

Meeting Minutes of
Board of Zoning Appeals
Held June 3, 2021

Members Present: Dan Gess, Clete Miller, Jack Norton, Jan Saurman, Scott Bruno

Also Present: Shawnee Schuller (Assistant to Building Director), Eric Tuck-Macalla (Building Director)

Excused: Terrance Burke, Carolyn Young, Lauren Oley (Assistant to Building Director)

Audience: Debra Blauman, Scott & Tama Ohnmeis, Michael Herrick

**Full recording of the meeting is permanently available on the City of Bay Village website under Government/Board of Zoning Appeals/View Most Recent Agendas and Minutes/Media*

Mr. Norton called the meeting to order at 7:33 p.m.

Mr. Norton explained the quorum requirements and advised that 4 of the 5 board members present will need to approve the request in order for the motion to pass and if the applicant would prefer they can request their agenda item be tabled and heard by all of the members.

Mr. Norton introduced the first item on the agenda, the approval of the minutes that were held May 20, 2021

Motion by Mr. Saurman, **Second** by Mr. Bruno, to approve the minutes of the meeting held May 20, 2021 as prepared and distributed.

Motion passed 7-0

1) Debra Blauman 24920 Sunset Dr.	The second variance is 1163.05 (h)(1) length of privacy screen. The allowable fence over 6 ft. 4Inches above grade is 32 feet, the Ms. Blauman is asking for a total variance of 12 ft. or 33%. 10% of the perimeter is 41 ft. the panels over 4Ft. 4 inches are all in three directions and a part of the deck structure. <i>Item Tabled 5/20/21</i>
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Mr. Norton introduced the first item on the agenda as Debra Blauman at 24920 Sunset Drive. He advised that this issue has to deal with the height of a structure on a deck. He doesn't want to call

it a privacy screen or a fence because that is part of what is in dispute. They wanted to have another opportunity to do further research and have the board revisit the site to be comfortable with what was being decided. Referring to the last meeting on this situation, the prior request was for a variance to allow the deck structure to be closer to the front setback. Through a variety of items that were discussed, including the uniqueness of the neighborhood and lot, the board concluded that this structure would be allowed via a variance to that front yard setback. Part of what needs to be decided tonight is if this isn't a fence or a privacy screen, but rather part of the structure, they may have already approved it based on the fact that they said there can be a structure here. With that in mind, after the board has had a chance to further visit the site.

Mr. Tuck-Macalla remarked that he looked at a bunch of different properties, probably about 10, with somewhat similar situations. He didn't get much of a conclusion. Some of them didn't have any permits and some that did didn't mention a privacy screen - although they have privacy screens. Perhaps they were added later. One in particular, which is pretty old, the building director at the time mentioned that the privacy screen that was attached to the one side of the deck could not be any taller than 6'. That was the only mention he could find. He asked Mr. Barbour this question and he seemed to think that this would be a privacy screen.

Mr. Miller stated that part of their previous conversation was to identify the elevation from the grade level to the top of the privacy screen and to determine if they are taking the top of the screen from the grade level or from the top of the deck surface.

Mr. Tuck-Macalla replied that one that he looked at the actual deck was 5' off grade and then above that there was a 6' privacy screen. He doesn't know how it was permitted. There was a permit for a deck, but it didn't say anything about a privacy screen - that must have gone on later. This particular one is 7' above grade, where it is now, it's less than 6' off the deck. There isn't anything conclusive in the records that he could find.

Mr. Norton advised that there was one situation that he recalled and he's almost positive, but he can see it from the street is the one where there was a second-floor deck. Because of the unusual lot situations within this whole area the applicant had received a variance to put in a three seasons room and then on top of that there was an open deck with a roof and a railing around two sides, the house on the third side, and they wanted to enclose the fourth side. The discussion was - is this a privacy screen or not? At that time, it was allowed under the idea that if they were allowed to build there - there could have built a solid wall. Maybe they don't need a special permit because they already applied for an adjustment to the permitted building permit and they were granted it. He's not sure how that exactly ties into this situation. Is the structure being there already approved? The other thing that he noticed, as he drove around the neighborhood, is that there are a lot of cases that came back to into his mind. A healthy number of variances have been granted in that area because it is so unusual. One he looked at today they had a very modest little porch and the steps from the porch went right down to the sidewalk. He doesn't know whether it was permitted or grandfathered in or what, but there are various situations along that line throughout that whole neighborhood because of its history as a cottage community.

