

*BZA minutes are transcribed in a summarized manner. Video footage is available for viewing in the (CATS) Audio-visual Department of the Monroe County Public Library at 303 E. Kirkwood Avenue. Phone number: 812-349-3111 or via email at the following address: [moneill@monroe.lib.in.us](mailto:moneill@monroe.lib.in.us)*

The Board of Zoning Appeals (BZA) met in the Council Chambers at 5:30 p.m., members present: Aquila, Hoffmann, and Klapper (Throckmorton and Neher absent).

**APPROVAL OF MINUTES:** May 18, 2017

**\*\*Klapper moved to approve the 5/18/17 minutes. Hoffmann seconded. Motion carried unanimously by voice vote.**

**REPORTS, RESOLUTIONS AND COMMUNICATIONS:**

James Roach, Development Services Manager, made the point that we have a quorum but it's a bare quorum so it would take a unanimous action of the board to make an action of either approval or denial. Also, the second case on the agenda is unusual in that it's a request to rehear a petition which we don't do very often. Prior to the discussion, I'll go over the history and procedures involving that particular case.

**PETITIONS:**

- UV-04-17 **Lewis Development Company**  
200 S. Washington St., 114 E. 4<sup>th</sup> St., 121 E. 3<sup>rd</sup> St.  
Request: Use variance to allow the use "drive through" in the Commercial Downtown (CD) zoning district.  
*Case Manager: Jackie Scanlan*

Jackie Scanlan (Sr. Zoning Planner) presented the staff report. The site is .40 acres and zoned Commercial Downtown (CD) and in the Downtown Core Overlay (DCO). The property currently contains the Fifth Third Bank. The Growth Policies Plan (GPP) designation is downtown. Surrounding uses are parking lots to the north, east, and south; office building with parking lot to the west. The petitioner is requesting a use variance to allow the use drive-through. Currently, there is an existing drive-through at the bank location. Drives-through are not permitted uses in CD zoning district. The petitioner is requesting redevelopment on the lot for a 4-story, mixed-use building that has already gone to the Plan Commission and received conditional approval. As part of the redevelopment effort the petitioner would like to leave the existing Fifth Third Bank on the site, including the drive-through amenity to the side which is the northern portion. GPP guidance suggests retention and expansion of existing businesses in our downtown area as well as emphasis on re-use of vacant and underutilized commercially zoned sites, while new surface parking areas and drives-through uses should be limited if not forbidden in the downtown area. The guidance is intended to protect and improve the pedestrian experience in the right-of-way along our private parcels, which is often threatened by the use of new drives-through. Overlay intent; the guidance suggests furthering a focus on mixed uses downtown which we often see. The site plan does include protection and enhancement of existing businesses and buildings. The BZA guidance for Commercial Downtown also suggests that the downtown be targeted for intensified usage of, again, vacant and underutilized buildings and sites. Peculiar condition is found in the existing condition of the site. You can see the Google street view--the northern part of the parcel; you can see the existing exterior drive-through which the site currently contains. It's a typical drive-through. The site along with the vacant parcel to the south are part of the

redevelopment proposal. So the approved redevelopment site plan will allow for the existing building to remain while additions are added on top of it. And you can see to the east, it would enclose the existing drive-through and you wouldn't be able to see from the road except for the entrance into a garage. Hardship is found in that compliance requires removal of an existing drive-through and an existing business in our downtown. The drive-through will actually become less visible with the proposed plan. Approval of the variance would allow continued operation of an existing business in the downtown area while not increasing the visual or safety burden on pedestrians along 4<sup>th</sup> Street. The Plan Commission made a positive recommendation regarding the drive-through use variance at its April 17 hearing with a 9:0 unanimous vote. Staff recommends the Board of Zoning Appeals adopt the proposed findings and approve UV-04-17 with the following conditions:

1. Approved subject to all terms and conditions of Plan Commission site plan #SP-16-17.
2. The drive-through use shall only be a permitted use for a bank. A *Zoning Commitment* to this effect must be signed and recorded prior to the release of a building permit.

