



City of Powell, Ohio

Powell Board of Zoning Appeals

Ed Cooper, Chairman

Robert Hiles

Joseph Jester

**MEETING MINUTES
FEBRUARY 28, 2008**

A meeting of the Powell Board of Zoning Appeals was called to order by Chairman Ed Cooper on Thursday, February 28, 2008 at 6:00 p.m. Board Members present included Robert Hiles and Joseph Jester. Also present were David Betz, Director of Development; Eric Fischer, Development Planner; Susie Ross, City Clerk; Gene Hollins, Law Director; and interested parties.

CALL TO ORDER/ROLL CALL

The Chairman said all those who testified at the last hearing are still under oath and any others providing testimony shall be sworn in as they come forward.

CONTINUATION OF HEARING OF FEBRUARY 20, 2008:

APPLICATION FOR APPEAL

Applicant:	W. Martin McCutcheon
Location:	1060 Cheliway Ct. Woods of Powell North subdivision
Zoning:	PR, Planned Residence District
Request:	Appeal of the Zoning Administrator's and City Engineer's denial of a Zoning Certificate for a fence proposed to be located in a Drainage Easement.

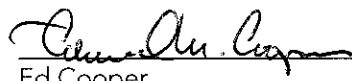
The official transcript of the proceeds is hereto attached as Exhibit A and accepted as the official record of the proceedings.

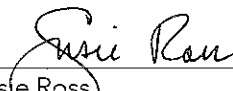
OTHER BOARD BUSINESS

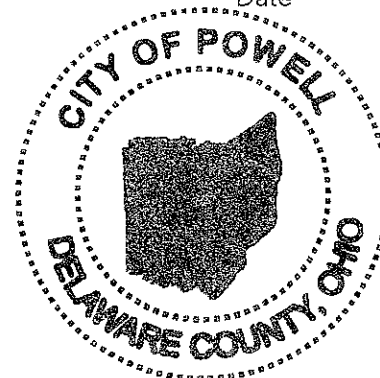
ADJOURNMENT

The meeting was adjourned at 6:19 p.m.

DATE MINUTES APPROVED: May 12, 2008


 _____ 7/7/2008
 Ed Cooper Date
 Chairman


 _____ 7/7/08
 Susie Ross Date
 City Clerk



1 BEFORE THE CITY OF POWELL
2 BOARD OF ZONING APPEALS
3
4 IN RE: :
5 W. Martin McCutcheon :
6
7 Proceedings before Chairman Ed Cooper,
8 Member Robert Hiles, and Member Joseph
9 Jester, taken at 47 Hall Street, Powell,
10 Ohio, on Thursday, February 28, 2008, at 6:01
11 o'clock p.m.
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1 APPEARANCES:
2 Wiles, Boyle, Burkholder
3 & Bringardner
4 300 Spruce Street
5 Floor One
6 Columbus, Ohio 43215
7 By Mr. Eugene L. Hollins,
8 Law Director,
9 On behalf of the Board.
10 J.C. DeBoard & Co.
11 5878 North High Street
12 Worthington, Ohio 43085
13 By Ms. Susan N. Hayes,
14 Attorney at Law,
15 On behalf of the Applicant.
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ALSO PRESENT:
Mr. David Betz
Mr. Mason Janczak
Ms. Susan Ross
Mr. W. Martin McCutcheon
Ms. Crystal McCutcheon

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

3 - - - - -

4 CHAIRMAN COOPER: We are here to

5 continue the application for appeal of

6 Mr. Martin McCutcheon.

7 Would you take the roll call for us

8 please, Susan?

9 MS. ROSS: Ed Cooper?

10 CHAIRMAN COOPER: Here.

11 MS. ROSS: Robert Hiles?

12 BOARD MEMBER HILES: Here.

13 MS. ROSS: Joseph Jester?

14 BOARD MEMBER JESTER: Here.

15 CHAIRMAN COOPER: Just for the

16 record, this has to do with 1060 Chelliway

17 Court, the Woods of Powell North Subdivision,

18 Planned Residential District. This is an

19 appeal of the zoning administrator's and city

20 engineer's denial of a zoning certificate for

21 a fence proposed to be located in a drainage

22 easement.

23 Before we get going here, we were

24 just handed a document from Mr. Betz.

1 Would you like to tell us --

2 MR. BETZ: I'll have Gene explain

3 it.

4 MR. HOLLINS: Sure.

5 CHAIRMAN COOPER: Mr. Hollick?

6 MR. HOLLINS: Hollins.

7 CHAIRMAN COOPER: Whatever.

8 Gene?

9 MR. HOLLINS: Gene is easier.

10 Mr. Chairman and members of the --

11 CHAIRMAN COOPER: May I back up for

12 a second?

