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

**APPROVAL OF MINUTES:** April 27, 2017

**\*\*Throckmorton moved to approve the 4/27/17 minutes. Klapper seconded. Motion carried unanimously by voice vote.**

**REPORTS, RESOLUTIONS AND COMMUNICATIONS:** None at this time.

**PETITION CONTINUED TO:** June 22, 2017

- 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*

**PETITIONS:**

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

Amelia Lewis (Long-Range Zoning Planner) presented the staff report. The subject property is zoned Residential Core (RC) and located in the Elm Heights Historic District. The petitioner is requesting to construct a 6-foot tall privacy fence along S. Highland Drive. The proposed fence would begin 8 feet from the southeastern corner of the house, extending approximately 13 feet west meeting the property line, and then extend 132 feet south along the property line. The standards for maximum height in the UDO state that, **“Forward front of the 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 on a public street.” Given that this property is located on a corner, it has frontages along S. Highland and E. 2<sup>nd</sup> St. Lewis noted the functional front of the house is along E. 2<sup>nd</sup> St. As previously mentioned, this property is located in the Elm Heights Historic District. The petitioner was required to receive a Certificate of Appropriateness (COA) from the Bloomington Historic Preservation Commission (HPC), which was acquired in March 2017. The following work was approved: Removing the evergreen trees along S. Highland Avenue, and constructing a 6-foot wooden fence along the back of the property and along Highland Avenue—8 feet from the rear of the house. On occasion the BZA has approved fence height variances when the following instances are true: When the property is at a corner; when the fence would be along a classified street; when the fence does not block the functional front of the house; when the fence does not loom over the street by use of a setback or lattice top above 4 feet. In this instance, the proposed fence is not along a classified street (*Lewis showed the BZA photo slides of various fences in the neighborhood*). An existing fence located at 528 S. Highland received variance approval from the BZA in 2012 to expand the existing fence, only after Staff recommended that it be denied. In that particular instance, peculiar condition was found in the small Lot size, existing grandfathered fence section, and the fact that it was a corner Lot including

the fact that the side street was along 2<sup>nd</sup> St. as opposed to Highland which has a higher level of traffic. Here are existing photos of the site. Currently, there are existing landscaping shrubs and trees that provide some privacy in the petitioner's back yard. This is the view looking down S. Highland. As previously stated, there are no sidewalks on either side of the street. To review what is permitted by code and what is actually being proposed; the petitioner has proposed a fence that would extend along S. Highland 6 feet. The UDO would permit placement of a 6-foot fence in line with the house as opposed to extending it beyond the façade. The petitioner would also be allowed to put a 4-foot fence in the same location as proposed. Another alternative would be to use plantings for privacy as it currently is today. There are three criteria for variances. 1) The use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner. Staff found that the use and value of the area adjacent to the property would be impacted as it would change the existing landscaping and visibility along a significant portion of the Lot. 2) The approval will not be injurious to the public health, safety, morals, and general welfare of the community. There is no sidewalk on either side of Highland Ave., which would create a greater need to protect pedestrian safety. 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 peculiar to the property is question, that the variance will relieve practical difficulties. Staff found there are no peculiar conditions on this property. While the property in question is a corner Lot, this is not a peculiar condition as there are many corner Lots throughout the City facing the same issue. In addition, Highland Ave., which is the street that is the non-functional side of the house is not a classified street with heavy traffic. The only practical difficulty on this site is protecting the existing mature walnut tree located along S. Highland. However; 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. Staff recommends denial of the fence height variance.

Alisan Donway, petitioner, referred to the survey of the property. Putting the fence where I'm allowed to, according to regulations, would essentially reduce the effective size of the yard by a large percentage. The walnut tree is in such a position that the fence would have to go about 2 feet to the east of the tree (the tree is 4 feet in diameter). If any posts have to be put in the ground the drilling could damage the roots and be fatal to the tree. Plus it would deprive the back yard of the essential part of landscaping (*Donway directed the Board to look at photos she'd taken of her Lot*). You can see that approximately 2 feet from the base of the tree would be between the stone edging to the planting bed and the tree. It would be about two-thirds of the way to the stone edge. That point is about 2 feet lower than the point where the trees are lined up, which is approximately where the fence would be. Putting a 6-foot fence at that position—this side of the tree, would do no good as far as getting any privacy because it would still have an effective height of 4 feet compared to a 6-foot fence on the property line. Again it doesn't do any good to use a 4-foot fence there. In addition, walnut trees are notorious for being very difficult to grow things under. She stated I provided a table; there are 10 hedge plants that I've listed. These are common hedge plants that people grow. Of the ones that are there, four of them cannot grow under walnut trees. Two of them will not grow under a shade tree because they need more sun. The two types of holly on page 1; they're not listed as tolerant of *Black Walnut Jaglon*. It wouldn't make a difference because they're occasionally damaged by deer, which is another problem in the back yard. Deer like to eat these plants so that eliminates eight out of the ten on the list. Out of those that are left, boxwood plants; some people have stated on the Internet that they've had good luck with boxwood under walnut trees. Boxwood grows very slowly. According to the person at Mays Nursery-Bloomington; he said they only grow under a tree about 3 inches per year. The tallest boxwood they sell is 30 inches. In 10 years the hedge would only be about 5 feet tall. I'm elderly so I might not live to see it grow that high. It also has many diseases and pests so it's not a sure thing. The last one, which is the one I have, is the Canadian hemlock. The two hemlocks to the left of the tree are in very bad condition. I don't know if new ones would grow well there or not. Keeping the ones that are there is not a solution and replanting is not a sure thing either since the ones currently there are not doing well. Also, Canadian hemlocks are expensive to maintain with pruning every year. Donway stated she presented pictures to the Historic Preservation Commission (HPC) of fences they approved that are currently in Elm Heights. She would like the fence to be beautiful as well as functional. These types of restrictions are

prejudiced against people who own corner Lots. In her opinion, people who own corner Lots have a more difficult time of selling their home because people don't want to have a back yard that has a complete view from the street.