Mike Carmin, petitioner's representative, said there have been three similar variances in the past: First Financial Bank, the German American Bank, and the Old National Bank at Lincoln and Kirkwood. It's close to this and it empties onto an alley when you come out of the drive-through, just like this one will. The drive-through would come off of 4<sup>th</sup> Street, come through the covered area past the bank, and then empty out into the 20-foot alley. The alley will actually be improved and it becomes the primary access to the parking garage, which is part of the project to the south. It will be completely covered (interior). Again, the Old National Bank building is similar to this. The hope is to keep Fifth Third Bank as a long-term tenant of the property, and of course, the drive-through is for their operations.

No public comments.

**\*\*Hoffmann moved to approve UV-04-17 based on the written findings, including the two conditions outlined in the staff report. Klapper seconded. Motion carried 3:0 by voice vote —Approved.**

- V-09-17      **Alisan Donway**  
1302 E. 2<sup>nd</sup> St.  
Request: Variance from maximum fence height standards.  
*Case Manager: Amelia Lewis*

***Note: Roach said the BZA will need to vote in order to re-hear petition #V-09-17 per the BZA Rules of Procedure, Article VII, Section F.***

Roach explained this petition was heard at the May meeting and denied by the board. A couple of things to note. Staff failed to send the petitioner a copy of the staff report before the meeting which is typical practice. As soon as the report is written and published, Staff sends it out to the board members and all interested parties including the petitioner. In this case, we made a mistake. The petitioner did not have an opportunity to read the report and formulate her presentation to the BZA based on the recommended proposed findings. In addition, there were two factual errors in the report that I would be happy to outline. At that point, the board denied the

petition. Due to those circumstances, the petitioner is now requesting that the board re-hear this petition. The Rules of Procedure are very specific. For cases that have been denied by the board, a petitioner must either wait 6 months to be heard again or they can be heard within 6 months, but it takes a unanimous vote of the board members present. Roach urged the board to allow the petitioner's case to be re-heard. Staff believes in the interest of service to the community, service to the public and due process. Staff recommends that you allow the petitioner 5 minutes to make her case for why she should be reheard but that's up to the board. Roach said there were some factual errors about where the fence would be located as well as how long it was. The report mentioned that the fence would come off of the southeast corner of the house and extend 132 feet. It's actually coming off the southwest corner and extending 69 feet; 132 feet was the length of the property and not the length of the fence. The diagrams and drawings presented in the packet and presentation were correct, but the description of the fence was incorrect in the staff report. The second error was that E. 2<sup>nd</sup> Street was identified as a classified street. In fact, it's a neighborhood street and not a classified street.

Sue Aquila asked if the packet link was available online prior to the hearing.

Roach said it was. However; I don't believe the petitioner was aware of that though.

Aquila said when a petitioner files a petition are they notified that all of the information will also be available online?

Roach said not regularly. Regular architects, developers, and engineers are aware of that.

Aquila: Even on the checklist the petitioner has to review?

Roach said I don't have the checklist available at the moment. I don't believe it's mentioned though. I believe the checklist may say that the packet will be forwarded the applicant.

Barre Klapper said she's inclined to re-hear the case. Joe Hoffmann said he's fine with it as well.

**\*\*Hoffmann moved to give the petitioner an opportunity to explain why the Board should hear her petition a second time. Klapper seconded. Motion carried 3:0 by voice vote.**

Aquila advised the petitioner that she only had 5 minutes to discuss why the board should re-hear it.

