

MINUTES OF MEETING
BOARD OF ZONING AND BUILDING APPEALS
SEPTEMBER 17, 2020

Members Present: Wright, Brandt, Farrell, Christ, Pempus

Presence Noted: Andrew Bemer, Law Director
Raymond Reich, Building Commissioner
Kate Straub, Planning and Zoning Coordinator

Council Members Present: Christina Morris, At-Large Council Member

Mr. Pempus opened the September 17, 2020 Virtual Special Meeting of the Board of Zoning and Building Appeals at 6:00 p.m. via ZOOM.

1. EMMA JOCHUM, 20932 Avalon Dr. – PUBLIC HEARING – Variance to construct an ornamental gate in the front yard with a height of 6’, located more than 12’ in front of the dwelling vs. 36” maximum height permitted for front yard fences and such fence segments shall be located no more than 12’ in front of the dwelling (Section 1153.15(j)(1)). Mrs. Emma Jochum, Property Owner is present with her Co-Owner/Co-Trustee, David Hessler, Attorneys, Michael O’Malley, Joseph Valore and Dean Valore (Valore & Gordillo, LLP). Also present on behalf of Emma Jochum are Dr. Khalid Darr, neighbor residing at 20900 Avalon Dr., Mr. Thomas Locker, Real Estate Agent with Howard Hanna and Mr. Ken Burney, Building Contractor. Present in opposition to the variance request are Attorneys Matthew Miller and Samuel Lauricia (Weston Hurd, LLP) together with their clients, Dr. Jonathan Heavey, neighbor at 20922 Avalon Dr. and Mr. Jeremy Thompson, neighbor at 20942 Avalon Dr.

Mr. Pempus introduced the item before the Board. All of the parties were sworn in. Mr. Pempus said that Attorney O’Malley may begin the presentation.

Attorney Brian O’Malley began by explaining that all of the witnesses he will call are present in the same room at the offices of Valore & Gordillo, LLP and each will appear in front of the laptop in order to be on screen during their testimony. The Board will hear Attorney O’Malley’s voice as he asks questions of them. Dr. Khalid Darr is the first witness. He has been neighbors with Ms. Jochum for over 35 years and she is a very sweet person. People wander into her yard and drive cars into her yard sometimes and she does not know who they are. She wants protection and he does not think that a gate that is on her property would cause any issues with neighbors. He confirmed that he signed the form that was submitted, which indicates he has no objection to the gate.

Attorney Samuel Lauricia asked Dr. Darr some questions on cross examination and the following is the information Dr. Darr conveyed: Dr. Darr has seen people driving their cars onto Ms. Jochum’s property and then turning around because they are looking for something or they are lost. With no gate, they can freely go there and bother her. He has seen them drive along her property and stay for a few minutes and then turn around and leave. He is familiar with where Dr. Heavey lives but he does not know his address. In relation to Dr. Heavey, he lives on the cul-de-sac and his house is right on the lake. He has

neighbors in the front and also has a common driveway and he lives to the east of Ms. Jochum. Ms. Louise Gordon lives right in front of him but he said that she has no hindrance in any fashion by this gate because she can hardly see it. She has no right to comment on this particular situation. Mr. Lauricia said that this fence is unique in that all of the other fences in the area are either cosmetic or leisure and this one is for a different purpose. Dr. Darr said he thinks it is a beautiful fence and it will look good. The fence does not cause any problem and Ms. Jochum needs protection at night when she is alone in her house. There being no further questions, Dr. Darr was dismissed.

Mr. Tom Locker, of Howard Hanna Real Estate is the next witness and the following information was conveyed by Mr. Locker: Mr. Locker lives in Westlake and has resided in Westlake and Bay Village for his entire life. He graduated from Cleveland State University and has been selling real estate for about 20 years. He is licensed by the State of Ohio since 2001 and his license is renewed every 3 years. Rocky River is one of his primary markets for listing houses and he has sold hundreds of houses here. Dozens of those homes have been located north of Lake Rd. in the Beachcliff I area and he is intimately familiar with Rocky River. The things he looks at when listing a house are location, condition and what overall improvements were made. Regarding this property and the location of the gate, there are other gates close by this one. He considers a gate to be an improvement to a property and he believes most people would assume that too. A gate of this nature is consistent with the residential character of the neighborhood and it is his opinion that this would not have a detrimental effect in terms of the pricing of another house. It is his experience that gates are actually a sought after feature.

