AGENDA
BOARD OF ZONING APPEALS
Zoom Meeting
Wednesday, March 10, 2021 - Meeting Starts at 6:00 P.M.

Pledge of Allegiance

Roll Call

Election of Officers

Approval of Minutes

December 9, 2020

Monthly Conflict of Interest Statement

Old Business

New Business

Request for a Variance from Development Standards to Allow an Accessory Structure in a Front Yard, to Encroach into the Front Yard Setback and Reduced Distance between Driveways in a Residential Zoning District; 611 N. Chandler Drive; Petitioner: Sid Sullivan; Case No. BZA 20-01

Request for a Variance from Development Standards to Allow a Fence Taller than Four (4) Feet in Height in a Front Yard in a Residential Zoning District; 723 N. Daisy Drive; Petitioners: Marisa Weiler and Jonathan Brauer; Case No. BZA 21-01

Board of Zoning Appeals Comments

Next Meeting: April 14, 2021

Adjournment

Planning Commission meetings are wheelchair accessible. The accessible entrance is located on the east side of the building. Accessible visitor parking spaces are located on the north side of the building. The Town further assures every effort will be made to ensure nondiscrimination in all of its programs activities, whether those programs and activities are federally funded or not. Close captioning of the public meetings are broadcast on Community Access Television Series 14 and Smithville Cable Channels 301 and 601.

MEETING NOTICE

Wednesday, March 10, 2021, at 6:00 p.m.

The Town of Ellettsville Board of Zoning Appeals will conduct its regularly scheduled meeting on Wednesday, March 10, 2021, at 6:00 p.m., local time.

The meeting will be conducted remotely. No Board of Zoning Appeals members will attend the meeting in person, but will instead attend remotely. The public is invited to attend by remote access. The meeting will be hosted by Zoom.

Topic: BZA 3-10-21
Time: March 10, 2021 06:00 PM Eastern Time (US and Canada)

Join Zoom Meeting
https://us02web.zoom.us/j/85125371642?pwd=aW1oSE50TkxRczIrNFlVTkplMjl1Zz09

Meeting ID: 851 2537 1642
Passcode: 939202
One tap mobile
+13126266799,,85125371642#,,,,*939202# US (Chicago)
+19292056099,,85125371642#,,,,*939202# US (New York)

Dial by your location
+1 312 626 6799 US (Chicago)
+1 929 205 6099 US (New York)
+1 301 715 8592 US (Washington DC)
+1 346 248 7799 US (Houston)
+1 669 900 6833 US (San Jose)
+1 253 215 8782 US (Tacoma)
Meeting ID: 851 2537 1642
Passcode: 939202

While the public will not be able to attend the meeting in person, public input is still encouraged. Agendas and meeting packets can be obtained by submitting an email request to: planning@ellettsville.in.us.

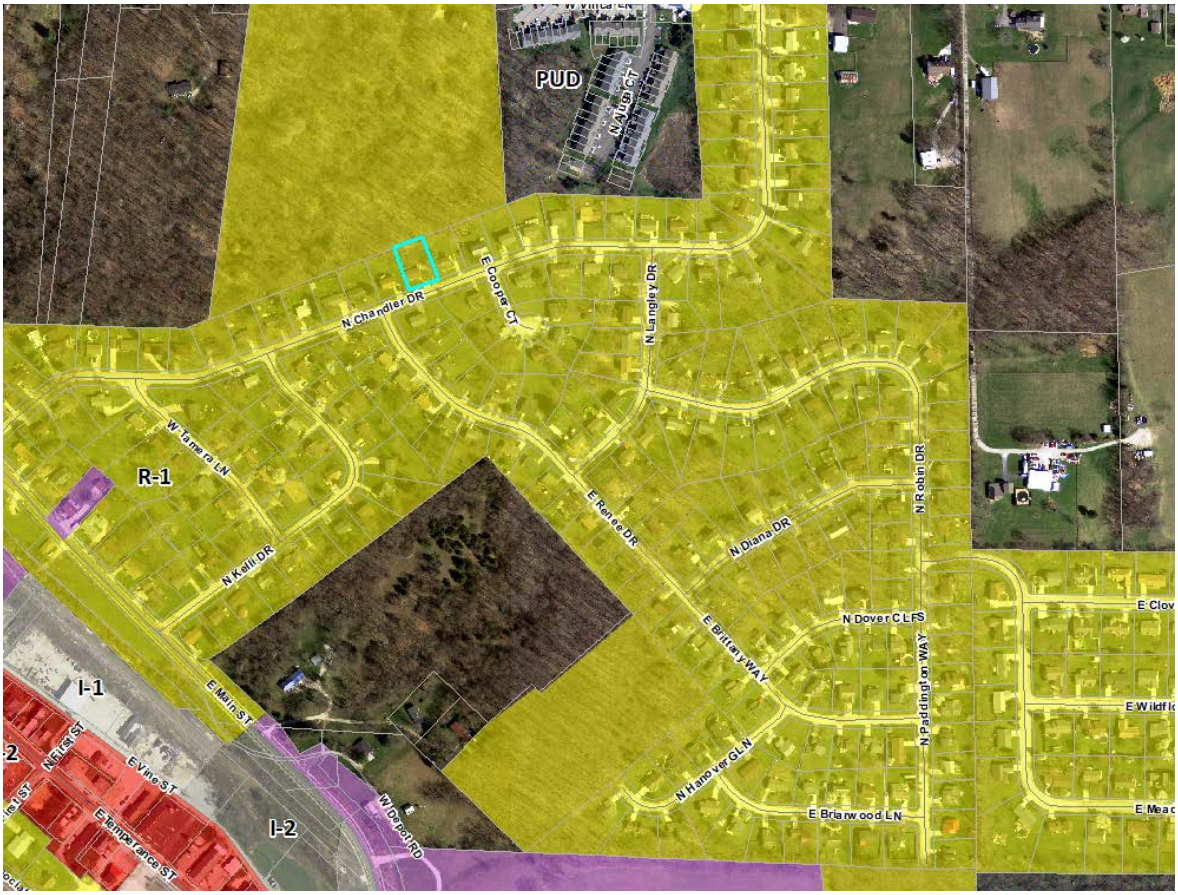
Town of Ellettsville
Department of Planning & Development

BZA 20-01–Variance from Development Standards
Staff Report

Petition

Case - BZA 20-01. A request by Sid Sullivan for a variance of development standards to allow an accessory structure in a front yard, to encroach into the front yard setback, and reduced distance between driveways in a residential zoning district. The subject property is located at 611 N. Chandler Drive.

Surrounding Zoning Districts & Uses



	Zoning District	Property Use
North:	R-1; Single Family Residential	Residential
South:	R-1; Single Family Residential	Kelli Heights
East:	R-1; Single Family Residential	Kelli Heights
West:	R-1; Single Family Residential	Kelli Heights

Considerations

1. The petitioner is requesting three development standards variances to allow a new accessory structure:
    a. Variance to allow an accessory structure in a front yard (§152.067)
    b. Variance to allow a structure to encroach fifteen (15) feet into the front yard setback (§152.190)
    c. Variance to allow a reduced distance between driveways (§152.227)
2. Indiana Code (IC 36-7-4-918.5) requires the following criteria be met in order to approve a variance from development standards request:
    a. The approval will not be injurious to the public health, safety, morals, and general welfare of the community;
    b. The use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner; and
    c. The strict application of the terms of the zoning ordinance will result in practical difficulties in the use of the property.
3. Additionally, Town Code requires the following criteria to be satisfied:
    a. The approval does not interfere substantially with the comprehensive plan.
    b. The approval is not based solely upon financial hardship or mere convenience; and
    c. The approval is in conformance with all other Town Ordinances.
4. In order to be considered a practical difficulty, the following criteria should be met:
    a. The need for a variance arises from unique conditions on the property and is not shared by neighboring properties in the same zone;
    b. Strict compliance with the standard would unreasonably prevent the landowner from using the property for a permitted use, or would render conformity necessarily burdensome;
    c. The particular request, or a lesser relaxation of ordinance standard, would provide substantial justice to the landowner and neighbors;
    d. The need for a variance is not the result of a self-created action by the current or any former property owner.
5. The property is zoned R-1; Single Family Residential.
6. Town Code addresses accessory structures in Section 152.067 (B), which specifically states they shall be located in rear and/or side yards.
7. Town Code addresses front yard setbacks in Section 152.190 (B), which specifically states a front yard setback in a single family residential zone is twenty-five (25) feet front the front property line.
    a. Front property lines along N. Chandler Drive lie approximately twelve (12) feet behind the edge of the road, with the house approximately thirty-seven (37) from the road.
    b. The accessory structure is approximately 14 feet by 20 feet, and would encroach 15

feet into the front yard setback, but remain 12 feet from the edge of the road.