Mr. Blauman advised that the screen in question is part of the structure. The joists are attached to the posts of the deck.

Mr. Gess advised that he's been reading the fence ordinance because that is what it could be presented under. Privacy screen is not defined, but a fence is defined, 'fence means any permeant enclosing structure including walls, privacy screens, site barriers, or dog runs'. He was struggling with if this was a fence or part of the deck structure. According to the ordinance definition whether it is a part of an enclosing structure, which it is, the wall seems like it would fall under the definition of a fence. Height, relative to the fence ordinance, is defined from 'vertical distance from existing grade at the base of the fence'. It would mean you're taking it from the earth/ground. In which case, Mr. Tuck-Macalla is saying it's a 7' fence according to these definitions. The thing that he struggles with is – what is the definition between what has been built and if it had been built at 36", like a normal deck rail, but still had that horizontal design then you could argue that it's solid enough to block sight and if that deck was more than a couple feet off the ground and had a deck rail system – what is stopping any other deck railing, some distance off the ground, from being challenged as a privacy screen. He's trying to read it as black and white, but he can't seem to figure out what definitions apply.

Mr. Tuck-Macalla stated that Mr. Barbour's review seemed like more of his opinion. He has gone around and round with it too. If you threw a roof on it or a pergola top with some boards it's something completely different. If they had a pergola and it has slats then is it a privacy screen? One could argue that in a situation where you'd have to get it 7' you'd have to have a deck 4' above grade and if that is the case they'd be required to have a 3' railing – per building code. In this situation you have a deck that is basically on grade with privacy screen above it. The height of that screen is variable and is not required by code.

Ms. Blauman advised that she has a question. Is there any code that limits the height of the railing around the deck? This is serving as the railing/catch all.

Mr. Tuck-Macalla replied that he understands what she means.

Mr. Norton commented that if they give someone a variance in an area they are not allowed to they may say that they want it left open for the future. The difficulty that he is having is that they've already changed the footprint on this lot to allow this. It was just the way it was plotted even though the lot is the opposite of that. They discussed how much of a variance would be appropriate. They determined it was okay to have a structure there – to him, once they've said it is okay to have a structure there then this could be a 2-story addition - although obviously it's not that. Looking at this, over all neighborhoods one of the things they worry about is setting precedent and that type of thing. This neighborhood is loaded with that because the whole nature of the neighborhood is grandfathered. Many of these lots wouldn't even be allowed under our zoning because of their overall size. In this case, he sees no harm in allowing this based on setting a bad precedent or harming the neighborhood.

Mr. Miller advised that he can't agree with that. He can't agree that they are addressing the sunset neighborhood solely exclusive of the rest of the city. The suggestion that it's part of the structure as only the posts are anchored to the structure, but you can cut those off at 36' and it still functions as supporting the deck. One of the things they've not tackled is the overall length of the enclosure – which, by his totals, comes in close to 50' of privacy screen. He is not willing

to call it a fence or a guardrail. At this point, it seems like a privacy screen because, from his perspective, that is clearly the intent. He thinks that they should also be discussing the overall length of this and consider if that is acceptable based on the exclusiveness of the neighborhood.

Mr. Norton remarked that he thinks it's 5-10% more than the 10% rule.

Mr. Bruno advised that he is inclined to agree with Mr. Miller. The deck may be anchored to the primary structure, but it can certainly be removed and isn't necessarily permanent. He would like to know the length of the privacy screening. As part of any variance motion, he would like some finding of fact especially the fact that Mr. Tuck-Macalla attested to the fact that the deck is basically at grade and if we can come to some sort of agreement that they are considering a variance of privacy screening based on the code. They need to know the length of what they are dealing with.

Mr. Tuck-Macalla replied that there is a total of 49' and 10% of the yard is 41'.