Alisan Donway, petitioner, supports the Planning Department's recommendation for a re-hearing of her petition. Although the Staff's slip up in not sending an advance copy of the report and recommendation was accidental and may seem merely procedural, it had a major due process effect on the previous hearing. She isn't a lawyer who can rebut arguments. She hasn't had a single experience of arguing for herself in a quasi-judicial hearing like this one. She came prepared to speak at the previous hearing only as she would to neighbors with nothing but a shared general sense of what is reasonable. At the previous hearing, there was technical language based on the Unified Development Ordinance (UDO) and she was unable to adequately respond. She has now received a copy of the new staff report produced by the Planning staff, which is significantly different from its previous report. In fact, the previous report contained a significant factual error about the proposed fence which this report corrects. She hoped the board would fully recognize the error and correction. She is now prepared with a statement that thoroughly rebuts on the basis of the UDO's wording; the Staff's new arguments for denying the requested variance. In her opinion, it would be grossly unfair for the BZA to refuse

to hear her case a second time. She believes Sue Aquila voted against her original petition on the basis of an ideological principle that appears to have no basis in the UDO. Aquila's grounds for opposing the petition can be heard in full in the recording of the previous meeting, which is available through Community Access TV (CATS). She respectfully submits to the board that what the UDO and the community has decided is that back yards are private living spaces, and therefore people have an understandable and legitimate desire to shield their back yards completely from prying eyes. The UDO and the community that wrote it has decided that nearly all Bloomington residents need to be able to surround their back yards with 6 to 8-foot high fences. There is no indication in the UDO that the community has decided that tall fences isolate people. We have decided that good fences make good neighbors. Further, the back yards of corner lots like the back yards of other lots, still need to function as private living spaces of the homeowners. The UDO sets specific fact-based criteria on the basis of which the greater restrictions on corner lots can be waived by the BZA. In her opinion, it's the board's responsibility to weigh objectively and impartially residents' arguments that the criteria for a variance have been met. Donway requested that Sue Aquila recuse herself from the discussion involving her petition. Aquila said she had spoken to the City Attorney but did not contact any other board member in advance of this hearing. She is submitting a record of "no contact" as a matter of public record.

Joe Hoffmann asked Aquila how she wanted to proceed. Do you feel compromised about this case?

Aquila said I've always looked at each case individually and impartially. I would continue to do that with this case but I respect both of you and I'm open to your thoughts.

Hoffmann said I wasn't here last time so I'm happy to re-hear the case.

Klapper said she's also open to re-hearing the case. In terms of the recusal, I don't see how there is anything that's been said that would compromise your ability to be impartial but it's Sue's decision correct?

Hoffmann said it's not a matter for us to decide. Our only question is to re-hear the case.

**\*\*Hoffmann moved to re-hear case #V-09-17. Klapper seconded. Motion carried unanimously by voice vote.**

**V-09-17--STAFF REPORT:**

Amelia Lewis (Zoning & Long Range Planner) presented the staff report. The property is located at the southeast corner of E. 2<sup>nd</sup> Street and S. Highland Ave. The property is zoned Residential Core (RC) and is located within the Elm Heights Neighborhood. The surrounding uses are primarily single-family. The petitioner received a COA (Certificate of Appropriateness) from the Historic Preservation Commission (HPC) for the variance. The petitioner proposes to construct a 6-foot tall fence along the west side of the property along S. Highland Ave. The proposed fence would begin 8 feet from the southwest corner of the house extending approximately 13 feet; meeting the property line and extending 69 feet south along the property line. **Lewis noted an error in the current staff report that stated there would be 7 feet from the curb to the proposed fence. Actually, there will be approximately 3 feet from the edge of the proposed fence and curb.** The standards for maximum height in the UDO state that "Forward of the front building wall of the primary structure, fences and walls shall not exceed 4 feet in height." The front building wall is defined as the building elevation which fronts a public street. Because this property is located on a corner, there are frontages along both S. Highland and E. 2<sup>nd</sup> Street while

the functional front of the house is along E. 2<sup>nd</sup>. The side along Highland Ave. is still considered the front. The petitioner received permission from the HPC to remove some existing trees and replace them with the proposed fence. The petitioner would be allowed to have a 4-foot fence in the same location and dimensions. However; in order for there to be a 6-foot tall fence it would have to be in line with the house. There are three variance criteria and I will be focusing on the third. There are no peculiar conditions on this property that require a variance from fence standards. The property in question is a corner lot meaning it has two front building walls. Although this is not a peculiar condition and there are many corner lots throughout the City facing the same issue. The only practical difficulty on this site is protecting the existing mature Walnut tree which is located along Highland Ave. However; the UDO does not prohibit a fence on this property. The tree could still exist with a 4-foot fence in the proposed location which is permitted by the UDO. There are alternative solutions that could still provide privacy and be compliant with the UDO. Staff recommends the BZA adopt the proposed findings in the staff report and deny the fence height variance.

