wants a child to end up 20 in a retention pond. I didn't think it would 21 be a problem. 22 MS. HAYES: No further questions at 23 this time. 24 CHAIRMAN COOPER: Thank you.</p>	<p style="text-align: right;">Page 28</p> <p>1 weight wise, I think I put this in the last 2 time, I believe it was about 1,200 pounds for 3 a mature root ball for a Crimson King Maple. 4 So you line up about 10 or 15 of those back 5 there and you're talking about a big 6 difference. 7 So I do think it's important to note 8 that the fence, weight wise, you're not 9 putting any bearing on that pipe whatsoever. 10 So I just also wanted to state that, make sure 11 we put it on the record. 12 CHAIRMAN COOPER: Thank you. And I 13 think you were just about to add something 14 else? 15 MS. HAYES: I was just going to add, 16 yeah, there's another permit, just again with 17 the examples of what gets done and approved 18 without appeal, with the same conditions that 19 Mr. McCutcheon was offering. 20 MR. JESTER: Can you come up here 21 and say that? I want to have that on record. 22 MS. HAYES: Sure. I was just going 23 to submit another one of the zoning 24 certificates that allowed a fence within an</p>
<p style="text-align: right;">Page 27</p> <p>1 Anything else you'd like to add, Ms. Hayes? 2 MS. HAYES: I believe that's all the 3 exhibits. 4 MR. MCCUTCHEON: If I can? Is that 5 all right? 6 CHAIRMAN COOPER: Please. 7 MR. MCCUTCHEON: The one thing that 8 I brought up at the end of the last session, 9 the last time we were together, my wife 10 thought it was very important, and it is, is 11 by the time you weigh the fence and the 12 footers, you're talking less than 500 pounds 13 over an 80-foot spread. So you're not talking 14 about putting weight on top of this. It's 15 going to weigh less than the actual dirt 16 that's sitting over top of it. 17 And again, I stated this before, 18 was, we're allowed to put as many trees there 19 as we would like as long as we don't make a 20 living fence. 21 The gentleman whose name is at the 22 bottom of the Hanson Manufacturers will be 23 glad to state to you guys that it is much more 24 of an issue for a tree to be there, and also</p>	<p style="text-align: right;">Page 29</p> <p>1 easement area that again had -- they allow it 2 with additional considerations. And written 3 on here is, fence is located within the 4 utility easement; resident is responsible for 5 any cost of removing and reinstalling. 6 MR. HILES: What is the date on 7 that, ma'am? 8 MS. HAYES: Pardon me? 9 MR. HILES: The date? 10 MS. HAYES: The date, this one was 11 also a 2005 certificate number, so it looks 12 like it was June 10th, 2005, approved July 13 7th, '05. And the address was 4173 Laurel 14 Valley Drive. 15 MR. JESTER: What offices approved 16 that? 17 MS. HAYES: Again, Director of 18 Development doesn't have "as noted"; it was 19 City Engineer, as noted. So I presume that 20 those changes were by the City Engineer. 21 MR. HILES: By the way, could you 22 just submit that to the clerk and we'll look 23 at it. 24 MS. HAYES: Sure. And these are</p>

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1 representative. Mr. McCutcheon had asked for  
 2 all the approvals within a five-year period.  
 3 Of those, I think there were 49 that had  
 4 fences placed within the easement area. Now,  
 5 not all of them had the same issues that he  
 6 had, but there are some that have the same  
 7 issues.  
 8 So, again, it's our contention that  
 9 by doing this in this manner, without taking a  
 10 consideration of what that ordinance is  
 11 designed to do, it's arbitrary to deny them  
 12 the right to place that there.  
 13 By placing it, as he even indicated,  
 14 if he did the drawing, had the fence outside  
 15 the easement area, it's going to hit a utility  
 16 that is outside the easement area, City of  
 17 Powell lights. At least from the markings  
 18 that are there. That certainly is probably  
 19 more of a public concern than allowing him to  
 20 build a fence over a drainage easement that in  
 21 all probability will never have to be  
 22 accessed.  
 23 CHAIRMAN COOPER: Mr. Betz.  
 24 MR. BETZ: Section 1145.34(g)(1)

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1 says, in part, that no fence will be  
 2 constructed or installed within the  
 3 municipality in the course of any easement for  
 4 public utilities or drainage easement without  
 5 the approval of the public utility and with  
 6 the concurrence of the City Engineer and  
 7 Zoning Administrator. Any denial of  
 8 concurrence by the City Engineer or Zoning  
 9 Administrator shall be made in writing and  
 10 state the basis therefor.  
 11 In an e-mail to the applicant, July  
 12 12th, 2007, indicating what our approval of  
 13 the zoning certificate was, we did approve the  
 14 zoning certificate with the fence to be within  
 15 -- can be within one foot of the easement, and  
 16 the reasons given for that in that e-mail were  
 17 three-fold.  
 18 One was, the proposed fence was  
 19 located over and runs parallel to a 48-inch  
 20 reinforced concrete pipe. And the cover of  
 21 the storm pipe ranges from two and a half to  
 22 three and a half feet. And our City Engineer  
 23 was concerned that the installation of the  
 24 fence posts over the pipe may pose a

