

**MINUTES OF VIRTUAL MEETING
BOARD OF ZONING APPEALS
CITY OF INDEPENDENCE
October 15, 2020**

AGENDA:

Old Business:

Approval of Minutes of Regular Board of Zoning Appeals Meeting held on September 17, 2020.

New Business:

- 1. 8226 Dalebrook Road, Patrick & Cynthia Porowski** – Requesting a variance to 1361.03 to permit an above ground swimming pool of temporary construction to not have a fence erected around it (not permitted).

The virtual meeting was called to order by Chairman Mark Moreal at 5:31 p.m. and the following responded to Roll Call:

PRESENT: **Mark Moreal, Chairman**
 Chris Walchanowicz, Councilperson
 Charles Bredt
 Carol Fortlage
 Pasquale Monteleone, Jr.

ALSO
PRESENT: **Gregory J. O'Brien, Law Director**
 Michael Gero, Building Official

Chairman Moreal stated that he wanted to ask the Board if there were any corrections, changes or additions to the September 17, 2020 Meeting Minutes.

A motion was made by Carol Fortlage, seconded by Councilperson Walchanowicz, to approve the Minutes of September 17, 2020 as presented.

ROLL CALL: **Yeas: Fortlage, Walchanowicz, Moreal, Monteleone, Bredt**
 Nays: None
 MOTION CARRIED

8226 Dalebrook Road, Patrick & Cynthia Porowski – Patrick and Cynthia Porowski were both in attendance and sworn in.

Chairman Moreal asked if anyone else was on the Zoom meeting that would need to be sworn in. There were no neighbors who were present.

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The Chairman asked Mr. Porowski to state for the Board his reason for the request, why he would need the variance.

Mr. Porowski stated that the request for the variance to the code was because the code stated that they would need a 48 inch tall fence, and the pool walls to the pool that they installed were 54 inch tall pool walls. He stated that he believed it would be redundant to have a shorter fence than the pool wall.

Chairman Moreal stated that he thought the code was that all pools were supposed to have a fence around the property or the pool itself, whether you would put one up on the pool deck or fence the pool in by itself. He asked the Building Official if that would be correct.

Building Official Gero stated that the code read that any temporary construction swimming pool on private property, no pool should be maintained on private property in the municipality unless a fence of at least four feet in height and approved by the Inspector of Buildings as to strength, was erected it at all times while it was filled. It shall have a gate that shall be kept securely locked during the time the pool was not in use by the owner or anyone using it with his permission.

Law Director O'Brien stated to answer the Chairman's question, if he could have a few minutes he could research it; but he believes that it would be what would be called an "attractive nuisance" that the State law was designed not for height per se, it would be to prevent others from coming on the property and maybe doing harm to themselves. He stated that was what he thought was the purpose of the fence, not necessarily what the height was, a minimum height to prevent the attractive nuisance and injury. He would say that a fence would be an integral part regardless of the height of the pool.

Chairman Moreal asked Mr. Porowski if he had heard that.

Mr. Porowski stated that he did, but it was not the way he would have interpreted it.

Law Director O'Brien stated that one item was how would he get into the pool.

Mr. Porowski stated that currently they had stairs that they bought from Litehouse Pool that were gated and have a padlock on them. He stated that in the future he planned on building a deck with a gate and padlock as well. He stated that it will always have a padlock gate. He stated that the walls were above 48 inches as far as being of danger, it would be actually safer than a 48 inch fence. He stated that it was up to code because it had a locked gate.

Law Director O'Brien stated that he was going to suggest to him again; he stated that he was very quick with his research these days given West Law, but he would have to do a little bit more. He stated that just briefly, the State requires (inaudible). The only means of entry would

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be a stairwell; and if the stairwell or ladder had a locking mechanism preventing anyone from climbing the ladder into the pool. He stated that if Mr. Porowski did not have that type of locking entryway mechanism, then his advice to the Board would be to require a fence around the perimeter.

Mr. Porowski stated that they have a locking mechanism with a padlock.

Law Director O'Brien stated that he heard Mr. Porowski, and he was telling the Board that it might be something for Building Official Gero to look at it. He stated that again, based upon the quick research here and the quick reading, it would be designed to prevent others from coming onto the property and drowning. That was the purpose.

