

**BOARD OF ZONING APPEALS
PUBLIC HEARING
MINUTES
January 17, 2018**

The Board of Zoning Appeals (BZA) held one advertised public hearing in the Council Room of the Vienna Town Hall, located at 127 Center Street, South, Vienna, Virginia, on January 17, 2018, beginning at 8:00 PM with Robert Petersen presiding as Chair. The following members were present: Gregory Haight, Bill Daly, Robert Dowler, Michael Gadell and George Creed. Donald Chumley recused himself from the meeting. Also attending and representing staff were Michael D’Orazio AICP, Acting Director of Planning & Zoning, Frank Simeck, CZA, Senior Zoning Inspector and Sharmaine Abaied, Board Clerk.

Chairman Petersen began the meeting stating all board members were present

Mr. Chumley requested that the election of officers proceed before the public meeting due to a conflict of interest with agenda item 1, unless the matter could be deferred for a month.

Mr. Petersen asked the board members their thoughts on election of officers before the public meeting.

Mr. Gadell stated that as Vice-Chairman and incoming Chairman he was not fully prepared to accept Chairmanship at this meeting, but would be happy to run the next meeting.

Mr. Petersen stated that they would not move the item of election of officers ahead of the public hearing.

Mr. Chumley stated he wanted the election of officers first or deferral of the meeting due to his current dealings with Carter Fence. Mr. Creed asked Mr. Chumley if he would be recusing himself from the meeting. Mr. Chumley asked if he could give his reason for putting off the agenda item for one month. Mr. Petersen asked if Mr. Chumley was withdrawing from the meeting. Mr. Chumley stated that if the meeting were to proceed he would need to leave. Mr. Petersen asked if Mr. Chumley was making a motion to postpone the hearing. Mr. Chumley stated yes he was making a motion to postpone the hearing. Mr. Petersen asked for a second to his motion, there was no second to the motion. Mr. Chumley asked to make his argument. Mr. Petersen stated his motion was not seconded so it would be out of order for him to make his argument in support of his motion. Mr. Chumley began to make his argument. Mr. Petersen stated to Mr. Chumley that he believed he had withdrawn himself from the meeting. Mr. Chumley stated, yes, he did not feel he could participate in the meeting. Mr. Petersen reminded Mr. Chumley that he was speaking on an issue even though he had already withdrawn himself from the meeting.

Chairman Petersen took a moment to review the Board’s procedures and powers, which are listed on the back of the agenda. There is no precedent, and decisions are made by a majority of those present and voting.

Request for an appeal of a zoning violation alleging that the Subject Property is not in compliance with Town Code § 18-17 as it relates to a corner fence exceeding the four (4) foot maximum height limit, for the property located at 626 Pine St SE, in the RS-16, single-family detached residential zone. Application filed by Sara V. Mariska and Nicholas Cumings agents of Walsh Colucci Lubeley & Walsh PC.

Mr. Nicholas V. Cumings, a member of the Virginia BAR, was present to represent the application. Mr. Cumings stated his understanding that there were multiple packets presented as they had filed the appeal in September, then filed a supplemental appeal after discussion with the town attorney and the Department of Planning and Zoning regarding the issues in this matter. Mr. Cumings stated he had hoped the board had time to review the packets he submitted. He also stated he received the memorandum from the town's attorney in response to his submissions and the staff report from the staff as well. Mr. Cumings began with background information regarding the matter. He stated the former owner applied for a 7-foot fence on the property and the application shows a 7-foot fence was requested, and writing was added by the reviewer stating 6-feet was permitted. The application was subsequently approved by the director of planning and zoning as well as public works for a 6-foot fence. Mr. Cumings also stated that by looking at the plat it shows that Follin Lane and Pine Street form a corner. He continued stating that after reviewing the staff report it is clear that a corner lot should have a 4 foot fence not a 6 foot fence. Mr. Cumings continued stating it was obvious that a mistake was made. He stated that the point of the discussion would be about how Virginia law since 1995 has shown that in similar situations the burden falls on the locality and not the homeowner. He continued stating the legislature chose to enact a statute to protect the homeowner in a situation where a permit is erroneously granted and the homeowner relied in good faith on the permit, which was granted to construct that which was permitted. Mr. Cumings stated the permit was issued April 26, 2016 and the Race family purchased the property from the former owner May 12, 2017. He continued stating they relied in good faith on the permit by purchasing the house as it had been over a year since the permit had been reviewed. Mr. Cumings then stated their right to the fence vested under the state law. He continued stating a notice of violation was issued August 15, 2017 and was appealed 30 days later by his firm. Mr. Cumings stated that the argument and what the board must conclude given the clear law on the matter is that there is no violation because a permit was approved by the town for the fence at its current height. The appellants now have a vested right to 6 feet regardless of what zoning ordinance provides for the corner lot. Mr. Cumings stated it was very similar to a (Virginia) Supreme Court case that interpreted that statute being discussed in which a family had a garage that was taller than it was supposed to be, but building permit had been issued and the garage was built and then later received a zoning violation. That case went all the way up to the Virginia Supreme Court, which agreed with the family that they had a vested right to the garage at its height because of the approved permit. Mr. Cumings stated the code section is 15.2-2311C which sets forth the conditions under which an erroneous permit would be valid: 1. a written order, determination, or decision by the zoning administrator, 2. At least 60 days must pass giving time for the department of planning and zoning to correct its error, 3. The aggrieved person materially relied in good faith and changed his or her position. Mr. Cumings continued stating the first two elements were met and the first two were not disputed by the town. The issue is the third element which is the argument that Carter Fence knowingly requested a fence that would violate the ordinance and therefore the Race family could not rely in good faith on the permit. Mr. Cumings continued stating it ignores that the code identifies an aggrieved person as the one who must materially rely in good faith. The appellants Dennis and Kathleen Race are the aggrieved people, they have relied in good faith that the fence was permitted when they purchased the home. Mr. Cumings stated that there was no evidence or allegation that the appellants acted in bad faith. He also stated that the appellants