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1 possibility of causing damage.  
 2 (Slide projection being shown.)  
 3 MR. BETZ: This is off the  
 4 engineering drawings I'm showing on the wall  
 5 here. This shows Mr. McCutcheon's lot, the  
 6 storm sewer that runs on the back of his lot,  
 7 and the retention pond in the back.  
 8 The normal water elevation is the  
 9 dark line, I'm showing with the hand on here,  
 10 approximately 20 to 30 feet from the property  
 11 line. The storm sewer runs from -- it  
 12 collects the stormwater through the whole --  
 13 well, through a lot of portions of the  
 14 subdivision and off the street and dumps it  
 15 into the retention pond.  
 16 The next page of those sheets, and  
 17 I'll turn this over for you to see, shows the  
 18 storm pipe cover only being two and a half to  
 19 three feet as the pipe runs from the street --  
 20 I'm sorry, from the street to the water  
 21 elevation.  
 22 So the City Engineer is concerned by  
 23 installing the fence post to that two and a  
 24 half to three and a half feet, if they're

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1 going to be 30 inches or below frost level  
 2 here, which is 32 inches, they might be  
 3 putting the pipe -- or the post on top of the  
 4 pipe.  
 5 The City Engineer also requested a  
 6 minimum of five feet clearance from the ends  
 7 of the storm pipe so that the unrestricted  
 8 access to unearth the storm pipe, should the  
 9 need arise for maintenance purposes, again  
 10 needing to get into and repair that pipe.  
 11 Now, this whole retention pond to  
 12 the south is also within a drainage easement.  
 13 This whole area, this whole lot that's owned  
 14 by the homeowners association is part of the  
 15 storm drainage easement. By allowing the  
 16 fence within one foot of the easement, and  
 17 like Mr. McCutcheon says, if a large piece of  
 18 equipment is needed to get in there to do the  
 19 pipe, the possibility exists that they could  
 20 go onto this property to the east and do the  
 21 work necessary, as well.  
 22 And also, then the city may have to  
 23 be burden the cost of removal or restoration  
 24 of the fence within the easement.

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1 Again, we stated we do have the --  
 2 the code does give the discretion to the City  
 3 Engineer to approve a fence within the  
 4 drainage easement on a case-by-case basis, and  
 5 in this case, if we agreed, that one foot in  
 6 the easement would be fine, and that's how we  
 7 approved it.  
 8 CHAIRMAN COOPER: Mr. Betz, could  
 9 you address these other couple properties, the  
 10 Watson Way and the Laurel Valley property?  
 11 You're welcome to take a look at these, if  
 12 you'd like. And could we get your comments  
 13 about these?  
 14 MR. BETZ: I'll do what I can.  
 15 CHAIRMAN COOPER: And this would be  
 16 the Watson Way property.  
 17 MR. BETZ: I'd have to look at the  
 18 engineering drawings about where the pipe is  
 19 exactly on the Watson Way property.  
 20 (Pause in proceedings.)  
 21 MR. BETZ: When the zoning code, I  
 22 believe, was changed, we originally did not  
 23 allow anything in any of the drainage  
 24 easements at one time, not even -- except for

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1 going through the variance process with the  
 2 Board of Zoning Appeals. I believe in 1998,  
 3 the code was changed to allow for the City  
 4 Engineer and Zoning Administrator to review on  
 5 a case-by-case basis the installation of  
 6 fences within drainage easements, and for some  
 7 time after that, we were trying to be flexible  
 8 with the location of fences.  
 9 I'm not sure when it happened, but  
 10 there was a time where we had an issue, and I  
 11 can't remember where it was at, but we had a  
 12 problem with the installation of a fence at a  
 13 storm sewer inlet, I believe it was. And  
 14 since that time, we are trying to be a little  
 15 per strict on where fences could go within  
 16 drainage easements so as to not create a  
 17 problem again.  
 18 One was with access to storm grates  
 19 and inlets for maintenance purposes, having  
 20 trouble with our service crews going out and  
 21 cleaning inlets and whatnot, and I think that  
 22 was the main problem with the issue that we  
 23 had.  
 24 CHAIRMAN COOPER: Is that an issue

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1 in this situation?  
 2 MR. BETZ: No, not in this  
 3 situation. There is one inlet that is further  
 4 to the south of the property. I can show on  
 5 you here.  
 6 (Slide projection being shown.)  
 7 MR. BETZ: There's an inlet on the  
 8 property next to it. There's a manhole on his  
 9 property, but it would be outside where the  
 10 fence would go. And then there's an inlet  
 11 further down on the lot next to them. Those  
 12 could be accessed via the property to the east  
 13 for clean-out from time to time, if necessary.  
 14 So in this case, it's not that problem.  
 15 The problem that our City Engineer  
 16 had is with the installation of the fence on  
 17 the pipe itself because the pipe is so  
 18 shallow, and that if work needed to be done on  
 19 the pipe, access to it would not be hindered  
 20 by the fence.  
 21 So I believe for reasons of trying  
 22 to prevent further problems like we had  
 23 before, and I can't remember where the  
 24 property is where we had problems with the