Chairman Moreal stated that Mr. Porowski mentioned he was going to put a deck on eventually. He asked if it would be around the whole pool.

Mr. Porowski stated that would cost him thousands of dollars. He stated that was the same reason he doesn't want to put a fence around the entire pool or yard because it would cost him thousands and thousands of dollars. He stated that the deck would probably be about a quarter of the pool, but again there will be a fence on the actual deck, like the railing and fence system. There will be stairs with a gate that would be padlocked.

Chairman Moreal stated whether this would mean anything or not, he put a pool in about seven years ago, and he went the same path as Mr. Porowski. He went in ground, but he was looking at above ground, and he went through the code and looked at it. He stated that he thought about putting a deck like Mr. Porowski stated; but he was going to have, he figured since he had to put a fence around it, he would put a two foot fence around the pool perimeter, attached to the pool. He asked Mr. Porowski if he looked into that.

Mr. Porowski stated that they own one. They bought one, but again because the code stated 48 inch fence, and the walls to the pool were 54 inch walls; it seemed that the pool walls were more than sufficient to provide whatever the code was trying to get at.

Mrs. Fortlage asked what was the height of the gate, the door.

Mr. Porowski stated that he would have to measure it. He stated that they bought it from Litehouse, so he was assuming it was approved. He could measure it when he gets home. He would assume that it would be the height that would be required by manufacturer specs and all. He stated that when he would build the gate for the deck, it would be taller.

Mrs. Fortlage stated that she thought she could see her way clear to this if the gate itself were at least 48 inches; but she would need some reassurance on that.

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Mr. Porowski stated that his wife was home, and she could take a picture of it and measure it.

Mrs. Fortlage asked if it was already there.

Mr. Porowski stated that they have the stairs.

Mrs. Fortlage stated that it sounded like he was the one who would have to go outside.

Chairman Moreal stated that his question prior, Mr. Porowski stated that they had bought the fence to go around the pool, on top of the wall of the pool. He asked Mr. Porowski if he had that or does he not?

Mr. Porowski stated that they were in possession of it, but they have not had it attached yet because they have not talked about attaching it. They would prefer not to attach it because it blocks the view from inside and outside the pool.

Chairman Moreal asked if it was a solid fence?

Mr. Porowski stated that the fence the Chairman was referring to was a two foot plastic fencing that would attach to the top rail of the pool, extending the wall another two feet. He stated that going back to his original point, they don't feel that they need it; and they were planning on returning it because it was not installed yet because their pool walls were over 48 inches high around the entire perimeter of the pool. It was over 48 inches tall, so as far as someone becoming injured or attracting a nuisance, whatever the term was, building a 48 inch high fence will do less than his actual pool wall because his pool wall was over 48 inches from ground to top rail around his entire pool.

Mr. Monteleone stated that he thought what they were saying was the fence was 48 inches tall, but if they do not see it, they might not come there; it would block the view of the pool was what they were getting at. He stated that if he understood Greg O'Brien, the fence that they have up now with the locked gate would all they would really technically need. He asked if that was correct.

Law Director O'Brien stated that he was saying that, and he was not giving the homeowner any advice; but he may want to consult his lawyer because if they don't have a mechanism, a locked mechanism to the ingress and egress of the pool, assuming that right now it sounded like it was a ladder or whatever.

Mr. Porowski stated that they were stairs.

Law Director O'Brien stated that if Mr. Porowski didn't have a locking mechanism to prevent someone from coming onto those stairs and getting into his pool, or he didn't have a fence

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around the perimeter of the pool and someone would drown, again he was not giving Mr. Porowski any advice and he didn't want Mr. Porowski to rely on it. He stated that Mr. Porowski may have a liability situation that he would not want because that would precisely be the Ohio Administrative Code. He stated that the City's code, and the law would allow the City to set forth its own code, which they do; but the intent of that code was to have a fence around the pool, regardless of the pool height because someone could still get on the ladder, a child, walk up the stairwell and jump into the pool.