Upon cross examination by Attorney Lauricia, the following information was conveyed by Mr. Locker. He does not understand the legal term of a gate and a fence. He assumes a fence is around the perimeter of something such as a pool, a house or a backyard and a gate would be access to a driveway, a pool or a backyard and a gate represents an access point. He sold three houses in Beachcliff I in April or May, located just a few streets away from Ms. Jochum's house. There was not a gate on any of those properties. The last time he sold a house with a fence on a neighboring parcel was recently on Argyle Rd. with a 6' fence in their backyard and also on the side and a gate came off of the side of their house. The address of that house is 290 Argyle Rd. The original list price was \$789,000 and it sold for \$735,000 and he explained why he thought it sold for below asking price. He believes that this fence will enhance the value of Ms. Jochum's property. Attorney Lauricia asked if he knows that one of the factors the Board looks at is what the impact of a variance is on the neighboring parcels and Mr. Locker responded that he is not sure how the Board arrives at a decision to grant a variance. He does not know how a gate can hinder anybody else's property because it is only located on Ms. Jochum's property. He explained what the requirements are to become a real estate agent and said that an appraiser has very similar requirements. He does not know how many properties he has seen in Rocky River with 6' mechanical gates but there have been a few. He can provide addresses at their request. There being no further questions, Mr. Locker was excused.

The next witness called is Ken Burney, the contractor. The following information was conveyed by Mr. Burney: Mr. Burney is a 1972 graduate of Rocky River High School and received a degree in Business Administration from Ohio University. Upon graduation, he

went to work for his father full time at Burney Builders. He is a third generation builder on the west side of Cleveland and his father retired a number of years ago and he has been running the company ever since. Regarding licensure, he is not required to be licensed by the State. General contractors are required to be licensed by the various cities they do work in. He has been licensed by the City of Rocky River for many years, and they tend to wait to get their annual registration certificate until they have a job to do in the City. The majority of Mr. Burney's work is remodeling and room additions at this point in time. His father began doing work for Ms. Jochum about 30 or 40 years ago. It was his understanding that the reason for the gate is security and to prevent strangers from coming up the driveway toward her house, primarily at night. He applied for a permit with the City, was given a card to post at the property for 10 days, after which a permit was issued for it on September 30, 2019. He spoke with the Fire Prevention Officer to determine the required width of the gate and how the Fire Department would operate the gate if they needed to. The gate is required to be 12' wide and they must install a Knox box, which is an electric switch that you put a key in to activate the gate. The Rocky River Fire Department is issued a key by the Knox company that operates all Knox locks in the City. He said that the Fire Prevention Officer actually gave him the form and specifically told him what product to purchase for the gate. He also spoke with the Knox company and received assurance that the Knox box is totally compatible with the gate and it is fine to incorporate it into the gate mechanism. He has since had occasion to speak with the new Fire Prevention Officer since his initial conversations in September of 2019. He met with him at Ms. Jochum's house and brought the Knox Box lock with him and the Fire Prevention Officer operated it with the key on his key ring. He was able to see the infrastructure for the gate that includes the concrete pad because that is already installed. He explained how the gate is designed and operates. He said it can be operated by a cell phone, key pad, and the Knox box key that the Fire Department has. It can also be operated by a siren from the fire truck. The gate has a contact bar on the bottom that if it touches an object it goes back up. If there is an object in the path of the gate, it won't be able to go down, similar to a garage door. The gate sits a minimum of 5" off of the ground so it can accommodate fire hoses under it. The driveway has an automatic sensor so that the gate is lifted when you drive over it to leave the property. Mr. Burney finds that this gate is consistent with the residential character of this neighborhood and there is a very similarly designed gate on Aberdeen Rd. at a house he recently did work on. This particular gate and the other gates in the neighborhood do not have any detrimental effect on the neighboring properties and when designed well, they are an enhancement. The gate does not interfere with any electrical wiring or overhead wires. The gate is powered underground and is run by a battery that would operate for many, many cycles should the power go out. The gate can also be manually opened. This gate is not a part of additional perimeter fencing system such as fencing or even a hedgerow, and you can walk around the gate very easily, specifically on the east side. There are some bushes on the west side of it but you could easily walk into the neighbors' yard and back into Ms. Jochum's yard. The gate is located approximately 15' into the property and not right on the southern border of the property. This lot is unique because it has no frontage on a street, which does not fit with the descriptions of lots in the City. The building officials did not have any concerns or reasons why they should not issue the gate permit that he applied for.