Alisan Donway, petitioner, moved to Bloomington in January 2016 in order to be closer to her family. The lot is only one-sixth of an acre. It has an attached garage on the east side of the house and a 12' x 16' foot deck on the rear south west side. A dilapidated wooden fence remains on the back property line of the lot. The neighborhood is completely residential but of the 22 homes that I was required to notify about this variance request, only 60% were owner-occupied and 40% were rentals. The other three corners of my intersection are all rentals, as is the house behind my property. Before I purchased my house, it too, was a rental property. In order to preserve the district as a mixed-use neighborhood, it requires a reasonable accommodation of the values of older homeowners who typically prefer quiet, privacy, and non-littered neighborhoods more than students do. At the previous hearing, a board member stated that I chose to buy a home within the City of Bloomington and I could've bought a home in a more rural area. In fact, I did not have that choice. My husband has a condition that precludes him from driving so I didn't have a choice to buy a home in a more rural area. To deny me a variance on the grounds that I could have moved to a more rural area of Bloomington amounts to discrimination on the basis of a medical disability. Donway referenced criterion #2 in the staff report (***The approval would not be injurious to the public health, safety, morals and general welfare of the community***). According to the findings in the June 15 staff report, there is a negative impact on the public space which the standard was designed to protect. A 6-foot tall privacy fence within the front yard at this location would adversely impact the streetscape and the comfort of pedestrians along a roadway with no sidewalk. First, to speak of my back yard as the front yard is humpty dumpty talk. You could say that the side of my house fronts Highland St., but to say that my back yard is therefore a front yard is utter sophistry. Second, the Staff has already considered that the fence would not adversely affect the use and value of the area adjacent to the property. So how is its effect on the streetscape supposed to be injurious to the general welfare of the community? A lattice top fence sitting behind a well-tended 4-foot green sward will be beautiful. In no possible way could this type of fence be injurious to the welfare of onlookers. Thirdly, the next block of Highland includes an abandoned boarded up house which is overgrown with trees, bushes, weeds and vines. Next to it is a house that seems permanently for rent and is also overgrown with weeds and bushes. On the other side of the street is a house with a porch whose wall is topped with stone. That stone topping is the permanent resting place for empty beer cans and big gulps. It's simply absurd to suggest that I will be degrading the local streetscape by setting off my historic zoned house and magnificent walnut tree with a beautiful lattice top fence and 4-foot green sward. The Historic Preservation Commission (HPC) is expressly charged with ensuring structures, including fences, are of a design form that is compatible with other buildings in the historic district in terms of its proportion, mass, configuration, building material, texture, color and location on a lot. The HPC has examined the lattice top fence that I have proposed and their findings are that it's compatible with the places to

