

**MINUTES OF THE CAPE CORAL
BOARD OF ADJUSTMENTS AND APPEALS**

WEDNESDAY, MARCH 28, 2007

COUNCIL CHAMBERS

6:00 P.M.

Meeting called to Order by Acting Chairman Moomjian at 6:46 P.M.

Roll Call: Baron, Bassett, Celestino, Clark, Colley, Gordon, Joseph, Moomjian and Rosario were present.
Colley was excused as Applicant/Appellant
Joseph abstained.

Also Present: Bill Buztrey, Assistant City Attorney
Harold S. Eskin, Attorney for the Board
Paul Dickson, Building Official
Susan Rice, Business Services Supervisor
Priscilla Rodriguez, Licensing Clerk

BUSINESS

CASE NO. 07-01A – GARY COLLEY

REQUEST FOR VARIANCE FROM

FLORIDA BUILDING CODES SECTION 424.2.17
RESIDENTIAL SWIMMING BARRIER REQUIREMENT
4905 Nassau Court
Cape Coral, Florida 33904

Assistant City Attorney Bill Buztrey explained the procedures for Members' Colley and Joseph. He questioned if any other members were biased in their opinion. He explained that the case must be based strictly on its merits and the evidence presented and not on favoritism or position of the Applicant or City Official. He questioned if any Members had a financial involvement with Mr. Colley.

Board Member Joseph explained his relationship, as pool contractor, listed on the permit with Mr. Colley. He explained that the fence permit was separate from the actual pool permit.

Board Attorney Harold S. Eskin questioned if Mr. Joseph's work would be affected by the decision made.

Board Member Joseph stated the only affect would be the inability to get a final inspection on the pool until the fence permit passes.

Board Attorney Eskin questioned if a fence is required to be put up, will it also delay the final approval.

Board Member Joseph stated that it would.

Board Attorney Eskin questioned whether Mr. Joseph would be involved with construction of fence.

Board Member Joseph stated that was not part of his job.

Board Attorney Eskin questioned whether the delay in getting the permit approved delayed his payment.

Board Member Joseph explained that it would.

Applicant/Appellant Gary Colley clarified the matter of compensation.

Board Member Joseph explained that there would be no delay in payment, only the completion as the City sees it. He stated that there is no payment issue involved in this matter.

Applicant/Appellant Colley stated that the project was paid in full.

Board Attorney Eskin questioned the stake of other members in the outcome. He also stated that Mr. Joseph should abstain from voting.

Assistant City Attorney Buztrey questioned if the Board had a quorum without Mr. Colley and Mr. Joseph.

Senior Recording Secretary Cheryl Logan confirmed that there was a quorum.

Assistant City Attorney Buztrey passed out a copy of Section 108, Construction Board of Adjustment and Appeals, as a handout.

Applicant/Appellant Gary Colley stated that there are two issues that he was appealing. He stated that the City required him to pull a fence permit when he pulled his pool permit. He stated that he installed the fence which meets all codes. He stated that

the fence was denied because of a pool final code. He explained that the Inspector said the fence was proper and did meet code. He requested the final on the fence. He stated that the Code states that a barrier must be around the swimming pool. He explained that he does have a barrier all the way around his pool. He stated that the fence ran all around his property and down to the seawall. He questioned why the fence must be four inches in from the property line. He explained that he installed self-latching and self-closing gates. He stated that the Inspector said that the barrier was inadequate because it was owned by the neighbor and is not on his property.

Board Member Joseph clarified that the inspector questioned the neighbor's fence and gate locks. He questioned the inspector's comments regarding the Code not being followed.

Applicant/Appellant Colley stated that the inspector wanted him to install another fence eight inches in from the existing fence, exactly like the one that was already there, all the way down to the seawall. He explained that the area between the fences would be even more dangerous to children, animals, police, and fire.

Board Member Joseph questioned why Mr. Colley failed the fence inspection. He stated that the Code does not prevent neighbors from attaching to fences already existing.

Applicant/Appellant Colley stated that on his permit, he showed that the neighbor had an existing fence. He explained that he was not questioned as to whether it was his or the neighbor's fence .

Board Member Joseph questioned the inspector's interpretation of the Code. He described the difference between the City's definition of fence permit and baby barrier. He questioned the building official's interpretation of the Code.