strongly dispute that Carter Fence did anything to deceive the town. Mr. Cumings stated that from what he had seen so far nothing the town has presented identified what Carter Fence was thinking when it filled out that specific application. He continued stating what might be surmised from other instances or other applications have no bearing on what happened with 626 Pine. He also stated the violation with the Better Business Bureau is a five plus year old violation. He also stated he understood that they are in good standing and that they built the fence at his home. Mr. Cumings stated it was entirely speculative to state that Carter knew or did something intentionally. He continued stating that it is difficult to understand how a fence contractor could deceive anyone when requesting a fence of a certain height, which is clearly written on the application. Mr. Cumings said it was obvious it was a mistake. He continued stating the underlying law of what section 2311 says and what the Supreme Court has clarified that it says, and that it is a remedial statute that is to protect a certain class of people, homeowners. Mr. Cumings stated that the legislature and the Supreme Court make it clear that the statute puts the risk of a simple mistake being put on the locality and not the homeowner after a certain amount of time has passed and money has been spent. He continued stating that the town's argument obviates the responsibility it has to enforce the zoning ordinance and appears to push the responsibility on to the fence contractors. Mr. Cumings stated there was a reference in the brief by Mr. Briglia to a disclaimer on the fence application stating: any fence that we are proposing here is in conformance with the zoning ordinance. He continued to say that a provision like the one mentioned in the brief does not destroy a statute that was passed by the Virginia legislature with the intent of putting the risk of a mistake on the locality rather than the homeowner. Mr. Cumings stated that the town could not obviate that by requiring every applicant to state that what they have applied for is in total conformance with the ordinance and then later say that under that statute it cannot count because you swore on the form it complied. He continued again stating, obviously, a mistake was made, and the law says it should be on the locality. Mr. Cumings said that it is the responsibility of the town to review the permits, and that mistakes will happen. He also said that the statute is clearly intended to protect homeowners from the hardship they suffer when they rely, to their detriment, on erroneous permits. Mr. Cumings stated that in the Rhoads case it was a garage, which would be expensive to remove and built to the correct height. He then said that removing the fence would incur a significant cost and was something the Race family thought they had when they purchased the home, which makes a difference in their ability to enjoy their back yard. Mr. Cumings stated that clearly the burden shifts to the town after 60 days, provided the property owners acted on the permit. He also stated that it was a remedial statute, literally construed to the purpose intended so protecting the homeowners can be accomplished. Mr. Cumings stated that given the liberal construction, the plain meaning of that statute, and the recent Supreme Court case, the BZA must grant this appeal and permit the fence to stand.

Mr. Petersen asked the board members if they had any questions.

Mr. Simeck asked to give a brief overview of the town's position.

Mr. Petersen stated it would follow direct questions for Mr. Cumings.

Mr. Dowler asked for an explanation for the blue lines and the yellow lines, as well as why there was a 7-foot mark and a 6-foot mark in the drawings on top of the survey. Mr. Cumings stated his examination of the permit is at face value, but believed that staff may recollect what someone said or did not say. He stated his understanding was that there were markings showing where there would be a 7-foot board fence, which was crossed out, and a maximum of 6 feet was written in and it was on the next page of the permit as well. Mr. Dowler asked if all those items exist when the permit was

submitted. Mr. Cumings stated that his understanding was that the application was submitted with the 7 feet on there and then it had been crossed out for 6 feet, then executed, and approved at 6 feet. He continued stating a 7-foot fence was requested and a 6-foot fence was approved. Mr. Dowler asked if Mr. Cumings spoke with the original owners or the fence contractor. Mr. Cumings stated that he had not discussed the matter with Mr. Carter or the former owner, but that the Race family had discussions with various people. Mr. Dowler said the statute talks in terms of a final determination. He then asked why it would be a final determination. Mr. Cumings stated that a fence permit that had been rejected could be appealed or could be overturned. He stated that there is a differentiation between interpretations or something looser and he thought that it was a final determination because the zoning administrator has examined what the applicant has proposed to build, has compared it to the zoning ordinance, and then made a decision as to what is appropriate to construct. Mr. Dowler then asked how that affects situations where a building permit is issued, but there are subsequent inspections and changes. For example if there was a fence inspection, would that not make it final until the inspection is done? Mr. Cumings stated that it may, but that there would also be the 60-day provision in the statute that gives the town the ability, within 60, days to simply correct anything. He continued stating that could be reconciled with any inspection the town would do to ensure that what was constructed conformed to the permit. Mr. Dowler then asked whether an aggrieved person is any person who subsequently buys the property as opposed to the original owner who relied specifically on the permit. Mr. Cumings stated he believed that both would be aggrieved people if a violation were issued. Mr. Dowler stated he agreed the original owner who submits the permit is aggrieved and then the subsequent owners step in the shoes of the original owner, which would then go from owner to owner. Mr. Dowler asked if he was correct in that thought process. Mr. Cumings stated he believed the statute to be literally construed to protect the class of individuals and property owners who have relied on these permits. He also stated that in this situation the Race family relied on the permit for the fence when they purchased the home. Mr. Dowler then stated he guessed the Race's would be an aggrieved party if this came down against them and they would have to take the fence down. Mr. Cumings stated the Race's would incur the costs just as the original homeowner would have incurred the cost. Mr. Dowler stated that it would qualify them as an aggrieved party. Mr. Cumings then stated he felt they have more or equal footing given that when they purchased the home they saw the fence constructed and desired the property as it appeared. Mr. Dowler asked if there were any further proceedings in the Rhoads Supreme Court case. Mr. Cumings stated he was unaware of any further proceedings.