8. Town Code addresses accessory structures in Section 152.227, which requires a minimum separation of twenty-five (25) feet between driveways in the same property.
    a. There is no required separation between driveways on adjacent properties, leading to many instances where two driveways are within twenty-five (25) feet of each other.
    b. There does not appear to be any consistency or reasoning to the minimum separation between residential driveways.
9. A variance, once granted, runs with the property no matter who owns the property.
10. All persons who own or have controlling interest in the property included in the petition have joined in the petition.

Criteria For Decisions – Variance From Development Standards

In taking action on all variance requests, the Board of Zoning Appeals shall use the following decision criteria, consistent with the requirements of Indiana Code. The Board may grant a variance of development standards from this Ordinance if, after a public hearing, it makes findings of facts in writing (consistent with IC 36-7-4-918.5) that:

DECISION CRITERIA – DEVELOPMENT STANDARDS VARIANCE

1. **General Welfare**: The approval (will or **<u>will not</u>**) be injurious to the public health, safety, morals, and general welfare of the community.

Staff Finding:

The location of the carport and driveway would be not cause injury to the general welfare of the community. Although the property will encroach into the front setback, the existing parking areas allow for excess parking and a shortened driveway will not cause a problem. The reduced distance between driveways is necessary to allow the new driveway to accommodate multiple vehicle and not encroach into the adjacent parcel, but should not cause any aesthetic concerns.

2. **Adjacent Property**: The use or value of the area adjacent to the property included in the variance (will or **<u>will not</u>**) be affected in a substantially adverse manner.

Staff Finding:

The location of the driveway and accessory structure are not substantially different from other legal non-conforming arrangements in older neighborhoods. There is no reason to believe that this situation will have any negative affect on surrounding properties, of which several in this area have been notified on multiple occasions for zoning violations.

3. **Practical Difficulty:** The strict application of the terms of the zoning ordinance (**<u>will</u>** or will not) result in practical difficulties in the use of the property.

Staff Finding:

Staff is of the opinion that the strict application creates a practical difficulty in the use of this property. The petitioner, for personal reasons, has requested to have a driveway and covered parking area near his front door, and the existing parking areas are not practical due to the slope

of the property. The proposed location of the driveway and covered parking structure are in the only location on the property that is not adversely affected by slope.

4. **Compliance with Comprehensive Plan:** The variance request (**is or is not**) substantially in compliance with the existing comprehensive plan.

Staff Finding:
The comprehensive plan does not specifically address accessory structures in front yards.

5. **Financial Hardship:** The need for the variance (**does** or does not) arise from some condition peculiar to the property involved.

Staff Finding:
The reasons for this request are due to the topography of the land and are not related to financial reasons.

6. **Compliance with other Town Codes:** The variance request (**is** or is not) substantially in compliance with other Town Codes.

Staff Finding:
Other than the items covered in this petition, the property is currently in compliance with all other Town Codes.

Board of Zoning Appeals Action

The Board of Zoning Appeals action shall be in the form of *approval, approval with conditions, denial, or a continuance.* The Board of Zoning Appeals takes final action on all variance petitions.

Staff Recommendation

At first glance, there does not appear to be much unique about this property, but upon further inspection, it becomes apparent that the slope of the property creates access issues, particularly when approaching the front entrance from the existing driveway. Other homes within the Kelli Heights subdivision have similar type structures in the front setback, and as this is a carport, it does not significantly obstruct the view of the house. Additionally, the structure does not pose any line of sight difficulties.

Therefore, based on the above analysis, it is of Staff opinion that the variance does meet requirements, and recommends approval of all three variances. Staff recommends that the Board consider all of the variances together as disapproval of one, would essentially negate the entire request of the applicant. The Board may approve the variance if, after testimony and discussion, it finds that the request does meet all six (6) of the stated requirements. If the Board denies the request, it shall state which requirement(s) of which variances have not been met.

Submitted by Kevin Tolloty, AICP
Director of Planning, Town of Ellettsville
March 2, 2021

Town of Ellettsville
Public Hearing
Notice
www.ellettsville.in.us
(812) 876-8008
03/01/2021

03/01/2021

03/02/2020

03/01/2021

American's with Disabilities Act & Fair Housing Act
Reasonable Accommodation

Sid Sullivan of 611 N. Chandler Drive is requesting a reasonable accommodation under the American's with Disabilities Act "ADA"). A reasonable accommodation is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with disabilities to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces, or to fulfill their program obligations. The ADA often refers to these types of accommodations as "modifications."

Any change in the way things are customarily done that enables a person with disabilities to enjoy housing opportunities or to meet program requirements is a reasonable accommodation. In other words, reasonable accommodations eliminate barriers that prevent persons with disabilities from fully participating in housing opportunities.

Reasonable modifications can include structural changes to interiors and exteriors of dwellings and to common and public use areas.

The Town of Ellettsville, Indiana, Code of Ordinances, specifically Section 90.15(C)(a): states *"Discrimination includes a refusal to permit, at the expense of the person with a disability, reasonable modification of existing premises occupied or to be occupied by that person if those modifications may be necessary to afford the person full enjoyment of the premises."*

Pursuant to the Fair Housing Act and the American's with Disabilities Act, the Town of Ellettsville, on behalf of Sid Sullivan, is requesting approval of the variance of development standards to allow an accessory structure in a front yard, to encroach into the front yard setback, and reduced distance between driveways in a residential zoning district.

