

1 Minutes of the Work Session of the Planning Commission of the County of
2 Henrico, held in the County Manager's Conference Room in the Government
3 Center at Parham and Hungary Spring Roads, beginning at 6:00 p.m. Thursday,
4 August 14, 2008. The Work Session was held to discuss a proposed
5 amendment to the Zoning Ordinance regarding alternative fence heights.
6

Members Present: Mr. E. Ray Jernigan, C.P.C., Chairperson (Varina)
Mrs. Bonnie-Leigh Jones, Vice Chairperson (Tuckahoe)
Mr. C. W. Archer, C.P.C. (Fairfield)
Mr. Ernest B. Vanarsdall, C.P.C. (Brookland)
Mr. Richard W. Glover (Brookland)
Board of Supervisors Representative
Mr. R. Joseph Emerson, Jr., Director of Planning,
Secretary

Member Absent: Mr. Tommy Branin, (Three Chopt)

Also Present: Mr. David O'Kelly, Assistant Director of Planning
Mr. Benjamin Blankinship, Principal Planner
Mr. Ben Sehl, County Planner
Ms. Sylvia Ray, Recording Secretary

7

8

9 Mr. Jernigan - All right. I'd like to bring the meeting to order, and turn
10 it over to Ben Blankinship at this time for the presentation on alternative fence
11 height approval procedures.
12

13

14 Mr. Blankinship - Thank you, Mr. Chairman, members of the
15 Commission. The purpose of this presentation is to discuss a proposed
16 amendment to the Zoning Ordinance concerning alternative fence heights. The
17 Zoning Ordinance limits the height of fences, walls, and hedges. Fences in front
18 yards are limited to three feet, six inches, except in planting strip easements,
19 where they're limited to seven feet, zero inches. That provision has been in the
20 Zoning Ordinance since 1960. Experience has shown that in most cases, in the
21 front yard a three-and-a-half foot fence is tall enough. There are times, however,
22 when a taller fence may be necessary. In those cases, the Planning Commission
23 may approve an alternative fence height greater than three feet six inches, as
24 part of a landscaping plan. Over the past five years, the Planning Commission
25 has reviewed an average of four such requests each year.

26

27 In April, the Board of Supervisors held a work session on an alternative fence
28 height request at 2008 Fon-Du-Lac Road. The Planning Commission had denied
29 the request for a taller fence, and the applicant appealed that decision to the
30 Board of Supervisors.

30

31 Anytime authority is delegated to the Planning Commission, clear guidelines are
32 necessary for exercising your discretion. There has to be objective criteria for
33 approving or denying the application. The current text of the Zoning Ordinance,
34 which you see in front of you there, says that the Planning Commission may
35 approve an alternative fence height that does not adversely affect these five
36 criteria, and the five are spelled out below. That provides some guidance, but the
37 concern was expressed at the work session that it may not be clear enough.

38

39 This slide shows a few examples of alternative fence heights in front yards that
40 have been approved in the past two years. These four photos show
41 developments where a consistent seven-foot fence was built all the way around.
42 It would not have created a consistent appearance if the fence had been seven
43 feet high on three sides, and then three-and-a-half feet in the front yard. As you
44 can see, these are all attractive, high quality fences. As you know, you have the
45 authority to review the construction details and materials, the colors, the design,
46 and the landscape when you approve these.

47

48 This slide shows some examples of individual residences. These four were taken
49 along River Road. As you know, that's a minor arterial road. Where a three-and-
50 a-half foot fence might be tall enough on a quiet residential street, houses that
51 front on a major road could really benefit from a taller fence, because of the
52 different impacts coming from the traffic. Again, these are attractive, high quality
53 designs.

54

55 Now, this slide shows four more examples. The first one in the top left corner was
56 built in violation of the Code. When the owners were notified of the violation, they
57 applied for the approval of the alternative fence height after the fact. You may
58 remember making some modifications. You can see that in the back, the fence is
59 taller. It's kind of scalloped, and a little bit softer in the front there. The rail fences
60 in the bottom left and the top right photos are only slightly higher than the three
61 foot, six inches allowed by code. The last example in the lower right-hand corner
62 is the existing fence on Fon-Du-Lac Road that the work session was about. They
63 proposed adding panels the same height as the brick columns, extending from
64 the front to the back along the existing brick wall. You can see how tall the
65 column is there in the foreground, and there's a matching one in the back. They
66 were going to build a fence that high all the way around.