Upon cross examination by Attorney Matt Miller, the following information was conveyed by Mr. Burney. Mr. Burney completed the permit application that was dated September 19, 2019 and the reason was for security or privacy for Ms. Jochum. He marked the application to say that the type of fence is ornamental and he could have checked the box that said it was a privacy fence on the application. He does not know specifically the fence ordinances and the legal difference between ornamental and privacy fences in the Code. He does not install a lot of 6' mechanical fences in Rocky River driveways and he has not installed one in any other city. He has not installed a gate with a Knox box on it in the City but he has installed an elevator with Knox box keys. A Knox box would be installed by a qualified electrician under the guidance of the Rocky River Fire Department. His knowledge of Knox boxes comes from reading and from what he has heard from other people. He said that the gate will be 5' tall and 6' is the maximum height he was told that the fence could be. However, they feel it is not necessary for the fence to be 6' tall so they purchased a 5' tall gate. Regarding how this gate or fence allay the concerns of kids walking into Ms. Jochum's yard, Mr. Burney said that it was not designed to keep people from walking on the property because it is more about cars. If the battery ran out, then it could be operated manually. He thinks that Ms. Jochum could lift the gate by herself because it is spring loaded. He considers the few properties along the lake in this small section of neighborhood to be extra private.

Before Mr. Burney was dismissed, Mr. Farrell asked if the battery back-up system is considered a fail-safe and Mr. Burney responded that it is his understanding that it is. If the battery fails, then it can be manually operated, as well, which makes that a second fail-safe system. Mr. Wright asked if there is any kind of an early warning system to let them know if the battery is about to fail. Mr. Burney responded that he does not know the answer to that but he can find out. A gate like this would have a service contract where people would come out periodically to lubricate the gate and they may at some point swap out the battery for a new one. Mr. Wright said that the fact that there is a maintenance program satisfies his question to help prevent a battery failure. There being no further questions, Mr. Burney was dismissed.

Mr. David Hessler is the next witness. The following information was conveyed by Mr. Hessler: Mr. Hessler lives at 2425 Pebblebrook in Westlake, Ohio. He is a practicing attorney in Ohio for 53 years. He is co-trustee/co-owner along with Emma Jochum of the residence where she resides and he has served in this capacity for approximately 5 or 6 years. He is here tonight as a co-owner of the property and he has always represented himself to be the co-owner and specifically not an attorney. He is familiar with the history of this gate and his daughter, Stephanie Lockhorst, who is a lawyer with his office, has had most of the personal day-to-day contact with Emma and they have a very close relationship. Stephanie had much more involvement with what was going on at the property but he is certainly aware because he speaks with Emma and with his daughter, Stephanie. Emma is 84 years old now and there is traffic that has been coming up her driveway, going around the circle and sometimes stopping or sitting there, then going out. It happens in the evening and at night with lights shining into her home. She has been nervous about it and it has been an issue, so his daughter, Stephanie suggested the gate to prevent vehicles from coming in. He knows that on one occasion as reported by both Stephanie and Emma, she contacted the Rocky River Police after she found 30 beer bottles

that were strewn around the yard. However, she was informed by the Police that there is nothing they can do unless it is happening at the time. In his mind, it makes the necessity for the gate even greater for her safety and security. He explained that Emma Jochum is Emil's second wife and they were married in 1988. They were married in Germany. He then brought her back and she has resided in this house ever since then. She lives alone and has no family members or caretakers and she does not go to Florida in the winter. Emma is a very private person who doesn't bother anybody and who does not like to complain. She is very community minded and is a very philanthropic lady as a major donor to many charitable organizations in Rocky River and surrounding communities, including a large contribution to finance the Moll Cancer Center at Fairview Hospital and to Lutheran Hospital, which are both now part of the Cleveland Clinic System, and other notable contributions. Mr. Hessler explained that Ms. Jochum has enjoyed good relationships with all of her neighbors but she may not have met Mr. Thompson yet. She appreciates the Heavey family and enjoys the children. The frequency of the traffic problem on Ms. Jochum's property has been increasing in the last several years. He explained his involvement in this gate project which was mostly done by his daughter, Stephanie, Ken Burney, Ms. Jochum and the City. He first became aware there was an issue when the City revoked the permit. He spoke with a Building Department staff member that said that the City does not involve themselves with Deed Restrictions and it should not be an issue. He had contact with Dr. Heavey within several days after that when Ms. Jochum was in Germany. Dr. Heavey said that nobody asked him about it ahead of time and Mr. Hessler responded that he did not know why anyone would feel the necessity to get his permission to put a gate on her property, and that conversation with Dr. Heavey was not very neighborly. When asked by Attorney O'Malley, Mr. Hessler responded that Dr. Heavey never indicated to him the impact that the size or aesthetics that the gate would have on his property values and those things never came up as the focus of his objection during the meetings to try to resolve the situation. He asked him in one of their phone conversations whether there was anything Ms. Jochum could do so that he would be satisfied and consent to the gate and he responded that there was nothing that she could do.