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1 inlet issues, we're trying to be a little bit  
 2 more strict on how the placement goes. And  
 3 again, we do have the ability and flexibility  
 4 to approve them in the easement at our  
 5 discretion.  
 6 CHAIRMAN COOPER: Do you have any  
 7 questions for Mr. Betz?  
 8 MS. HAYES: Yes.  
 9 -----  
 10 CROSS-EXAMINATION  
 11 BY MS. HAYES:  
 12 Q. When you say that equipment could  
 13 come into the east of this property, we are  
 14 talking of a severe slope, aren't we, from the  
 15 end of that property line down to the pond?  
 16 A. In this area here.  
 17 Q. Yes.  
 18 A. Yeah. There would still need to be  
 19 -- to have access for the equipment to come on  
 20 the flat part. It widens out as you go  
 21 further down and further to the north, and  
 22 that's where I was saying the equipment can go  
 23 on the property to the south, if need be.  
 24 Also, the area where the slope is, if work had

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<p>1 to be done, could be temporarily filled in for 2 access by the piece of equipment as well. 3 MS. HAYES: Okay. I believe these 4 are part of the packet, as well, pictures of 5 the subject property. 6 MR. HILES: I think we've all -- 7 myself and Joe, we visited the project and 8 seen the contours, and we have the pictures. 9 BY MS. HAYES: 10 Q. Okay. The second issue, you keep 11 bringing up on a case-by-case basis that 12 you're allowed to decide if something goes in 13 the easement. Are you just referring to 14 1145.34, or is there some other regulation 15 that gives you that discretion? 16 A. Well, I'm referring to paragraph 17 (g)(1) in 1145.34, and with the language the 18 way it is, we feel that we have the 19 opportunity to approve fences within drainage 20 easements and we also have the ability to not 21 approve them. It says with concurrence of the 22 City Engineer and Zoning Administrator. We 23 may not concur. That would require an appeal 24 to this body.</p>	<p>1 A. Well, I do believe that it would 2 take an extraordinary amount to damage the 3 pipe. I'm not sure what would happen after 4 the installation, the freeze-and-thaw 5 characteristics. If the fence post is not 6 within or below frost line, that could cause 7 heaving of the post over time. What kind of 8 damage that might do to the pipe is unclear. 9 Q. And you'd indicated before, trees 10 are permitted to be built in this easement 11 area, correct? 12 A. Yes. 13 Q. And do you have any experience with 14 tree roots and that as around drainage pipe? 15 A. Yes. 16 Q. And they were a significant hazard 17 to pipes? 18 A. Well, only if the -- only in certain 19 types of trees that have root systems that 20 grow further than two feet deep. 21 Q. But the only -- 22 A. Most root systems on trees do not 23 grow beyond two, two and a half feet deep, 24 even into full mature growth.</p>
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<p>1 Q. Okay. But does it say -- I mean, 2 you may not concur, maybe a public utility has 3 agreed and you don't concur; does that give 4 you the right then to say you can go X number 5 of feet on the easement? 6 A. We believe we can. That was the 7 purpose of why the code was changed this way 8 back in 1998. I was here at the time. 9 Q. And you've indicated one of the 10 bases for the decision was that these could 11 potentially -- the fence posts could 12 potentially damage the pipe, correct? 13 A. The City Engineer was concerned 14 with that, yes. And I concur. 15 Q. He's not here tonight, correct? 16 A. No. But I concur. 17 Q. Okay. And you have seen the letter 18 from the manufacturer of the pipe that says it 19 would be virtually impossible to damage it 20 with a fence-post digger, correct? 21 A. Yes. I just saw it tonight. 22 Q. Does that change any of your belief 23 regarding the McCutcheons going to damage this 24 pipe in any way?</p>	<p>1 Q. The only trees, though, that are 2 restricted are Willows, correct? 3 A. Willow trees would not be good in 4 there. 5 Q. We've also heard testimony from Mr. 6 McCutcheon of a five -- you've indicated a 7 five-foot area to get equipment in there, and 8 he said, given that large of a pipe, that's 9 not going to cut it; there's going to have to 10 be equipment that comes onto his land anyway 11 to get to that pipe? 12 A. Like I said, the property to the 13 east is part of the drainage easement. It 14 would have to be determined at the time 15 whether or not they'd have to go on his 16 property. 17 I don't know the workings of that 18 kind of heavy equipment besides what I've 19 seen, but it depends; if the whole pipe needed 20 to be replaced, then I could see a larger 21 piece of equipment being needed. If it's a 22 piece of equipment needed to go in and have 23 access to that storm inlet to clean it out, 24 suck it out or whatever, vacuum, a large</p>