Mr. Norton commented that if they are dealing with it as a variance to the 10% rule they would be looking at an 8' variance.

Mr. Gess advised that they are not exceeding 32' in any one direction so that is not in play. An 8' variance to the 10% rule is what is in question. He would suggest that it might not matter what this is – if it was 8' less in length.

Mr. Bruno advised that one of the other things that he's been wrestling with is – if they should consider a provision that this variance be granted contingent upon the deck as an accessory to the primary structure.

Mr. Saurman replied that he thinks that would be a good idea.

Mr. Norton remarked that they could treat this as an accessory structure even though it's semi-attached. It has a separate post forming its foundation and separate joists. They could consider it an accessory structure.

Ms. Blauman clarified that it's considered a privacy screen right now, but if she were to cut 5' off of 6' of it – then it would become a railing in that part and then it would be okay?

Mr. Bruno inquired if she intends on doing that? If so, her application doesn't reflect that.

Ms. Blauman replied that she doesn't, but she also didn't realize it was a problem. She thought she could just wrap that around. She thought she'd grow stuff off it and she didn't realize there was a maximum height – as far as going around that.

Mr. Bruno advised that it appears that they are treating it as a privacy screen. The spirit of the code and law in Bay relative to prohibit fencing above 6'6" above grade that would be inconstant with the code by requiring no more than 32' in one direction or exceeding 10% of what lot. So, by placing something onto a deck that has a height that is inconstant with a railing and, in turn,

has turned this into a conversation relative to code 1163.05 which deals with privacy screening and fencing. They're potentially trying to tie the structure to the existence of the deck – as in if the deck was to be removed so would this structure. The reason they are doing that is because the variance lives with the property. He is not comfortable granting a variance where she can have privacy screening on this property in perpetuity unless it's related specifically to this deck as it exists currently. If this deck were to change in some shape or form the variance, as he would provide for it, would terminate as well.

Mr. Tuck-Macalla inquired if this could be a special permit.

Mr. Norton replied that would make good sense.

Mr. Miller stated that he just quickly looked the dimensions, if they treated it like an accessory structure, and it comes up to 550 sq. ft. which would seem to well exceed the accessory option. He would be more in favor of a special permit and disregard the accessory structure and disregard the length as long as they are giving a special permit with the conditions that should the deck ever be removed this screen is also revoked.

Mr. Bruno remarked that he likes that option especially based on the two conversations they've had.

Mr. Norton stated they wouldn't need to do anything formal with the application they'd simply make it a special permit to address the situation.

Mr. Tuck-Macalla advised that code section is 1121.42.

Motion by Mr. Bruno, Second by Mr. Saurman, to grant a special permit to the property at 24920 Sunset Drive per CO 1121.42 allowing the privacy screening to exist as part of the deck that exists on this property as built and currently in place. Mr. Bruno added three findings of fact related to this special permit.

Findings of Fact

- 1) The deck is on grade as represented by the building department.
- 2) Based upon discussion and research by the building department and the board the structure on top of the decking along the parameter of the decking is being treated as a privacy screen.
- 3) The board and building department, in discussion tonight, determined that it would be most appropriate to consider this as a special permit with a provision that the privacy screening be only allowed so long as the deck, that currently exists in its structure, exists the privacy screening would be allowed under this special permit. If the deck is to be removed or altered in anyway that the special permit would terminate and need to come before the board of zoning for reassessment.

Roll Call Vote:

Yeas – Gess, Miller, Norton, Saurman, Bruno

Nays –

Excused – Young, Burke

Motion Passed 5-0

2) Scott Ohnmeis 30322 Provincetown Ln.	Applicant is requesting a variance to section 1163.05 (h)(2) limiting a privacy screen to 32 feet in any direction. The owner is seeking a variance of 194 lineal feet. 10% of the lot perimeter is 54 feet.
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Mr. Norton introduced the next item on the agenda as Scott Ohnmeis at 30322 Provincetown Ln. The board has had any opportunity to review the application and visit the site. As perhaps you can tell from the previous case and discussion...