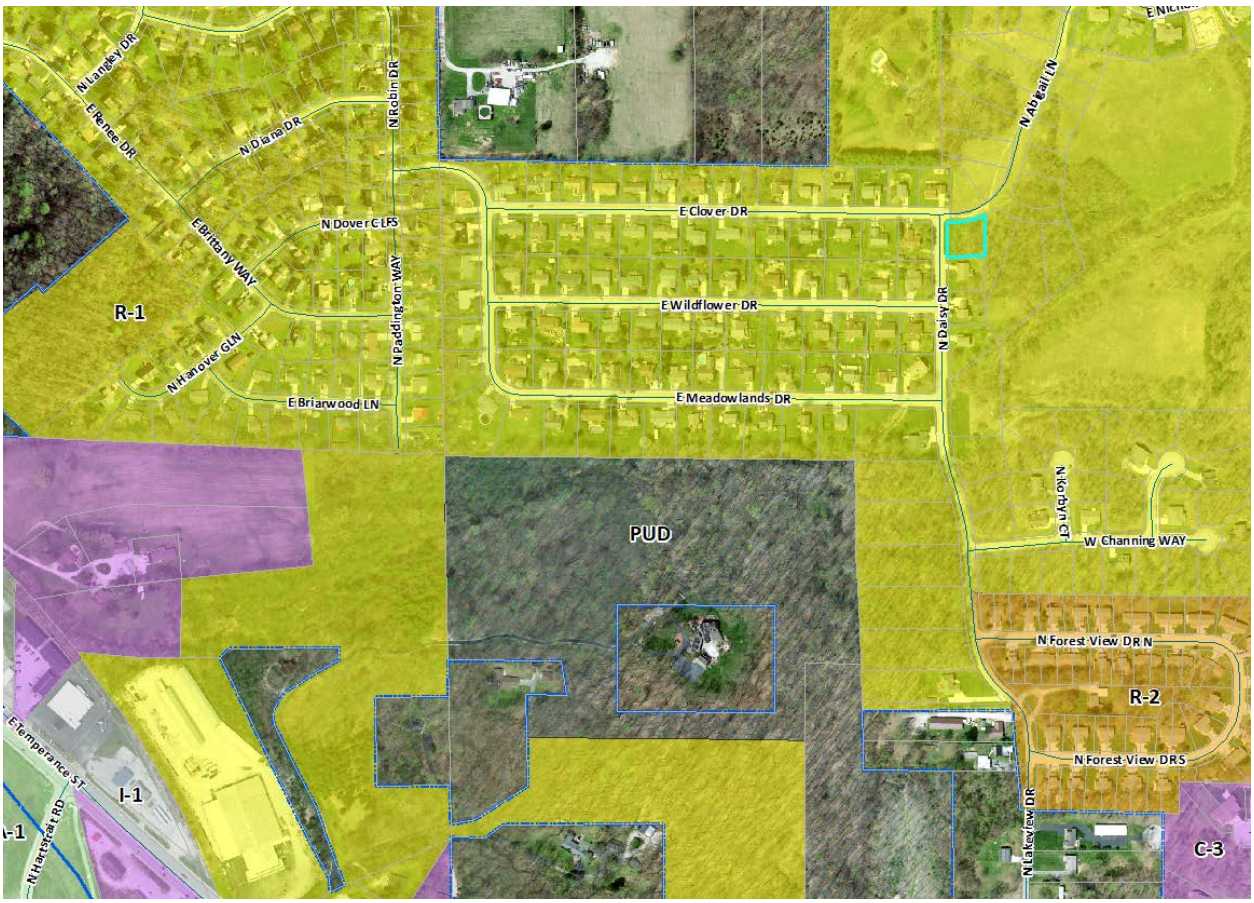
Town of Ellettsville
Department of Planning & Development

BZA 21-01–Variance from Development Standards
Staff Report

Petition

Case - BZA 21-01. A request by Marisa Weiler and Jonathan Brauer for a variance from development standards to allow a fence taller than four (4) feet in height in a front yard in a residential zoning district. The subject property is located at 723 N. Daisy Drive.

Surrounding Zoning Districts & Uses



	Zoning District	Property Use
North:	R-1; Single Family Residential	Ruby Creek
South:	R-1; Single Family Residential	Meadowlands
East:	R-1; Single Family Residential	Ruby Creek
West:	R-1; Single Family Residential	Meadowlands

Considerations

1. The petitioner is requesting a development standards variance to allow a fence taller than four (4) feet in height in a front yard in a residential zoning district (§152.054).
2. Indiana Code (IC 36-7-4-918.5) requires the following criteria be met in order to approve a variance from development standards request:
    a. The approval will not be injurious to the public health, safety, morals, and general welfare of the community;
    b. The use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner; and
    c. The strict application of the terms of the zoning ordinance will result in practical difficulties in the use of the property.
3. Additionally, Town Code requires the following criteria to be satisfied:
    a. The approval does not interfere substantially with the comprehensive plan.
    b. The approval is not based solely upon financial hardship or mere convenience; and
    c. The approval is in conformance with all other Town Ordinances.
4. In order to be considered a practical difficulty, the following criteria should be met:
    a. The need for a variance arises from unique conditions on the property and is not shared by neighboring properties in the same zone;
    b. Strict compliance with the standard would unreasonably prevent the landowner from using the property for a permitted use, or would render conformity necessarily burdensome;
    c. The particular request, or a lesser relaxation of ordinance standard, would provide substantial justice to the landowner and neighbors;
    d. The need for a variance is not the result of a self-created action by the current or any former property owner.
5. The property is zoned R-1; Single Family Residential.
6. Town Code addresses fences in Section 152.054 (A)(1), which specifically states fences in front yards may not exceed four (4) feet in height.
    a. Section 152.054 (B) defines front yards on corner lots (see attached diagram).
7. A variance, once granted, runs with the property no matter who owns the property.
8. All persons who own or have controlling interest in the property included in the petition have joined in the petition.
9. The Board has heard a very similar case in 2017 (BZA 2017-04) regarding a fence on a corner lot.
    a. The property owner requested a variance to leave the fence at six (6) feet in height in the secondary front yard, and was denied by a 3-1 vote.

Criteria For Decisions – Variance From Development Standards

In taking action on all variance requests, the Board of Zoning Appeals shall use the following decision criteria, consistent with the requirements of Indiana Code. The Board may grant a variance of development standards from this Ordinance if, after a public hearing, it makes findings of facts in writing (consistent with IC 36-7-4-918.5) that:

DECISION CRITERIA – DEVELOPMENT STANDARDS VARIANCE

1. **General Welfare**: The approval (will or **will not**) be injurious to the public health, safety, morals, and general welfare of the community.

Staff Finding:

The location of the fence is far enough from the intersection of N. Daisy Drive, N. Abigail Lane, and E. Clover Drive that it will not cause any sight concerns for traffic.

2. **Adjacent Property**: The use or value of the area adjacent to the property included in the variance (will or **will not**) be affected in a substantially adverse manner.

Staff Finding:

The increase in fence height should have no effect on adjacent properties.

3. **Practical Difficulty:** The strict application of the terms of the zoning ordinance (will or **will not**) result in practical difficulties in the use of the property.

Staff Finding:

The strict adherence to zoning in this case would not be detrimental to the use of the property, as a four (4) foot tall fence could be placed in the same location. Corner lots are common and do not create any unique conditions with this property. Additionally, a practical difficulty cannot be from the result of a self-created action.

4. **Compliance with Comprehensive Plan:** The variance request (**is or is not**) substantially in compliance with the existing comprehensive plan.

Staff Finding:

The comprehensive plan does not specifically address fences in front yards.

5. **Financial Hardship:** The need for the variance (**does or does not**) arise from some condition peculiar to the property involved.

Staff Finding:

The variance request is directly related to the property location and not due to a financial hardship.

6. **Compliance with other Town Codes:** The variance request (**is** or is not) substantially in compliance with other Town Codes.

Staff Finding:

Other than the fence, the property is currently in compliance with all other Town Codes.

Board of Zoning Appeals Action

The Board of Zoning Appeals action shall be in the form of *approval, approval with conditions, denial, or a continuance.* The Board of Zoning Appeals takes final action on all variance petitions.

Staff Recommendation

While the variance would meet most of the required findings, it does not appear to meet the finding of a practical difficulty. There is nothing prohibiting the homeowner from putting a four (4) foot tall fence in the front yard, and in fact, the Board has set a precedent for having a fence lowered to the required height. The fact that this fence has already been constructed should not be considered as a reason for approval. The purpose of granting a variance is to alleviate a situation in which adhering to zoning standards is reasonably difficult due to a unique condition of the parcel. Corner lots are not unique and there is nothing associated with this parcel preventing the homeowner from constructing a four (4) foot tall fence instead of a six (6) foot tall fence.