67

68 Also, we have received two new applications since that work session. Both of
69 these examples show fences that have already built, again, and the homeowner
70 has approached the County after the fact to gain approval. The top two photos
71 are of a house in Foxboro North subdivision. The bottom two photos are of a
72 house in Brookside Gardens. We've explained to the applicants that we can't
73 process their applications until we receive guidance on which way this
74 amendment is going to go, so those are pending.

75

76 The proposed amendment that we're putting before you this evening would still
77 allow the Planning Commission the authority to approve alternative fence
78 heights, but it would provide some additional guidance when exercising that
79 discretion. For example, the proposed language would say—It would be the
80 same five criteria that are listed in the Code now, but the new language would
81 say that if none of those five criteria is found to be adversely affected, then the
82 Planning Commission shall approve the request.

83

84 This slide here shows that the maximum limit that would be placed on alternative
85 fence height. Our research shows that over the past five years the average
86 height that has been approved has been about five feet, six inches. In planting
87 strip easements, and in business office and industrial districts, alternative fence
88 heights would be limited to ten feet. As you know, now there is no upper limit.
89 Theoretically, you could approve a fence 24 feet high, if the applicant applied for
90 it. Under this amendment, it would cap it in planting strip easements, and in
91 business office and industrial districts at ten feet, and in residence districts—
92 where the current allowance is only three feet, six inches—you'd be allowed to
93 approve them up to seven feet. The purpose would be to put enough limits on
94 the Planning Commissions' discretion that you would be within the delegated
95 authority that the Board of Supervisors has given you.

96

97 I'll be happy to answer any questions.

98

99 Mr. Jernigan - Any questions for Mr. Blankinship?

100

101 Mrs. Jones - Yes.

102

103 Mr. Jernigan - Okay.

104

105 Mrs. Jones - I do want to ask just a couple questions because a
106 few things you said just registered in my mind. When you were talking in the
107 very beginning, you said that as we repeat these requests, it may be—and the
108 word you used was “necessary,” for us to approve a deviation on the height of a
109 fence. Now, “necessary,” then, I'm assuming you're referring to these five
110 criteria. But the five criteria obviously are so general that it has given rise to the
111 conflict we're trying to address now. What is really a logical and defensible
112 reason to deny a request? I kind of approach it from what would it take to deny,
113 as opposed to what must we do to approve. In the Fon-Du-Lac case, the
114 overriding reason for the request was because one neighbor hated another.

115

116 Mr. Blankinship - Right.

117

118 Mrs. Jones - Now, I'm a little concerned that we start getting into
119 those kinds of issues, and there is no end to it. So, I welcome parameters,
120 although I'm very cautious about them because every case is so different. They
121 just don't fall into neat little categories. So, along the line that I'm willing to agree

122 that we need to define and kind of tailor this to our needs, as we've found them to
123 be, seven feet had to come from somewhere. Where did that seven-foot
124 restriction come from?

125

126 Mr. Blankinship - Seven feet is what is currently allowed in the side and
127 rear yards in residential districts. Given that most of the experience we've had in
128 the last five or ten years has been in the five to six-foot range, we felt setting it at
129 seven feet would be consistent with the side and rear, and would not set us up
130 where it was contradicting what had been approved in the last few years.

131

132 Mrs. Jones - In my recollection of the ones that you have pictured
133 here is that none of those were taller than seven feet for the wall, although the
134 columns are.

135

136 Mr. Blankinship - Yes.

137

138 Mr. Vanarsdall - We started around six feet at one time, and
139 [unintelligible]. I think that's where the seven came from.