Mr. Creed stated he felt there was a conflict between the document he had and what was presented on the screen regarding color markings showing the 6-foot markings showing the height of the fence. Mr. Petersen stated he has the same color on his document, but understood it to be yellow. Mr. Creed stated he would like the record to reflect that the green line showing the 6-foot fence on their documents was in fact the yellow line in the presentation.

Mr. Daly disclosed that he and Mr. Cumings sit on a board of directors for the Fairfax Law Foundation. He stated he didn't feel it was a conflict with which he would need to recuse himself.

Mr. Petersen asked the board if there were any further questions or statements. He then asked if anyone else would like to speak on the matter.

Mr. Briglia stated he wanted to give legal argument and make sure some facts and evidence were entered into record. Mr. Briglia stated he would like Ms. Murphy to give some testimony to answer some questions that have already been asked as well as give additional information. He then stated

Mr. Simeck, the zoning administrator, had information that will help put things in perspective before he made legal argument.

Mr. Petersen swore in Mr. Frank Simeck for his testimony.

Mr. Simeck stated the town does not dispute that the town had approved the permit submitted by Class A contractor Carter Fence Company. He then stated the town code section 18-17: Any fence from the rear lot line to and including the front line of the building shall be no more than six (6) feet high, except that on a corner lot the fence along the side yard fronting on a street shall be no more than four (4) feet high. He continued stating that the town does not dispute that there was a mistake made based on the interpretation that it was an interior lot, but it was in fact a corner lot. Mr. Simeck stated that the plat did not have a radius, which most corner lots show on their plats. He continued stating Stuart Carter from Carter Fence Company gave the permit marked up and signed the disclaimer stating: I hereby certify that all fences constructed will be within the boundaries of the applicant's property and built in compliance with § 18-17 of the Vienna Town Code (see reverse). This includes, but is not limited to, the construction of the fence so that the posts and support members are on the inside and the finished side faces the street or adjacent or abutting properties. Mr. Simeck restated that is was part of the fence application. He also stated that staff reviewed previous fence applications by Carter from 2013 that showed about 15 fences with 6 being corner fences which shows that Carter knows how to install fences and is the highest level of a contractor, Class A.

Mr. Petersen opened up questioning to the board for Mr. Simeck.

Mr. Creed asked if the plat was included with the application when Mr. Carter signed it. Mr. Simeck stated that was correct. Mr. Creed then stated it showed that it was a 6-foot board on board. Mr. Simeck then asked for clarification as to the picture. Mr. Creed stated it was the plat, which showed a 6-foot fence, was allowed. Mr. Simeck stated that was correct, but it was approved in error and that the town does not dispute that.

Mr. Dowler asked if what was stated on the front of the permit, section 18-17 Vienna code (see reverse, was on the reverse of the permit. Mr. Simeck stated that was correct and that it was a three page permit. Mr. Dowler then asked who drew the yellow and blue lines. Mr. Simeck stated that it was Stuart Carter of Carter Fence. He then asked who drew the blue and yellow lines on the reverse side of the permit application. Mr. Simeck stated it was part of the permit that shows where fences are allowed to be located. Mr. Dowler then asked if a blank permit comes with the yellow and blue lines. Mr. Simeck stated that in fact the highlighting was done after the fact by staff after it was signed. Mr. Dowler asked when. Mr. Simeck stated it was a graphic representation of where the 4-foot, 6-foot, and corner radius of 3-feet is allowed, highlighting the different sizes of fencing. Mr. Dowler stated his reasoning for asking. He stated that if it was marked during the permit submission, there may have been conversation stating the 6-foot fence was not allowed. Mr. Simeck stated he would need to have Ms. Jennifer Murphy answer that as she took in the permit application.

Mr. Daly asked if an assumption could be made looking at the certification on the application, which was first submitted and stamped received on April 25, 2016. He asked if it was safe to assume the red ink where it says "office use only" or above where it says "not allowed per town code" and items are crossed off were not there when submitted by Stuart Carter. Mr. Simeck stated that was correct. Mr. Daly then asked if someone in the planning and zoning office added the red ink. Mr. Simeck stated

that was correct. Mr. Daly then asked who added the red ink. Mr. Simeck stated it was Ms. Murphy. Mr. Daly asked if it was Mr. Simeck's belief that Stuart Carter knew he was not compliant with 18-17 because of his experiences with the town that 7-feet would not be allowed under any circumstances. Mr. Daly continued stating that Mr. Carter put his signature on an application that states the 7-feet would run along a significant portion of the fence and then asked again if that was Mr. Simeck's belief. Mr. Simeck stated that was correct and that Mr. Carter is well aware that the town does not allow 7-foot fences. Mr. Daly then asked who wrote the red language and Mr. Simeck stated he believed it was Ms. Murphy's handwriting.

Mr. Haight asked if the town's position was that, the homeowners did not proceed in good faith. Mr. Simeck stated that he believed the homeowners were relying on a fence company that was well established that knew how to install fences to put in a fence correctly.

Mr. Petersen asked Mr. Haight if he felt his question was answered clearly and Mr. Haight said yes.

Mr. Daly stated under the Rhoads case statute in the Rhoads case which is Virginia code section 15.2-2311C and at the end it discusses a permit obtained through fraud. He then asked if it was the town's and Mr. Simeck's position that fraud had occurred by virtue of Mr. Carter signing and submitting an application that he knew was not in compliance with town code section 18-17. He then asked if Mr. Carter's fraud was then fraud of the owners when submitting the application. Mr. Simeck stated it was correct.

Mr. Petersen asked if Mr. Briglia wanted to speak and then stated that Ms. Murphy was requested to speak as well. Mr. Briglia stated it would help if Ms. Murphy testified.

