

**MINUTES OF THE HOLLADAY CITY
BOARD OF ADJUSTMENT MEETING**

Tuesday, September 11, 2007

6:00 p.m.

City Council Chambers

4580 South 2300 East

ATTENDANCE

Board Members:

Barbara Dunn, Chair
Michael Blackham
Carrie Greenberg
Wayne Janssen
Michael Pusey
Dominic Welch

City Staff:

Paul Allred, Community Development Director
Jon Teerlink, City Planner
Doug Brewer, Code Enforcement Officer

1. Agenda Items – Welcome – Barbara Dunn, Chair.

Chair Barbara Dunn called the meeting to order at 6:04 p.m. and welcomed those in attendance. Board Member Greenberg read the Chair statement.

2. Staff Report on Application – Matt Flegal – 4510 South 2800 East – Request for approximate four-foot variance from Chapter 13.76.710(B) Fences of the Holladay City Code to maintain an existing fence in a residential area in excess of six feet in height.

(18:08:48) Community Development Director, Paul Allred, presented the staff report and stated that the matter involved a variance request on the Flegal property located at 4510 South 2800 East. The property was currently zoned R1-8 meaning that the property in question has to have at least 8,000 square feet in area. The Flegal property was significantly larger than that, however, in staff's opinion zoning was not the relevant issue in this case. In fact, many issues had been raised about the property. He did not intend to address issues deemed irrelevant to the matter at hand. He suggested the Board do the same. The issue was whether a fence that has been constructed on the property could be taller than six feet. Staff had visited the site on numerous occasions and most recently took measurements.

The issues were as follows:

- The applicant artificially raised the level of his land in conjunction with the installation of an in-ground pool.
- The applicant built a fence around a portion of his yard for privacy and safety that is taller than allowed by Code. The Code was very clear that six feet is the maximum. The six feet was measured from natural grade.
- The general slope of the land was downward from east to west and downward from north to south. The lowest corner of the yard is the southwest corner. That was also the portion of the yard where the pool is located and the fence height is greatest from natural grade.

- When the fence was installed, complaints were received about the overall height. Staff inspected the fence and took pictures some time ago and informed the owner that the fence was too tall at that time. The applicant was instructed to take the fence down. There was some miscommunication over the summer between the applicant and staff about whether or not he could present his case to the Board of Adjustment. The applicant was encouraged to go to the Board after he visited the City Council and asked them to allow the fence. The matter was delayed because of miscommunication on the part of staff. Staff apologized for that delay. The applicant was allowed to make application with the Board of Adjustment to bring the issue forward.
- As staff measured the fence, the highest point from natural grade was measured on both the south and west sides of the property at 10'2". Staff had heard claims that it was taller than that, but they were careful to measure from the natural grade several feet outside the property line to get an exact height. Staff found it to be almost exactly the same height on both the west and south sides of the property.

(18:12:27) Mr. Allred explained that the applicant was informed of the infraction some time ago and was told that he would have to mitigate the situation. The applicant had come to the Board to ask for a variance. Mr. Flegal was informed of his options regarding fence height and was notified that there was a violation.

In staff's analysis, the Board of Adjustment should review the application and the arguments in light of the five-part test set forth in the State Code. State law was explicit that the applicant must meet all five parts of the test to be approved. The questions raised by staff were:

- Is the need to have a fence that exceeds the ordinance as explained by the applicant self-imposed or economic?
- Is the variance essential, instead of convenient, to the reasonable use of the property?
- Is the situation of the additional fill material with the fence on top peculiar only to this property, or throughout the community? Was there something about the nature of the property that would make for an argument that the fence should be allowed to stay? Generally, in variance situations, the goal was to look for an inherent problem with the land itself that cannot be mitigated any other way. He knew of only a few instances where that was actually the case.
- If not, does this situation affect the property differently than others in the area?

Mr. Allred identified other issues that the Board may wish to consider:

- What is the impact, if any, if the variance is allowed on any nearby property?
- What is the importance of the fence height rule in the overall land use scheme of the City?
- If the variance is not granted, what will be the potential of forcing the applicant to remove the fence? Would removal of the fence decrease the value of the home, have a negative impact on abutting properties, or result in needless distress to the property owner or others?
- Are there other mitigating circumstances that have not been included in the report?