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1 vacuum truck, we could probably get into that  
 2 area over that easement with that.  
 3 Q. And these inlets, though, aren't an  
 4 issue on this property, correct?  
 5 A. Well, it could be if we have to put  
 6 a piece -- a vacuum truck to go in there.  
 7 Q. Okay, but the one is located --  
 8 A. Under general normal maintenance  
 9 system, whether we go out and hand-clean them,  
 10 then that wouldn't be a problem.  
 11 Q. And there is one located that would  
 12 be outside the fence line --  
 13 A. Right here.  
 14 Q. -- that is along the street,  
 15 correct?  
 16 A. There's an inlet in the street.  
 17 There's a manhole here outside where the fence  
 18 would go. And then in the neighboring  
 19 property, there's two inlets along the same  
 20 easement line where it would make sense to  
 21 have access to those from the street here and  
 22 through this area if we had to use like a  
 23 suction truck or something to get out there  
 24 and unclog the drain or unclog the pipe.

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1 Q. Okay.  
 2 A. First they would try to do it from  
 3 this storm inlet here.  
 4 Q. How often has there been an issue of  
 5 accessing a pipe other than the inlets you're  
 6 talking about over the last five years?  
 7 A. Over the last five years? We had  
 8 one instance to have to replace a storm sewer  
 9 that had been damaged, that I know of, and  
 10 there was no fence problem there.  
 11 Q. And on the other applications you've  
 12 seen that you were addressing why they were  
 13 allowed or what have you, they had language  
 14 saying that the homeowner would take care of  
 15 the cost, correct?  
 16 A. Yeah. We had done that for some  
 17 time after this -- the ordinance was changed  
 18 to give the City Engineer and Zoning  
 19 Administrator some ability to approve fences  
 20 within easements. Again, we had a problem at  
 21 a hearing where an inlet was on a property,  
 22 and that was problematic, so we were trying to  
 23 be a little bit more aggressive in how we  
 24 issued permits then from that point on.

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1 Q. Okay. And on those, I saw on one of  
 2 those designated that homeowner to get utility  
 3 approval. So did you actually approve a  
 4 permit before the utility had approved it?  
 5 A. I'd have to look and see.  
 6 Q. It would be --  
 7 A. Well, I understand the note, I  
 8 remember the note, but I don't know. I'd have  
 9 to see. We don't require the utilities to  
 10 give us approval letters. We used to do that  
 11 under the code prior to '98, and when the code  
 12 was changed, we don't require those anymore.  
 13 But that's up to the homeowner to get those.  
 14 Q. Okay. You don't require the  
 15 approval, although 1145.34(g)(1) does say that  
 16 it cannot be done without the approval of the  
 17 utility, correct?  
 18 A. Exactly. But we don't necessarily  
 19 have to have that public utility approval  
 20 prior to the permit --  
 21 Q. So you kind of control the process?  
 22 A. Yes.  
 23 MS. HAYES: If you could back up  
 24 the pictures to the location where it showed

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1 the depth, I guess?  
 2 MR. MCCUTCHEON: What I look at  
 3 there is where there's the least amount of --  
 4 MR. JESTER: I can't hear you, and  
 5 I'm missing this whole conversation, if you  
 6 don't mind.  
 7 MR. MCCUTCHEON: Okay. What I'm  
 8 concerned about here is, you know, that's  
 9 nice, but where there's the least amount of  
 10 cover, the fence isn't going. Where there's  
 11 the most amount of cover is where the fence is  
 12 going.  
 13 MR. BETZ: Right. The fence is  
 14 going to start about here.  
 15 MR. MCCUTCHEON: Yeah. So although  
 16 you're looking at it, it's just a shallow  
 17 cover, where my fence is going -- is going,  
 18 possibly; excuse me for saying that -- but  
 19 it's got the most amount of cover. So what  
 20 I'm trying to state is, although you're  
 21 looking at a picture, you know, it's not at  
 22 that two and a half foot level, it's more to  
 23 the three and three and a half foot level.  
 24 MR. HILES: Now you're on this side

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1 of the --

2 MR. MCCUTCHEON: Yes.

3 MR. JESTER: When I went out and

4 looked at it, you had a thousand flags going

5 up and down the back yard there. Those flags,

6 the fence was within those flags, right?

7 MR. MCCUTCHEON: The fence is beyond

8 the flags. That was where the utilities run.

9 MR. JESTER: Yeah, the flags were

10 where all the utilities are.

11 MR. MCCUTCHEON: Yes. So the fence

12 is beyond that toward the pond.

13 MR. JESTER: Towards the back.

14 MR. MCCUTCHEON: Yes.

15 MR. JESTER: The fence does not go

16 over any utility lines?

17 MR. MCCUTCHEON: It crosses

18 utilities at two points. It doesn't run

19 perpendicular to them -- or parallel, I'm

20 sorry.

21 MR. BETZ: If I may help to answer

22 that question, most of the utilities are along

23 the edge of this 10-foot easement line

24 (indicating on slide show).

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1 MR. MCCUTCHEON: Yes.

2 MR. JESTER: Along?

3 MR. BETZ: The edge here, as you

4 look where the hand is panning, and what he

5 proposes, he'll cross them here, and he'll

6 cross the utilities here, but when he proposes

7 to go here, they're well away from the

8 utilities.