Mr. Porowski stated that he understood what the Law Director was saying. He stated that he had a picture of his stairway. He stated that it had a gate, it had a mechanism, it had a padlock. They bought it from Litehouse Pools. He stated that all of that was already discussed, and it was locked. He believed that it was over 48 inches, he would have to measure it just to double check. He stated that the gate was locked. He stated that they have two small children, and the last thing they would want was for anyone to get near their pool. He stated that last bit of their worries would be the actual height of the wall.

Mrs. Porowski asked if she could send the picture to the Secretary.

The Chairman stated that it could be sent to the Secretary.

Law Director O'Brien stated that while they were doing that, he would agree with Mr. Porowski, the 54 inches would meet the intent of the fence; so as long as they would have a locking mechanism and it would be kept locked on the stairwell; and then when they would convert to a deck, that would have the same locking mechanism. He stated that there would be no reason for the fence because anyone over 54 inches, if they fell in, they would be able to stand up and not drown.

Chairman Moreal asked Mr. Porowski if he had a pool heater.

Mrs. Porowski stated that they did have a pool heater and a pump.

The Chairman stated that he was assuming that it was probably right next to the pool.

Mrs. Porowski stated that it was behind the pool.

Chairman Moreal stated that by right somebody could step on that getting into the pool.

Law Director O'Brien stated that they could. He stated that the law was designed for toddlers and infants and children of extremely younger ages. He stated that he was just arbitrarily picking a three-year old to climb up there and climb into the pool; that could be problematic.

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Mr. Bredt stated that he keeps thinking about a raised pool, regardless of the size, anywhere in the City. He stated that pools generally have a fence around them, not part of them. He stated that he was struggling with interpreting the wall of the pool as being a fence. He stated that he just didn't buy it.

Councilperson Walchanowicz stated that one of his concerns was setting a precedent for people in the future who want to put a pool in and not spend the money on a fence. Then they come back to this, and now every year they will have 20 or 30 people who put in a pool and don't want to do a fence. Then they come back to this, and say so and so got a pool with no fence, why can't we? He stated that even though the circumstances may be different; it may just be a future battle. He stated that one of his biggest concerns is the kids. He stated that kids will climb on anything. He stated that he didn't care if the pool would be four foot tall, five foot tall, ten foot tall; they will find a way to get up there.

Mr. Porowski stated that he didn't know what good a 48 inch fence would do if they were saying a kid could climb anything.

Mr. Bredt stated that it would define the boundaries of the property in some way, shape or form.

Councilperson Walchanowicz stated that by law, if you would either have a fence around your pool or around your yard, it would take away that liability on the homeowner if something would happen to a kid because you have everything done by code and by the State of Ohio law with a fence and a pool.

Mr. Porowski stated that back to his original point, the walls were over 48 inches high, and they have a locked gate that would comply to all those laws as far as he knows.

Mrs. Fortlage stated that Mr. Porowski had equipment that would constitute a climbing mechanism.

Mr. Porowski stated that he fell off the call when that conversation happened. He stated that he didn't hear what happened. He stated that they did have a filter and a heater that were off the pool wall. They were not right on the pool wall. He stated that they were not directly against the pool wall. He stated that it was not like somebody could step up on that a climb over the pool wall. They were a foot off. He stated that they were closer to two feet off, and he could even pull them back a little further. He stated that they were not talking about negligence, they were talking about a child that doesn't know better and climbing up and accidentally falling in. He stated that again to reiterate, they have two small children, and that was their top priority would be to protect their children or other people's children for that matter.

He stated that the pump was not something that could be climbed on. He stated that they were narrow and round. He stated that it was not something someone could balance on. He stated that

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the heater was a square box, but the heater was off the pool; and he could pull that back even further. He stated that even where it was located currently, it would take an Olympic gymnast to jump off of it into the pool.

Chairman Moreal stated that he wanted to go back; they understand that Mr. Porowski has a stairway with a locking mechanism. He stated that was great. He stated that he wanted to refer this to Law Director O'Brien. He stated that the fence that came with the pool that Mr. Porowski was going to return, but he could put on. He stated that it would probably extend his wall to about seven feet.

Mr. Porowski agreed. He stated it would be somewhere in the middle.

The Chairman asked the Law Director if that would constitute a fence?

Law Director O'Brien replied yes.

The Chairman stated that he felt comfortable with that because now it would be 54 inches plus 2 or 2 ½ feet.

