

THE ZONING BOARD OF APPEALS OF THE TOWN OF AVON HELD A VIRTUAL REGULAR MEETING FOR A PUBLIC HEARING ON THURSDAY, APRIL 28, 2022, AT 7:00 P.M., VIA GOTOMEETING: By web, <https://global.gotomeeting.com/749172669>; or by phone: [+1 \(646\) 749-3129](tel:+16467493129), Access Code: [749172669#](https://global.gotomeeting.com/749172669#).

Present were regular Board members Chair Eileen Carroll, Vice Chair Christy Yaros, Michele O'Connor, Jaime Polhamus, and Eileen Reilly. Absent were Alternate members Thomas McNeill, Vi Smalley and James Williams. Also present was Emily Kyle, the Planning and Community Development Specialist for the Town of Avon, and Hiram Peck, the Director of Planning and Community Development for the Town of Avon.

Chair Carroll called the meeting to order at 7:05 p.m.

E. Kyle took roll call for the Board. E. Kyle welcomed new member, Michele O'Connor. We have a quorum of 5 Board members. This meeting is virtual via executive orders which have been extended.

I. PUBLIC HEARING:

Application of Virginia Brown, Owner of 86 Woodford Hills Drive; regarding the Zoning Enforcement Officer's interpretation and determination of the Avon Zoning Regulations regarding the definition of structure as it pertains to a fence/wall. This Appeal is being brought under Avon Zoning Regulations, Section X.C.2., and pertains to property located at 94 Woodford Hills Drive in an RU2A Zone.

E. Kyle stated that there is one agenda item tonight which is the Public Hearing for the Appeal of Virginia Brown, owner of 86 Woodford Hills Drive, regarding the Avon Enforcement Officer's interpretation and determination of the Zoning Regulations regarding the definition of structure as it pertains to a fence/wall. This Appeal is being brought under Zoning Regulations, Section X.C.2., and pertains to the property located at 94 Woodford Hills Drive in an RU2A Zone owned by Joseph J. Farraye, Thomas T. Gresh and Nicole M. Gresh (the "Owners").

E. Kyle continued that the appellant or representative of the appellant will give their presentation or any comments first. Following that, we will have Staff input, then we will then open the floor to any members of the public that are interested in speaking as this is a public hearing. The ZBA will have opportunity for questions and comments with both the Appellant, Staff and the public.

V. Brown asked if she had time limits and E. Kyle replied that because V. Brown is the appellant of the case, there are no time limitations. The ZBA did receive the package materials including the materials emailed to staff the previous night understanding that they may have not had enough time to review the most recent items.

V. Brown began by stating that she resides at 86 Woodford Hills Drive and is the abutting neighbor of the Owners. She believes that the issue in front of the ZBA is relatively simple and discrete. It is whether the Owners' proposed retaining wall, which is a 3' x 5' concrete block retaining wall, at some points 6' high, and approximately 180' long along V. Brown's side

boundary line, qualifies as a structure under the Avon Zoning Regulations. Despite some of the statements made by H. Peck in his letter to the ZBA dated April 21, 2022, that is the only issue that V. Brown is asking the ZBA to decide and the answer to that question will determine whether there is a required side yard setback. The Zoning Regulation that V. Brown is referencing is Section II. C. – structure is defined as “anything constructed or erected which requires location on the ground or attachment to something having location on the ground but excluding pavement”. Her position and basis for this Appeal is that in accordance with that section, the Owners’ proposed retaining wall qualifies as a structure. She continued that in H. Peck’s letter dated April 21, 2022, his statement regarding a fence and a wall being the same is not relevant or correct. A fence can be seen from both sides. In contrast, a retaining wall can only be seen from one side and in this case, it will be from her side. They are entirely different and commonly serve different purposes. Generally fences are for the purposes of enclosing a piece of land, dividing a piece of land, or separating two estates. V. Brown continued that however, H. Peck is correct that neither term, fence or wall, is specifically defined in the Avon Regulations. But she thinks that the question is not whether the retaining wall is a fence but rather the question is whether the retaining wall proposed by the Owners qualifies as a structure. V. Brown said that there is instructive language contained in the Avon Zoning Regulations which she cited that answers that question affirmatively as the wall proposed by the Owners is “constructed or erected, requires location on the ground or attachment to something having location on the ground” and not in any way does it serve the purpose of a fence. She continued that the Owners proposed retaining wall is not being used as a fence – it is being erected to raise their yard to a uniform height so they can further extend their 15’ wide driveway by an additional 25’, resulting in a 40’ driveway. She said that the retaining wall functions as a very large obtrusive platform rather than anything even closely akin to a fence. V. Brown said that due to the height of that retaining wall in some areas, the Owners will be legally required to provide guards on top at all points that exceed 4’. She referenced the Affidavit that she submitted in her supplemental submission (#1) from Marcus Puttock who is a professional engineer with Godfrey, Hoffman and Hodge and opined on this issue. V. Brown stated that the concrete blocks that the Owners proposed for this retaining wall commonly referred to as bunker block wall, are huge. They are 3’ x 5’ blocks commonly used in commercial projects. Each block weighs more than 4,400 lbs. A crane will be needed to lift each block. These are not the average blocks used for a residential retaining wall. She has attached photographs of concrete blocks (#8) in her supplemental submission. She agrees with H. Peck that there are fences sitting on property lines all across Avon however she doubts that there are many, if any, examples of a 3’ x 5’ concrete block wall that at some points will reach 6’ high and more with guards sitting on boundary lines in residential areas in Avon. Also, unlike a fence, the retaining wall is only visible from one side, hers. The Owners themselves have asserted that the wall is not aesthetically pleasing in any way (Exhibit G of her Appeal).