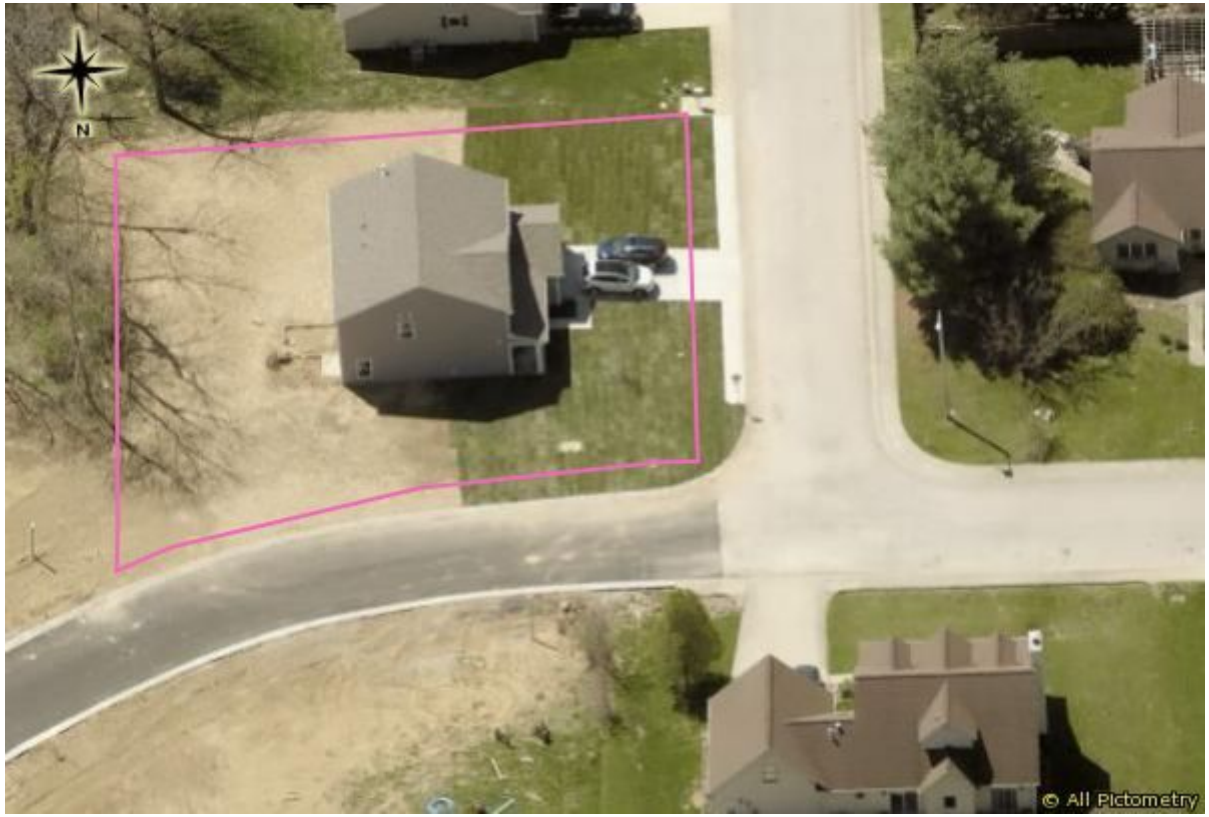
Therefore, based on the above analysis, it is of Staff opinion that the variance does not meet all requirements and recommends denial of the variance request. The Board may approve the variance if, after testimony and discussion, it finds that the request does meet all six (6) of the stated requirements. If the Board denies the variance, it shall state which requirement(s) have not been met.

Submitted by Kevin Tolloty, AICP
Director of Planning, Town of Ellettsville
March 2, 2021

11/30/2020

Fence Height Diagram - Corner Lot

723 N. Daisy Drive



04/20/2020

BZA Variance Application Description

In a letter dated October 20, 2020 Denise Line, the Assistant Planner for the Town of Ellettsville, issued Ms. Marisa Weiler and Dr. Jonathan Brauer (hereafter "we") a Request for Compliance. That letter states:

> *"On October 16, 2020, while conducting an inspection in your neighborhood we noticed a fence constructed on your property located at 7223 [sic] N. Daisy Drive. What caught our attention was the 6' fence in your yard running parallel to Abigail Lane.*
>
> *According to Ellettsville Town Code, when a property is located on a corner lot, it is considered to have a secondary front yard (see diagram included with the enclosed fence code). Any fence located in a secondary front yard, between the front yard building setback line and the road right-of-way, shall not exceed four feet in height (§152.054(B)(2).*
>
> *Therefore, we are requesting you either remove the fence in the front yard or reduce the height of the fence to four feet as permitted by the Town Code."*

We respectfully request to be issued a variance to leave the fence as it is currently constructed. In this document, we begin with a brief **summary of key arguments (I)**. This is followed by a **point-by-point reference and reply (II)** to the portions of Ellettsville Town Code and Indiana Code that are relevant to variance requests. Subsequently, we provide more details about the **context and circumstances (III)** that have led to this Request for Compliance and our corresponding variance request; this third section also includes several pictures to help visualize the lot and related issues (e.g., street corner visibility).

Overall, these three sections taken together should make clear that (a) our variance request is clearly warranted under State and Town codes; (b) its approval would not pose any problems addressed by the ordinance in question (i.e., safety or visibility issues); (c) its denial would constitute a substantial injustice to the property owners; and, for these reasons, (d) our variance request is widely supported by our neighbors and was publicly supported by the Ellettsville Town Council - the legislative authority responsible for creating the ordinance.

I. Summary of Key Arguments:

(1) Our lot was on a dead-end (Daisy Dr.) when we purchased it in December 2019. Our fence was planned before Abigail Lane was constructed and before we had any knowledge that the road would be installed. As such, our professional fencing contractor (Award Fence) and the property owners (Marisa Weiler & Dr. Jonathan Brauer) all believed we were fencing in two side yards and a back yard; neither we nor our contractor had any reason to consider ordinances pertaining to a "secondary front yard" because Abigail Lane did not exist. We planned and ordered the fence at the beginning of the COVID-19 pandemic, which caused major construction supply and installation delays, resulting in final fence installation in summer 2019. While waiting on fencing materials and installation, Abigail Lane was created.

(2) Of central import to Ellettsville BZA variance requests, the Town's Request for Compliance in this case constitutes a "practical difficulty" under Indiana Code and Ellettsville Town Code. Specifically, as it was pandemic-related construction delays and the subsequent construction of Abigail Lane that resulted in an ordinance violation, the need for a variance "arises from unique conditions on the property" and "is not the result of a self-created action by the current or any former property owner." Moreover, the financial costs of compliance and the risks associated with compliance (detailed below) would "render conformity necessarily burdensome," whereas "approval of this variance request would provide substantial justice to the landowner."

(3) The ordinance in question is intended to protect community safety by maintaining visibility at street corners. Our fence does not create any such visibility or safety risks, neither in general nor specifically of the kind addressed via the intent of this ordinance. The Ellettsville Town Council recently confirmed this purpose and the need for the ordinance in question at their meeting on January 25, 2021. Additionally, in their public discussion at that same meeting, the Town Council specifically identified our lot and fence as constituting a "unique" case that is appropriate for a variance request and signaled their support for a variance in our unique case.

(4) For the above reasons, and as we explain in detail below, our request for a variance stems from a unique set of circumstances in which:

a. requiring compliance would involve holding the property owners responsible for a violation that was not willfully created by the property owners but instead caused by a unique confluence of events (i.e., pandemic and new road construction);

b. requiring compliance is unnecessary to meet the legislative intentions behind the ordinance (i.e., visibility and safety) – a fact that was uniquely confirmed by the Town's legislative body;

c. requiring compliance would constitute arbitrary and selective enforcement of an ordinance that is not being enforced upon the property owners' closest neighbors;

d. and requiring compliance would achieve only technical bureaucratic aims, while failing to improve the public good in any way yet simultaneously posing significant burdens on the property owners.

II. Town and State Codes: Point-by-Point Reference and Reply

The Ellettsville Town Code (§ 152.295) permits the BZA to "*hear and approve a request for a variance from the development standards under the zoning and subdivision ordinances*" provided that certain criteria are applicable. The first three criteria (A-C) are somewhat straightforward:

(A) The use for which the variance is sought is a permitted use in the zoning district in which it is located.

- Six-foot tall privacy fences are permitted in residential lots throughout the state, county, town, and the Meadowlands neighborhood. Moreover, as we show later (see point #2 under Section III below) *all* proximate Meadowlands neighbors (Daisy Dr.

and adjoining streets) with fenced-in corner lots have privacy fences that are comparable to that of the petitioners (i.e., 6' tall and located in "secondary front yard").