Mr. Bredt stated that he thought Mr. Porowski stated that it was 2 feet.

The Chairman stated that now Mr. Porowski was at 80 inches.

Mrs. Fortlage stated that she would have to say if she was looking at that idea, she would consider that a greater danger just because then you lose your line of sight of the children in the pool.

Mrs. Porowski agreed.

Mr. Porowski stated that it was actually something also that he felt you could grab ahold of pull yourself up on. He stated that if anyone would want to come to his house and stand next to the pool. He stated that he was 5'10", and when he stands next to it, the pool was up to his chest. He could run full speed, and he would bounce right off of it. He would not fall in it. He stated that he knows that the Board was having the meeting from an office or board room so it was conceptual. He stated that when he was there, to him the walls were more than sufficient; and being that they were over 48 inches, they were taller than putting in a 48 inch fence.

Mr. Bredt asked Mr. Porowski when he took his permit out to put the pool up on his property, and he was there and saw it. He asked if Mr. Porowski was advised of the necessity of a fence around the pool.

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Mr. Porowski stated that he didn't remember. He stated that they did take a permit out. Again, his wife was the one who purchased the pool, and she did buy the additional fencing that went on top at the time of the purchase. She was in somewhat of duress because pools were selling out like crazy when she purchased it because of the Covid pandemic. She was trying to get the sale done as quickly as possible. So, she purchased it, but after doing research and talking to the Building Department and asking for the exact code. They received an e-mail from Mr. Gero, and it stated it was 48 inches was the required fence. That was what led to the appeal was because they have more than 48 inches of wall or protection from entering the pool with a locked stairwell. That was why they filed for the variance because it didn't seem necessary.

Mr. Monteleone stated that they were talking about the pool and not talking about the fence.

Law Director O'Brien stated that he never bought a pool, either in ground or above ground, but his guess was they wouldn't sell the pool without selling the fence. He stated that candidly his guess was they didn't care if they would install the fence, but they wouldn't want the liability of it. That was just his hunch.

Mrs. Porowski stated that they did not require them to purchase anything with the pool as far as fencing was concerned at all. It was completely 100% optional. She stated that she did send the e-mail to the Secretary with the pictures.

The Secretary stated that she didn't have it yet.

Mrs. Porowski stated that she would make sure it went through.

Mr. Bredt stated that the extension of the pool wall that they were calling the two foot fence on the top of the wall of the pool as an accessory added would potentially be something that you could ignore if you had a true fence around the property with a lockable gate. That was how he interpreted it. He stated that the wall of the pool was a wall, and a fence was a fence; and unless they could get security all around the pool, he was not going to be in favor of the variance.

Mrs. Porowski stated that it raises another question for her. She was driving to her parents' house the other day who also live in the City, and there was a resident on Oakwood Drive that also has an above ground pool and has no fence. She was also aware of a home that has an in ground pool with no fence. She stated that the in ground pool to her would be a concern. She stated that she didn't understand how the people got away with it.

Law Director O'Brien stated that not that the Board was asking Mrs. Porowski to rat out the neighbors.

Mrs. Porowski stated that she didn't want to do that, but she was trying to figure it out.

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The Law Director stated that they would be very interested in just checking into those.

Councilperson Walchanowicz stated that they would call that somebody putting up a pool without pulling permit for it. He asked if that was right with the Building Official.

Building Official Gero stated that Councilperson Walchanowicz raised a good point there. He stated that they were not driving around monitoring every pool that would get installed in the City with the pandemic going out. They have had a rash of pools, of in ground pools; those were a little easier to monitor because they would be a bigger project rather than just going to Litehouse Pool or Walmart and getting an above ground pool and putting up in the backyard.

Chairman Moreal stated that he believed to Mrs. Porowski's point that there were a couple of in ground pools. He stated that he knows of one that was 40 years old when the development was built, and maybe back then, they didn't know what happened 40 years or 30 years ago; but today they were going by the City's code. That was the level the Board was up against right now.

Mrs. Porowski stated that she gets that. She stated that just from a safety perspective, an in ground pool to her is a far greater risk.

Chairman Moreal asked if the Secretary had received the picture yet.