9 MR. JESTER: Okay.

10 MR. MCCUTCHEON: And while you're

11 there, I think another statement was a concern

12 about getting in there and cleaning that out.

13 A truck could not get into that easement area

14 and drive back there to clean that out,

15 because there's trees everywhere there. So

16 they would have to cut down trees to get to

17 that. So they really couldn't get to that in

18 that direction.

19 I agree with you, they could

20 sit at the street with a vac truck and get to

21 that first one. That's not an issue. The

22 ones in the people's yards beside of us,

23 they're going to have to take a truck through

24 their yard. There's no way to get through

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1 that easement. Although you say you can build

2 it up and drive equipment in there, the same

3 thing goes there. You're going to have to

4 take out trees to do that.

5 And another thing, to work on that

6 pipe, from my expertise in the business I'm

7 in, you're going to have to straddle that pipe

8 to work on it. You can't sit to the east and

9 dig to get to that pipe. You can, to a

10 degree, but you do have to straddle it. And

11 to pick that up and work on it, you do have to

12 have a 110,000-pound machine sitting there to

13 do that.

14 So just from my expertise, you're

15 going to have to straddle that. And to sit on

16 that slope with an excavator, you can dig and

17 pull some material over there, but to sit on

18 that slope, would -- and I'm not an OSHA

19 expert, but I would think it would be against

20 OSHA's regulations, because if you pick that

21 pipe up and it counteracts, you're going to be

22 backwards over in that pond.

23 But just to make a statement of,

24 what's there, you couldn't get a truck back

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1 into there; you're going to have to tear some

2 trees out to do so.

3 And if I can ask you one thing.

4 Have you guys had problems with pipe, not

5 with inlets, but just with pipe, with fence

6 over top of it?

7 MR. BETZ: No.

8 MR. MCCUTCHEON: Okay. Thank you.

9 MS. HAYES: That concludes our

10 questioning.

11 CHAIRMAN COOPER: Any questions?

12 MR. HILES: I don't believe so. Do

13 you have any questions, Joe?

14 MR. JESTER: No.

15 CHAIRMAN COOPER: Do I hear a

16 motion?

17 MR. CLOSE: Mr. Cooper, if I could

18 address the Board?

19 CHAIRMAN COOPER: Yes, sir.

20 MR. CLOSE: First, I want to make

21 sure that everybody understands that, although

22 this was sent back by Judge Duncan Whitney, it

23 was sent back with any determination on the

24 merits of the case at all. This is as if it

<p style="text-align: right;">Page 50</p> <p>1 had never been to the court. There were a 2 couple technical issues that needed clearing 3 up, one of which has already been handled by 4 Mrs. Haynes -- 5 MS. HAYES: Hayes. 6 MR. CLOSE: I'm sorry. Examination 7 of Dave, there's an issue that if you don't 8 have sufficient cross-examination, that in 9 fact a judge can hear the case on the merits 10 rather than deferring to your judgment. And 11 that was one of the reasons this came back. 12 But at any rate, you're free to make 13 any decision you want, and Judge Whitney, by 14 him sending it back, gave no indication that 15 he thought you should do one thing or the 16 other. 17 As to the issue of these variances, 18 I'm not about to stand here and tell you that 19 you can't consider them, because you can 20 consider anything you want that's submitted to 21 you. But as a matter of law, the case law is 22 very clear that as all variances are to be 23 granted on a case-by-case basis, they are not 24 binding on you in any way.</p>	<p style="text-align: right;">Page 52</p> <p>1 that last time, as the deed restrictions and 2 so forth. We've got to work that out, but I 3 think for future homeowners. 4 MR. CLOSE: Now, if you all say 5 that's what you want to do, we'll do the best 6 we can to figure out how to get it done, but 7 I'm telling you, I don't know for sure how 8 we'd make it run with the land without at 9 least a straw man conveyance of some kind or 10 other. 11 MS. HAYES: Well, -- 12 MR. CLOSE: If I can finish, and 13 then you're welcome to rebut anything I say. 14 Lastly, and the other reason I think 15 that this case is back here from Judge 16 Whitney, and I've read all the proceedings, 17 the transcript of the previous hearings, when 18 it comes time to consider this application, 19 and, you know, we can read what happened and I 20 know it's in front of you this time, it is 21 imperative that the BZA look at 1127.06(e) and 22 the seven criteria that you're required by law 23 to consider. Now, as a matter of fairness -- 24 I'm sorry?</p>
<p style="text-align: right;">Page 51</p> <p>1 So if you want to consider what 2 happened on these two other properties, you 3 certainly can, but if you want to agree with 4 the administration that it was time to draw a 5 line, you don't have to grant a variance on 6 this property, even if it was an exactly 7 identical situation on another property, which 8 we don't know about. So I wanted to clear 9 that up. 10 Lastly -- well, second to lastly, 11 this issue of payment from a legal 12 perspective, if somebody's got to come in and 13 tear it up, that the McCutcheons are willing 14 to pay for it, I've got a concern of how we 15 make that run with the land so that it's 16 binding on more than just the McCutcheons. 17 I have no question that him having 18 gotten up here and given his word here that if 19 there were a problem, the problem would be 20 taken care of. My question is, how 21 mechanically do we get to a point where any 22 succeeding property owner is bound by that 23 same agreement. 24 MR. HILES: And I think we discussed</p>	<p style="text-align: right;">Page 53</p> <p>1 CHAIRMAN COOPER: May I interrupt? 2 MR. CLOSE: Yes. 3 CHAIRMAN COOPER: Because those are 4 for variances; is that correct? 5 MR. CLOSE: And that's what we're 6 asking for here. 7 CHAIRMAN COOPER: No, we're asking 8 for an appealing of a decision here. I don't 9 think we're asking for a variance. Is that 10 correct, or am I confused here, Dave? 11 MR. CLOSE: It's my understanding, 12 Mr. Cooper, and I certainly stand to be 13 corrected, that it takes a variance to get the 14 approval of this fence. 15 MS. HAYES: I disagree. 16 MR. CLOSE: The city has denied the 17 variance requested. I think that you all 18 still have to meet the criteria for a variance 19 in order to grant this fence. The fence is 20 outside of what the code generally allows. 21 CHAIRMAN COOPER: I don't think that 22 the city has to right to grant the variance 23 without us, just on their own. 24 MR. HILES: The variance has to come</p>