V. Brown referenced H. Peck’s rationale that because the regulations do not specifically use the terms “fence” and “retaining wall”, his interpretation is not subject to challenge. V. Brown believes this is nonsensical, nor is H. Peck’s argument that this is the way it has been interpreted since 1957 sustainable. She continued that incorrect interpretations that ignore the plain and unambiguous language of established regulations, are subject to challenge, and regulations must be interpreted as written and not rewritten by the Zoning Enforcement Officer based on some unexpressed policy or whim. If the ZBA decides that this wall qualifies as a structure, then there

is a setback requirement that would be 25' from the side yard. V. Brown requests that the ZBA acknowledge that the Owners' proposed 3' x 5' concrete block retaining wall, that is at some points 6' and runs approximately 180' along her side boundary line, qualifies as a structure pursuant to the Avon Zoning Regulations and reverse the decision of the Zoning Enforcement Officer.

H. Peck began by referring to his April 21 memo that he sent to the ZBA. There is no definition of wall or fence in Avon's current regulations and having known the previous Zoning Enforcement Officer who worked with the Town for many, many years, he knows firsthand how the regulation was interpreted. H. Peck continued that there are four items the ZBA should focus on. 1. There are hundreds of fences and probably a good number of that subset, walls, that have been constructed on property lines and there are no aesthetic considerations with regard to whether neighbors like the look of a fence or wall. There could be a number of uses of fences but a fence and a wall serve essentially the same purpose. There are many, many fences or walls on property lines throughout Town and should the ZBA decide to uphold or sustain this Appeal, they would be made non-conforming. 2. There is no basis in the regulations for the Appeal. If the applicant wanted to propose a change in the regulations, or propose some definitions which do not currently exist, they could do that and the Planning and Zoning Commission would consider them. H. Peck believes that they would not be favorably considered but there may need to be a definition of a fence or a wall put into the regulations. 3. If the ZBA decided to uphold this Appeal, it is very possible that every application, under our current regulations, would need to go to the ZBA before it went to any other land use board. 4. The outcome of assuming that every fence or every wall is a structure leads to an irrational result. If you wanted to put up a fence in front of your property, it would have to meet all the setback regulations for that. His opinion is that the common sense consequences of an alternative interpretation do not make any sense. Lastly, he hopes that the ZBA denies this Appeal.

Chair Carroll opened the hearing to questions from the Commissioners to the Appellant, V. Brown, or H. Peck. E. Reilly asked V. Brown if this would be an eye sore on her property. V. Brown answered absolutely. E. Reilly continued that V. Brown has a right to quiet enjoyment of her property. She asked V. Brown if it decreased her property value. V. Brown answered that affirmatively and it would be visible only to her and not the Owners.

Chair Carroll asked if there were other questions from the Commissioners and there were none. She then opened the floor for public comment. There were no comments. Chair Carroll clarified that the Appeal is asking if the Zoning Enforcement Officer's interpretation and determination of the Avon Zoning Regulations regarding the definition of a structure as it pertains to a fence or wall is correct. The Appeal is asking that the ZBA overturn the ZEO's ruling. E. Kyle confirmed that and if that happened, in order for the Owners to continue, they would need an application to the ZBA for a variance if they wanted the wall in the same spot, or the wall would have to be moved if the variance was not granted. E. Kyle continued that the Appeal is about the ZEO's interpretation of a wall or fence as a structure.