The Secretary stated that she did not have it yet.

Mrs. Porowski stated that it should be coming through.

The Secretary stated that it had not come through yet.

Mrs. Porowski stated that she could text the picture if it was easier. She didn't know if anyone wanted to give out their cell phone number. She stated that it was up to the Board. They could wait for the e-mail.

Mrs. Fortlage asked what was the picture again.

Mrs. Porowski stated that it was the picture of the gate and locking mechanism.

Chairman Moreal stated to the Law Director that if the ladder with the locking mechanism, and he had stated earlier for the State of Ohio that was code.

Law Director O'Brien stated that was a preventative mechanism.

The Chairman asked if that would eliminate the fence.

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Law Director O'Brien replied yes. He stated that it did not comply with the City's code.

The Chairman stated that was what he wanted to hear.

Mr. Monteleone stated that he would want to make a motion that either they have to put up the fence around the pool or put the fence up around the yard at this point.

Law Director O'Brien stated that it wouldn't be a motion to do that. The Board would take up consideration of the application to avoid putting up a fence; and then the applicants could choose whatever fence they would need to put up. That would be their prerogative, but it would essentially be voting on their request to not put up a fence.

Chairman Moreal stated that the applicants would not have to do the whole yard, it could be just 40 feet around the pool or something if they wanted.

Law Director O'Brien replied correct.

Chairman Moreal stated that he stated that he kind of had an idea of what the ladder looked like.

The Secretary stated that she still didn't have the e-mail.

Mrs. Fortlage asked if they had a motion on the floor to deal with the variance?

Mr. Monteleone stated that he didn't think they did because his motion was not correct.

Chairman Moreal stated that you would ask for what they were requesting, and then the Board would vote on it that way.

Mr. Monteleone stated that he would like to request a motion that the not permitted fence was not possible.

Law Director O'Brien stated that it would be a motion to grant the variance to 1361.03 to permit an above ground swimming pool of temporary construction to not have a fence erected around it. That would be the motion; and if the Board would not be in favor of granting, it would be a no. If the Board was in favor, it would be a yes.

Mr. Porowski asked if the Board was going to vote.

Law Director O'Brien replied yes.

Mr. Porowski stated that he had to pause for second at work. He asked if the Board was voting or could he say anything prior to the vote?

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Chairman Moreal stated to Mr. Porowski that he could go ahead, they will let Mr. Porowski say one last thing.

Mr. Porowski stated that he just wanted to know exactly, being that the pool wall was over 48 inches high which would be a deterrent, the same as a fence. He stated that he thought it would suffice. He wanted someone to explain to him the rationale behind something over 48 inches high would not be sufficient compared to a 48 inch requirement from the code.

Mrs. Fortlage asked the Law Director if he wanted to tackle that one.

Law Director O'Brien stated that he didn't have enough time nor was he asked to look into the history of fencing around swimming pools. He wanted Mr. Porowski to take it for the Law Director practicing 26 years and talking with the other 650 lawyers that he practices with. He stated that his suspicion was that there was nothing code which he had been reading, both the Administrative Code, there was nothing in the code that would distinguish higher above ground pools versus lower above ground pools. He stated that it was irrelevant according to the code because it was not mentioned in there.

The Law Director stated that was what clear, based upon the intent of the fencing.

Mr. Porowski asked if it was irrelevant.

The Law Director stated that he wanted to finish, then Mr. Porowski could question him. He stated that he thought that it was the fencing around the perimeter of the property or the fencing around the perimeter of the pool that would act as a visual deterrent, and it would prevent children of tender age from getting into that pool and harming themselves. He stated that was why he read some, which was not in the City's code, but some language that if the only means of ingress and egress was stairs, and he has locks, that sometimes that would be permitted in lieu of a fence. He stated that was all he could tell Mr. Porowski, based upon the 34 minutes flailing around various case law.

Mr. Bredt stated that was the State Code he was talking about.

Law Director O'Brien replied yes because the City's code is somewhat mirrored on the State law.

Mr. Bredt stated that the City was more restrictive.