Mr. Petersen swore in Ms. Jennifer Murphy for her testimony.

Ms. Murphy stated Mr. Carter brought in the application April 25, 2016. She then stated he submitted the application and the supporting plat with the blue and yellow lines. She stated they spoke for several minutes. She then stated that she could not remember whether she or Mr. Carter pointed out that, a 7-foot fence was shown on the application. She said they spoke about it and that Mr. Carter stated he knew, but that it was what the homeowner wanted so he was asking the question. Ms. Murphy stated that they could not approve a 7-foot fence. She then asked that if he was okay she would mark the application rather than stamping it rejected and make him submit another application. Ms. Murphy stated they finished talking and she completed the review of the application. She stated that when looking, while reviewing, it was a narrow lot with no corner radius so she looked at it as if it was a standard lot. Ms. Murphy then stated while she was talking with Mr. Carter she thought they were talking about a 6-foot fence around the rear perimeter, which is allowed on a standard lot. She then stated she did not realize, at the time, it was not a standard lot. Ms. Murphy then stated the red ink was her handwriting and that the blue line was for the 7-foot fence and the yellow line was for the 6-foot fence that was proposed. Ms. Murphy then stated they spoke about the 7-foot fence and that it was not allowed and then marked it out and made notes. She then stated that while reviewing it as a standard lot she deemed it appropriate to have the 6-foot fence. She then stated she stamped it, logged it, and walked it to the director for his approval and signature.

Mr. Petersen stated that Mr. Cumings said that there was no evidence that the Carter Fence Company, represented by Mr. Carter, attempted to deceive and that it was a simple mistake. Mr. Petersen then stated that two board members have asked Mr. Simeck if the town looks upon this as an act of fraud.

Mr. Petersen asked if Ms. Murphy felt it was a simple mistake or if fraud was involved. He also stated his understanding from the January 16, 2018 memorandum from Mr. Briglia that was given to all applicable parties; board members, council, Mr. Cumings, and others; that the word fraud or malfeasance has a significant effect on the time limit of 60 days for the town to rectify a mistake. Mr. Petersen asked Ms. Murphy's view. Ms. Murphy stated she could not know what Mr. Carter was thinking although they did discuss the 7-foot fence. She continued stating she could not say it was intentional fraud even though he is very familiar with town principle.

Mr. Petersen stated he wanted to note to Mr. Cumings and Mr. Briglia that the issue of whether the town can take action after 60 days has elapsed from the issuance of the permit goes very much to the issue of whether it was a simple clerical error or whether fraud or malfeasance was involved. Mr. Petersen then said he hoped Mr. Briglia would speak on this and that Mr. Cumings would have a chance to follow up later. Mr. Petersen asked for other statements or questions for Ms. Murphy.

Mr. Daly stated that Ms. Murphy said she couldn't know what Mr. Carter was thinking, but still wanted to go to the specific conversation they had immediately preceding the writing in red. Mr. Daly said the application and plat stated 7-feet and then asked when she saw it what did she say. Ms. Murphy stated she said, you know we can't approve this for 7-feet. Mr. Daly asked what Mr. Carter said. Ms. Murphy stated he said, I know, I know, but you know the homeowner wants this. Mr. Daly stated he thought that was what Ms. Murphy had said the first time. He continued saying that although he said I know, I know, there is a signature in which he's certifying he's in compliance with 18-17 of the town code. Mr. Daly asked if Ms. Murphy knows or not that he is knowingly submitting something and signing something that's false. Ms. Murphy asked for clarification, if she knew whether he was signing something that was false. Mr. Daly stated yes, and that he (Mr. Carter) submitted the application and immediately said to you I know that 7-feet is not approvable. He still signed certifying compliance with the town code that he is not complying with. Ms. Murphy agreed it was a safe assertion that he (Mr. Carter) submitted something he knew was false.

Mr. Creed stated the reason he asked for clarification for the yellow and blue lines on the application because it looks like two applications; one for 7-foot and one for 6-foot. Mr. Creed asked if it was two applications. Ms. Murphy stated that she was trying to hash things out. Mr. Creed said he understood what she was doing, but he was considering what the applicant did, the applicant put two requests in front of you; one for 7-foot, and one for 6-foot. Ms. Murphy stated it's not uncommon in some scenarios because there can be different sizes of fence on a property. Mr. Creed asked if Mr. Carter knew that we do not allow 7-foot fences in the town of Vienna, and Ms. Murphy stated yes. Mr. Creed asked if the intake person who gets these requests that appear to be two requests, one acceptable and one not, are they still accepted and go forward or is it rejected. Ms. Murphy stated intake personnel accepts it and tries to work with the applicant for staff to review. She continued stating that staff does not do counter reviews, but that they try to speak with applicants or representatives and take the paperwork in for a thorough review. Ms. Murphy stated she accepted the application, spoke with Mr. Carter and he filled it out. Mr. Creed asked if it was moved forward for review and Ms. Murphy stated yes.