13 MR. HOLLINS: Absolutely.

14 CHAIRMAN COOPER: We're reminded

15 we're still sworn in. Anybody new that might

16 testify, we'll swear you in as we get there.

17 Thank you, Gene.

18 MR. HOLLINS: What I'm going to

19 tell you, there probably is no need to

20 continue the public hearing at this point.

21 Mr. Chairman, members of the BZA, since the

22 last opportunity to speak with you concerning

23 this, staff and myself have had a chance to

24 sit down and talk through the issues.

1 One thing that we have been lacking
2 has been perhaps a recordable document to
3 address the concerns, which are mostly
4 related to what happens if we need to get to
5 the utilities to do some work on it. The
6 document which you were presented tonight is,
7 in essence, a recordable instrument, and you
8 can read the terms, obviously.

9 CHAIRMAN COOPER: We've read it.

10 MR. HOLLINS: Sure. And it
11 addresses those concerns. I think we had the
12 ability to give notice and make sure that the
13 fence -- or in other cases in the future, we
14 think we could use this same instrument. It
15 may not be a fence. It may be some other
16 type of improvement. But we can get them to
17 remove that, but it's do the work and then
18 restore the fence or the improvement as need
19 be.
20 And we have shared this with the
21 attorney for Mr. McCutcheon, and the document
22 is acceptable to the applicant, as well.
23 With this, and I'll let -- I'll let
24 Dave speak for himself, but I think with this

1 the staff is recommending approval of the
2 fence, i.e. we're recommending that you
3 approve their appeal, grant their appeal, and
4 we will issue the permit and get it moving.
5 CHAIRMAN COOPER: I have a
6 question, maybe more -- you're probably
7 better qualified to answer than anyone: Is
8 this, in essence, granting a variance, this
9 agreement here?
10 It is granting a variance; is it
11 not?

12 MR. HOLLINS: The way the code is
13 worded on this, we've got reference to both
14 variances and exceptions, and we also have
15 the administrative, I think, discretion, left
16 to the engineer and the zoning administrator.
17 You know, the way this really, I think, plays
18 out is with this document, this is something
19 that will allow staff just to exercise its
20 discretion to say, yeah, it's -- it's
21 acceptable to go ahead and build that in our
22 easement, because any concerns we had are
23 addressed by this document. So they're
24 really just -- under the code, I think,

1 they're now exercising their discretion to go
 2 ahead and permit this to happen without the
 3 need for getting into acceptance of
 4 variances, et cetera.

5 CHAIRMAN COOPER: Our zoning code
 6 specifically addresses this situation, and
 7 obviously this is -- this is contrary to what
 8 our zoning code says.

9 I guess I'm asking if the authority
 10 is there to do this without having a formal
 11 variance made?

12 MR. HOLLINS: I think it is not
 13 necessarily contrary to your zoning code.

14 Your zoning code just -- or if somebody
 15 requests to build something in a utility or
 16 drainage easement, your zoning code directs
 17 that applicant to address it to the utility
 18 company to see if they have any objection,
 19 then to address the request to the engineer
 20 and to the zoning administrator. It does not
 21 outright prohibit things in utility
 22 easements. It just gives the engineers and
 23 the zoning administrator some discretion to
 24 look at it. And if they determine that for

1 some engineering reason or, like in this
 2 case, access to utility reason, they would
 3 deny it. But if they determined their issues
 4 are addressed or their concerns are
 5 addressed, they can say, yeah, you can go
 6 ahead and build that.

7 (Multiple speakers.)

8 CHAIRMAN COOPER: I guess I'm
 9 looking at 1145.34(g)(1), that says,
 10 specifically, no fence will be constructed or
 11 installed within the municipality in the
 12 course of any easement for public utilities
 13 or drainage easement.

14 MR. HOLLINS: Uh-huh.

15 CHAIRMAN COOPER: So, in my
 16 opinion, this is contrary to the code. And
 17 I'm just trying to satisfy in my own mind --
 18 I don't have a problem with the document.
 19 I'm just trying to satisfy it in my own mind
 20 how this works.