Staff believed the questions posed were central to making a proper determination. Mr. Allred

recommended the Board made a careful examination of the site, review the application, listen to public input, and listen to the report from the applicant.

(18:14:59) Mr. Allred stated that notice was sent to the neighborhood of tonight's meeting. The purpose of the notice was to solicit public comment. The matter was scheduled as a public hearing. Staff members were present to answer any questions. City Planner, Jon Teerlink, had been on the site several times and worked with Code Enforcement Officer, Doug Brewer. Mr. Brewer was involved in sending the notice to Mr. Flegal informing him that the fence was in violation.

Chair Dunn asked what options were available to the applicant. Mr. Allred stated that sometimes in an effort to work things out, citizens are encouraged to work with their neighbors on an issue they might have. At one point in the process, the applicant was encouraged to speak with one of the neighbors who had a concern with the fence. He stated that the City would handle several hundred complaints this year with one part-time person to handle them all. Often situations were handled on a priority basis. At times staff reserved the right to enforcement in abeyance, which means that although there is a violation, the City will not enforce it if there is harmony in the neighborhood about a situation. Staff attempted to resolve the situation, however, it was unsuccessful, which was the reason the matter was before the Board.

(18:18:40) Mr. Allred stated that other options would be to reduce a portion of the fence height. The issue was that there were portions of the site that had been filled approximately four feet and then the fence placed on top, creating a total height of 10 feet. That much fill was not added all the way along the property long as far as staff could tell. Staff suggested it be stepped down and adjusted to meet the requirement. Other options were recommended. Mr. Allred recommended, however, that the Board deal only with the issue of the fence tonight recognizing there were other issues with the property.

In response to a question raised by Board Member Welch, Mr. Allred stated that the fence was fairly uniform in height and taller than six feet. He estimated it was about 6'3" in height standing next to it. The grade change was greatest in the southwest corner, which was where the greatest violation of the fence regulation was located. Staff was very careful about how they measured the fence and did so numerous times. Fencing requirements were discussed. Mr. Allred explained that the issue tonight was what had happened in this instance. He explained that the ordinance was pretty hard and fast and before the property was disturbed, the applicant would be allowed six feet. He viewed it as a fall issue. He stated that at some point the City would have to draw the line. He stated that Salt Lake County probably issued fence permits and had different rules than the City. Many today were probably building a fence or wall not knowing they need a permit and a review from staff. He remarked that there were approximately 9,500 homes in the community.

Mr. Allred was asked to discuss the Utah Building Code for guardrails. Mr. Allred responded that the International Building Code requires at least a 42-inch barrier for a fall hazard. Any drop off over two feet had to be protected.

(18:24:22) Chair Dunn invited the applicant to come forward.

The applicant, Matthew Flegal, gave his address as 2800 East 4510 South. In the beginning, they approached their side and rear neighbors and told them they would be putting in a swimming pool, level the site out, and put a fence up. They put the fence up without checking on height restrictions. Besides privacy, they were concerned about safety for the pool. As they were in the process of installing the pool, their pool contractor stated that he would not finish the pool without a six-foot fence. Their homeowners' insurance also required them to have a minimum five-foot fence around the pool. He tried to work with the neighbor that complained. The neighbor was fine with the fence, but due to other situations with their property, was using the fence as leverage against the Flegals.

Mr. Flegal spoke to others in the neighborhood and obtained signatures from neighbors who were in favor of the fence as built due to safety. He explained that the pool utilized a salt water system that does not use chlorine. One to two times per month the pool cover is removed and acids added to keep the chemicals balanced. The chemicals need to circulate without the cover on.

Mr. Allred recalled also that privacy was a significant issue for the Flegals. Mr. Flegal agreed and stated that their main concern was the safety of the pool. The height of the fence was also of concern since the fence in one place would be two feet high on his side and have a six-foot drop on the other.

Chair Dunn was aware that one of Mr. Flegal's neighbors was unhappy with his fence and asked if there were others who were opposed. Mr. Flegal responded that of the people he spoke with, there were three couples that either did not want to get involved or didn't care. Safety was the main concern of his neighbors as well. In response to a question raised, Mr. Flegal stated that construction of the fence began approximately one year earlier.

