

**MINUTES
BOARD OF ADJUSTMENT
THURSDAY, JULY 12, 2012
HOOD ROOM, MATTHEWS TOWN HALL**

PRESENT: Chairman Eric Welsh, Vice Chairman Stephen Lee, Members Walter Monestere and Jim Mortimer; Alternate Member Jim Jiles; Attorney Robert Blythe; Senior Planner Jay Camp and Zoning Technician/Deputy Town Clerk Lori Canapinno

ABSENT: Member Derek Morgan; Alternate Members Jeanne Moore and Cecil Sumners

CALL TO ORDER/INVOCATION

Chairman Welsh called the meeting to order at 7:21 pm and gave the invocation.

APPROVAL OF THE MINUTES

Vice Chairman Lee made a motion to approve the minutes of the June 7, 2012 meeting. Mr. Mortimer seconded and the motion was unanimously approved.

VARIANCE REQUEST: Case 2012-7: 157 North Trade Street, Parcel ID 193-262-06; Café 157

Chairman Welsh designated Alternate Member Jim Jiles to act as a voting member for this case.

SWEARING IN

The following were sworn in: Jay Camp, Jim King, George Poriortis

STAFF REPORT

Planner Jim King explained the property is located at 157 North Trade Street, parcel number 193-262-06. The applicant, George Poriortis, is the owner of the business at that location - Café 157. The Millers, who are the property owners, have authorized Mr. Poriortis to apply for this variance.

The applicant is seeking relief from the requirement to replace a fence or wall behind the right of way (ROW) for the café-style building along the 100 block of North Trade Street pursuant to Section 153.064(H)(1)

The building was erected in 1979 and designed as a bank. It was constructed prior to the adoption of Historic Urban Core (HUC) regulations and the Downtown Overlay. A change of use occurred in 2004 when it became a coffee shop/office. The change of use triggered the need for a variance from Section 153.064(H)(1). That section states that buildings used for café-type uses may be located up to ten feet off the right of way line (ROW) as long as a fence or wall is provided and any other use aside from café-type uses must be built to the ROW line. The intent is to allow café to have outdoor seating while not disturbing the normal flow of pedestrian activity along the sidewalk. The building is set back more than ten feet so a variance was requested and granted and a white picket fence was added at the ROW line. In 2007 another change of use occurred. That tenant requested the same variances. Those variances were granted with the stipulation that the fence be maintained.

Over time the fence deteriorated. The current tenant removed the fence. Upon removal, the Town's Code Enforcement Officer issued a Notice of Violation requiring the reestablishment of the fence. The applicant is now requesting an amendment to the previous variance – the building still exceeds that allowed ten feet, so that variance still needs to remain in effect – but the applicant requests that the fence stipulation be dropped to allow him to use living vegetation instead of actual fence material to provide that wall or fence-like definition to the property line.

Mr. King read from the minutes of the 2007 Board of Adjustment meeting during which the previous variance had been granted: “The Chair moved to grant the variance to section 153.064(H)(1) – building line no greater than ten feet from sidewalk right of way, as long as the building remains a restaurant and the continuation of the fence including the extension on both sides.”

Section 153.064(H)(1) of the Zoning Ordinance states that build-to lines are established for most existing streets in the Overlay district. As new streets are proposed, they will be assigned a street type category and build-to lines shall be assigned. Any new construction in the 100 block of North Trade Street, because it contains a majority of historic commercial structures set at or near the sidewalk, shall not exceed 10 foot setback from the right-of-way, except for outdoor café-type or other outdoor uses when a fence or wall is carried across the right-of-way to continue the visual continuation of building faces.

Mr. King displayed photographs of the subject property (photographs 1 and 2 as included in the staff report) which were taken approximately two weeks prior to the meeting. The building is roughly twenty-five feet from the sidewalk and various vegetative plantings approximately two feet behind the ROW line with other plants and art elements throughout the front setback. He also displayed an older image of the property with the old fence in existence, taken from a Google Earth image dated October 2011 photograph 3 as included in the staff report).

Chairman Welsh asked if any other businesses on that block had received variances or were noncompliant. Mr. King said no – aside from Café 157, the bike shop, greenhouse and farmer's market are the only other locations that are recessed from the sidewalk. The greenhouse and farmer's market locations have white picket fences and the bike shop has a partial white picket fence at its location that covers the grassy area between the two adjacent buildings.