which it is visually related—the streetscape. The staff report speaks of the comfort of pedestrians along a roadway with no sidewalk. This objection is rebutted by two facts: There are tall hemlock trees along the property line with branches extending out to the road. A pedestrian or bicyclist who felt threatened by oncoming traffic could not get off the street without plunging into the hemlocks. If the hemlocks are replaced by a fence, there will be an open 4-foot grassy strip for the safety of pedestrians, dog walkers and cyclists. By the same token, setting a lattice top fence beyond a 4-foot grass strip will improve the visual beauty of the street and it will keep the fence from looming over pedestrians and dog walkers as a solid fence would if placed adjacent to a sidewalk. At the previous hearing, a board member remarked as a reason for denying me a variance that, *“Tall fences are not inviting”*. Frankly, mature adults do not want to invite random passersby into their back yard. Back yards are living spaces and mature adults want to live their lives in private. One could equally say that curtains and blinds are not inviting. At the previous hearing the same board member stated that, *“We as a community have decided tall fences isolate people.”* The community has actually decided that back yards are personal living spaces and residents have an understandable need to shield that living space from prying eyes by means of adequate fences. Donway referenced criterion #3 (***The strict application of the terms of the UDO will result in practical difficulties in the use of the property. That the practical difficulties are peculiar to the property in question; that the variance will relieve the practical difficulties***). According to the staff report findings of June 15, there are no peculiar conditions on this property that require a variance from fence standards. The property is on a corner lot, meaning it has two front building walls. This is not a peculiar condition as there are many corner lots throughout the City facing the same issue. The only practical difficulty on this site is protecting the existing, mature walnut tree located along Highland St. The UDO does not prohibit a fence in this location and the tree could still exist with a 4-foot fence as permitted by the UDO. There are alternative solutions that could still provide privacy and be compliant with the UDO. I will rebut this by making five points: I have never argued that being a corner lot was a peculiar condition. I wrote in my petitioner’s statement that the outstanding peculiar condition on my lot is its topography. It dramatically changes the effect of the fence height. There is a 30-foot vertical drop on Highland Avenue between 1<sup>st</sup> and 2<sup>nd</sup> Streets. Anyone who knows the neighborhood will tell you that ninety percent of that drop comes between University Avenue and 2<sup>nd</sup> Street. The drop occurs beside my house and the house behind me; that is the peculiar condition of my lot. Pedestrian and bicycle traffic along Highland is substantial in the morning and late afternoon. The peculiar condition of topography also means that my back yard drops off sharply from the southwest corner on Highland to the northeast corner of the back yard, which is about level with 2<sup>nd</sup> Street. To erect a 6-foot fence in line with the side of the house as the UDO allows, would place the fence so far downhill as to yield even less privacy than a 4-foot fence on the property line. A suggestion was made at the previous hearing that I could build a 4-foot fence from the southwest corner of the lot-north, down Highland Avenue to a point past the tree, then jog to the line of the house, then continue a 6 to 8-foot fence north to the edge of the house. The problem with this suggestion is again the peculiar topography. The southwest corner where the fence would be 4 feet is precisely the high ground view point that allows my privacy to be invaded. A secondary problem is a garden area that lies north of the tree and just to the east of the hemlocks. I’ve been working diligently to rehabilitate the garden from long neglect. A fence running in line with the side of the house would put the garden area outside of my yard where it would succumb to weeds and litter. At least one board member suggested at the previous hearing that landscaping and hedging alternatives might exist and should be investigated. I have taken that suggestion and explored the possibilities with Jason Fulton of May’s Greenhouse. Jason’s conclusion is that there are no other feasible hedging alternatives that are evergreen, shade tolerant, Jaglon tolerant, and deer resistant. The staff report concludes there are alternative solutions that could still provide privacy and still be compliant with the UDO. To that I say, “What are those alternatives, name them?” The terms of the UDO would deprive me of the

back yard privacy that the UDO itself recognizes as a legitimate value of homeowners that needs to be secured by adequate fencing.

**BZA:**

Hoffmann said I understand the UDO permits a fence even with the house line on both of the fronting streets. How tall can that fence be under the code? Roach responded 8 feet.

Hoffmann: It's possible to have an 8-foot fence along the line extending from the house edge? Roach responded correct.

Klapper questioned Staff as to why this petition went to the HPC before coming to the BZA.

Lewis said I believe you asked this question last month. It's an issue that we're trying to work on between our department as well as the HAND Department, which the HPC is housed out of. From what I understand, it's typically more of a scheduling issue. When a petitioner comes in and they need to come to the BZA as well as the HPC, we put them on both dates on separate calendars. Sometimes the HPC meeting is before the BZA meeting date which is why they approved it. Also, the HPC doesn't check for zoning compliance. I believe they are more focused on the historic nature of the house, the property, and the neighborhood as opposed to what is actually allowed in the UDO.

Klapper added that it's concerning because it creates an expectation on the side of the petitioner that there has already been an approval. She asked the petitioner why she would like to remove the existing hemlocks on her property.