(18:35:56) Chair Dunn opened the public hearing and invited those in support of the applicant to speak.

Jack Peake gave his address as 2794 East 4510 South and stated that his property was on the west side of the Flegal's property. He commented that the only place the fence is 10 feet high was on his side of the fence. In Mr. Flegal's backyard his property shows a six-foot fence. In reality there were two fences; a six-foot fence on Mr. Peake's side of the property, the retaining wall on Mr. Flegal's property, and Mr. Flegal's fence on top of that. Mr. Peake thought this was a petty grievance having to do with something else. His problem was that if the fence were taken down, there would be a safety issue. With a four-foot retaining wall there would have to be either 36 or 42 inches of guardrail on top. Adding those numbers together equated to well over seven feet. Regardless, something would be needed if the retaining wall remained. He had no objection to the fence and stated that it had become a place for him to grow ivy. The objection could not pertain to the view since the view before was less than what was there presently. Previously there were untrimmed trees on the site that were 25 feet high. Had the original trees been trimmed, the Flegal's could have left the original landscaping and none of this would have happened. The previous owners had dogs on the property and Mr. Peake put his fence up simply because the backyard was being used as a dog run. The garage that the Flegals tore down was a "rat-infested mess". The Flegals had done nothing but improve the property since they moved in. He had no serious concerns with the existing fence but would have concerns if the fence

were torn down. He would then have liability issues of his own since a small child could fall from the four-foot retaining wall onto a concrete surface on his property.

(18:40:41) Rosalind Newren gave her address 2740 East 4510 South. When the issue came up she went around the neighborhood and took pictures of fences. Copies of the pictures were provided to the Board. She understood that the City had imposed a six-foot requirement, but noticed that the terrain in the City lent itself frequently to a need for a variance. The need for adaptations may arise from factors such as flood prevention, safety, aesthetics, privacy, and insurance requirements. The City did not seem to have an ordinance pertaining to fence heights. It was Ms. Newren's understanding that the Flegals obtained authorization to install the pool. That implied that some safety standards should be met. She supported the variance and noted that a six-foot fence was required by the Flegal's insurance company for the safety and liability of others. She stated that the fence was well constructed and the pool and fence enhanced the property. She stressed that the fence did not interfere with the scenic view of any of the neighbors.

Chair Dunn next invited those opposed to the variance to speak.

(18:44:20) Dr. Barbara Mandleco gave her address as 2815 Wanda Way and stated that she lived on the southwest corner of the Flegal's property. Her husband was unable to be present. She stated that a woman directly south of the Flegals, by the name of Doris Billingsley, was ill. She knew for a fact that when the pool was being built the previous summer that Mrs. Billingsley was opposed to it. She commented that this was just one of many issues they had had with Mr. Flegal relative to Holladay codes and variances. The other concern she had was that Mr. Flegal was given notice the previous January to resolve the fence issue. She was concerned that he was laughing in the face of the ordinances. Because of other concerns they had with the property, she believed this was just the beginning of other problems. Dr. Mandleco's husband spoke to Mr. Flegal the previous winter and they made an agreement about certain things. Mr. Flegal did not follow through on those agreements. Dr. Mandleco's impression was that the pool was started before permission was granted. Instead of removing the dirt when building the pool, they piled it next to and under the pool. That was part of their other issue. Dr. Mandleco submitted pictures to be added to staff's file. Dr. Mandleco stated that there were issues other than the fence and she did not think the fence looked very safe from her side. It was noted that no complaint was received from Mrs. Billingsley.

In response to a question raised, Dr. Mandleco stated that she and her husband had an issue with the fence when it was being built the previous summer. They contacted the City about it and complained. When her husband met with Mr. Flegal, Mr. Flegal stated that he had a lot of expenses and it would be too costly to take the fence down and the pool out even though he knew it was against code. Her husband asked him to address other issues. The other issues were never resolved. This was only one instance of Mr. Flegal violating the Code. She stated that they and Mr. Flegal came to some agreement with regard to the fence as long as other issues were taken care of. The other issues were not resolved. Mr. Mandleco again contacted the City and nothing was done. The Mandlecos did not think the fence was appropriate, however, when the other issues were not resolved, the fence issue came up again. She stated that there were numerous other violations related to the property, but they were only dealing with one tonight. She thought the issue should have been resolved in the summer of 2006 when the pool was built.