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1 before this Board, doesn't it, Dave?  
 2 MR. BETZ: If I could have a minute  
 3 with Mr. Close?  
 4 CHAIRMAN COOPER: Sure. Please.  
 5 (Pause in proceedings.)  
 6 MR. CLOSE: Mr. Betz and I can  
 7 agree to disagree. I still think you've got  
 8 to meet the same criteria. It's not that  
 9 you're all out here with no mother to guide  
 10 you. And I think that without looking at  
 11 those criteria, that you cannot grant this  
 12 variance.  
 13 CHAIRMAN COOPER: So you're saying  
 14 this is a variance, the appeal of their  
 15 decision --  
 16 MR. CLOSE: I think as it comes --  
 17 I'm sorry, excuse me, Mr. Cooper, I didn't  
 18 mean to interrupt.  
 19 It's not a variance in the classical  
 20 sense of the word. But in fact the code gives  
 21 him the authority to make a decision which is  
 22 now being appealed, and the question to you  
 23 is, what criteria do you have then to judge it  
 24 by? If you'll give me five minutes with the

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1 code, I will answer that specific question.  
 2 CHAIRMAN COOPER: You may have it.  
 3 MR. CLOSE: Would you recess?  
 4 CHAIRMAN COOPER: Yes. We'll talk a  
 5 recess.  
 6 (Recess taken.)  
 7 CHAIRMAN COOPER: What's happening,  
 8 Mr. Close?  
 9 MR. CLOSE: Your Honor --  
 10 CHAIRMAN COOPER: Your Honor?  
 11 You've got me confused.  
 12 MR. CLOSE: When one looks at  
 13 1145.34.  
 14 CHAIRMAN COOPER: Yes, sir.  
 15 MR. CLOSE: (G)(1) gives the  
 16 administrators the ability to determine  
 17 whether or not the fence can be built in these  
 18 easements.  
 19 CHAIRMAN COOPER: Yes.  
 20 MR. CLOSE: If they wish to appeal  
 21 from it, section (J) comes into compliance,  
 22 which speaks of variances.  
 23 CHAIRMAN COOPER: Okay.  
 24 MR. CLOSE: Now, it's my position,

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1 then, that for this to be approved they've got  
 2 to meet the requirement for any other  
 3 variance, except -- which I was going to get  
 4 to second -- you've got the right to say  
 5 merely that they're exempt for health, safety,  
 6 and general welfare. You can give an  
 7 exemption which is different than a variance.  
 8 If health, safety, and welfare aren't the  
 9 reason for your decision, it's my opinion that  
 10 they've got to meet the conditions of the  
 11 variance.  
 12 CHAIRMAN COOPER: And that would be  
 13 proving a hardship?  
 14 MR. CLOSE: Yeah. Well, it's more  
 15 than proving a hardship.  
 16 CHAIRMAN COOPER: That's just one  
 17 part of it.  
 18 MR. CLOSE: They've got to meet all  
 19 seven requirements.  
 20 CHAIRMAN COOPER: Right.  
 21 MR. CLOSE: And of the seven, I'm  
 22 not going to argue about 1, 2 or 6. But, 3,  
 23 they are not fully deprived of the value of  
 24 the property; 4, the hardship can't be