Chairman Welsh said he was coming back to the ordinance with its exception that allows a fence or wall at the ROW line and asked what the Town was trying to accomplish with that provision. Mr. King explained the intent is to have uniformity or continuation from the adjacent buildings, so as pedestrians walk down the street they see a consistent boundary at the back of the sidewalk, be it a building's wall or fencing material at the same setback as the existing buildings. It offers a feeling of continuation. Chairman Welsh asked if the Town felt that a continuation of foliage would accomplish the same effect. Mr. King said the Zoning Ordinance does not include a definition of a fence or wall. The Code Enforcement Officer's interpretation is that the existing landscaping would not be sufficient to meet the intent of the ordinance.

Mr. Mortimer asked about the bicycle shop. Mr. King said that structure has a partial fence. Mr. Camp noted that fence was probably put up simply to keep people from walking on the grass and that it was probably not a requirement.

Attorney Laura Budd represented Café 157 and addressed the Board. She explained that she represented not only George Poriotis, the owner of Café 157, but also the Millers, who are the property owners and who gave consent for their tenant to make this variance request, as well as the newspaper and café that was located in the subject property in 2004.

Ms. Budd said the restaurant is a local business, not a chain, and is a big draw to the Town of Matthews with regard to residents. It has recently begin to collaborate with other businesses in downtown Matthews, which increases foot traffic in downtown Matthews.

The building houses a restaurant and is set back from North Trade Street. The Zoning Code does require some sort of fence or boundary that makes it look as if it is hugging the sidewalk since the setback is so large. What was in place before, the white picket fence, was in place since at least 2004 if not earlier and which was not maintained well. It was deteriorating, was in danger of collapse and was not repairable. It needed to be removed. Mr. Poriotis knew he was required to replace the fence so he worked with a landscape designer to determine what would look best there, keeping in mind that the Town of Matthews is seeking to be a green community. He has effectively installed a green fence. He has created a boundary between the building and the sidewalk, which creates the impression that that building is now hugging the sidewalk.

This green fence is of the required height and located at the required setback and consists of new plantings and standing large flowerpots with a fountain. It achieves the proper delineation between the use of green materials and the creation of that boundary, just like a traditional fence would do. The fence is aesthetically pleasing to the eye and adds to the aesthetic curb appeal of downtown Matthews. It does not fight with the adjacent properties in terms of their architectural styles, both of which are brick, as the white picket fence almost did.

This is not a hardship that Café 157 brought on itself. It inherited the fence and was required to keep the fence. When it was time to replace it, Mr. Poriortis looked at all the options and determined that the landscaping fit not only with Matthews' long term Strategic Plan and its Downtown Master Plan, but also fit within the Zoning Code because the code does not actually say what a fence or wall must consist of. If one considers the typical and conventional definition of a fence or wall, it is to create a boundary and that is what this vegetation does.

There was much discussion earlier with regard to other properties in downtown Matthews that are subject to this same requirement. Ms. Budd said the bike shop is not in compliance with the requirement since there is no fence on one corner. One could make the argument that the vegetation that has been planted on that corner of Trade and Charles Streets also creates a boundary with the use of vegetation. The fence that is in front of Renfrow's fits is perfectly as does the picket fence in front of the Farmer's Market.

Ms. Budd said this is a special and unique circumstance. This is one of only three properties in downtown Matthews that must meet this requirement and the conditions do not result from the actions of the property owner or tenant. If the Board grants the variance there will be special advantage or privilege because again, only three properties are subject to this requirement and all three have a different approach to meeting the requirement. It is not materially detrimental to the health, safety or welfare of any citizen and will not result in an expansion of any nonconformity with regard to the restaurant or any of the surrounding properties.

Ms. Budd introduced five photographs showing close-ups of the vegetation and other materials (Exhibits 1-8 hereby referenced and made a part of these minutes).

Chairman Welsh asked who the actual applicant was. It was confirmed that Mr. Poriortis was the applicant and the property owners have given their written consent for this application. Ms. Budd said the tenant worked with the owner regarding the takedown of the fence and the installation of the new materials. All of their interests are in line and the owners gave their consent and are in essence asking for this variance while allowing the tenant to speak for them. Chairman Welsh said it seems that there are different issues that pertain to Café 157 than the owner, because every time a different tenant comes in they could come in and claim there was a lack of hardship to them. Hardship has to be determined based upon who is the ultimate applicant, and since the variance runs with the land it seems that the ultimate applicant should be the owner of the property. Ms Budd said she would address any issues if there was a particular hardship question between owner and tenant since she represents

the tenants in lease negotiations. The lease requires the tenant to remain in compliance with every ordinance and regulation of the Town of Matthews. So the replacement of the fence is a tenant expense, not an owner expense, and the cost of fixing or replacing the fix is borne completely by Café 157.