(18:52:15) Mr. Allred stated that to his knowledge the pool had passed all of its inspections and was operable. The issue staff had with the pool originally was that on the plan submitted to the City, there was no indication of a grade change. It seemed to be devoid of that information. He thought there was a disconnect between what was represented on the plan and what was built. The fact that the pool met the building code requirements did not change the fact that the natural level of the land was built up. That was where the problem stemmed from.

Mr. Allred explained that many cities require any property with a pool to have a six-foot fence with an enclosure. The building code now says that with an automatic pool cover, there is no need for a six-foot fence. The City deferred to the requirements of the International Building Code. The applicant stated that his pool had an automatic cover.

Dr. Mandleco stated that they started complaining the previous summer before the pool was built. She pointed out that when neighbors complain, the applicant should do something immediately to make sure they are in compliance with the Code. Part of their concern was that it had been one calendar year since the fence and pool were put in. Mr. Flegal had received two letters from the City stating that he was to resolve the issues. Dr. Mandleco was concerned that the City was not enforcing its ordinances.

(18:55:55) Dr. Javier Saenz gave his address as 2787 East 4510 South where he had resided for the past 45 years. He thought the Flegals had done wonders for the property and saw it mostly as an issue of control rather than the reality of what was happening. If he were building a pool under the same circumstances with small children, he would build a 20-foot fence. He thought the Flegals' actions were to address safety. He wondered if the safety of children should be considered above everything else. He expressed support for the fence.

There were no further public comments. Chair Dunn closed the public comment portion of the meeting.

Board Member Pusey stated that by right the six-foot fence along the outside meets the letter of the law. The safety concern he saw was with Mr. Flegal protecting his own property and children from falling over the top of the six-foot fence outside of the retaining wall. The Code requires that any time there is a drop of more than two feet, there must be a 3'6" barrier or guardrail. He also thought the pool cover met the Code requirements. He encouraged the Flegals to be home when evaporating chemicals into the pool and the cover is off. He hoped the City and Mr. Flegal could reach a solution to the fall off issue. He was unsure there was one, however. He recognized that the fence was totally noncompliant with the ordinance.

Board Member Janssen stated that he was in the insurance business and up until 10 years ago, insurance companies never cared about the fence problem. In the last five years, anytime he sells a homeowners policy to someone, it must have a five or six-foot fence around it. The same restrictions applied to trampolines. It was a safety factor. He stated that from one side of the fence, Mr. Flegal had done the right thing, however, from the other side there was a problem.

(19:02:32) Board Member Greenberg asked how the Board was to consider the insurance company's request. She did not see that it was a self-imposed requirement. Mr. Allred stated

that staff believed it was not their job to enforce what the insurance company may require. Staff's main concern was to state that the grade was changed. If the grade had not been changed, a cover could have been put on the pool without the need for a six-foot fence and there would have been no insurance problem. The insurance requirements were irrelevant to staff. The Code did not and could not take that into account in every instance. The problem arose from the grade being changed.

Board Member Welch sympathized with the homeowner. He also had a pool and after seeing the request, he was shocked to learn that six feet was the law. He measured his fence and found that it was six feet. He had privacy through trees and safety through a pool cover. He thought they all were side issues. He remarked that the fence was in violation of the Code. The only question was whether the Board could justify it through one of the legal avenues available. He believed the Board had no choice since the applicant was clearly in violation.

Board Member Greenberg agreed that it was a violation of Code but thought the Board had a choice and could require a guardrail of a certain height. She thought the Board should determine an appropriate height for a guardrail.