Mr. Daly asked about a corner radius and that on the plat there is typically a quarter of a circle indicating it's on a corner lot, Ms. Murphy stated yes. He then asked if that's what she was referring to as a corner radius and she stated yes. Mr. Daly asked if it was missing, Ms. Murphy stated yes. Mr. Daly asked if Ms. Murphy knew why it was missing. He followed up stating that he was asking the question to see if the surveyor made a mistake or if someone prior to giving to the town deleted it

which led to the mistake. He then asked that if the corner radius had been there it would have caught Ms. Murphy's eye and she would have known it was a corner lot, and known the fence should be 4-feet instead of 6-feet, Ms. Murphy stated she would have known it was a corner lot if the corner radius was there. Mr. Daly asked if she knew why the corner radius was missing and Ms. Murphy stated she did not know, but that she has recently seen plats like that. She also stated she was not a surveyor so she wasn't sure if it was due to the right of way and measurement which creates the radius. Mr. Daly asked what percentage of corner lot applications indicate that corner radius and Ms. Murphy stated around 90%. Mr. Daly stated the 90% would be consistent with the fence regulation page that town gives to applicants for fence permits. Ms. Murphy stated it is part of our old application and it was created by the former director years ago and had been scanned in and was sometimes printed in black and white and in color which may add to the confusion. Ms. Murphy asked if board members had looked at the newer graphic that denotes the standard lot. Mr. Daly stated it wasn't part of the application in question and that the older graphic was part of that application. Ms. Murphy stated she wasn't sure. Mr. Daly continued stating the picture below showed letter A would be referred to a corner radius which is where one street meets the other, Ms. Murphy stated yes. Mr. Daly stated the reason for the importance is that a different height is required as a maximum which is 3-feet as opposed to 4-feet which is for safety purposes for drivers to see around. Mr. Murphy stated that was correct. Mr. Daly said it's not unusual for someone who is typically putting in fence permit applications to know the 6-feet vs. 4-feet, but to also know the corner is only 3-feet and that there needs to be a corner radius there to know it's a corner lot. Ms. Murphy agreed with Mr. Daly's statement.

Mr. Gadell said it looks as though most of Ms. Murphy's markings happened on April 25th. He continued stating that in the box that says for official use only that he could see her writing in red that has an asterisk that says maximum all height is 6-foot. Mr. Gadell stated he was familiar with process and procedures and he stated that on the application above it shows there were two other supervisors who also reviewed the application and missed the same mistake. He continued stating the director of planning and zoning signed on the 26th and the director of public works signed on the 27th. Mr. Gadell stated it was missed several times upon review. Ms. Murphy stated that for clarification the public works reviewer is not reviewing for those items they are looking for public works related items like easement that would affect public works requirements. Mr. Gadell stated everyone can make a mistake and that there are checks and balances for a reason and it was missed on a second check and Ms. Murphy stated yes.

Mr. Petersen thanked Ms. Murphy for her testimony and asked her to remain until the public hearing is closed if she was needed to be called upon again.

Mr. Briglia approached and stated that he would like both Mr. Cumings memorandum and his memorandum to be entered into the record. Mr. Briglia stated he wanted to review other Carter fence projects and wanted them entered into the record as well. He stated they go towards intent for the application. Mr. Briglia stated that Ms. Murphy admitted to a mistake and that other eyes looked at it and missed it as well because Ms. Murphy doesn't make a lot of mistakes. He then stated that she had wanted to explain to the board why she made the mistake due to the turn radius. Mr. Briglia stated he believed the reason the turn radius wasn't there was due to Follin Lane being an unimproved street and the original lot line was most likely drawn like that. Mr. Briglia said that Mr. Carter submitted a certified application that he was in compliance with 18-17 and due to Mr. Carter's experience with fence permits in the town and that Mr. Carter repeatedly asks for permits for 7-feet even though he knows he's not allowed. Mr. Briglia stated he checked the state board of contractors

which is the disciplinary action board for all general contractors. He continued stated the board gave a written reprimand for doing work without a permit. Mr. Briglia continued discussing that Carter fence knowingly submitting applications that are outside of town code. Mr. Briglia also stated that the previous owners were advised of the violation along with the real estate agent before the property was sold. He said he felt bad for the Races, but that they stand in the shoes of the Kleiners (previous owner) and Carter Fence. Mr. Briglia also stated that it was deemed that Carter Fence was trying to “pull a fast one” which under Rhoads would not be considered reliance in good faith. He stated that in the Rhoads case it was reliance in good faith. Mr. Briglia gave some of the details in regards to the Rhoads case as it pertained to this application. He then stated that this case with 626 Pine does not have the good faith reliance on a certificate stating it’s in compliance. Mr. Briglia stated you cannot rely on something in good faith when someone certifies it’s accurate, but knows it’s false. He stated that it was void ab initio if obtained by fraud and not relied on in good faith. Mr. Briglia stated the distinction is that the permit was obtained by fraud. Mr. Briglia discussed that people are bound by the actions of their agents handling the permits. He also stated that the town submits that the fence is not in compliance and the zoning administrator is correct to require it to be reduced in size to the 4-foot corner lot size in accordance with the specifications attached to the application.

Mr. Petersen asked if Mr. Briglia could elaborate that the sellers and agent were aware that the fence was not in compliance at the time of sale or previous to the sale. Mr. Briglia asked Mr. Simeck to elaborate. Mr. Simeck stated he contacted the agent about the zoning violation so that it was disclosed. Then on May 9th there was a town hall meeting with Mr. Kleiner, the property owner at the time. Mr. Simeck stated Mr. Kleiner was unhappy about the discovery and didn’t want to jeopardize the sale of his home. He stated the sale continued and the Races acquired the home in the days or weeks thereafter. Mr. Simeck stated that in a sales transaction he was under the assumption there would be a type of disclosure. Mr. Petersen asked if they knew for fact that there was disclosure at the time of sale. Mr. Simeck stated he did not know for fact, but that standard procedure for agents is that when something like that is discovered they have to disclose it.

Mr. Creed asked Mr. Simeck when the fence was built. Mr. Simeck stated he wasn’t aware, but assumed it was shortly thereafter. He then asked when it was noticed that there was a zoning violation. Mr. Simeck stated the zoning violation was reported around a year after, April 2017. Mr. Creed asked if the house was on the market at that point and Mr. Simeck stated that was correct. Mr. Creed asked if the Races were present as he had a question for them.

Mr. Petersen asked them to testify.

Mr. Dennis Race stated he was a member of the DC Bar.

