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BEFORE THE CITY OF POWELL

BOARD OF ZONING APPEALS

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IN RE: :

W. Martin McCutcheon :

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Proceedings before Chairman Ed Cooper,  
Member Robert Hiles, and Member Joseph  
Jester, taken at 47 Hall Street, Powell,  
Ohio, on Thursday, February 28, 2008, at 6:01  
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.

16 ALSO PRESENT:

17 Mr. David Betz  
18 Mr. Mason Janczak  
19 Ms. Susan Ross  
20 Mr. W. Martin McCutcheon  
21 Ms. Crystal McCutcheon

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

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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 Cheliway  
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. Holick?

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 "buts" 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.

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11 Thereupon, the proceeding was  
12 concluded at 6:19 p.m.

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CERTIFICATE

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

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Columbus, Ohio, on this 13<sup>th</sup> day of March, 2008.

Kristie J. Hatala

KRISTIE J. HATALA  
Certified Digital Reporter  
Notary Public - State of Ohio.

My commission expires August 1, 2012.

Adele Moorehead

ADELE L. MOOREHEAD  
Certified Digital Transcriber

1 ORIGINAL

2 HEARING OF: W. MARTIN MCCUTCHEON, BZA

3 DATE OF DELIVERY:

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5

CITY OF POWELL  
47 HALL ST  
POWELL, OH 43065

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7

A handwritten signature in cursive script, appearing to read "Susan Ross", is written over a horizontal line.

8

MS. SUSAN ROSS

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