Through cross examination by Attorney Matt Miller, the following information was conveyed by Mr. Hessler: Mr. Hessler does not know the meaning of the terms privacy fence or ornamental fence. This is a gate that opens and closes and it is not a fence. The purpose of it is to make it difficult for vehicles to trespass onto her property and it will give her a sense of security. He does not know if the Heaveys or the Thompsons would be aware of any cars that drove through to go to Ms. Jochum's property. The combination of kids coming onto the property, beer bottles being there and cars driving up her driveway because they are lost and must turn around are the practical difficulties. A pedestrian can enter the property by just walking around the gate. The November meeting was attended by the Mayor, Law Director Bemmer, Ms. Straub, Mr. Reich, Mr. Miller, Mr. Lauricia, Mr. Heavey, Mr. Hessler and Ms. Jochum. The Mayor was very gracious in trying to mediate a resolution. He does not recall a moment during that meeting where Mr. Miller, Mr. Lauricia, Law Director Bemmer and Mr. Hessler went to the hall to discuss a possible resolution. He said they discussed in the meeting that Ms. Jochum could build the gate on her property but when she no longer used the property as her full-time residence it would be removed. He does not recall that there were any specific concerns that he did not want to discuss in front of Ms. Jochum. The discussion they had in the Mayor's office was that

the gate could be removed when Ms. Jochum passes away or was no longer the owner or resident of the property, and that was the agreement they had when they left the meeting in November. He suggested to Mr. Lauricia that he should write up the document and he received it a short time later. They reviewed it and said that there was absolutely no way they could ever agree to the overreaching provisions in the agreement. He attempted to continue the discussion with Mr. Lauricia and wrote extensive descriptions of the objections and why they could not agree to the provisions. The proposal had provisions such as Dr. Heavey having complete approval of the design, materials and workmanship of the gate. He also wanted complete control of scheduling the workers and that they would provide an indemnity in the document to indemnify him and anybody that would somehow be injured on the gate. The biggest objection they had was they wanted them to agree that the deed restriction actually does prevent a gate to be erected, which in their judgment, it does not. They allow for a hedge fence and the gate is part of the hedge fence in his judgment. It also stated that upon removal, no person ever, even a subsequent owner, could erect any kind of a gate on that property without the specific consent of Dr. Heavey or the person he happens to sell his property to. To put a permanent restriction like that on a prime piece of real estate that abuts Lake Erie in Rocky River is not something they could ever do. There being no further questions, Mr. Hessler was dismissed.

Ms. Emma Jochum is the next witness. The following information was conveyed by Ms. Jochum: Ms. Jochum has lived at 20932 Avalon Dr. since after she married Emil Jochum in May of 1988 in Germany. She is a co-owner of the property and her husband passed away in 2007, just before his 103rd birthday. She is a widow and lives alone on the property and she does not leave the property in the winter. She has no caretaker, only good friends and good neighbors, which is her wish. The need for the gate was prompted by the fact that despite her new security system, it is not enough at night. So often a fake alarm comes up and it is very frightening because she is alone. This gate would be protection for her. She is very worried about strangers coming into her property and there was damage done to her garden by vehicles that have driven around the circle. This went on even when her husband was still alive and in the last year before she applied for the permit it made her sick because it was so bad. She found over 30 beer bottles on her property and there was broken glass around a big tree and on her driveway. She called the police department in the beginning of October of 2018 because of that event and she is not the type of person to call the police for just any reason. She is a very quiet person but her situation made her sick. When she came to the solution with the gate, her friend told her it would be a good idea. She sees a few cars outside in the evening and when the sun goes down. One time a car almost hit her because the girl was driving so fast. She does not always see every car drive through but she sees what is damaged in the morning. The cars are bigger now and they travel fast on her property. Ms. Jochum likes Dr. Heavey and especially the kids. She is impressed and she can leave the gate always open for the kids but not at night because it is for security and protection. Dr. Heavey came to her and they had a good talk about the gate after she came back from Germany in the beginning of October last year, but she is not sure exactly when they met.

Attorney Samuel Lauricia said that he has no questions for cross examination of Ms. Jochum. Attorney O'Malley said that they have no other witnesses to call.