Applicant/Appellant Colley requested two votes. Does the fence meet code? And, is the fence a baby barrier?

Board Member Gordon questioned the type of fence and whether the neighbor had a pool.

Applicant/Appellant Colley explained that it was a chain link fence and that the neighbor did not have a pool. He discussed his conversation with the inspector regarding who would repair it if it was damaged.

Board Member Rosario questioned who would be liable if fence was damaged.

Applicant/Appellant Colley explained that he was liable. He discussed barrier problems.

Board Member Moomjian explained the reason for pool barriers and liability. He questioned interpretation of the Code.

Board Member Gordon questioned if he would be fencing both sides.

Applicant/Appellant Colley stated that he would be. He explained that putting up another fence, exactly like the one that was already there would be unsightly and dangerous.

Board Member Clark questioned if the pool permit was separate from the fence permit.

Applicant/Appellant Colley stated that the pool permit and fence permit were separate issues.

Board Member Moomjian questioned pool barrier requirements. He stated that he felt that the fence permit should be approved.

Board Member Joseph stated that the fence permit is a separate issue after the fact.

Board Member Clark stated that the fence issue should be resolved in order to clarify pool barrier issue.

Applicant/Appellant Colley discussed what could be deemed to be a barrier.

Board Member Celestino questioned the fence permit.

Applicant/Appellant Colley explained where the fence was supposed to be located, including gates.

Board Member Celestino questioned if it was a property line fence.

Applicant/Appellant Colley stated that it was not.

Board Member Celestino questioned how a property line fence can be a barrier to the pool.

Applicant/Appellant Colley explained the various requirements necessary for a barrier.

Board Member Moomjian explained that there were two different barrier requirements.

Building Official Paul Dickson clarified that a pool barrier was to prevent unintentional access into a swimming pool. He stated that a barrier can be breached. He explained the differences between intentional and unintentional access. He cited the barrier requirements, as required by the Code. He explained that a fence on the property border cannot be a pool barrier. He explained that as soon as a fence is no longer on the property, it no longer qualifies as a barrier. He discussed the application process for a fence permit.

Board Member Moomjian questioned why the Building Department approved the fence as a barrier.

Building Official Dickson explained that a mistake was made by the Plan's Examiner. However, even though a mistake was made, he cannot allow it because it is a life safety issue.

Board Member Moomjian questioned whether this was a life safety issue.

Building Official Dickson explained that this was not an interpretive section of the code, but prescriptive. He stated that this was not his personal interpretation, but strictly prescriptive and he must follow it. He explained that when a prescriptive part of the Code is bypassed, then someone other than the property owner can be held responsible.

Board Member Moomjian questioned whether Mr. Dickson had been to the site.

Building Official Dickson stated that he had not.

Board Member Moomjian explained that he had been to the site and that there was no way someone would be able to get through the two poles where the fences were joined.

He stated that he didn't believe that is was a life safety issue.

Building Official Dickson explained that it was not up to him to decide and that his job is to enforce the Code.

Board Member Joseph questioned the Code requiring the fence to be on the property border and what the specifications were.

Building Official Dickson explained that the barrier has to be in the perimeter not on the property border.

Board Member Rosario questioned the access point and installing an additional fence.

Building Official Dickson explained the Code specifications.

Discussion was held regarding various safety issues.

Board Member Gordon stated that the pool has a barrier, the existing fence.

Building Official Dickson explained that in order for barrier to qualify, it has to be on the perimeter of the pool. He explained the Code specifications.

Board Member Moomjian questioned if there was any case law in regards to this issue.

Building Official Dickson explained why the City fought the State Code regarding barriers and that the City lost. He stated that the State and BOAF (Building Officials Association of Florida) are very clear that in order for the barrier to be a qualified barrier, it has to be on the pool perimeter.

Board Member Joseph questioned the designation of the fence permit.

Building Official Dickson described the fence application process. He stated that he meets with contractors on a regular basis to go over these kinds of issues.

Board Member Gordon stated that the City made an error in its approval. He stated that he believed that Mr. Colley should be able to leave it the way it is. He questioned the possibility of an affidavit from Mr. Colley stating that he would replace the fence if it was damaged.