140

141 Mrs. Jones - There's no differentiation between solid fencing and
142 open fencing.

143

144 Mr. Blankinship - Not in this draft, no ma'am, as there is not in the
145 current ordinance.

146

147 Mrs. Jones - Well, I just don't think we can go ahead and approve
148 things because neighbors hate each other. That situation just was unpleasant
149 from the start. I didn't have a dog in that fight except it didn't sound like good
150 public policy to me. It may or may not. How would it be different under this
151 proposal?

152

153 Mr. Blankinship - Well, one of the principles that we talked about in the
154 work session with the Board of Supervisors was that we wanted to change the
155 ordinance as little as possible, and still cure what was seen as a problem. The
156 problem being that the discretion of the Planning Commission was not narrowly
157 enough tailored by the ordinance. We didn't want to completely rewrite the
158 subject, the statutes, we wanted to make the least changes that we believed
159 would solve that problem. That's how we ended up where we are. There is
160 always going to be some discretion, and the Planning Commission is just kind of
161 in that in-between place, where the Board of Supervisors has legislative
162 discretion, which is much broader. We as staff try to exercise as little discretion
163 as we possibly can in interpreting and enforcing the Code. You're always going
164 to be in that kind of in-between place.

165

166 Mrs. Jones - My last point is that the Fon-Du-Lac case would have
167 come before us and we would have had no choice but to approve it.

168
169 Mr. Blankinship - Well, unless you could make a finding that, for
170 example, criterion #2 here is, "the visibility or value of abutting and/or adjacent
171 properties would not be adversely affected."
172
173 Mr. Vanarsdall - I think the answer to that question, though, is "if"—
174
175 Mr. Jernigan - That's what I was questioning, too, because at the
176 end you said that if none of the five conditions exist, we will approve. So, it's
177 not—
178
179 Mr. Glover - You can't deny it.
180
181 Mr. Jernigan - So, it's kind of like a POD now. If it meets code, it has
182 to pass.
183
184 Mr. Emerson - The whole thing that gave rise to this was the fact that
185 the word, "may," was providing the Commission with more legislative authority
186 than administrative authority. That's not how it's granted to the Commission by
187 the Board or by the State of Virginia.
188
189 Mr. Glover - How do you gauge the amount of light and air on the
190 adjoining property?
191
192 Mr. Emerson - That's a very good question, Mr. Glover.
193
194 Mr. Glover - Do you have a good answer?
195
196 Mr. Blankinship - No sir. Those are very old words that have been
197 floating around zoning cases since 1928—impeding adequate light and air.
198
199 Mr. Glover - Well, with all the outstanding intellectual capacity that
200 we have in the Planning Department, I don't see [unintelligible] a statement that's
201 understandable. Also, it's an incomplete sentence.
202
203 Mr. Blankinship - Yes. I don't believe any of the ones, the five that were
204 mentioned, is cast as complete sentences there.
205
206 Mr. Glover - What's to prevent somebody encroaching on
207 somebody's property? Are these the ones that the Board set that night at the
208 work session?
209
210 Mr. Blankinship - These are what are in the Code now.
211
212 Mr. Emerson - This is the plan—
213

214 Mr. Glover - What are we going to change?
215
216 Mr. Emerson - We could make changes to that, but the changes
217 proposed right now are the ones that the Board discussed. Other than the height,
218 which would fall back on other sections of the Code. This is for the height.
219
220 Mr. Glover - I just don't understand how providing for alternative
221 heights would directly affect traffic or pedestrian safety. But pedestrian safety, if
222 it's in my yard, you don't belong in my yard walking. Okay?
223
224 Mr. Emerson - I think in that case you wouldn't feel like it was
225 impeding on traffic or pedestrian safety. That's in cases where fences go near
226 roads and right-of-ways where it might impede visibility and be a danger.
227
228 Mr. Glover - Well, that's the reason you have number 5.
229
230 Mr. Emerson - Aptly so. We certainly can revisit—
231
232 Mr. Glover - I'm not telling you to, I'm just asking questions.
233
234 Mrs. Jones - See, the principal question is to take the word, "may,"
235 substitute it with the word, "shall," from the current Zoning Ordinance, and then
236 add the specifics about height.
237
238 Mr. Blankinship - Add the height limit amount.
239
240 Mrs. Jones - Right, the height limit.
241
242 Mr. Glover - The only thing that I see is that the Planning
243 Commission, if they meet all these five criteria, you can't deny. That's the only
244 difference.
245
246 Mrs. Jones - Right, and I would argue that parsing words is a
247 [unintelligible] science, and we could probably—
248
249 Mr. Glover - [Unintelligible.]
250
251 Mrs. Jones - Well, maybe so, maybe so. But I'm just trying to play
252 devil's advocate with you.
253
254 Mr. Glover - I know, and that's good.
255
256 Mrs. Jones - I could go ahead and probably make most all cases fit
257 somewhere in here, if I argued enough. Whether it's a winning argument is
258 whole other issue. If we're going to give direction, I appreciate the specifics of the
259 height limit, because I think that helps the public as well. I mean, it clearly helps