Board Member Blackham thought the situation was an interesting one. The family improved the property and the fence was nice from the homeowner's property. Most of the neighbors agreed that the fence was necessary for safety. When Board Member Blackham viewed the fence from the neighbor's house to the west, he did not think the fence was very attractive. The neighbor, however, had no objection to it. One neighbor had a very small portion of the fence on their property but seemed to be using the fence as leverage for other unresolved issues. He found that troubling. Paramount to him was the safety of the children that will be in the yard. The City was in a difficult situation in that if they suggested the fence be lowered, the homeowner would have a difficult time obtaining homeowners' insurance. He realized that was not something the City should be concerned with. The City's concern pertained to the fence. He thought it was obvious that the fence was out of Code. He thought the real issue was that the one complaining neighbor had an issue with the fence as leverage against other issues on the property. He wondered if, during the meeting between the neighbor and Mr. Flegal, whether any solutions came to light.

(19:10:32) Chair Dunn agreed that the situation was a difficult one. She recognized there were some safety issues with regard to the retaining wall and a shorter fence. She asked Board Member Pusey about the Code requirement he brought up with regard to the retaining wall. Board Member Pusey explained that the Code states that if there is a change in grade of over two feet, it must be protected with a guardrail. Inside the residence it can be 36 inches high; outside it had to be 42 inches. He believed the problem was self-imposed.

Chair Dunn asked Mr. Allred how much of the grade had been changed in the rear yard. Mr. Allred responded that the greatest change was about four feet in the far southwest corner. From staff's perspective, when the grade is changed the property owner gives up the right to have a fence in the way they want it. Chair Dunn asked what portion of the property the grade change affected. Mr. Allred was unsure but stated that Mr. Peake explained to him approximately where the grade was. He informed staff that the property undulated in some areas, but most of the grade change occurred in the far southwest corner.

(19:19:16) Mr. Allred reiterated to the Board that the issue of the fall hazard was somewhat irrelevant. Because of the way the property was sloped originally, if the applicant hadn't filled it, there would be no fall hazard. The fact that Mr. Flegal filled that property was not a violation. The violation was when the property was filled and a six-foot fence was put in on top of it. Board Member Pusey thought the fall hazard could be mitigated through plantings. A fence was not necessary. Mr. Allred stated that no fence was needed because the property owner had a pool cover. The insurance was not the issue.

(19:21:36) Chair Dunn moved to deny the request for the fence variance on the basis that it does not meet the five-part test, which measures the Board's decision. It seemed from staff and the testimony of Mr. Flegal that the retaining wall and the fence are self-imposed and while essential for safety, may not be essential at 10 feet. There was additional fill material added to the site in violation of the Code. She stated that not everyone in the neighborhood had been able to add fill to their yards. While it may affect the neighborhood and others in the area in a difficult manner with regard to safety, she was not certain that it was a right belonging to the homeowner. Board Member Welch seconded the motion. Vote on motion: Wayne Janssen-Aye, Carrie Greenberg-Aye, Dominic Welch-Aye, Michael Pusey-Abstained, Michael Blackham-Aye, Barbara Dunn-Aye. The motion passed.

It was difficult for Chair Dunn to vote against homeowners when she would rather vote yes. While she could see that letters had been written to the applicant, she also could see how the City had tried to work with the neighborhood to resolve the situation. Unfortunately, that was not the case. She thought it was difficult to encourage homeowners to move forward if there is one vote in disagreement.

(19:25:23) Mr. Allred stated that staff struggled with the same issues and recognized there were competing interests. He remarked that as a department, they had embarked on generating more discussion with the City Council and Planning Commission on these issues. From time to time, staff writes articles in the City's newsletter where they encourage property owners to contact the City who tries inform and educate people to avoid these types of problems. Staff agreed to sit down and help in the situation. During the rewrite of the zoning ordinance this coming year, staff would encourage the Council to reexamine the fence issues and perhaps look at the City's standards to see where allowances could be made.

Chair Dunn thought graduation of the fence line to the back slope area might be a possible solution to help the homeowner. She did not see the necessity of taking down the entire fence. The neighbors were encouraged to be patient with the City.

3. Review and Approval of Minutes – November 1, 2006, May 22, 2007, and July 17, 2007.

(19:29:56) Board Member Greenberg requested that the minutes be distributed sooner in the future. Chair Dunn stated that it was a previous problem that had been resolved.