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1 self-created, and in fact they knew about the  
 2 easement when they bought the house; that  
 3 takes out of play. It's the minimum variance  
 4 sought to restore value to the land. Then you  
 5 get a factual determination whether the  
 6 difference between 35 and 45 feet is a  
 7 significant difference. And does it confer on  
 8 the applicant any special privilege denied by  
 9 this regulation to other lands.  
 10 Now, I don't mean to confuse this,  
 11 because, again, you can exempt based on  
 12 general welfare, under section 1145.34(J).  
 13 But I think if that general welfare provision  
 14 doesn't apply, then they've got to meet the  
 15 conditions of the variance.  
 16 CHAIRMAN COOPER: Does 1145.05 come  
 17 into play here, where it says that no  
 18 permanent building or structure shall be  
 19 placed or permitted which may damage or which  
 20 may interfere with the installation,  
 21 operation, or maintenance of such utilities  
 22 that's constructed in easements?  
 23 MR. CLOSE: That's why it becomes a  
 24 variance if you grant it for other than

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1 general welfare, I think.  
 2 MS. HAYES: I would disagree,  
 3 because I don't believe the fence is  
 4 considered a permanent structure.  
 5 MR. CLOSE: Mr. Cooper, what I have  
 6 offered counsel here, and I don't know what  
 7 they're going to do with it, but what I had  
 8 offered was that, I had not expected this  
 9 issue to come up, and I'm certainly willing to  
 10 look into it further, if they want to waive  
 11 the 30-day period for you to render a decision  
 12 so that you can consider it at the next  
 13 meeting without having to go through all  
 14 the public hearing stuff, then on behalf of  
 15 the Law Department, we'll be happy to put  
 16 out a memo on this and discuss it at that  
 17 time.  
 18 CHAIRMAN COOPER: I would personally  
 19 like to see the engineer involved in this this  
 20 evening. I am not speaking for the rest of my  
 21 Board here, but I would not have a problem  
 22 postponing a decision this evening.  
 23 MR. CLOSE: If you'd like him here,  
 24 we can get him at the next --

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1 MR. JESTER: I agree with you.  
 2 CHAIRMAN COOPER: I think I'd like  
 3 to do that, because I'd like to find out more  
 4 about these other couple properties that were  
 5 done since the change in the law and see if  
 6 they are in fact similar, which I can't 100  
 7 percent tell from these what's going on.  
 8 MR. CLOSE: We'd have no objection  
 9 to doing that, if the applicant doesn't.  
 10 MR. JESTER: What were the reasons  
 11 that we would be postponing it?  
 12 MS. HAYES: With all due respect, I  
 13 can't -- you know, my client has been through  
 14 this process. It's been a long and lengthy  
 15 one. We're back here to present our record.  
 16 I'm sure the engineer had the opportunity to  
 17 be present or you could have scheduled it at a  
 18 different time. We believe it's clear. I'll  
 19 give you my two cents about whether a variance  
 20 is needed or not, and if need be, Judge  
 21 Whitney will reconsider it.  
 22 MR. BETZ: Mr. Chairman, just as a  
 23 point of order, this information was just  
 24 presented tonight. This has engineering

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1 information that we were not aware of that  
 2 they just presented, and we'd like some time  
 3 to have our engineer look at this. You don't  
 4 have to make a decision within 30 days of your  
 5 hearing.  
 6 MS. HAYES: Is Mr. Betz the Law  
 7 Director? Is he allowed to tell this Board  
 8 what they can or cannot do? I believe that  
 9 statement was, he told them what they --  
 10 MR. CLOSE: Counsel, I don't hear  
 11 that that way, and there's no reason to get  
 12 into ad hominem attacks here. He certainly  
 13 has an opinion what the letter says, and your  
 14 client voiced his opinion the same as Mr. Betz  
 15 has.  
 16 I think, actually, seeing no  
 17 prohibition in the code, I don't know why you  
 18 can't just continue the public hearing to your  
 19 next meeting for the engineer to be present.  
 20 Then the 30-day requirement doesn't apply.  
 21 MR. MCCUTCHEON: Since I can speak,  
 22 also, Mr. Betz did know before tonight that  
 23 that letter was coming. Did he see it? No.  
 24 But he just stated he did not. I think we

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1 talked on the 14th, and he did know it was  
 2 coming. So just to respond that he did know  
 3 it was coming.  
 4 MR. BETZ: I didn't say --  
 5 CHAIRMAN COOPER: That's all right.  
 6 We're not going to get into that.  
 7 MR. CLOSE: That's all right.  
 8 We're not going to get into that.  
 9 CHAIRMAN COOPER: Mr. Close, how do  
 10 we procedurally go about postponing our  
 11 decision until we can get to the engineer?  
 12 MR. CLOSE: A motion to continue the  
 13 public hearing to a date certain, your next  
 14 meeting date, concurred by a majority of the  
 15 Board would be sufficient to do that.  
 16 CHAIRMAN COOPER: Next meeting  
 17 date --  
 18 MR. HILES: We don't have standard  
 19 meeting dates. We meet as needed.  
 20 MR. CLOSE: But in order to avoid  
 21 the renotification, if you can pick a date so  
 22 that you can say a date certain this is going  
 23 to, it would avoid any notification problems.  
 24 MR. HILES: I would like to do this