Chairman Welsh asked Ms. Budd to explain the difference between a green fence and a hedge. Ms. Budd said she just used the term green fence and that Café 157 didn't put in a hedge, which would be effectively one seamless continuation of greenery all the way across. That's the standard conventional definition of a hedge. What Café 157 has created is a green fence because it is a boundary that separates the building from the sidewalk. She said she used the term "fence" because it has gaps in it, somewhat like a picket fence, to create depth and attracts people to the restaurant.

Chairman Welsh clarified that Ms. Budd is saying that a hedge or green fence would both be barriers and that she labeled it a green fence because it has gaps or spacing in it. Ms. Budd agreed but said perhaps a better way to look at it would be to call it a vegetative border that is used to create a boundary. She said one could make the argument that a vegetative fence is in compliance with the Zoning Code since there is no definition of a fence within it.

Chairman Welsh asked when the fence was taken down and Mr. Poriotis said it was removed approximately three months ago. He explained some of the history of his work on the property and said he has received many compliments about his new landscaping.

There was some discussion of the bike shop and why a fence is not required there. Mr. Camp offered an opinion that they may have received a variance or that the businesses in that location may have been grandfathered in and as such not required to install a full fence. He explained he would have to do some research to come up with a definitive answer. Mr. King pointed out that the exterior renovations to the subject property may have been what triggered the original variance request.

DELIBERATIONS

Chairman Welsh said he was not prepared to make a judgment on the issue of green fences and whether or not they would be in compliance with this ordinance so will look at this issue from the perspective of a standard variance request. Mr. Mortimer agreed. Vice Chairman Lee said he thought vegetation could be construed as a fence but that the intent in this situation is to replicate a building line and shrubbery would not fit into that particular definition.

Chairman Welsh said he thought the applicant has put in a great deal of effort to have something that looks becoming and is attractive for the Town and to him that is a significant issue. It's not a fence but he has done something very attractive for this location. He referred to the previous situation with the picket fence and said it looks a bit odd to have a fence and then a wall only six feet behind it, so the new arrangement is more pleasing.

He said he heard no evidence that the option to install another fence would cause an undue hardship, so the question now is whether or not this vegetation is acceptable to the Board or if a fence should be reinstalled.

Mr. Mortimer said the code doesn't say what a fence is and that this is a very attractive alternative. Mr. Jiles said this provides the downtown feel to the block visually, aesthetically and probably physically. He said he thinks it serves the purpose very well and meets the intent of the ordinance.

Vice Chairman Lee agreed and said this provides a better façade and streetscape. He thinks of fences as boundaries and an actual fence would probably be a boundary to customers, while this vegetation is more inviting and attractive. From the standpoint of the ordinance, he said he doesn't believe a white picket fence accomplished that either. In that respect the vegetation accomplished as much or more visual continuity as a white picket fence.

Mr. Mortimer said the ordinance is ambiguous and the applicant's landscaping is more attractive than a fence. Vice Chairman Lee said he would vote to grant the variance based on that ambiguity.

There was some discussion of the condition and verbiage related to the granting of a variance. Chairman Welsh said he was concerned that future tenants may not maintain the existing landscaping but did not want to cause the applicant to be in violation if one of the existing shrubs grows too large, dies or otherwise changes. He suggested adding a condition that the tenant would have to replace vegetation if any died, and Vice Chairman Lee suggested requiring the plantings to be maintained with reasonable care.

Chairman Welsh made a motion to grant the variance request for relief from the requirement to install a fence or wall behind the right of way for a café-style building along the 100 block of North Trade Street, pursuant to Section 153.064(H)(1), provided that what has been referred to as a green fence – foliage, trees, planters - be maintained and continued in a substantially similar form as depicted in photos as presented as evidence at this hearing. Mr. Mortimer seconded and the motion was unanimously approved.

Chairman Welsh read the findings of fact. The Board was presented with evidence that granting the variance would be consistent with the general purpose and intent of the ordinance. The line of foliage with the line to the street is attractive, beneficial to the town by continuing that line of continuity down the block while being pedestrian friendly. The Board also heard evidence of hardship should the variance not be granted since a

significant amount of effort and financial resources were undertaken to plant this vegetation, which were borne by the applicant. An additional burden was imposed on the applicant and his business with regard to the fence requirement. The property has changed uses a few times which has resulted in this particular ordinance coming onto play and the dilapidated quality of the fence was not caused by the applicant but was corrected by him. The property owner and the business owner do have somewhat divergent issues but nevertheless hardship exists which are not the applicant's doing.

ADJOURNMENT

Mr. Jiles made a motion to adjourn. Mr. Monestere seconded and the motion was unanimously approved. The meeting adjourned at 8:30 pm.

Respectfully submitted,

Lori Canapinno
Zoning Technician/Deputy Town Clerk