Mr. Ohnmeis remarked that they are asking for 150' more than the previous applicant. He put one reason on his application, but he would like to discuss two other reasons they're requesting this variance. The first, as listed on the application, their daughter adopted a dog from the county shelter and it was the only dog that the shelter would allow them to look at because they have a smaller dog. They love this dog and it's a very good dog – not vicious at all. His daughter has researched this breed quite a bit – they think it's a Belgian Shepard and a boxer and this dog can jump. They have researched canine websites and most of them say a 4' fence will not keep this dog in. They have seen how this dog performs on a leash and they agree with that. Some websites said 5' would be appropriate and others said they need 6' to be safe. He understands in Bay Village that would be tough. Reason number two, is that he and his wife are foster care givers for the county. They currently have their 5th placement, a 10-year-old boy, and they have not, except for one exception, had an issue about biological family members trying to contact the child in their care. One of the five it was an issue. They have had children with special needs and the extra fence height might help them in that regard. Thirdly, they have a utility easement behind their house so that the fenced in part of their yard doesn't but up with the people behind them on Ashton. That is a utility easement – they own that property, but they aren't allowed to do anything there. They like the view and the privacy, but two things – the utility companies' telephone and electrical access back there and they don't keep it up. It actually looks dangerous and maybe some of you saw it when you were on site. The telephone access pole is rusty and leaning and because high voltage runs through it it's dangerous. Animals are nesting in it and it's rusty. He only thought of this yesterday. He spoke with a woman who applied, and was granted, a privacy fence – she lives on Walmar and her house is adjacent to Bradley park and she has a dog and there was an incident with the dog and she was granted a 6' privacy fence. He was sort of walking around and seeing all the houses that have higher fences within a stone throw of their house there are quite a few. She was out and he talked to her and she said one of the reasons that she got the privacy fence wasn't just because of the issue with the dog it's because he property is adjacent to a public property. In talking with her she actually gave him the idea – that his property is adjacent to a utility easement. He advised that they are going to do this fence regardless of the decision tonight. They were going to do a 4' chain link fence and then in talking to the neighbor, he talked to every adjacent neighbor and if anyone had a problem they wouldn't

even try for a variance because those relationships are more important. Two of the neighbors did have a problem and getting back to the utility easement – they have neighbors that use the utility easement as a dump and it's an eyesore. What they have decided to do – the neighbors to the east have an existing 5'5" board on board or shadowbox style fence. They are going to do the same style of fence and use their fence on that side. Those neighbors recently redid part of their fence – so the applicant is going to pay to redo that side of the neighbor's fence. If they are struck down they are going to do board on board all the way around. Directly across the street their neighbors have an aluminum fence that is at 6'. Talking to those neighbors they got a variance because you can see through it – they also have a dog that can jump. What they are asking is they will do 4', but they would love to do 5'8" so they match their neighbors, but if they could get an extra foot to give them a standing chance with the dog and to give them a little more sense of security with the kids that might be playing back there they'd be very happy with that.

Mr. Norton advised there are two different rules in regard to fencing. Past the front of the house you can have 4'4" fence as much as you want. In the front yard, it's 3'4". The 4" was added some years ago because people don't want to put a fence on grade where it's muddy and you can't trim it. When the ordinances on privacy screens were first considered, a long time ago, what they didn't want to happen is to form a yard that is a corral that cuts off the view of the neighborhood. They wanted, when you were standing up, to be able to see above and keep the neighborhood together. There are many examples in Westlake or North Olmstead it's a little corral and it's breaks up the neighborhood into little boxes. Privacy is a desirable feature. The two rules, as it applies to all the lots, there is 10% rule where Mr. Ohnmeis can have 54' they also said they don't want these long walls to break up neighborhoods. You can go 54', but after 32' you have to change direction so it's not a long wall. In your situation, it would be a real corral. If you went up to 5' the average person isn't going to see over it. There is a third factor in that if you have a swimming pool you're allowed to have up to 6'. People who have a swimming pool, because of a safety issue are permitted more. His use of a higher fence for animal control is very understandable and there are breeds that can top a 4'4" fence. That is a request that the board gets 10 times a year, if not more. They haven't brought themselves to rewrite the law in that fashion. The council people are elected and they frown upon the board changing the laws. He went on to explain how he could use the 54' in conjunction with the neighbor's fence to not enclose the entire yard.