Donway explained that at least three of them are dead and two of them are too close to the house and too large. If the top of the hemlock gets any closer carpenter ants could just walk right across to the house. I have permission to take down the trees and they are all less than 9 inches in diameter.

Hoffmann said the petitioner eluded to in her remarks an issue of discrimination based on her husband's medical condition. We've occasionally had cases in the past that have raised this issue. I'm wondering if Staff has any comment about that or if our legal counsel has any comment.

Roach said he would defer to the Assistant City Attorney, Anahit Behjou.

Behjou said I have not researched the issue of discrimination but I don't know if it would apply in this situation because the fence isn't stopping them from having easy access to the house. I'm happy to do more research for them and I'm happy to connect them to the Human Rights Commissioner. Maybe they can help them to figure out how to approach the house, but it doesn't sound like the fence would cause any issue for them to get to the house. Accessibility to the house isn't dependent on having this fence.

No public comment.

Donway said bringing up the medical disability issue was only in reference to one of the board members saying that we could move further out of Bloomington where there would be no privacy problems, etc., but that's not an option for us. I was trying to show that the City won't let us have a 6-foot high fence or take down the walnut tree. We're unable to have a private back yard. They

don't recognize the unavailability of plants which will make an adequate hedge to be in place of a fence, so we're left high and dry with practically no alternatives. Even the possible use of deciduous hedges leaves me with a back yard that isn't private 6 months out of the year. It also requires a lot of pruning that a fence doesn't and I can't do that at my age. We're both retired and we don't have a lot of money to spend on stuff like that.

Klapper asked Staff for clarification. The petitioner is able to erect up to an 8-foot high privacy fence if it were in line with the west elevation of the house? Roach said that is correct; or a 4-foot fence in the location proposed.

Klapper: So the issue or conflict is wanting to do the high fence in the proposed location?

Lewis said it's the combination of the height and the location.

**\*\*Hoffmann moved to deny V-09-17. Hoffmann stated he would like to adopt the Staff findings for #1 and #2. Regarding Staff finding #3. Hoffmann stated he would like to find there is a peculiar condition on the property. The peculiar condition is the combination of three things: It's the corner lot, it's the topography, and it's the existence of the walnut tree. The combination of those three is a peculiar condition; however, the variance requested is far too broad in light of those three aspects of the peculiar condition. In other words, it's not a variance that is proportionate to the condition on the property. In my view, the most appropriate solution is to build a fence that is either 6 or 8 feet tall as the code permits, in the proper location, and then request a variance to allow that fence to be jogged around the tree in a manner that would preserve the tree and keep it in the back yard. But to request a variance to move the fence to the extent to which this proposal does, I find that it's not justified by the peculiar condition on the property. Klapper seconded. Motion carried 3:0 by voice vote—petition denied.**

- V-12-17      **Tim Kennedy**  
100 S. Lincoln St.  
Request: Variance from maximum fence height standards.  
*Case Manager: Amelia Lewis*

Amelia Lewis (Zoning & Long Range Planner) presented the staff report. The petitioner owns the single-family home at the southwest corner of S. Lincoln and E. Allen Street. The property is zoned RC (Residential Core) and is located within the Bryan Park Neighborhood. The primary surrounding uses are single-family residential. On March 30, 2017, the department's Zoning Compliance Planner issued a Notice of Violation to the property owner for a fence in excess of the maximum height requirements. The petitioner has repaired and expanded an existing non-conforming fence, measuring 70 inches in height along both street frontages. The new portion of the fence measures 72 inches in height. The petitioner is requesting a variance for the maximum fence height. The proposal is for a 6-foot tall privacy fence along the north side of the lot along Allen Street. The property owner removed existing privacy hedges that were along E. Allen Street and replaced those hedges with a 6-foot tall privacy fence. A portion of the fence is lawful non-conforming or "grandfathered," while the newly constructed extension of the fence along Allen where the hedges previously were is in violation of UDO (Unified Development Ordinance)



standards. Because this property is located on a corner lot, any fence extending beyond the front façade of the house on either street is in violation over 4 feet. This is different from the last petition in that a portion of the fence is grandfathered. I believe that there were trees here and the petitioner removed them and replaced it with a fence, which is why the problem has arisen now. Staff finds no peculiar conditions on this property. The property in question is a corner lot meaning it has two front building walls. This is not a peculiar condition as there are many corner lots throughout the City facing the same issue. The UDO does not prohibit a fence in this location, rather it just limits the height of a fence to a maximum of 4 feet. Staff recommends that the BZA adopt the proposed findings and deny the petition.