Mr. Creed asked if on the disclosure form was there any indication that there was a violation. Mr. Race stated no, but that they were informed the day before they closed on the house. Mr. Creed asked if he had signed the disclosure statement. Mr. Race stated he was not sure and that they were not made aware until the day before closing.

Mr. Daly asked if the fence was up when they signed the contract for the house and when that was. Mr. Race stated yes and that it was, according to Fairfax county tax records, it was May 12, 2017. Mr. Daly asked if it was possible that everyone was made aware of the zoning violation the day before signing. Mr. Race stated that according to Mr. Simeck there was some discussion a few days before, but not with him. Mr. Race stated that he was told the night before closing that there was a violation

that was being disputed because the permit had been approved. Mr. Race continued stating that they were led to believe there would not be a problem because there was an approved permit. Mr. Daly asked if Mr. Race had any conversations with Mr. Carter. Mr. Race stated after they closed on the house he spoke with Mr. Carter. Mr. Daly then asked if he had any discussions with the seller before closing on the house about the application and what he knew. Mr. Race stated no, just the real estate agent the night before closing. He said shortly after the closing he met with the seller and Mr. Carter. Mr. Daly asked if it was after the closing and Mr. Race said yes. Mr. Race stated that Mr. Carter stated he applied for the fence and asked for a 7-foot fence and only a 6-foot fence was granted /approved which was up. He then stated Mr. Carter was surprised it was an issue. Mr. Daly stated there was a reference to a meeting May 9th and asked if it was safe to assume the meeting on May 9th with Kleiner was May 2017. Mr. Simeck stated that it was May 2017. Mr. Daly asked if there was doubt in anyone's mind that the fence was constructed by Mr. Carter, who already knew it should not have been approved. Mr. Race stated that Mr. Carter stated it was approved. He continued stating a mistake was made, but they should be entitled to having the fence as is according to Virginia State statute or just contract laws. Mr. Race said there was detrimental reliance on the Kleiner family and his family, relying on a permit that was approved. Mr. Daly stated that as an attorney what Mr. Race didn't mention was whether or not the permit was secured through fraud. He continued discussing the code and that at the time of signature Mr. Carter knew that his application did not comply with code. Mr. Race stated he disagreed stating he signed certifying to a portion of the fencing requirement, but didn't sign off on the height. He asked for a 7-foot and got a 6-foot. There was continued discussion on whether the application was in compliance at time of signature and if it was proof of fraud.

Mr. Petersen offered his clarification regarding the April 25, 2016 application which he states was the request of a 6-foot and 7-foot fence, not just a 7-foot fence. Mr. Race stated he felt Mr. Petersen was mistaken. He continued stating Mr. Carter requested a 7-foot fence and Ms. Murphy stated you cannot have a 7-foot fence, but you can have a 6-foot fence. Mr. Petersen asked Mr. Simeck to put the application on the screen and asked everyone to note that it says 6-feet and 7-feet. Mr. Race said no, and Mr. Creed and Mr. Petersen pointed out that it was written on the application. Mr. Race said he didn't understand that to be the case.

Mr. Creed asked for Mr. Briglia again. Mr. Creed stated that it was clear there were mistakes made during the application process, the construction process, and the zoning process. He also stated he knew the intent was for it to be brought down to a 4-foot fence. Mr. Creed then stated on the other side Follin, which is the rear of most homes, has a board on board 6-foot fence. He then stated Vienna Village has a brick wall that looks to be 6 to 7-feet. Mr. Creed said if the fence was allowed to stay it would be in simpatico up to the end of Pine Street. Mr. Briglia stated that would be a request of a variance, which is not before the board. Mr. Creed asked if they had done that, Mr. Briglia stated they had not, and chose to go the way of relying on the Carter fence application which was granted in error. Mr. Briglia stated that as recently as January 10th Carter Fence was caught constructing a corner lot fence without a permit. He stated that Carter Fence builds nice fences, but their conduct cannot be excused. Mr. Briglia stated that building permits that are granted in error are void ab initio unless they qualify under the Virginia Code. He continued that he believed there was evidence before the board that the permit was obtained in fraud and not relied on in good faith. Mr. Briglia continued discussing what the Races could have done as well as the code for the town of Vienna.

Mr. Petersen asked if anyone else would like to speak on the matter before Mr. Cumings return to make further statements.

Mr. Cumings stated his client was confused about the fence request of one side of the property being 6-foot and the other 7-foot. He continued stating that when he read Mr. Briglia's brief he did not see it as the town taking the position that the permit was acquired through fraud or malfeasance. He continued stating that statute was clear that unless it is proven that such written order was obtained through fraud is the way to avoid the 60 day or good faith reliance. Mr. Cumings stated he did not see anything that has proven fraud, which was a serious and severe allegation. He continued stating he understood that a 7-foot fence was requested and Mr. Carter signed an application stating a 7-foot fence complied with the zoning ordinance. Mr. Cumings also stated he understood that Mr. Carter should understand the town's rule, having done so much work in town. He did not believe anyone could attest to what was going through Mr. Carter's mind, as he wasn't present to speak on the matter. Mr. Cumings continued stating if he had known that the town was going to allege that he obtained the permit through fraud, he would have contacted Mr. Carter so he could appear and speak to that. He continued a request for 7-feet, reduced to 6-feet, does not prove fraud it demonstrates the town made a mistake in determining what is allowed. When the town amends the permit, they made a determination. He continued stating that it was a simple error based on the radius in the corner that was not noticed the plat. Mr. Cumings stated that the statute is clear that the aggrieved person is the one who is required to have materially changed his or her position in good faith reliance. He also stated he felt the Races qualify as the aggrieved people and the statute must be liberally construed to effect its intended purpose, which is to protect the aggrieved parties from these types of mistakes. Mr. Cumings stated the burden shifts to the locality. He also stated that Carter Fence does not have a responsibility to determine how high the fences should be, it is the town's responsibility to enforce and administer the code. Mr. Cumings continued discussing whether Carter Fence Company knew the fence requirements for every jurisdiction with which they work. He also mentioned that they must build in the dozens of fences if not more.