Chairman Moreal stated that he thinks that as Mr. Bredt stated earlier, he stated that putting a fence up around the property defines the property. It would define Mr. Porowski's property line, and somebody jumping over a fence was kind of a trespassing thing. He stated that if the fence wasn't there, the first thing they would get to would be the pool; at least Mr. Porowski protected

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by law himself with the fence. The Chairman stated that he knows that Mr. Porowski didn't want to put a fence up, but that was how the Chairman would take it as a safety thing with the City. If somebody would jump over the fence, it would be trespassing on the property. If they would get into the pool, he has done everything he could to prevent that.

Mr. Porowski stated that to the Chairman's point, and there was an attorney in the room, someone jumping over a fence or walking on his property without permission would still be trespassing regardless whether he would put up a fence or not. Them coming on his property unwanted would be by definition trespassing. He stated that maybe he misheard what the attorney said, and he apologized for not remembering his name; but he thought he heard him say that having an egress or an entrance with a locking mechanism being over the 48 inches would be sufficient. He asked if he heard that wrong.

Law Director O'Brien stated that he wanted to answer Mr. Porowski's first question. He stated that Mr. Porowski was correct. Anybody who would enter his property without his property would be a trespasser, and he would owe the least amount of duty from a liability standpoint. However, there were exceptions to that law; and one of them was the attractive nuisance doctrine where as you were drawing them as you have a pool, which he can tell Mr. Porowski was defined in many cases an attractive nuisance. He stated that therefore Mr. Porowski would not have the luxury of the trespassing, or at least the full breath of the defense of a trespasser and the lack of duty to a trespasser. The Law Director stated that was Number One.

The Law Director stated that Number Two was that he stated that he read quickly that at least a section of the Administrative Code. He wouldn't want to give that full opinion, and the Board rely on it until he had time to research it. He stated that there seemed to be an indication that if a locking mechanism of an above ground pool as far as what he read was a ladder, not a stairwell, and the ladder was secured through a locking mechanism where no one could climb the ladder; that would be sufficient in lieu of. That would be one instance, and he was providing that to the Board.

Mr. Porowski stated that based on that though, and he knows the Law Director stated that he didn't do his full research; but based on what he just stated, he thought it would somewhat back up his appeal. He stated that also the Board was about to take a vote on Mr. Porowski's appeal. The Board was going off the information that the Law Director was giving the Board currently, and from the sound of it, it sounded like some people were against it which has him worried he will lose his appeal already; and they don't necessarily have all the facts.

Law Director O'Brien stated that it was not his job to provide the facts for Mr. Porowski, with all due respect. He stated that it was Mr. Porowski's job to support what would be called a practical difficulty standard. The Board was very well aware of what elements would go under into that decision-making process; and they would use that decision-making process whether or not to grant Mr. Porowski's variance. He stated that it was as simple as that.

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Mr. Porowski stated that he understood.

Mrs. Fortlage stated that the way that it would work, she asked the Chairman if he minded her trying to do it, and she wanted him to chime in if she didn't get completed. She stated that if Mr. Porowski would lose the appeal right here and now, he could not bring it back. If the Board would table the matter, and Mr. Porowski wanted to look into things and come back with more facts or a slightly different one, they could consider it at a later time. She asked the Chairman if he wanted to add anything to that.

Chairman Moreal stated that if Mr. Monteleone wanted to pull his motion off the table, the Board could table the matter. He stated that he was pretty sure that Mr. Porowski's pool was closed for the year. He stated that Mr. Porowski could look into it and get some support on his own to prove his case; but just so Mr. Porowski would know, what Mr. O'Brien stated was for the State of Ohio. The Chairman stated that the Board was going by the code for the City of Independence. He stated that he would have no problem if Mr. Porowski wanted to go ahead and table the matter. Like he stated, he was sure the pool was closed now.

Mrs. Porowski stated that the pool was closed today.

Mr. Porowski stated that it was closed, but he didn't see how it changes the matter. He stated that the pool was not changing. The pool walls would be staying the same height as they were now as they will be when the pool will get re-opened, and the same locked gate will be locked at all times when the pool was closed or opened.

Chairman Moreal stated that if that was the case, the Board would vote based on the code in Independence.

Mr. Porowski stated that it would require the 48 inch fence.

The Chairman agreed.