Building Official Dickson stated that the fence was not approved, only reviewed. He stated that there is a potential for a plan's examiner to miss an item. He explained that does not allow the inspector to approve it, just because it wasn't picked up in plan review.

Board Member Joseph questioned if the fence ran laterally, would it meet every other code. He questioned if Mr. Dickson's only concern was to meet Code.

Building Official Dickson stated that was correct.

Board Member Moomjian questioned if this all made sense to Mr. Dickson.

Building Official Dickson stated that he did not comment on his personal point of view. He stated he did feel that the Code made sense and that he did felt comfortable with

his decision. He stated that he did not believe his decision adversely affected the Applicant.

Board Member Gordon questioned if the Board's decision was relevant.

Building Official Dickson stated that he is enforcing the Code as presented.

Board Member Celestino questioned whether the current fence satisfies the safety requirements. He questioned the practical aspects of the Code and whether there were other ways to satisfy the requirements.

Board Attorney Eskin explained that it was case specific. He explained the details of the appeals process. He stated that a Hold Harmless Agreement signed by Mr. Colley would be acceptable.

Board Member Celestino questioned the existing conditions and whether they meet the safety codes.

Building Official Dickson stated that in his opinion it does not.

Board Member Celestino questioned moving the fence, just to meet code, regardless of the fact that the common fence satisfies the objective of the Code from a safety standpoint.

Building Official Dickson explained that the City can be held harmless, but he cannot be because he is the one signing off on the barrier. He stated that there is no "commentary section" of the Code.

Board Member Joseph questioned the difference between prescriptive and interpretive definitions. He stated that there is no interpretation to this part of the Code and that it was very prescriptive.

Building Official Dickson explained that the Code does not authorize interpretation. It is very specific with no latitude.

Board Member Rosario questioned whether there would be an issue if the fence were on the subject property.

Building Official Dickson stated that it is a matter of location only.

Board Member Gordon questioned whether the property had been surveyed.

Applicant/Appellant Colley stated that the fence was definitely not on his property. He questioned the claw baby barrier.

Building Official Dickson explained that it is a barrier and not a fence, but that it can be installed permanently.

Applicant/Appellant Colley questioned the installation of baby barriers.

Applicant/Appellant Colley stated that he felt that the Code does not make common sense. He stated that the Code doesn't clarify whose property the fence needs to be on.

Building Official Dickson stated that it was, in fact, in the Code.

Board Member Celestino moved, seconded by Board Member Bassett to approve the Variance with conditions.

Board Attorney Eskin clarified the Motion and stated that Mr. Colley would need to sign a Hold Harmless Agreement.

City Attorney Buztrey requested that all of the conditions stated in Section 108.42 of the Florida Building Code be included in the Hold Harmless Agreement.

Building Official Dickson questioned whether a Variance could be used on a building code.

Board Attorney Eskin explained that it covers entire City Code. He explained that Section 108.5.2 absolves the City Officials and employees from liability.

Board Member Baron questioned if the Building Official could file an appeal.

Assistant City Attorney Buztrey explained that the City can appeal to the Circuit Court according to F.S. 553.771. He explained that their decision was final, but that the City can appeal to a higher authority.

Board Attorney Eskin explained that it can be appealed to higher authority, but not to City Council. He explained that if the Variance was granted, it would allow the existing conditions to remain as a variance, and as an exception to the interpretation by the City officials. The applicant/appellant would sign a Hold Harmless Agreement, holding the City harmless for the decision to allow him to keep the fence the way it is and that all conditions of Section 108.4.2 must be met.

Board polled as follows: Baron, Bassett, Celestino, Clark, Gordon, Moomjian, and Rosario voted "aye." All "ayes". Motion carried.

APPROVAL OF MINUTES

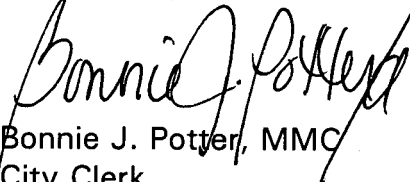
Board Member Gordon, seconded by Board Member Clark to approve the Minutes of February 22, 2006, as presented.

Voice Poll: All "ayes". Motion carried.

ADJOURNMENT

There being no further business, the meeting was adjourned at 7:53 P.M.

Respectfully Submitted,


Bonnie J. Potter, MMC
City Clerk