Mr. Creed asked why someone would sign an application for 7-feet, as Stuart Carter did, when it says it would be in compliance of 18-17 of the Vienna town code and shows 4-feet, 6-feet, and 3-feet, but nothing that states 7-feet. Mr. Cumings stated he does not know what Mr. Carter was thinking. Mr. Cumings stated that the aggrieved party are Mr. and Mrs. Race who relied in good faith on the permit that was approved by the town. He stated the actions of Carter Fence are irrelevant unless it rises to the level of proven fraud in which case the board could make the determination that the permit was obtained through fraud. Mr. Creed stated we do not know if it was or was not fraud, but that a 7-foot fence was requested and 7-feet is not allowed per the town code. Mr. Cumings stated that was request, but then stated the town reviewer responded by approving a 6-foot fence which is also not permitted. He continued stating the reviewers had opportunity to recognize that it was a corner lot and reduce it to 4, but it was reduced to 6 and the law states an error should be born by the locality and not the homeowner. Mr. Cumings stated he did not see any evidence proving fraud and he also did not see that the alleged actions by Carter Fence mean that the aggrieved parties (the Races) did not rely in good faith. He also stated it is the department of planning and zoning's responsibility to determine how high the fence should be not Carter Fence.

Mr. Petersen asked if there were further questions for Mr. Cumings or if board members would like to make a statement or ask further questions of anyone.

Mr. Daly stated he had a question for Mr. Briglia. Mr. Daly asked if it is proof of fraud when an applicant signs an application that they know to be false, as Mr. Carter did on April 25. He then said, is the law of Virginia clear that the fraud of an agent can be imputed to the principal. He continued

stating that Mr. Carter's fraud is all that is needed to determine if the fence should come down. Mr. Briglia stated there was additional evidence before the board, and the testimony of Ms. Murphy that Mr. Carter stated it was what the property owners wanted. He continued stating they have the evidence that the owners were complicit in their request for 7-feet. Mr. Briglia stated that in the issue of fraud, the property owners stand in the shoes of their agent for that issue which is the town's position. Mr. Daly said that it could not be known if Kleiner knew that 18-17 would not allow for the requested 7-feet. He also stated that Mr. Carter signed a request for a 7-foot fence, certifying it would be in compliance of town code section 18-17. Mr. Briglia stated the package he submitted shows Carter Fence is a Class A contractor and that should be considered when determining if it was intentional or a mistake. Mr. Birglia stated that in their brief they stated it was an intentional act by Mr. Carter and that the homeowners could not rely on in good faith. He also stated they did not hide the fact that it was a criticism of Carter Fence's application or that staff was not pleased with Mr. Carters way of doing business.

Mr. Petersen asked if anyone present wished to say anything further on this issue.

Mr. Creed made a motion to close the public hearing

Mr. Dowler seconded the motion.

Motion:	Creed
Second:	Dowler
Passed:	6-0
Absent:	Chumley

**BOARD OF ZONING APPEALS
REGULAR MEETING
MINUTES
January 17, 2018**

The Board of Zoning Appeals (BZA) met in regular session to review one advertised public hearing in the Council Room of the Vienna Town Hall, located at 127 Center Street, South, Vienna, Virginia, on January 17, 2018, beginning at 8:00 PM with Robert Petersen presiding as Chair. The following members were present: Gregory Haight, Bill Daly, Robert Dowler, Michael Gadell and George Creed. Donald Chumley recused himself from the meeting. Also attending and representing staff were Michael D'Orazio, AICP Acting Director of Planning & Zoning, Frank Simeck, CZA, Senior Zoning Inspector and Sharmaine Abaied, Board Clerk.

Item No. 1

Request for an appeal of a zoning violation alleging that the Subject Property is not in compliance with Town Code § 18-17 as it relates to a corner fence exceeding the four (4) foot maximum height limit, for the property located at 626 Pine St SE, in the RS-16, single-family detached residential zone. Application filed by Sara V. Mariska and Nicholas Cumings agents of Walsh Colucci Lubeley & Walsh PC.

Mr. Dowler made a motion that the appeal from the Director of Planning and Zonings determination be granted and that the applicant has a vested right to maintain a 6-foot fence along the east side yard

on property located at 626 Pine Street SE in violation of section 18-17 of the towns code.

Mr. Petersen asked if there was a second to the motion to support the appeal by the property owners.

Mr. Gadell seconded the motion.

Mr. Petersen asked if Mr. Dowler would like to speak in favor of his motion.

Mr. Dowler stated that the Rhoads case was determinative of the issue as well as all the discussion today. He said that it does state there is an exemption and in terms, it states it is a vested interest to maintain what would otherwise be illegal under the zoning act laying out the parameters of what's required. Mr. Dowler stated it was a remedial result in the case in favor of homeowners or an aggrieved party. He also stated he was not sure if these people (the Races) were really aggrieved since they did not get or rely on the permit. They are the subsequent owner. Then he stated that if the board ruled against them, they would suffer the cost of taking the fence down or coming in for a variance. He then stated that the exemption is different from a variance so it is understood that the Races did not get a variance for a 6-foot fence. Mr. Dowler stated they can have the exemption unless fraud is proven. He then stated they could speculate as to what Mr. Carter was thinking, what he wasn't thinking, discuss the list of violations, but that it did not rise to the level of proof sufficient under the code section. Mr. Dowler stated that it was admitted that it was a mistake and that it is entirely speculation that what was heard amounts to fraud. Mr. Dowler then commented on Mr. Carter's relationship to the town which seems to be an unhappiness with Mr. Carter and his way of doing business. He then stated that, in view of the remedial nature of the statute, that these people (the Races) should not be caught up in the town's unhappiness with Carter. Mr. Dowler then stated these were the reasons the appeal should be granted.