Tim Kennedy, petitioner, said I would like to acknowledge our tenants that are here this evening. I recently learned that the height of the fence violates a City ordinance. I'm hoping the City will grant me a variance and allow me to keep the fence in its present form. I understand that ignorance of the law is no excuse, but it never occurred to me that we would not be allowed to build a fence in that location and that I should've asked the City first. There already is a stockade fence on the property just to the east of the fence in question. This fence was in place when we bought the property 20 years ago. Apparently this portion of fence is not in violation, perhaps since it existed before the law was instituted. Privacy fences are such a common feature in our neighborhood even on corner properties. I found 14 examples of these types of fences in a cursory, forty-five minute drive around the neighborhood. What existed prior to putting in the new fence was a ratty and overgrown privacy hedge that was much taller than the fence we've replaced it with. We tore out the hedge to be able to cut down an enormous, dying maple tree behind the house which was in danger of falling on our house or into Allen Street. Without the hedge, the house and the deck behind the house was completely exposed to our tenants. Our tenants still wanted the privacy that the hedge afforded so we put in the fence. This has become a vicious cycle. According to the City, there are two problems with our fence. First, our fence is 72 inches tall; allowed is 48 inches. The existing stockade fence is 70 inches tall. The second problem seems to be one of naming. In my mind our back yard has always been our back yard, but since our lot is at the corner of Lincoln and Allen, the City considers it a front yard. I think the purpose of the law may be to prevent people from barricading themselves and obscuring a view of their houses. The existing stockade fence really obscures a view of the house more than the new portion of fence does. I believe that a fence in the location should obscure the house a little to afford some privacy. Since the property is located on the downslope of the hill, the sidewalk that runs along Allen Street is significantly higher than our property and people walking along Allen can look down into the house and the deck behind the house. If you're sitting on the deck behind the house, you're pretty much at eye level or a little below eye level with people walking along Allen Street. Without the fence or with a shorter fence it would not be nice or very private. I know our tenants use the deck a great deal. Without the 72" fence this sense of privacy is diminished and I would argue so is the value of our property. Over the years we have done extensive work to maintain and improve our property. In 2003 we did an extension renovation to the exterior of the house by removing the aluminum siding and restoring the original wood exterior; we're having it painted now. Removing the dangerous tree cost us \$1870. We removed an unsightly and overgrown hedge for \$675 and installed a very nice fence in its place for \$1240. We hope the City will allow us to keep the new fence in its present form.

**BZA:**

Joe Hoffmann asked Staff if it's ever the case that the existence of a non-complying i.e., illegal structure. Does that ever count as a peculiar condition on a property?

James Roach, Development Services Manager, said there have been occasions when at the Staff's recommendation, the Board has found presence of a legal non-conforming structure to be evidence and peculiar conditions for a variance, but an illegal structure—No.

Hoffmann: I take it the reason for that is because if we go down that road then it becomes a defacto way for anyone who wants to, to avoid the legality of the code? Roach responded absolutely.

Klapper asked Staff to briefly summarize the code from 2007.

Roach said this change in the code was a very tiny portion of a very large update to the code. I'm not sure it got debated a whole lot, but the general philosophy is—as was stated in the previous case, is that large (tall) fences near the street are not friendly for neighborhoods or pedestrians. To keep any kind of fence from blocking views of homes and looming over sidewalks—lots of different reasons, corner lots have caused problems. The department may have not considered all of the different permeations and consequences of this ordinance when it was adopted. It's certainly on my list of things to reevaluate when the City updates the Unified Development Ordinance (UDO) this fall and next year. The code says no fences above 4 feet tall between the front building wall of a structure and the street.