(B) All persons who own or have controlling interest in the property included in the petition have joined in the petition;

- Marisa Weiler and Jonathan Brauer jointly own the property; both are included on this petition.

(C) The request complies with the requirements under the chapter of the Floodplain Overlay District in this chapter;

- This request has no implications for and is compliant with requirements pertaining to the Floodplain Overlay District sections of the Code.

The fourth criteria (D) specifically references Indiana Code; that code and responses are included here as well for convenience:

(D) The Board of Zoning Appeals shall have made an affirmative finding for each of the criteria under I.C. 36-7-4-918.5…

The aforementioned Indiana Code (*I.C. 36-7-4-918.5*) stipulates the following three conditions regarding variance applications:

(1) the approval will not be injurious to the public health, safety, morals, and general welfare of the community;

- As we explain later (see points #3, #4, and #5 under Section III below), approval of this request will not be injurious to the public health, safety, morals, and general welfare of the community. In contrast, requiring compliance with the ordinance may pose risks to public health and safety.

(2) the use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner; and

- As we explain later (see points #3, #4, and #5 under Section III below), usage of adjacent lots is unaffected by the fence as-is and hence is unaffected by approval of this request. In contrast, *denial* may result in adverse effects due to aesthetic appeal of current fence compared to the outcome of modification requirements.

(3) the strict application of the terms of the zoning ordinance will result in practical difficulties in the use of the property. However, the zoning ordinance may establish a stricter standard than the ''practical difficulties'' standard prescribed by this subdivision.

- Requiring compliance with the zoning ordinance would result in substantial practical difficulties for the homeowners.

- At the time we purchased this property (December 2019) and subsequently planned and ordered the fence in question, our designs were in compliance with the Ellettsville Town Code. This is because, as noted above and explained below, we were on a dead-end road – <u>Abigail Lane did not exist</u>. Due to this fact, the fence in question was planned and contracted to be built in a side yard and not a secondary front yard (see point #1 under Section III below). Likewise, our professional fence

contractor (Award Fence), who has many years of experience building fences in the region in compliance with Bloomington and Ellettsville Codes, also assumed we were fencing a side yard and saw no issues with our fencing plan.

- The COVID-19 pandemic, which resulted in widespread construction delays during spring and summer 2020, also affected our fence installation. We purchased our home in December 2019 and planned our fence shortly thereafter. Since we were installing a custom-ordered white "vinyl" fence (see pictures below), our fencing contractor had to order the fence materials from a manufacturer. Unfortunately, this order was placed in the early days of the pandemic. Like many in the construction and manufacturing industries, the fence manufacturer was delayed by substantial supply-chain and manufacturing disruptions. This resulted in a delayed fencing installation; the materials were finally delivered and fence was installed in summer 2020. While waiting on manufacturing, the empty field by our house was leveled and Abigail Lane was constructed. As such, pandemic-related delays and subsequent construction of Abigail Lane coalesced to cause the ordinance violation in question.

- As explained, our fence is constructed with expensive custom-ordered materials. Our contractor informs us that moving the fence would be very expensive and inevitably will result in product damage. Meanwhile, shortening its height would require labor-intensive and non-factory-recommended personal modifications that will also inevitably cause damage or, alternatively, labor-intensive fence removal and an expensive order of new shorter fence materials. Either option would impose significant financial burdens on the homeowners. In addition to labor, time, and steep financial costs, moving the fence would also result in substantial portions of property being unusable for kids playing protected behind a fence. Specifically, the entire side yard – the only level part of the entire lot – would be unusable, unless we allowed our children to play on by the side of the road rather than behind the fence that was constructed to protect them. In addition to labor, time, and steep financial costs, restricting the fence height would also pose resident and neighborhood safety risks due to the presence of a large-breed dog (Boxer) who could leap over a 4' fence.

Returning to Ellettsville Town Code, the fourth criteria (D) continues with four subcomponents defining a "practical difficulty" – a term specifically referenced in the Indiana Code above.

(D) [continued] …a practical difficulty should meet the following criteria:

(1) The need for a variance arises from unique conditions on the property and is not shared by neighboring properties in the same zone;

- There are several reasons our "need for a variance arises from unique conditions" on the property:

    (a) Our lot was a dead-end and not a corner when purchased in December 2019. Our fence was planned and contracted in compliance with Town Code; pandemic-related construction delays in combination with subsequent construction of Abigail Lane caused the ordinance violation by changing our northern side yard to a "secondary front yard" (see point #1 in Section III

below). This is an unexpected and extremely atypical situation – i.e., it is a "unique condition" that is not shared by any other properties in the same zone.

(b) Unlike neighborhoods in which all fences are compliant with Town ordinances, the Meadowlands neighborhood has several properties with six-foot-tall privacy fences constructed in secondary front yards in direct violation of the same ordinance. In fact, there are three fenced-in corner lots on the exact same block of Daisy Dr. All three properties have six-foot-tall privacy fences near the sidewalk in their secondary front yards parallel to Daisy Dr. (see point #2 in Section III below). Again, this is an atypical and hence "unique" situation that permits consideration of a variance request.

(c) All street corners have corner lots. However, unlike most corner lots, our "secondary front yard" facing Abigail Lane is the only front yard on the block; that is, it is not adjacent to another front yard. In contrast, the lot directly adjacent to our fence (i.e., the only other house "on the block") does not face Abigail Lane. Instead, our fence backs up to rear/side corner of the under-construction house on that neighboring lot. As such, the fence does not pose any usage or visibility issues for our neighbors. Moreover, due to the fence's construction and both the lot and street corner layout (angling substantially wider than 90-degrees), the fence does not restrict visibility for auto traffic or pedestrians at the Daisy Dr./Abigail Ln. intersection. That is, the fence does not restrict street visibility beyond that already restricted by the corner of our house (see point #3 in Section III below). Again, these are "unique" circumstances for a corner lot, where tall privacy fences might pose visibility issues for neighboring driveways and/or cars approaching street corners where angles are 90-degrees or narrower.

(d) As noted earlier, at their meeting on January 25, 2021, the Ellettsville Town Council specifically identified our lot and fence as constituting a "unique" case that is appropriate for a variance request and signaled their support for a variance in our unique case.

(e) Taken together, these points coalesce into a truly unique – i.e., singular and unmatched – set of circumstances in which:

- <u>requiring ordinance compliance would be holding the property owners responsible for a violation that was not willfully created by the property owners but instead caused by a unique confluence of events (i.e., pandemic and new road construction)</u>;
- <u>requiring compliance is unnecessary to meet the legislative intentions behind the ordinance (i.e., visibility and safety) – a fact that was uniquely confirmed by the Town's legislative body</u>;
- <u>requiring compliance would constitute arbitrary and selective enforcement of an ordinance that is not being enforced upon the property owners' closest neighbors</u>;

- and requiring compliance would achieve only technical bureaucratic aims, while failing to improve the public good in any way yet simultaneously posing significant burdens on the property owners;

(2) Strict compliance with the standard would unreasonably prevent the landowner from using the property for a permitted use, or would render conformity necessarily burdensome;

- These criteria are met and explained in earlier sections and in subsequent sections below.

(3) The particular request, or a lesser relaxation of ordinance standard, would provide substantial justice to the landowner and neighbors;

- This criteria is met and explained in earlier sections and in subsequent sections below.

(4) The need for a variance is not the result of a self-created action by the current or any former property owner.

- This criteria is met and explained in earlier sections and in subsequent sections below.

The fifth and final criteria (E) includes three subcomponents (1-3) that state:

(E) The Board of Zoning Appeals shall have made the following additional findings:

(1) The approval complies substantially with the comprehensive plan;

- Our request should comply substantially with the comprehensive plan.

(2) The approval is not based solely upon financial hardship or mere convenience; and

- Our request is not based solely upon financial hardship or mere convenience, though these are important additional reasons for approval that indeed apply in this situation.

(3) The approval is in conformance with all other ordinances of the town.

- Our request is in conformance with all other ordinances of the town.