V. Brown added that she is not asking the ZBA to determine that a fence is a structure. She is specifically asking the ZBA to make the determination that this particular retaining wall qualifies as a structure. H. Peck reminded the ZBA that there is no distinction in the regulations between a

fence or a wall. Depending on the topography, they can serve the same purpose or they can serve different purposes. A decision to change the way the regulation was interpreted is going to affect many, many properties in town that already have fences or walls on the property line. Chair Carroll asked if there is a different definition if something is a retaining wall or just a wall. H. Peck confirmed that there is no current definition in our regulations that makes that distinction. He continued that one thing that we are going to be doing, starting in July if the Town budget is approved, is a comprehensive revision of our regulations.

E. Reilly asked if the wall is an industrial looking retaining wall. V. Brown answered that she included in her supplemental materials what a 3' x 5' concrete block would look like. It is very much an industrial looking block wall and is not a quaint farm stone wall. Each block weighs 4,400 lbs. and there will be many of them lined up along her boundary line.

Vice Chair Yaros asked H. Peck if how something looks to a home owner has any bearing whether the town approves or denies a permit in this kind of case. H. Peck answered that no, there is no way to tell whether a particular wall is going to be offensive to somebody. He continued that there is no proof in the record that this is going to devalue anyone's property. Usually what happens when neighbors put up a fence or a wall and the other neighbors do not want to see it, they plant some evergreens in front of it and that is the end of it. Vice Chair Yaros asked K. Olson about this and K. Olson concurs with H. Peck that it is about the regulations and trying to get into aesthetics is like going down a rabbit hole so you try to have bright line rules when it comes to defining things. Vice Chair Yaros asked if the ramifications of changing this particular decision would affect future or previous structures of fences and walls that have been built. K. Olson replied that yes, potentially it would because when the Planning and Zoning Commission grants an approval, their interpretation of the regulations have some precedent, and so do the application of those regulations to specific scenarios by the ZBA. So when the decision is rendered that says that we interpret the regulations as "X" it will have an effect as precedent. Down the road, it could potentially mean that others with retaining walls are now in a non-conforming use category. The regulations as they stand today have to be interpreted fairly and equitably.

Vice Chair Yaros made a Motion to Close the Public Hearing. E. Reilly seconded the Motion. The Motion passed unanimously. E. Kyle stated that now is the opportunity for the ZBA to have a discussion and deliberate amongst yourselves before making a final motion. E. Kyle stated that there are three options for the ZBA to review. The first would be to deny the Appeal. The second would be to uphold the Appeal, which would then require either a variance to keep the wall in the same spot or the Owners to move the wall. The third would be if the ZBA did not feel prepared to make a decision tonight, you could continue the decision portion of this to your next regularly scheduled meeting which is May 19. E. Reilly asked if upholding the Appeal means that the wall does not go up. E. Kyle answered that assuming there is a unanimous vote of 4 or more Commissioners, the ZEO's interpretation of fences and walls would be revoked which would nullify the ZEO's approval section of the building permit. K. Olson continued that one of the motions would be to uphold the ZEO's decision and find that the proposed wall was compliant with zoning regulations. So if you uphold the decision, then you would be denying the Appeal. If you disagree with the interpretation of the zoning regulations, then you would be

finding that this did not conform with zoning regulations and therefore you would be affirming the Appeal.

Vice Chair Yaros made a Motion to Deny the Appeal. Chair Carroll seconded the Motion. E. Reilly asked for clarification and K. Olson said that affirming the Appeal means you are denying H. Peck's interpretation of the regulations. If you agree with H. Peck, then you would vote in favor of denying the Appeal. E. Reilly questioned whether anyone would like to look at an industrial type retaining wall all the time. She continued that there are regulations but you have to live with neighbors. Vice Chair Yaros stated that she made the Motion because she does not believe that it is in the ZBA's jurisdiction to determine this Appeal based on how you feel that the wall may look. That requires a different avenue such as changing the zoning regulations. If the ZBA said yes because we feel for the homeowner, then we could be potentially changing the laws going forward. To her, these are two separate issues.

II. OTHER BUSINESS: None.

III. NEXT REGULARLY SCHEDULED MEETING: May 19, 2022

E. Reilly made a Motion to Adjourn. Chair Carroll seconded the Motion. The Motion passed unanimously. The meeting was adjourned at 7:48 p.m.

Janet Stokesbury, Clerk
Zoning Board of Appeals
Town of Avon Planning and Community Development