Hoffmann: If the petitioner wished, he could even build an 8-foot fence along the line that essentially is the side of the house/side of the deck?

Roach: Sure. Much like in the previous petition there would be other options. One option would be a 4 to 8-foot tall fence in line with the front of the house. Another option would be to reduce the height of this fence to 4 feet. A third option would be some other sort of solution for privacy, including landscaping.

**Public Comments:**

Natalie Christian has been a tenant of Mr. Kennedy's since the fall of 2015. My partner and I have lived there for a while and we've been very happy in this house which is why we're here to support the keeping of this fence. The hedge was removed while we were tenants and the fence was put in its place. We do spend a lot of time in the back yard on the deck. I think that's evidenced by the garden we put in that Tim showed photos of. We were present when there was no hedge and no fence. I know part of this ordinance is to keep pedestrians feeling safe and like fences aren't looming over them, but without having this fence present I felt very isolated from my neighbors. I didn't feel comfortable being outside. As Tim mentioned, people look from the street down into the back yard and it was very uncomfortable. There are alternatives for the fence by moving it to the line of the house or replacing it with some sort of greenery or even shortening the fence. Those don't sound like great ideas to me. Moving the fence would cost Tim money but would also essentially put a fence through the middle of our back yard. Adding a hedge to replace the fence would destroy our garden. Shortening the fence would not afford us the privacy we need. Many people passing by have commented on how beautiful the fence is compared to the horrible hedge that was there. The fence hasn't been isolating.

Micas (last name inaudible) said we live on the edge where the undergrads live in this neighborhood. When we were putting in the garden we found a lot of trash that was basically thrown in the hedge or through the hedge by passersby. I feel having a shorter fence or something with landscaping would basically keep this yard as the trash disposal of the neighborhood. If the Board rules that this fence needs to be shortened, I would ask that some sort

of trash cans be placed in the neighborhood so our garden doesn't become the trash disposal of the whole street.

Kennedy, petitioner, said I don't think setting the fence back would be much of a solution. It would basically chop up the property. It's actually quite nice the way it is. Joe, if the fence went back along the deck would you think it was a very nice situation? I would think probably not.

Aquila: The Board can't respond to your question. Kennedy responded that he understood.

Kennedy said I realize that rules are made for reasons, particularly in the front of the house and it's a very good reason, but I think the individual nature of people's lives and circumstances are very particular and specific. I would hope that the Board could grant a variance just because of those particulars.

**\*\*Hoffmann moved to deny V-12-17 based on the findings outlined in the staff report. Klapper seconded.**

**BZA:**

Hoffmann said this doesn't give me any joy especially because I understand the petitioner's lack of any culpability. Under the circumstances it's completely understandable why the petitioner felt like this fence was a normal thing to build, but I just can't find enough of a peculiar condition on this property. As James (Roach) suggested, what we really need to do is revisit the policy question. Our current code reflects two policy choices: 1) People on the streets and pedestrians walking along streets have priority over privacy of residents. 2) Given the way the code is written, the code also expresses a policy that people who own corner lots have smaller back yards. There is a back yard in this case as well as in the last case, it's just that the back yard is defined in such a way in terms of where the fences could go, etc., etc., it's simply defined as a much smaller back yard than most people have. Those are policy questions that ought to be reconsidered. I will express my own personal hope that whatever enforcement discretion the City may have, that they would take into consideration the fact that the code might very well be changed within months and that that discretionary enforcement might be exercised wisely. In my view, this is simply not an appropriate case for a variance.

Klapper echoed Hoffmann's sentiments. We've definitely seen the need for privacy weighed against public issues and coming to a head on corner lots and fences. It definitely requires some additional thought and evaluation. It's tough to be in this position at this point.

**ROLL CALL: Motion carried 3:0 by voice vote—petition denied.**

Meeting adjourned.