III. Additional Context and Circumstances (with Pictures)

#1. House was on a dead-end (Daisy Dr.) when we purchased it; Abigail Lane did not exist.

- Our property, which is located at 723 N. Daisy Dr., is lot #86 of The Woods of the Meadowlands neighborhood. When we purchased our house at the end of 2019 and started planning our fence, Meadowlands Dr. ended at Daisy Dr. This is clear in both the “ME 86 Plot Plan” (attached below) and the “Erosion Control Plan” (attached below). There was no Abigail lane; our back yard and northern side yard, where the section of fence currently in question is constructed, bordered undeveloped land. This can be seen in the pictures below.

- Above, our property shortly after purchase, with the North side bordering undeveloped land and no road. Below, our property today.

- According to #20 of The Woods of the Meadowlands' Declaration of Covenants and Restrictions (i.e., HOA document; attached below):
    - *"Sidewalks. Shall be installed and paid for by the owner of the lot when lot is built on, where there is a hard surface driveway that part shall be accepted as sidewalk, the sidewalk shall be four feet wide and shall be six feet from the concrete curb.*"

  In the above picture, note that the sidewalk stops at the end of Daisy Dr. There was no bordering road (later Abigail Lane) next to which the builders (Beacon Builders) could have installed a sidewalk. In fact, in response to our question about whether there were any plans to remove trees or develop next to or behind our lot, Beacon's realtor who sold us the house

told our realtor (paraphrased): “I do not know what they are doing with the land around you, but there are currently no plans to develop it”:.” We were surprised and quite disappointed to see the trees being ripped down behind us a few months later.

- Hence, when we initially reached out to our fencing company to place an order and get on the long waitlist for a fence, we – and our professional fencing contractor – thought that we were fencing in a back yard and two side yards. The subsequent construction of Abigail Lane changed our side yard to a “secondary front yard,” resulting in an ordinance violation. As our property was on a dead-end road in the fence planning stage, neither we nor our fencing contractor had any reason to consider fencing ordinances pertaining to secondary front yards.

#2. Our fence was planned and ordered in compliance with Town and neighborhood rules. Even now, after Abigail Lane’s construction, our fence is comparable to several other 6’ privacy fences located in “secondary front yards” in the Meadowlands neighborhood – including three on the same exact block of Daisy Drive alone.

- Unfortunately, we were unaware that the Ellettsville Town Code contained a specific ordinance (152.054(B)(2)) pertaining to fencing in a “secondary front yard.” If we had been aware of this ordinance, we certainly would have made every effort to comply with all appropriate rules and ordinances, or we would have gone through proper channels initially to request a variance.

- Yet, even if we *had* been aware of this ordinance when we planned the fence, we would not have known that the ordinance applied to us given our lot’s placement on a dead end road (see #1 above). We were aware of The Woods of the Meadowlands’ Declaration of Covenants and Restrictions (attached below), which we consulted before planning our fence to ensure compliance with HOA rules. #10 of that HOA document states:

    - “*Fences. The owner of each lot agrees not to erect fences of barbed wire, fences which are electrically charged nor those made of steel materials, except chain link. Fences shall not be higher than six feet within sixty feet of any roadway with the exception of swimming pool enclosures. No fence may be constructed on the property lines parallel to any roadway nor may side lot fences extend beyond the front of any house except decorative fences not more than forty-eight inches high.*”

  As explained above, since there was no road bordering the northern side of our property, we thought this was considered a side yard. To be safe, we conservatively built the fence well within the property lines on both sides and the back yard because we wanted to be good neighbors and avoid any disputes with future neighbors. We talked with our Meadowlands neighbors about our fence plans to identify and address up front any potential concerns. We also made sure not to extend the fence beyond the front of the house; rather, we set the “front” of the fence back several feet because, it seemed to us, that is how most of our Meadowlands neighbors’ fences were constructed. Since receiving this Request for Compliance, we alerted many of our Woods at Meadowlands neighbors; everyone we spoke to was happy with the fence and did not think it should be shortened or moved. Also, one of our neighbors posted information about our variance request on the *NextDoor* neighborhood

app, which resulted in an overwhelming amount of support from our Ellettsville neighbors – including from the Ellettsville Town Council itself.

- In planning our fence, we checked the county's website and iccsafe.org, and we asked our fencing contractor (Blake Ward, Award Fence), who has many years of experience building fences in the area, how people typically build their fences on lots like ours. He too followed neighborhood norms – with the exception that we used much more expensive custom-ordered "vinyl" or PVC materials that are uncommon in our neighborhood – to ensure the fence improved the property aesthetically and that it would continue to do so for years to come. When we reached out to our fencing contractor upon receiving this Request for Compliance, he was shocked and stated that he has never seen a request like this.

- As one of us (Dr. Jonathan Brauer) is a Professor of Criminal Justice at IU, we certainly realize that ignorance of an ordinance is not a valid excuse for violating an ordinance. Yet, nonetheless, we *were* ignorant of this ordinance despite our many good faith efforts at following neighborhood rules and ensuring our neighbors were happy with the result. In hindsight, we wish that we had checked with someone in the city before planning our fence – and will most certainly do so for any future projects. Instead, we relied our fence contractor's expertise, conversations with our neighbors, and on HOA documents approved by the Town. At the time we planned and ordered our fence, we were complying with all Town and neighborhood rules, and we were completely unaware of the possibility that there might be a problem with our fence in the future.

- Even now, after Abigail Lane's construction, our fence is consistent with our neighbors' fences in The Woods at Meadowlands neighborhood, where several fenced-in corner lots throughout the neighborhood also have 6' tall privacy fences in secondary front yards parallel to roads. In fact, there are three houses on corner lots that are directly within view of our front porch on Daisy Drive; all three of these corner lots have "secondary front yards" facing Daisy Dr. (across the street from our house), and all three of these corner lots have fences that are in direct violation of the same Town ordinance. While the Ellettsville Town Planner claimed in an earlier BZA meeting that these fences were constructed prior to the adoption of the Town ordinance in question (a disputable claim given the visual age of these fences), nonetheless these fences do not predate the Town-approved Meadownlands HOA rules which contain comparable restrictions. As seen in the pictures below, all three have 6' tall privacy fences built within a couple feet of the sidewalk (rather than 4' tall in place, or 6' tall set back 25' from curb).

- These are just the three we can see from our front door; there are several others throughout The Woods at Meadowlands neighborhood also violating the same ordinance that we see every day when walking our dog. <u>Our goal here is not to request enforcement of this ordinance on all our Meadowlands neighbors. Rather, we wish to illustrate the fact that our ignorance of this particular ordinance does not reflect a lack of concern for the rules. In contrast, we honestly believed we were doing things the “right way” by following HOA guidelines (at the time, given we were on a dead end road), by hiring a respected and knowledgeable contractor, and by following neighborhood fencing norms.</u>

#3. The violated ordinance is intended to protect safety by maintaining visibility at corners and driveways proximate to corners. Our fence does not pose any such visibility or safety risks, and the Ellettsville Town Council agrees.

- Ellettsville's ordinance restricting fence heights in secondary front yards is comparable to those found in many Town codes, as such ordinances serve an important purpose: like setback regulations, such ordinances help minimize "blind corners," thereby ensuring a minimum degree of visibility exists to help increase automotive stopping distances and prevent auto and pedestrian collisions at street corners.