Mr. Porowski stated that maybe he was not just hearing it from him. He stated that the pool wall was over 48 inches all around the pool. To him that would satisfy the code; but he asked if someone was saying that he would have to have a fence regardless.

Several people replied that was the code.

Mr. Porowski stated it would be a separate fence. He stated that outside of a pool, he would have to have a fence. He stated that attaching a two foot additional wall extension would qualify.

Law Director O'Brien stated that then Mr. Porowski's variance request would be to attach a two foot barrier fence around the perimeter in lieu of the 48 inch required by the code.

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Mr. Porowski stated that he certainly did not want to a build a fence around his entire yard. He stated that it would cost a fortune, plus no one in his community or his development has a fence. They all have open yards to each other pretty much. He stated that he would have to build a fence around the pool. He stated that they already bought the fencing to go on the top rail, it just seemed that it was unnecessary based on the walls being over 48 inches around the pool.

Law Director O'Brien stated that he thought the disconnect was the fact that Mr. Porowski was analogizing the height of the fence with the height of his wall; and they were separate and distinct decisions. He stated that the fence was designed to be a barrier, and they have chosen 48 inches which may be the State code. He didn't know. He thought the State code might be 60 inches, but regardless. The Law Director stated that he thought the problem Mr. Porowski was having, he has an above ground pool that was higher than 48 inches why would he need a fence when in fact the code was written as a deterrent, and the fence should be installed regardless of the height. He stated that Mr. Porowski could have a 20 foot high, and they could argue the absurdity of that, but that was the disconnect they were having.

Chairman Moreal agreed.

Mr. Porowski stated that he saw the disconnect but it seemed that a 48 inch foot fence would be less of a deterrent than something taller like a 20 foot wall. He stated that anything over 48 inches would be more of a deterrent than the actual fence in his mind. He stated that he was biased in the situation.

Mr. Bredt stated that he would like to call the question and cut off discussion unless the application was tabled, he would make a motion to approve the variance as presented.

Pasquale Monteleone stated that he would second that motion.

A motion was made by Charles Bredt, seconded by Pasquale Monteleone, to approve the variance requested as presented.

**ROLL CALL: Yeas: None
 Nays: Bredt, Monteleone, Walchanowicz, Fortlage, Moreal
 MOTION FAILED**

Mrs. Porowski asked if they didn't get the option to table the matter.

Mrs. Fortlage stated that it was offered twice before the Board voted.

Mr. Bredt stated that now Mr. Porowski would have to come back with a completely different application for a variance which would have to be different.

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Law Director O'Brien stated that there was one exception to that. He stated that the one exception would be to get on the agenda for next month prior to the Minutes being adopted; and then the Board could re-open the vote for reconsideration; but that was discretionary to the Board Chairperson.

Chairman Moreal stated that he asked the applicant if he wanted to table the matter, and the applicant asked what was going to change. So, that was why the Board voted on it. He stated that the Board explained what their thoughts were and how they were approaching it. The applicant stated that nothing was going to change; so the Board went ahead and voted on the matter.

Mrs. Fortlage asked if the applicants were still in the meeting. She asked if Mr. & Mrs. Porowski were both there on one phone.

The Secretary stated that someone left the meeting.

Mr. Porowski stated that he thought it was just him on the phone. He stated that he thought that his wife hung up.

Chairman Moreal stated that was where the Board stood. He stated like the Law Director stated, if the Minutes would not be approved, and the Board could open up the meeting again for a vote. He asked what would Mr. Porowski do to change the situation.

Mr. Porowski stated that to the tabling question, when the Chairman asked earlier, there was some more discussion after that for clarification; and that was why neither one of the applicants said anything about the tabling. He stated that the second time it was asked, he stated that he thought it was too quick. Someone asked about tabling the matter, and then the Board went right into a vote. He stated that it seemed like there was not a pause there for him to make that decision, plus he would have wanted to discuss it with his wife for 5 or 10 seconds to make sure that was what she wanted to do or not.

He stated that the option now would be to do some more research and see what else there was to support their case. He stated that if that would be before next month.