**BZA:**

Barre Klapper asked Staff to clarify what it means for the HPC to approve something that's not (inaudible). It's a little confusing when it says, "only 8 feet from the rear of the house." When they're describing the 6-foot fence where they say it's appropriate along the rear property line and along Highland only 8 feet from the rear of the house. I don't understand spatially what that means.

Lewis stated the 8-foot portion that the HPC was discussing was from the far end of the house up. So at the furthest most southwest corner of the house, the fence would start 8 feet in front of that. It does enclose a tiny portion of the actual; it will come 8 feet off of the wall.

Klapper: 8 feet off of the wall of the house?

Lewis stated it would be 8 feet along the house façade. The HPC doesn't look at whether it meets code, rather than if it fits in with the neighborhood and if it affects a contributing historic structure.

Klapper: Which this is I would imagine? Lewis responded yes.

Klapper stated there is nothing to preclude the homeowner from doing a stretch of 6-foot high fence off the corner of the house straight to the south, and then jogging the fence down to get around the tree at 4 feet. There could be a combination so that up closer to the house they could have more privacy, probably where they sit and where the rear deck is. And to allow for the inclusion of that large tree in the back yard, that could be accomplished with a 4-foot high fence that could go out to their property line along the west and run to the southwest corner? Lewis responded yes.

Klapper: There is nothing in the code that would preclude that?

Lewis: No. That would be a decision up to you and then the COA (Certificate of Appropriateness) would be amended.

Klapper stated she's trying to understand that there is a way, working with the code, to achieve some level of privacy and include the tree within the yard and meet a lot of goals that the homeowner has while still meeting code. And meeting the spirit of why the regulation is what it is, so that we don't have walls of fences along roadways in our neighborhoods.

Carol Stewart Gulyas asked Staff to confirm whether or not the petitioner showed some type of fence design to the HPC.

Lewis: Yes. They were in the packet and I believe the two are similar to this style of fence with the 4-foot and the lattice or just a regular slat fence. I asked the petitioner earlier today and she said she had not decided between the two.

Jo Throckmorton asked Staff to go back to page 11 (referring to the information packet) to clarify if Highland is on the left side of the photograph. Lewis responded that is correct.

Throckmorton stated there is no sidewalk on either side of the street. So the only people who are passing by there would be in a car?

Lewis responded that people would be walking by but they would be walking in the roadway.

Klapper asked Staff to clarify if the proposed fence type is one that has a lattice on top or one that is solid board to the top. Lewis said that is correct.

Klapper: There isn't one proposed fence type? Lewis said no. Both of those were approved by the HPC.

Throckmorton: But both are in violation of the code? Lewis said at 6 feet, yes.

Donway, petitioner, responded by saying that a 4-foot fence wouldn't work artistically for the landscape of the yard. Also, a 4-foot fence wouldn't keep the deer out. The house sits up fairly high even though the back yard is low. You can see a lot of the back of the house when you're driving by. The City allows the fence to go up to half way to the front of the house. I'm not even asking that, just the part that encloses the area where the breakfast nook is so that traffic isn't driving by when we're eating. We can't see the traffic anyway if we have the fence.

Stewart Gulyas stated she's inclined to approve the variance because she understands the special nature of the back yard and it seems appropriate.

Klapper said she feels a little divided because when these variances have been approved, it's been very specific to busy streets being adjacent to busy streets either from pedestrian traffic or automobile traffic. In this situation, it doesn't have either. I have to say that you are in a City and you bought a house on a corner Lot. These houses are close together and some of them are on view. I think there are some mitigating approaches to help with the privacy issue. Being somebody who lives in the neighborhood, who deals with deer and knows people who do have high fences; deer jump 6-foot fences too so I don't think that's necessarily a remedy. I understand the desire for some privacy and think it's completely reasonable. There are several tools to try and get there and I know there are some challenges. As a neighbor and somebody who walks this neighborhood a lot, I understand why we have the regulation that we do so that we don't get tall fences along roadways. I don't feel like this variance meets the level of hardship that the property can't be used.

**\*\*Throckmorton moved to deny V-09-17 based on the written findings in the staff report. Klapper seconded.**

Throckmorton stated the homeowner is still allowed to build a 4-foot fence which provides some privacy. I agree that it's in the City. I agree that these are grouped closely together in this neighborhood. I think despite the discussion of potential landscape in order to bring the height of (inaudible) to the street above 4 feet and actually much higher than 6 feet, I don't think it's been explored fully. There are options and people do it. That's going to look a lot different than having a 6-foot fence. I think there was some misunderstanding about what Barre (Klapper) was saying, which is you can take the 6-foot fence off the back of the house—to a point—and then go back out to the street at 4 feet and continue 4 feet, which gives you some added privacy and it would not obstruct your view of the tree. I think there are enough factors here that wouldn't allow for that type of variance.

Aquila stated I would just like to comment that I have been on this Board for a very long time and this is not personal. We have taken this position as a community in that tall fences are not inviting and tall fences isolate people. This Board has consistently recommended denial on these cases and I voted denial on every single one of them. We're sensitive to what's happening for you; however, we have to think of the community as a whole living in an urban area.

**ROLL CALL: Motion carried 4:0 by voice vote—petition denied.**

Meeting adjourned.