  For example, American Planning Association's historic report on ordinances regulating fencing describes the common practice of regulating fence heights near roadways on corner lots (see "Vision Clearance" section: https://www.planning.org/pas/reports/report113.htm). As the report notes:

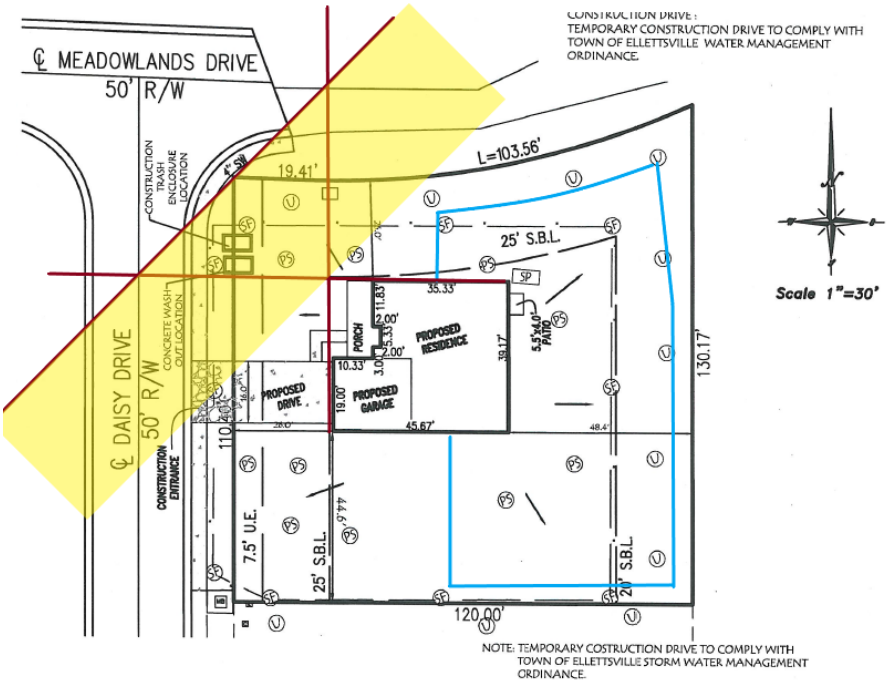
  > "The usual practice is to forbid obstructions over a certain height in a triangle established by measuring a certain distance back from the property line intersection and then connecting the two points established by measurement. The hypotenuse of the triangle becomes the setback line."

- After discussing variability across ordinances in details such as measurement methods and restriction types, the report cites sources that explain the logic behind such restrictions:

  > "Regardless of the width of the intersecting rights-of-way or the amount of required zoning setback, this stopping distance of 80 feet for 20 M.P.H. speed or 90 feet for 25 M.P.H. speed always is obtained with a triangular area free from sight obstructions under the combination of zoning setback and corner sight triangle as recommended above."

- Likewise, in their January 25, 2021 meeting, the Ellettsville Town Council – the legislative authority responsible for establishing such ordinances – spent 30 minutes discussing the merits of maintaining or changing the fencing ordinance in question (for a summary, see *The Ellettsville Journal*, Feb. 3, 2021, pp.1). This discussion confirmed the purpose of and need for this specific ordinance restricting fence height in front and secondary front yards. Consistent with American Planning Association's report, Town Council members ultimately decided to retain the existing fencing ordinance out of concerns about visibility at street corners for cars approaching the corner and for cars leaving driveways near the corner.

- For convenience, below we present a modified version of our Plat Map that overlays the visibility "triangle" (red lines) and cross-corner visibility spectrum (yellow shaded region) needed to ensure safety for drivers and pedestrians near or approaching the intersection of Daisy Drive and Abigail Lane. We also sketched in the location of our privacy fence (blue lines).



- As is clear from the image above, due to fence placement (halfway back on the house and set back somewhat from the property line) and the lot and street corner layouts (e.g., lot and Abigail Lane curving north away from our lot and wider than 90-degrees), our fence does not impede street corner visibility in the critical visibility triangle. The subsequent two pictures confirm the conclusion drawn from our plat map sketch: the fence does not restrict visibility at the street corner in either direction, nor does it at the front or back side of the fence.

- Likewise, in their January 25th meeting, the Ellettsville Town Council did not simply reaffirm the need for this specific fencing ordinance via a vote to retain it – the Council members also specifically discussed our property and fencing ordinance violation. In fact, it was this specific Request for Compliance on our fence that motivated the Council's discussion in the first place. Council members had personally driven by and viewed our fence, then reported they had no issues with our fence. Likewise, the Council concluded that our fence does not pose any of the visibility problems motivating the ordinance and, lacking the ordinance intent, the Council publicly encouraged a variance request and supported its approval. The pictures above lend credence to their conclusion: In our unique situation, forced compliance is unnecessary to achieve to the ordinance's motivating goals of visibility and safety.

#4. We *and* our neighbors are better off if the fence is permitted to remain unchanged

- Changing the fence would pose safety risks: We purchased a 6' privacy fence to keep our kids and dog (a Boxer) safe. Moving the fence back to the building setback line would result in a large part of our lawn with the flattest grading to be outside the fence line. This would force us and our kids to play many of our lawn games outside the fence's boundaries on the flat side yard (aka, "secondary front yard") – right next to what is now a road (Abigail Lane) that is teeming with substantial construction traffic. In contrast, lowering the height of the fence in place to 4' would result in an ineffective permitter for our dog, as a sufficiently motivated Boxer can jump over a 4' fence. Hence, the changes required by the ordinance constitute practical difficulties in the form of undermining the safety goals that motivated our expensive fence in the first place.

- Changing the fence would threaten to diminish curb appeal and neighborhood property values: We sunk our savings into a beautiful, expensive, white PVC fence that, unlike wood fences, will not degrade over time and thus will improve our lot's curb appeal for years to come. We also have devoted ample resources and effort toward ensuring that all visible yard in front of the fence is sodded and looks appealing to neighbors and potential home buyers who visit the area. See below for pictures of our current fence and surrounding yard.

- If we are forced to comply with this ordinance, we do not have sufficient funds to order new 4’ tall PVC fencing or pay our professional fencing contractor to tear down our old fence and reinstall a new 4’ fence in its place on the north side of our property. If required to change it, I will try to manually cut the current fence down to 4’ high; if that is unsuccessful, the likely result will be a cheaper non-matching fencing option (e.g., chain link) along that section. (Note too that the backyard was improperly seeded by the builder; currently, it is not as visually appealing as the sod we had installed outside the fence; see picture below.)

- <u>Keeping the fence as-is by granting a variance is the safer, more aesthetically pleasing option. Requiring change will result in substantial financial, time, and labor costs; it will also result in a substantial part of the most desirable portion of the lot being unusable or less safely used, and/or in an asymmetric fence of different heights (and likely materials) bordering each side of our house’s façade. Ultimately, this may hurt our home’s curb appeal</u>

and value, as well as hurt bordering property aesthetics for current neighbors and for potential new home buyers in the newly developing neighborhood on/around Abigail lane.

#5. Current 6' privacy fence is not effectively 6' tall due to surrounding grade elevation

- Finally, despite being a 6' tall privacy fence, the current fence does not effectively sit or "look" that high given the surrounding grade elevation. For instance, the newly built house that sits directly across the street from the north side fence in question – i.e., across from what is now considered our "secondary front yard" – has a much higher average grade elevation. Specifically, the ME 86 Plot Plan (Figure X below) shows an average grade of approximately 749.00 in our side yard near the fence, compared to a grade elevation of approximately 750.00 at our curb and 751.00 at the opposite curb. Meanwhile, the opposite curb sits at the bottom of a hill, with the houses across the street sitting at a substantially higher elevation that is several feet above our grade (i.e., grade elevations at the back of the lots across the street approaching and exceeding 760.00).

- As a result, the 6' privacy fence already stands lower than 6' relative to the curb grade elevation, and it stands substantially lower than the home grade elevations that are directly across from the fence. In fact, the new house directly across the street from our fence has an unimpeded view over our fence from their first-floor elevation point of our back door and most of our yard. This can be seen clearly in the picture below, which was taken at eye-level from our side kitchen window: the windows on a standard-size truck at the opposite curb are visible over the top of the fence, and the neighboring house's entire porch and front door are fully visible over the fence. Hence, this is not an imposing privacy fence that blocks visibility. In contrast, due to grading, it does not even afford the level of privacy that one typical receives from a 6' fence; neighbors can easily see over it and into our yard or beyond the fence.