21 MR. HOLLINS: Let me make sure I'm
 22 focused on the same language you are.

23 When it was quoted in that second
 24 "whereas" clause, it says verbatim what you

1 just said.
2 CHAIRMAN COOPER: Okay.
3 MR. HOLLINS: But it goes on to
4 say, without the approval of the public
5 utility and with the concurrence of the city
6 engineer and the zoning administrator.
7 CHAIRMAN COOPER: Okay.
8 MR. HOLLINS: The prohibition is
9 sort of conditioned on those things not
10 happening. If those, all those folks -- and
11 one of the things the McCutcheons have done,
12 and we will ask anybody with a fence in a
13 similar situation in the future to do, is
14 contact all the public utilities. And
15 they've all signed off on it.
16 CHAIRMAN COOPER: Right. I think
17 that was Exhibit B from our previous hearing.
18 MR. HOLLINS: Right. And so that's
19 consistent with the code.
20 CHAIRMAN COOPER: Okay.
21 MR. HOLLINS: And then asking for
22 the zoning administrator and city engineer's
23 approval, they've done that. And as long as
24 this is acceptable to the applicant, they're

1 in concurrence with it, all that -- all that
2 being said, everything that just was done
3 there is consistent with the code, so you
4 wouldn't need a variance or an exception.
5 You've gone through the process actually to
6 get approval of it.
7 BOARD MEMBER HILES: Sir, I have a
8 question. And this is for the future, so we
9 know.
10 MR. HOLLINS: Right.
11 BOARD MEMBER HILES: If they have
12 there the information from the utility
13 companies, and for some reason you do not --
14 you turn it down, what at that point?
15 Does it come to the board at that
16 point?
17 MR. HOLLINS: Yes.
18 MR. BETZ: Yes, it can. Yes, if
19 they want to either appeal our ruling, like
20 Mr. McCutcheon has, or under a variance
21 application, either/or, they can do that.
22 BOARD MEMBER HILES: Okay.
23 MR. BETZ: And the cases that we
24 will have -- and one of the things we were

1 searching for is a document like this.
 2 Mr. Hollins was great enough to put this
 3 together. Because prior to this, it was, you
 4 know, notes on a permit, and not very
 5 enforceable for future owners. And that's
 6 where we ran into our problems before.
 7 And so now this is something
 8 recordable that everybody should know about
 9 when they buy their house, if they do the
 10 proper research. So that's why, now, we're
 11 happy with this in this case.
 12 In other cases, similar to this, if
 13 they're, for example, drainage easements with
 14 swales, and there's over-land routing, and
 15 things like that, we'll certainly have to
 16 keep fences out of those areas, and those are
 17 things that, you know, we would end up
 18 explaining to, you know, residents or
 19 applicants in those kind of cases.
 20 And that's why we have said, you
 21 know, a case-by-case basis, because not every
 22 easement is the same, not for the same
 23 purpose. So with this kind of -- with this
 24 kind of document, it really helps us out.

1 BOARD MEMBER JESTER: I don't see a
 2 mention of an emergency. Say tonight, at
 3 midnight, they get somebody that -- somebody
 4 has got to go in there and dig, and the only
 5 thing that was addressed in this is five days
 6 advance notice. And I wonder if that, if an
 7 emergency, shouldn't be considered, because
 8 that leaves it pretty wide open, if somebody
 9 goes in there tonight, and that happens.
 10 MR. HOLLINS: Yeah. And I don't
 11 disagree with you. The five days notice I
 12 think was more thought, obviously, was to
 13 give them a chance to move it out in maybe
 14 the least costly manner, so it could be put
 15 back. You don't want to tell them today that
 16 you're coming out tomorrow; get your fence
 17 out, out of the way.
 18 And that might be sort of a
 19 case-by-case basis.
 20 The only thing that's underneath
 21 this one that is a real concern is just a
 22 storm sewer.
 23 BOARD MEMBER JESTER: But this
 24 says, this covenant that you're mentioning,

1 is to be used anyplace. And I just feel very
2 strongly that, to protect the utilities and
3 anybody else, because this is --- as this goes
4 down the road.

5 MR. HOLLINS: Yeah.

6 BOARD MEMBER JESTER: Because, I
7 mean, utilities, at midnight, if they come
8 out there and start digging, the homeowner is
9 still responsible for that, and I don't think
10 this covers that.

11 And my other concern is, the
12 utilities, I read all the letters, and they
13 all said, yes, you can do it, but. And
14 they've all got a lot of "puts" down through
15 there that you must do this, this, and this.
16 So this piece by itself, with all those
17 covenants, should be --- I think the utility
18 should be -- should be contacted. And say,
19 okay, what attachments have you got on this
20 thing, too?
21 MR. HOLLINS: Mm-hmm.
22 BOARD MEMBER JESTER: This thing,
23 this is a little simplified for me.

24 MR. HOLLINS: Okay.

1 BOARD MEMBER JESTER: And it's
2 fine. I don't disagree.

3 MR. HOLLINS: And I appreciate

4 these comments, but this is our first stab at
5 it.