260 everybody. But I'm not sure it absolutely solves the problem; we'll just have to
261 see.

262
263 Mr. Glover - I think in your mind it may not. But if you stop and
264 think about why you're doing this, you're doing it because, if they meet these
265 criteria, what harm is it for you if a landowner want a seven-foot fence in the front
266 yard? Are you creating a harmful situation?

267
268 Mrs. Jones - There are several elements you weigh, and a lot of
269 the times there is no harm. I don't think—

270
271 Mr. Glover - —any of those elements are in here, especially air. If
272 somebody can't breathe in the next yard—

273
274 Mrs. Jones - That's not a good thing.

275
276 Mr. Glover- Or if the light doesn't shine on their yard. Well, I think
277 what it's doing is allowing the fence, if it's not offensive. At what point does the
278 fence become totally offensive to the whole neighborhood, or adverse to the
279 whole neighborhood? I think in years past, aesthetics would not hold up in a
280 court case, I don't believe, by itself. Isn't that right? However, aesthetics, we
281 work on on every case, and you bring numbers 9 and 11 back. I think this gives
282 guidance to the Planning Commission that you must, shall, or will approve it
283 when they come in and they're not really putting the neighborhood, or the
284 neighbor, or this new [unintelligible] in a negative light. But we could pick it apart,
285 if you want to.

286
287 Mrs. Jones - There may be times when that will be a very nice
288 thing to have in the back pocket.

289
290 Mr. Jernigan - Yes, #2 is a little—Where it says, “provided the
291 permitted height and design does not adversely affect the visibility or value of
292 abutting and/or adjacent properties.” In Highland Springs, everybody's tight in
293 there and somebody puts up a seven-foot fence, you can't see any cars coming
294 down the road. So, if you have kids playing—

295
296 Mr. Glover - Then that falls under #5.

297
298 Mr. Emerson - In that case, they could possibly fall under #3.

299
300 Mr. Glover - And your traffic engineer is going to give you a ruling
301 on that. If you think about it, it's not adversely affecting anything; you've already
302 been doing it. What this just says is you shall do it if these criteria are met. It
303 keeps the litigation from taking place.

304
305 Mr. Jernigan - Hallelujah

306
307 Mrs. Jones - Hallelujah.
308
309 Mr. Jernigan - We had a case in Highland Springs where they put up
310 a six-foot fence. The people next door were complaining. You want to know
311 why? They couldn't see the police cars coming down the road when they
312 thought they might get raided.
313
314 Mr. Blankinship - We could add a criterion #6.
315
316 Mr. Glover - It's your call tonight to make a recommendation.
317
318 Mrs. Jones - We can't have powers assigned to us that we don't
319 have, first of all. Secondly—
320
321 Mr. Glover - But this gives you the power.
322
323 Mrs. Jones - Well, secondly, I think this is probably as well
324 designed as it can be made and still allow some discretion for individual
325 situations. I don't object to it, I just wanted to make sure I understood.
326
327 Mr. Archer - Well, it seems to me like each time one of these come
328 up, they're always different. I do have a question. I'm certain there are people
329 who might have built fences that go beyond what is allowed. We don't police that,
330 do we? We don't ride around looking for seven-foot fences.
331
332 Mr. Blankinship - As a general rule, no. Now, the Community
333 Maintenance staff does do some proactive enforcement. I think particularly when
334 they see something like—I'm trying to bring up examples. This one here, I think
335 that may have been proactive.
336
337 Mr. Emerson - No, it wasn't—
338
339 Mr. Blankinship - Was there a complaint on that?
340
341 Mr. Emerson - Yes.
342
343 Mr. Glover: Did they have to take that down?
344
345 Mr. Blankinship - It's still pending.
346
347 Mr. O'Kelly - They also applied for two variances, one for a car—
348 Well, a use permit for a carport in the front yard after the fact, which was denied
349 by the BZA. They also had screening around trash and debris from previous
350 construction. It's off Oakley's Lane.
351