BEACON BUILDERS, LLC
PO Box 784836
Indianapolis, IN 46278

PROPERTY ADDRESS:
723 N. DAISY DRIVE

EROSION CONTROL PLAN
LOT 86
THE MEADOWLANDS
SUBDIVISION
SECTION FIVE
INSTRUMENT NO. 1999024582
ELLETTSVILLE, INDIANA
MONROE COUNTY, INDIANA

NOTE:
1.) EROSION CONTROL MEASURE MUST BE FUNCTIONAL AND MAINTAINED THROUGH CONSTRUCTION.

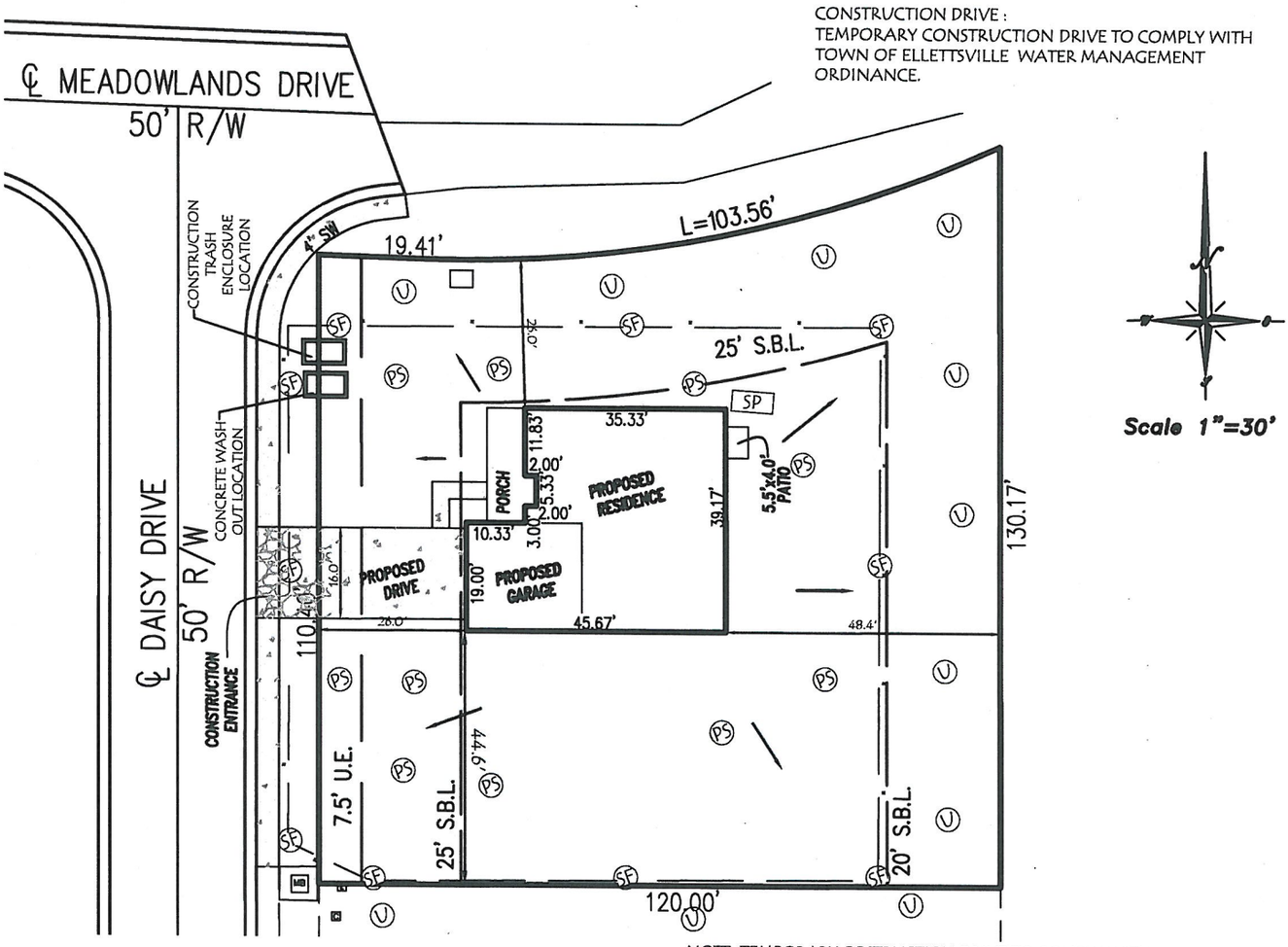
2.)SEDIMENT DISCHARGE AND TRACKING FROM LOT SHALL BE MINIMIZED.

3.) ADJACENT LOTS DISTURBED BY AN INDIVIDUAL LOT OPERATOR MUST BE REPAIRED AND STABILIZED.

4.) CHANGES OR DEVIATIONS TO THIS PLAN SHALL BE SUBMITTED TO THE TOWN OF ELLETTSVILLE FOR APPROVAL.

5.) THE INDIVIDUAL LOT OPERATOR IS RESPONSIBLE FOR INSTALLATION AND MAINTENANCE OF ALL EROSION AND SEDIMENT CONTROL MEASURE UNTIL THE LOT IS STABILIZED. THE OPERATOR MUST COMPLY WITH ALL REQUIREMENTS OF THE STORM WATER MANAGEMENT ORDINANCE OF THE TOWN OF ELLETTSVILLE, INDIANA.

CONSTRUCTION DRIVE :
TEMPORARY CONSTRUCTION DRIVE TO COMPLY WITH TOWN OF ELLETTSVILLE WATER MANAGEMENT ORDINANCE.



NOTE: TEMPORARY COSTRUCTION DRIVE TO COMPLY WITH TOWN OF ELLETTSVILLE STORM WATER MANAGEMENT ORDINANCE.

LEGEND :

- (SF) DENOTES SILT FENCE
- (S) DENOTES SAND BAG INLET PROTECTION (OR APPROVED EQUAL)
- (U) DENOTES UNDISTURBED AREA
- (TS) DENOTES TEMPORARY SEEDING
- (PS) DENOTES PERMANENT SEEDING
- [SP] DENOTES SOIL STOCKPILE PROTECTION
- DENOTES CURB INLET PROTECTION
- DENOTES DOUBLE CURB INLET PROTECTION
- DENOTES DROP INLET PROTECTION
- DENOTES TEMPORARY CONSTRUCTION ENTRANCE

NOTE: CONTRACTOR TO COMPLY WITH ALL APPLICABLE SECTIONS OF THE "INDIANA HANDBOOK FOR EROSION CONTROL IN DEVELOPING AREAS" PUBLISHED BY THE DIVISION OF SOIL CONSERVATION, INDIANA DEPARTMENT OF NATURAL RESOURCES, OCTOBER 1992, FOR THE PROPER INSTALLATION AND MATERIALS USED FOR ALL EROSION CONTROL MEASURES SHOWN ON THESE PLANS.

I, the undersigned Registered Land Surveyor, hereby certify that I have conducted a survey to establish A Plot Plan of proposed improvements and erosion control measures under my direct supervision and to the best of my knowledge, information and belief this plan is an accurate representation of that survey of the following described real estate:

Lot 86 in The Meadowland Subdivision Section Five as per plat thereof recorded as Instrument No. 1999024582 in the Office of the Recorder of Monroe County, Indiana. Subject, however, to all legal highways, rights of way, easements and restrictions of record.

CERTIFIED: 04-03-19
RE-CERTIFIED: 06-05-19

HAROLD GIBSON
REGISTERED
No. LS 910021
STATE OF INDIANA
LAND SURVEYOR

HAROLD GIBSON, Registered
Land Surveyor, RLS910021

Harold Gibson, President
RLS910021
321 N. State Street
Greenfield, Indiana 46140
(317) 462-4055
www.hgsurveys.com

H.GIBSON
LAND SURVEYING, LLC

811
Know what's below.
Call before you dig.

DATE	REVISIONS
6-4-19	REVISED HOUSE FOUNDATION PER CLIENT

FILE: 19-026

SCALE: 1"=30'
DRAWN: CKK
CHECKED: HG