Mr. Petersen asked Mr. Gadell if he would like to speak in favor of the motion.

Mr. Gadell stated that Mr. Dowler eloquently explained the position. He continued stating that it is a case of a homeowner hiring a contractor to build a fence that they trusted was in good standing with the town and would file the proper permits and have an approved drawing. Mr. Gadell stated that he did not think that it had been proven or not proven that Mr. Carter intended to deceive the town. He then stated from a homeowner's point of view they had hired someone to build a fence, they got permits for the fence, and the fence is up. Mr. Gadell continued stating that whether they agree or not it would fall the hardship of the current homeowner to fix the situation, which he believed everything appears they acted in good faith.

Mr. Petersen stated he opposed the motion. He stated his reasoning was that there is an agreement that the fence does not comply with the requirements of the town. Mr. Petersen continued stating that part of town where the fence exists the maximum height permitted is 4-feet and it is a 6-foot fence. Mr. Petersen then stated after having listened to the testimony presented this evening and having read the written submissions from Mr. Cumings' firm and from Mr. Briglia, the town attorney, that he is convinced that the application for fence permit dated April 25, 2016 was not submitted in good faith. He then quoted Mr. Briglia that the fence was not built in good faith and further constituted fraud. Mr. Petersen stated Mr. Briglia's testimony and information provided by the town was convincing, so he will oppose the motion.

Mr. Petersen asked if others wanted to speak for or against the motion.

Mr. Creed asked that if the motion is approved does it mean it's conforming or is it a non-conforming lot. Mr. Dowler stated they have a vested right to maintain and continue the non-conforming / violation of a 6-foot fence.

Mr. Daly stated focusing on the statute 15.2311C which is the subject matter of the Rhoads case requires that we prove that fraud. He stated that he is satisfied that Stuart Carter should not have put his signature on the certification knowing that the 7-foot fence could not be approved. Mr Daly states that the problem is corrected by the red handwriting by Ms. Murphy and at that point, the mistake that was made was not secured through fraud. Mr. Daly stated that fraud has to be proven by clear and convincing evidence. He continued stating that if a 7-foot fence had been built it would be easier decision that it would have to come down because it would have been secured through fraud. Mr. Daly stated he does not feel the same about the 6-foot part of the application. He stated that his signature should not have been put on the certification by virtue of the 7-foot fence request, he did not feel comfortable stating there was proof that the 6-foot fence was secured through fraud. He went on to say that with the statute and the Rhoads case a circuit court would determine that the motion should have been granted if the motion is not granted and for those reasons he supported the motion.

Mr. Petersen asked for further comments before asking for a vote.

Mr. Creed expressed his disappointment that the mistake was not caught until a few days before the sale of the home was going to settlement when the fence was built a year earlier. He stated that if a violation had been put on it and been served to the current owner, he could have rectified it at the time, come before the board, or put it on notice on the Virginia disclaimer form to let the Races know there was a potential problem.

Mr. Dowler stated that he could see that it was a mistake, and anyone looking at the survey would have felt comfortable believing it was an interior lot and a 6-foot fence would be in order. He said he didn't believe the town, with all the work they do, should be held accountable. He then stated that the problem was the Rhoads case which came down in August 2017 and changed what would be considered the burden of a mistake on the applicant.

Mr. Petersen stated all on the board had spoken except Mr. Haight and offered him the opportunity to speak on the motion. Mr. Haight declined to speak.

Motion:	Dowler
Second:	Gadell
Against:	Petersen
Passed:	5-1
Absent:	Chumley

Election of Officers

Mr. Petersen stated they were open for nominations for Chairman and Vice-Chairman. Mr. Creed nominated Mr. Michael Gadell as Chairman and Mr. Daly seconded that motion. Mr. Petersen asked if there was any discussion. There was not discussion so a vote was called for.

Motion: Creed
Second: Daly
Passed: 6-0
Absent: Chumley

Mr. Gadell as new Chairman asked for a motion for Vice-Chair. Mr. Creed made a motion to nominate Mr. Robert Dowler. Mr. Gadell asked for a second to the motion. Mr. Petersen seconded the motion.

Motion: Creed
Second: Petersen
Passed: 6-0
Absent: Chumley

Approval of the Minutes

Mr. Gadell asked about the changes need by the minutes. Mr. Creed stated the July 19th minutes Mr. Zimmerman's testimony is missing from Item #4. He continued stating that the board clerk would go back through the minutes to correct. Mr. Creed made a motion to accept the minutes from the September 19th meeting. Mr. Gadell clarified that September's is a motion to accept and July 19th needs changes. Mr. Gadell asked if there was a motion to approve the September minutes as submitted. Mr. Petersen stated with corrections. Mr. Creed made a motion to approve the September minutes as amended by Mr. Petersen.

Motion: Creed
Second:
Passed: 6-0
Absent: Chumley

Mr. Gadell asked what the changes were for July. Mr. Creed stated there were many changes and that they need to be re-submitted to the next meeting. There was continued discussion regarding the minutes.

Mr. Petersen made a motion to approve the November minutes as amended. Mr. Creed seconded the motion

Motion: Petersen
Second: Creed
Passed: 6-0
Absent: Chumley

Mr. Gadell stated that September and November were approved and July is carried to the following month.

Mr. Petersen stated his appreciation to the board for allowing him to serve as Chairman.

Adjournment

The meeting was adjourned at 9:54 PM.

Respectfully submitted,

Sharmaine Abaied
Board Clerk.