Law Director O'Brien stated to Mr. Porowski that he had been sitting on the Board a long time, and it was the first time that the Board has offered tabling candidly that he can recall ever, and someone not really picking up on that signal; but having said that, he realized that Mr. Porowski was not before Boards much. He stated that he wanted to tell Mr. Porowski the specific option that he had. If Mr. Porowski feels that there was information like the picture link that never came through or other information that he would feel would be definitive and material to the Board's consideration, he could present that to Debi Beal, the Clerk, and the Chairperson and Board members will get that information. If any individual Board member felt compelled to

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reconsider their decision, based on that information, they would prior to the Minutes being adopted at next month's meeting, they would make a motion for reconsideration of the application. If that would pass by at least a vote of 3 Board members, then the discussion would be re-opened and the Board would listen and consider that additional information and take another vote. If that motion to reconsider did not sustain with at least 3 Board members, then the decision of the Board this month would be final; and the Minutes would be adopted. The only other option for the applicant would be a 2506 appeal in the Court of Common Pleas down in Cuyahoga County.

Mr. Porowski stated that he would have to get his ducks in a row quickly and get it to the Clerk.

The Chairman replied yes.

Mr. Porowski stated that he will discuss the matter with his wife.

Mr. Monteleone asked if Mr. Porowski could get a variance to put the fence around the pool next month or a fence around the pool, whatever he would decide to do it; and then the Board could vote on that. He stated that would be an option.

The Chairman stated that if Mr. Porowski would do that, he would not need a variance from the Board. If he would put a fence up. He stated that was what the Board told Mr. Porowski.

Mr. Monteleone stated to Mr. Porowski to just put the fence up.

Building Official Gero stated to the Chairman that he believed that the Law Director stated that since the Code has the 4 foot fence; if Mr. Porowski would put the 2 foot fence on top of the pool, he would apply for a variance to put that up in place of the 4 foot fence. He thought that was the way the Law Director explained it.

Chairman Moreal stated that he wanted to see what Mr. Porowski would do, and the Board would go from there.

Mr. Porowski stated that to clarify, he would have to file for another variance to put the fencing on the top rail.

Chairman Moreal stated that according to the Building Official, he would believe so.

Mrs. Fortlage stated that there was no guarantee that he would get that variance. She wanted Mr. Porowski to know that.

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Law Director O'Brien stated that to be fair, the arguments or discussions of the applicant thus far, the height of the pool wall plus 2 foot of barrier fencing; the Board may take that into consideration.

The Chairman agreed.

Chairman Moreal asked if everyone was good for now.

Mr. Porowski stated that just the last couple of comments. He stated that it wasn't cheap stuff. It was expensive, and he has to put holes in the top rail of his thousands of dollars that he just spent on a pool. He would have to drill holes into it to put the additional fencing on the top rail. He stated that now he was hearing that may not be sufficient; and he would still have to put up a fence, even if he would put that up. The variance could fail again?

Law Director O'Brien stated to Mr. Porowski stated that the fact that the pool was closed today; he assumes that everybody was rational and reasonable and no one would be going out with a drill anytime soon; so the Board could cross that bridge next month when the Board would get to it. He stated that he thought Mr. Porowski's point on how the wall was will be seriously considered asking for a 2 foot variance on the City's 48 inch requirement for fencing.

Mr. Bredt stated that he had a technical question since the Board was still talking about the same pool. He asked if the pool being winterized was emptied?

Chairman Moreal stated that he would assume no.

Mr. Bredt stated that he was asking the applicant.

Mr. Porowski stated that the pool was not drained completely.

Mr. Bredt asked if there was a cover over the pool.

Mr. Porowski stated that there was a winterized cover that was bound around the outside, and he had it staked down as well.

Mr. Bredt replied okay.

Chairman Moreal stated that it was pretty much a safety cover he believed.

Mr. Bredt stated that he understood. He thinks that the Board has gone beyond what they need to.

Chairman Moreal stated that the Board was done for tonight.

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A motion was made by Chairman Moreal, seconded by Pasquale Monteleone, to adjourn the Board of Zoning Appeals meeting of October 15, 2020.

The Board unanimously agreed to adjourn the meeting.

There being no further business, the Board of Zoning Appeals meeting of October 15, 2020 was adjourned at 6:21 p.m.

Chairman Mark Moreal

Debi Beal, Secretary

Minutes Unapproved at Time of Release 10/16/20