6 BOARD MEMBER JESTER: Yeah.

7 MR. HOLLINS: And you sort of got
8 to live with these documents sometimes and
9 make sure they really do cover the
10 situations.

11 I would, though, at this point,
12 want to also check in with the applicant to
13 make sure.

14 BOARD MEMBER JESTER: Yeah.

15 MR. HOLLINS: Our intention is to
16 make sure this, before it ever gets signed,
17 meets with their approval, meets with your
18 approval, and we will probably ask for your
19 approval tonight, conditioned upon a document
20 that is substantially similar to this, but
21 addresses your other concerns.

22 And so I'd ask, is there any
23 problem with, you know, an emergency-type of
24 situation?

1 MS. HAYES: I don't think there
 2 would be any problem with an emergency. I
 3 don't know that it needs to be in the
 4 document, because it is in an easement area.
 5 And so the problem you have with utilities is
 6 that they always have the right to get into
 7 their facility at any time.

8 BOARD MEMBER JESTER: I totally
 9 disagree with your comment. Respectfully, I
 10 do. But I've been there at midnight when you
 11 got to tear stuff out. I'm an old utility
 12 guy, and maybe that's a negative on this
 13 thing. But when you got to go in there at
 14 midnight, and tear up everything, the owner
 15 has got to know that that can happen, and
 16 that he's going to be responsible. And this
 17 doesn't cover that.

18 MS. HAYES: Well, the letters, I
 19 think, on the approval cover that, as well.

20 BOARD MEMBER JESTER: I don't see
 21 it. And I'm not trying to be ornery or
 22 difficult. This is a great first start, but
 23 it doesn't take care of this thing that
 24 happens all the time.

1 MR. McCUTCHEON: And can I comment
 2 on that just a second?

3 BOARD MEMBER JESTER: Oh, sure.

4 MR. McCUTCHEON: I may be correct;
 5 I may not. But you guys, please interrupt if
 6 I'm incorrect, but the way an easement is set
 7 up is that the utility company has the right,
 8 at any time, if you build anything on it,
 9 they can come in at any time and remove it,
 10 anytime. They don't have to warn you. That
 11 is, as a homeowner with an easement there, I
 12 have to be aware of that. If I built a
 13 fence, and they want to come in two hours
 14 later and tear it down, they don't have to
 15 tell me. That's what I'm doing by putting a
 16 fence on the easement. I'm taking that
 17 chance.

18 And another thing to address
 19 utility companies, my wife works for AEP, so
 20 we're pretty well aware of what goes on
 21 there, but just like utility companies, the
 22 letters you receive from me, from the utility
 23 companies, those additional information in
 24 there looks like they're making me sidestep

1 to agree to dig in my back yard. That's the
2 same thing anybody would get. Most people
3 don't ask for those, because all they do is
4 call OUPS, which is the company you have to
5 call to go in the utility area, and they
6 agree to that without getting those
7 documents, but they're still agreeing to the
8 same thing that I supplied you all.

9 BOARD MEMBER JESTER: I respect
10 your comments, and I have to say on public
11 record that I feel this is a great start, but
12 it needs some more definition. And I'm
13 not -- I just am not comfortable with it at
14 this point in time. I'm sorry to do this,
15 but I think it needs some work.

16 MR. BETZ: Well, one thing we could
17 do is, just under your -- if you approve this
18 with the condition that we add emergency
19 language in here, subject to Gene's approval.

20 CHAIRMAN COOPER: It seems to me
21 that you might be digging a hole for yourself
22 by saying five days on here, and you're
23 saying from the city or public utility, if
24 I'm reading this correctly.

1 MR. BETZ: Yeah. We can't --
2 they're in our easement, and that's where --
3 I don't disagree with what Mr. McCutcheon
4 said last week, but restoration obligation,
5 it all depends on the terms of whatever
6 easement we negotiated. In this case, this
7 is our easement, and, yes, public utilities
8 have access to our easements, but they're
9 still subject to our control, ultimately.
10 Those are the terms of the platted
11 easements.

12 CHAIRMAN COOPER: So AEP would know
13 that this document exists, and know that they
14 have to give five days notice to do any work?
15 MR. HOLLINS: AEP should be going
16 through a process with the city when they
17 want to get in one of our easements and want
18 to do work.

19 BOARD MEMBER JESTER: Well, what do
20 they do at midnight?

21 MR. HOLLINS: I think you're right.
22 If it's an emergency situation, they're not
23 going to ask us first. I don't disagree with
24 that.