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<p>1 as soon as possible. I agree, I think they've 2 presented their case. The legalities, I 3 understand, but this has been dragging on. 4 MR. JESTER: I think one of the 5 things that's entering into this, though, the 6 city obviously is taking a different look at 7 this type of situation. And I think I need 8 some more legal advice and the engineer's 9 advice. I want him to have the right decision 10 coming back to him, and I feel there's a void 11 right now as to what's developed tonight. 12 MR. HILES: I agree. I think he 13 needs a timely decision, though. 14 CHAIRMAN COOPER: Yes. Well, do you 15 gentlemen have calendars with you? 16 MR. JESTER: What's the time frame? 17 CHAIRMAN COOPER: You know, I can't 18 pick out a date sitting here right this 19 moment, but I would like to postpone this 20 decision until we can get the City Engineer 21 involved in this process. I'd like to know 22 why these properties were different. 23 MR. JESTER: Do we need 30 days, 24 Dave? Is this a 30-day thing?</p>	<p>1 MR. CLOSE: Well, they're not 2 required to be, because the burden is on the 3 applicant to prove his case. So they don't 4 have to be there. 5 MR. MCCUTCHEON: But I have to be 6 here to prove my case, and they can take their 7 time -- 8 MR. CLOSE: Sir, -- 9 MR. MCCUTCHEON: I'm just asking. I 10 don't know. I mean, I'm not being -- 11 MR. CLOSE: Mr. McCutcheon, as the 12 applicant who has been aggrieved by a 13 decision, it's your obligation to put on a 14 case that allows them to find that you're 15 entitled to it. 16 MR. MCCUTCHEON: And please don't 17 disregard what I was asking. 18 MR. CLOSE: I'm not. I don't mind. 19 CHAIRMAN COOPER: Mr. McCutcheon, 20 we've made a decision on this previously, and 21 I think it would probably be to your advantage 22 to let us continue this to a later date. 23 MR. MCCUTCHEON: And I'm not arguing 24 that. I just don't know the process, and</p>
<p>Page 63</p> <p>1 MR. CLOSE: You're required to have 2 30 days after the public hearing. The only 3 thing I'm saying is, you don't have to close 4 the public hearing tonight as long as you 5 continue it to a date for which we will not 6 have to give further notice. So if you just 7 pick a date and say that's when it's going to 8 be, the public hearing continues to that time 9 and then you've got 30 days after then to make 10 a decision. 11 CHAIRMAN COOPER: Ms. Ross, can you 12 come up with a date for us when we can have 13 this room? 14 MS. ROSS: If you can give me just a 15 moment, I will. 16 CHAIRMAN COOPER: Okay. Thank you. 17 MR. CLOSE: And we can hope the 18 engineer is available. 19 CHAIRMAN COOPER: We'll get one of 20 them here. 21 MR. MCCUTCHEON: Is there a reason 22 they're not able -- I mean, I'm just curious 23 on my behalf, because I know they were both 24 here last --</p>	<p>Page 65</p> <p>1 that's why I was questioning it. 2 CHAIRMAN COOPER: It might to be 3 your advantage, I should say. 4 (Discussion off the record.) 5 CHAIRMAN COOPER: Does Thursday the 6 28th at 6:00 work for everybody? 7 MR. MCCUTCHEON: I'll make it work 8 on my behalf. 9 CHAIRMAN COOPER: Okay. 10 MS. HAYES: Yes. 11 CHAIRMAN COOPER: Well, then I will 12 make a motion that we continue this hearing to 13 include the City Engineer for Thursday, 14 February 28th, at 6:00 p.m. 15 MR. HILES: I'll second the motion. 16 MS. ROSS: Ed Cooper? 17 CHAIRMAN COOPER: Yes. 18 MS. ROSS: Robert Hiles? 19 MR. HILES: Yes. 20 MS. ROSS: Joseph Jester? 21 MR. JESTER: Yes. 22 CHAIRMAN COOPER: Any other new 23 business? No new business. 24 MR. JESTER: I move we adjourn.</p>

1 CHAIRMAN COOPER: I'll second that.  
 2 We are adjourned.  
 3 -----  
 4 Thereupon, the proceedings were  
 5 concluded at 7:50 o'clock p.m.  
 6 -----  
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1 CERTIFICATE  
 2  
 3 The undersigned do hereby certify that  
 4 the foregoing proceedings were digitally  
 5 recorded, electronically transmitted, and  
 6 transcribed via audible playback, and that  
 7 the foregoing transcript of such proceedings  
 8 is a full, true and correct transcript of  
 9 the proceedings as so recorded.  
 10  
 11 IN WITNESS WHEREOF, I have hereunto set  
 12 my hand and affixed my seal of office at  
 13 Columbus, Ohio, on this \_\_\_\_ day of .  
 14 \_\_\_\_\_, 2008.  
 15  
 16  
 17  
 18 \_\_\_\_\_  
 KRISTIE J. HATALA  
 Certified Digital Reporter  
 Notary Public - State of Ohio.  
 My commission expires August 1, 2012.  
 20  
 21  
 22  
 23 \_\_\_\_\_  
 DONNA J. BELLOUS  
 Certified Digital Transcriber  
 24

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