Chair Dunn referred to page 6, line 17, of the November 1, 2006, minutes with regard to the Utah League training. Chair Dunn clarified that the comments were actually made by Board Member Greenberg.

(19:32:01) *Board Member Welch moved to approve the minutes of November 1, 2006, as amended. Board Member Pusey seconded the motion. Vote on motion: Wayne Janssen-Aye, Carrie Greenberg-Aye, Dominic Welch-Aye, Michael Pusey-Aye, Barbara Dunn-Aye. The motion passed. Michael Blackham did not participate in the vote.*

To the May 22, 2007, minutes Mr. Allred referred to page 1, line 46, and suggested “Cooley Rule” be put in parenthesis. To line 29, of page 2, he suggested the word “opinion” be changed to “recommendation”. He noted that on page 5 there was a double period that should be corrected. On page 7, line 27, “One Board Member” should be changed to “Board Member Greenberg”. To page 8, line 28, he stated that the intent was to indicate that it was appropriate for the City to find a way to reappoint Henry Kesler. Staff explained that at the time, Board Member Kesler could not be reappointed due to rules in place. Chair Dunn did not recall that. It was suggested that the minutes remain as written. On the next line, he suggested “that” be changed to “the Board’s recommendation”.

(19:35:48) *Board Member Pusey moved to approve the minutes of May 22, 2007, as amended. Board Member Janssen seconded the motion. Vote on motion: Wayne Janssen-Aye, Carrie Greenberg-Aye, Dominic Welch-Aye, Michael Pusey-Aye, Barbara Dunn-Aye. The motion passed. Michael Blackham did not participate in the vote.*

The minutes of July 17, 2007, were reviewed. Mr. Allred referred to page 1, line 28, and suggested “former Chair Henry Kesler was no longer an active member” be changed to “Henry Kesler’s term had expired six months prior”. On page 1, line 35, there was a double period typo. To page 2, line 12, he suggested “special exceptions” be changed to “special exceptions/exemptions”. He thought that was a special distinction. He suggested the change be made throughout the document. To page 1, line 18, “Blackburn” should be changed to “Blackham”.

(19:39:15) *Board Member Janssen moved to approve the minutes of Tuesday, July 17, 2007, as amended. Board Member Welch seconded the motion. Vote on motion: Wayne Janssen-Aye, Carrie Greenberg-Aye, Dominic Welch-Aye, Michael Pusey-Aye, Barbara Dunn-Aye. The motion passed. Michael Blackham did not participate in the vote.*

4. Other Board Business.

It was suggested that the Board coordinate their site visits. Chair Dunn stated that in the past the Board had coordinated at 8:00 a.m. for those who could visit properties. It was noted that the Board was informed not to do that. Mr. Allred stated that the Board could field trip as a group, however, there would need to be public notice provided. If a member of the public wanted to come along, they were welcome to. He explained that once there is a quorum it is considered a public meeting. Some liked the idea of field tripping but there was question as to whether it was appropriate to discuss the findings as a Board after the field trip. Chair Dunn stated that it was not appropriate to discuss and form an opinion prior to coming to a meeting. The variables of the issue, however, could be discussed. Judgment of an issue should be reserved until the Board has heard from the public since it would always have an impact on what is considered.

(19:44:00) Mr. Allred stated that in terms of the Board there may be a couple of issues coming up in the next few weeks. One was a detached structure on a very difficult lot. It seemed to have

a very good case for hardship. Another dealt with a land use issue similar to the one addressed tonight.

5. Adjourn.

(19:45:11) Board Member Janssen moved to adjourn. Board Member Greenberg seconded the motion. Vote on motion: Wayne Janssen-Aye, Carrie Greenberg-Aye, Dominic Welch-Aye, Michael Pusey-Aye, Barbara Dunn-Aye, Michael Blackham-Aye. The motion passed.

The Board of Adjustment Meeting adjourned at 7:45 p.m.

I hereby certify that the foregoing represents a true, accurate, and complete record of the Holladay City Board of Adjustment Meeting held Tuesday, September 11, 2007.



Teri Forbes
T Forbes Group, Inc.
Minutes Secretary

Minutes approved: 10-24-07