1 And the emergency part of it, Dave
 2 and I were discussing we could certainly add
 3 language that basically says, if there's a
 4 failure to comply with the five-day notice,
 5 or if you need to immediately take it -- we
 6 need to immediately take it down, in an
 7 emergency situation, what's going to happen
 8 is we or the utility are going to take it
 9 down. Replace it.

10 BOARD MEMBER JESTER: I can tell
 11 you, if people are out of service, the fence
 12 will come down. And the question, what I
 13 don't want to have happen, is the homeowner
 14 coming back on the utility, and saying, you
 15 tore down my 8,000 dollar fence. I want
 16 protection that the City of Powell and the
 17 utilities are all laid out, and all these,
 18 this one and in the future, because I think
 19 that's pretty wide open. You know, tonight
 20 if they go out there and tear it out, I mean,
 21 the land owner is going to come back very
 22 quickly, and say, wait a minute; you tore my
 23 fence down. You did that. I didn't. You
 24 pay for it. And I see that happening.

1 CHAIRMAN COOPER: But I think the
 2 point is taken, Joe. I think this document
 3 will be amended to address emergency
 4 situations.

5 MR. HOLLINS: Correct. Yeah. We
 6 can do that.

7 BOARD MEMBER HILES: Would you be
 8 comfortable with that, Mr. McCutcheon, to
 9 amend this for that, that statement?

10 MR. MCCUTCHEON: Sure, as long as
 11 it's agreeable.

12 I mean, I think what we will have
 13 to face here is an emergency situation they
 14 still have to call OUPS, who has to come in
 15 and lay out the lines, because you still
 16 can't dig unless you know where something is.
 17 So it all takes a little time.

18 I'm not concerned about it.

19 CHAIRMAN COOPER: Ms. Hayes, do you
 20 have any comments about this?

21 MS. HAYES: I -- you know,
 22 emergency language, again, it's my position
 23 that I believe they have the right to come
 24 into it anyway. So -- and he, you know,

1 places a fence there at his peril.
 2 So I'm comfortable with you adding
 3 emergency language.
 4 CHAIRMAN COOPER: All right.
 5 BOARD MEMBER HILES: With making a
 6 motion here, now, we're going to say with the
 7 emergency language added.
 8 And then you will work that out
 9 with the McCutcheons, Attorney?
 10 MR. HOLLINS: Yes.
 11 CHAIRMAN COOPER: You want to make
 12 a motion?
 13 BOARD MEMBER HILES: I would make a
 14 motion to approve the appeal with the
 15 stipulation that the language we spoke of
 16 will be added.
 17 CHAIRMAN COOPER: To the
 18 declaration of covenant.
 19 I'll second.
 20 MS. ROSS: Ed Cooper?
 21 CHAIRMAN COOPER: Yes.
 22 MS. ROSS: Robert Hiles?
 23 BOARD MEMBER HILES: Yes.
 24 MS. ROSS: Joseph Jester?

1 BOARD MEMBER JESTER: No.
 2 CHAIRMAN COOPER: We have any
 3 further business, new business?
 4 MULTIPLE SPEAKERS: No.
 5 CHAIRMAN COOPER: Do I hear a
 6 motion to adjourn?
 7 BOARD MEMBER JESTER: So moved.
 8 BOARD MEMBER HILES: Second.
 9 CHAIRMAN COOPER: Adjourned.
 10 - - - -
 11 Thereupon, the proceeding was
 12 concluded at 6:19 p.m.
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CERTIFICATE

1 The undersigned do hereby certify that
 2 the foregoing proceedings were digitally
 3 recorded, electronically transmitted, and
 4 transcribed via audible playback, and that
 5 the foregoing transcript of such proceedings
 6 is a full, true and correct transcript of the
 7 proceedings as so recorded.

8 IN WITNESS WHEREOF, I have hereunto set
 9 my hand and affixed my seal of office at
 10 Columbus, Ohio, on this 13th day of
 11 March, 2008.

12
 13 Kristie J. Hatala
 14 KRISTIE J. HATALA
 15 Certified Digital Reporter
 16 Notary Public - State of Ohio.

17 My commission expires August 1, 2012.

18
 19 Adelle Moorehead
 20 ADELE L. MOOREHEAD
 21 Certified Digital Transcriber
 22
 23
 24

1 ORIGINAL
 2 HEARING OF: W. MARTIN MCCUTCHEON, BZA
 3 DATE OF DELIVERY:
 4

5 CITY OF POWELL
 6 47 HALL ST
 7 POWELL, OH 43065

8 S.D. Ross
 9 MS. SUSAN ROSS

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