352 Mr. Jernigan - I'm trying to figure out where they—
353
354 Mr. Emerson - The top two are the same dwelling.
355
356 Mr. Jernigan - Yes.
357
358 Mr. O'Kelly - The brick portion of the fence is built in the right-of-
359 way.
360
361 Mr. Vanarsdall - Just recently, about two weeks, a person put up I
362 think it was a six foot, looked like, fence in the front yard, but they haven't
363 finished it. And Community Maintenance were going to have a talk with them.
364 What he did, he lowered the fence. When he put up the fence, he lowered it, but
365 he didn't lower the posts. So, we have [unintelligible].
366
367 Mr. Blankinship - The Code does allow posts and decorative features to
368 be taller, and it doesn't say how much taller.
369
370 Mr. Vanarsdall - They need to know that the posts could be taller.
371
372 Mr. Blankinship - Normally, people don't put them more than six inches
373 or maybe a foot taller than the fence itself. I'm surprised Community
374 Maintenance wasn't successful in negotiating a solution to that.
375
376 Mr. Vanarsdall - [Unintelligible] the normal situation [unintelligible].
377
378 Mr. Blankinship - Yes.
379
380 Mrs. Jones - Has there been any discussion about referencing the
381 columns or posts, support posts or fencing into those ordinances?
382
383 Mr. Glover - You mean for the height.
384
385 Mrs. Jones - Well, just looking, for instance, at the brick home.
386 That's the same situation as the Fon-Du-Lac case. That was several feet higher
387 than the accompanying wall section. If they can do that, do you think we should
388 have any kind of reference to the height of those?
389
390 Mr. O'Kelly - That portion of the brick fence does not require the
391 alternative fence height. The majority of the fence doesn't exceed the 3-1/2 feet.
392 The wooden portion in the front yard is the problem.
393
394 Mrs. Jones - But the columns are not part of that.
395
396 Mr. Emerson - No. The columns are legal and within the ordinance,
397 other than they're in the right-of-way.

398
399 Mrs. Jones - Other than that.
400
401 Mr. Vanarsdall - Mr. Chairman.
402
403 Mr. Jernigan - Yes sir.
404
405 Mr. Vanarsdall - If we go ahead and set the public hearing date
406 tonight?
407
408 Mr. Emerson - Yes sir, I have that on the agenda as a discussion
409 item later in the meeting.
410
411 Mr. Vanarsdall - Staff is recommending September the 11th. We could
412 do it now and not have to do it during the meeting.
413
414 Mr. O'Kelly - It hasn't been advertised.
415
416 Mr. Jernigan - Are there any questions, other questions for Mr.
417 Blankinship? All right. Thank you, Mr. Blankinship. We don't take any action
418 now, do we?
419
420 Mr. Emerson - No sir, Mr. Chairman. We'll set the public hearing at
421 your regular meeting.
422
423 Mr. Jernigan - All right. We'll take a break and reconvene at 7:00.
424
425 Mrs. Jones - Thank you very much.
426
427 Mr. Blankinship - Thank you.
428
429
430
431
432
433
434

Mr. R. Joseph Emerson, Jr., Secretary
435
436
437
438
439
440

Mr. E. Ray Jernigan, Chairman