Mr. Ohnmeis stated that they have about 90' of nearly 6' fence that is essentially going to become part of their fenced enclose – does that knock out their portion or is that the neighbors?

Mr. Norton advised that if the neighbor has 90' on their property and if they want to use that as part of his system as long as his fence is on his property line then he can do that. Some people have done that.

Mr. Bruno commented that the applicant has represented that he has talked to his neighbor to the east and you are willing to economically accommodate for a fence line on their property. So, they would have a run, and to the chairman's point, he would then have 54' to use on the north and west side of his property, but he'd have to break it off at 32' on any one direction.

Mr. Ohnmeis stated that if they are not successful in their request whether they do that he doesn't know. The dog is going to figure it out. He doesn't see how they can use that 54' standalone to have a run for the dog.

Mr. Bruno remarked that he is not inclined to break from consistency. This is his third term on the board and he doesn't ever recall accommodating for a dog. That is something that he will not break from. He does recognize some of the comments and representations he's made in reference to the easement property to the north that he has to deal with. Mr. Bruno has an easement on the northside of his property with utility poles can be inconvenient in the no man's land, but from a privacy standpoint he could use some of his 54' to take away some of that view if they so choose. The request is pretty significant beyond anything they typically come close to. They try to tinker around the edges of the code so things within the percentages 5,10,15% they start to consider as a percentage above and beyond what is permitted by code, but this is a pretty significant ask.

Mr. Ohnmeis replied that his request is 8" which is 15% above what is permitted. He feels that 8" of fencing to help with the three things he brought to their attention. He feels that is a fringe request. He isn't asking for 6' he is asking for 5' which is an additional 8" of fencing. They mentioned the corral. He's attempted to discuss the layout with his neighbors to ensure it's to their best benefit as well in their design. They are trying to avoid a corral. He contacted 5 or 6 contractors and as soon as he said Bay Village they all cringed. It's to the point where one contractor said they won't do fences in Bay Village. He assumes it's because of this? He's not really sure he understands the openness or ordinance – it is what it is. It's just unfortunate that they're not going to make exceptions for dogs and it's unfortunate because it's their job to serve Bay Village. And Bay Village is a dog community and it's a dog friendly community. People love their dogs. How does the city define a pool? If they had a pool they could do 6'?

Mr. Tuck-Macalla replied that a pool is a body of water that is over 100' sq. ft. in surface area and is below grade. It can only be 1' above grade.

Mr. Ohnmeis replied that it has to be an inground pool?

Mr. Tuck-Macalla replied that was correct.

Mr. Ohnmeis remarked that it seems that the city is taking care of the wealthier people in the community.

Mr. Tuck-Macalla replied that they don't make the code they just have to enforce it.

Mr. Bruno clarified that the pool is a safety issue. The applicants' points are well taken and the code has been brought up in council before. The board of zoning appeals is here to tinker around the edges and hear applications.

Mr. Norton advised that it's not 8" as compared to 4'4" it's that it changes it to a privacy screen because once you're at that height a normal citizen is restricted in their view – that is what the whole aiming point is. The 8" takes it from a fenced to a privacy screen. As to the nature of a corral he can only point to driving around both Westlake and particularly North Olmstead – you see these yards where they have 6' section of fencing and it encloses the entire yard. That's what they're referring to as a corral. When you're in a yard like that you can't see past it. It breaks the neighborhood up. If everyone did that everyone would, visually, have their own little box. It would take the neighborhood and line up boxes which is common in a lot of cities. Bay Village had a year long review of the fence ordinances, which was just recently, when it came down to it they said they don't want to change it. That was the elected people not the appointed people.

Mr. Gess added that one of the things that needs to be stated that a particular use isn't justification for a variance. If they look at what they are suppose to evaluate, the basis of a variance, it comes down to the uniqueness of the property. That might cause a difficult hardship because of the property itself.

Mr. Ohnemeis replied that their property is unique. They are a property that is adjacent to a utility easement.

Mr. Gess advised that he could see himself going down that discussion limited to the rear property line. If he was asking for 40-45' to screen the unsightliness of the utility easement because it is unmaintained he might be willing to entertain an extension above the 32' run. He can't allow that particular thing to be extrapolated to 194 lineal feet.

Mr. Ohnemeis inquired what the spirit of the law with regard to the 32' and 10% allowable? What is that for? If Bay Village doesn't want privacy fence – why is a small amount allowed?

Mr. Bruno replied that a small amount would be allowed for providing privacy to a patio area. He also referenced the safety issue regarding sight lines. They try to consider uniqueness. That is why the board may consider allowing the applicant to use more of their 54' on the northside to go beyond the allowable 32'.

Mr. Saurman spoke to the fact that they often look at hardships. He doesn't see his request as a hardship to the use of the property.

Mr. Miller remarked that there are a dozen streets in Ward 2 that all have the utilities coming down in the backyard. There are about 1,500 homes that have the same condition that he does.

Mr. Ohnemeis commented that if the reason for 32' is for privacy, which is not what they are trying to do, they are not trying to block the view from their neighbors which is why they aren't doing the full 6'. They made some comments earlier regarding safety issues – number two on their list of reasons is their safety issue. It's a safety issue if you have an inground pool, but that is the only safety issue that the law seems to want to protect.

Mr. Gess remarked that the applicant's questions are not wrong to ask, but the difficult thing for them is they're not the right body to receive them. They need to be directed to council who makes these rules. The hardship is not based on the use of the property, but the hardship is related to the physical characteristics of the property itself. It's unique in its shape or terrain to cause the ordinance to not be fairly applied to their property. It's physically unique. It has nothing to do with the property owners use, but rather the physical characteristics. Personally, he can relate and emphasize with the applicant, but that's not the justification that is permitted here. As Mr. Norton said, the council had an opportunity, prompted by a lot of public feedback, to reconsider these ordinances because a lot of people have wanted to have taller fences and it was left unchanged. He doesn't think it's a right to change the way they've been interpreting it.

Mr. Ohnemeis inquired how there are so many privacy fences? He can scroll through the picture if they need to.

Mr. Gess advised that no one is saying he's not permitted a privacy fence. He's just saying that it is limited.

Mr. Ohnemeis stated that he's seen many that far exceed the allowable length. He doesn't understand that just 2 years ago his neighbor across the street got approval. They have a 6' fence for their dog, wonderful couple, they treat their dogs like their children. They're on a corner lot, which when he talked to the building department, said that is a red flag. It's a wonderful fence and we're happy for them.

Mr. Bruno advised that without the address and the minutes from that meeting – there isn't factual representation. Mr. Tuck-Macalla can research that, but he doesn't recall in his 3 terms approving a 6' fence for a dog.

Mr. Ohnemeis stated that the owner is a pediatrician and talked to him about the process of the meeting and they went through the same thing. They knew their changes were slim to none tonight going into it, and listening to Ms. Blauman's case they knew they were in trouble, but he just doesn't understand why there are so many privacy fences. If he can produce that across the street, in the last two years, would the board consider that?

Mr. Norton remarked that they don't have a full board tonight and if the applicant would like to research further and submit this address to the building department. The building department will check it out to see if a permit or variance was issued and the board can revisit the whole issue. Perhaps they could table the issue for tonight and they can take another look at it. It might be a fair way to deal with it tonight.

Mr. Gess confirmed with the applicant that they want to table the issue.

Motion by Mr. Gess, **Second** by Mr. Saurman, that the agenda item for 30322 Provincetown Lane be tabled to a future meeting to allow the applicant time to provide additional information, with the assistance of the building department, and research on other parcels that may be pertinent to their discussion at the next time.

Roll Call Vote:

Yeas – Bruno, Gess, Miller, Norton, Saurman

Nays –

Excused – Young, Burke

Motion Passed 5-0

There being no further business to discuss the meeting adjourned at 8:50 p.m.

Jack Norton, Chairman

Lauren Oley, Secretary