Attorney Lauricia said he will be calling 2 witnesses. The first witness is Dr. Heavey. The following information was conveyed by Dr. Heavey: Dr. Heavey usually works second shift, which is 3:00 p.m. until 1:00 or 2:00 a.m. He sits on his porch until 3:00 or 3:30 a.m. He would be able to see cars driving down the driveway from his porch and he does not see any cars driving down it at night. He did see a car drive down the driveway the day after they were before the BZA last month, and it was more than likely an ironic event. He cares very much for Ms. Jochum but at the same time he has certain property rights that they are unfortunately in court about right now. He would have a concern if this variance were granted and he did present a proposal to Ms. Jochum and Mr. Hessler that would alleviate the security concern, which was she could have the gate as long as she lives there and he would remove it at his cost when the property ceases to be her permanent residence. He did that because he cares for her and he takes her security concern seriously, even though he does not see evidence of cars and trespassers. He does not drink beer and he drinks scotch and bourbon and he throws the bottles away to recycle when he is finished. If installed, this gate would be the only one he is aware of and he thinks it would change the character of the neighborhood. He is not aware of any vertical lift-type gate in the area and all of the other adjacent neighbors on both side of him other than Dr. Darr and Ms. Jochum, oppose this gate. His view of people driving on the shared driveway is better than Dr. Darr's ability to view them. It is possible that the cars going around the circle was a mailman and he thinks that is the case. He has been hyper vigilant with contractors for his house about going through there and none of them go there. However, he has seen a mailman up there. He said that at 2:00 a.m., ambulances are often in front of fire trucks and the trucks are not always dispatched in at the same time as an ambulance. Ambulances don't often have an independent Knox box and even if they do, more often than not there is a delay. Seconds can make a difference when a person is having a heart attack. A Knox box can be problematic, especially in the middle of the night and figuring out what the back-ups to the Knox box are could cost critical seconds, as well. If you have seen consequences first hand, then you have to be able to speak up about it. He agrees with and has had experience with some of the types of instances explained in the articles they submitted to the Board members regarding the failure of the Knox boxes set forth in the articles. Contrary to the way it is depicted in movies, if CPR is initiated on scene, then mortality skyrockets to about 99%. He has spoken with the Director of the EMS, Dr. Joe Lally, who is a former resident of his and he trusts that Dr. Lally would echo his concerns that EMS should not have obstruction, even with the attempt to have a work-around with a Knox box. Even though he personally does not see it in the best interest of anybody to have a gate of this type installed, he continues to seek a resolution to provide Ms. Jochum security. He considers his neighborhood to be low traffic and low crime. He often sees the police patrolling along Avalon on night shift. Except for the recent acute medical emergency where PD was accompanying as chaperones, he has no recollection of police ever responding to calls at his neighbor's house. They have sought but had limited time to obtain an appraisal from a certified appraiser that could show the impact. However, they had an experience with this when they were setting up a home equity line of credit and he explained it. The first appraisal they got valued their house at around the \$800,000 range, which is clearly inaccurate for the area because the moment you go to the south side of Avalon Dr. the valuations drop by 50%. They went back to the bank and said that their land is contiguous with the other waterfront properties and there is even easement access to these lots through their lot. The bank substantially increased the valuation of their property

due to that but they had to provide documentation of the easement to the bank so they would adjust their methodology for the valuation. He agrees that if a gate is not subject to the regulations of the Rocky River Code, and everyone simply installed them, then it would be a dangerous, slippery slope.

Through cross examination by Attorney Michael O'Malley, the following information was conveyed by Dr. Heavey: He agrees that Ms. Jochum's property is unique and is more or less land locked because it does not front on Avalon Dr. like Dr. Heavey's property, the same way Dr. Darr's lot and Dr. Darr's neighbor's lot to the east are situated. He was not aware that the name of Dr. Darr's neighbor to the east is Mr. Brandt, and that he filed a petition with the Board indicating he has no objection. He did see the document submitted by Dr. Darr and does not doubt Mr. Brandt sent a similar document. He did not see the photographs Mr. O'Malley submitted on behalf of Ms. Jochum and he is only aware of a gate across a driveway around Aberdeen Rd. and one on Frazier Dr. He is not aware of any others on Avalon Dr. He is not aware that there is a gate across the driveway two doors down and across the street as shown in the photographs. More often than not, ambulance drivers probably do have a Knox box key and agrees that so long as the ambulance has the same key as the fire truck, then the Knox box should work just fine. He has no basis to dispute what the Fire Protection Officer wrote from a fire department perspective. He is glad to hear that they are building in some of the safety features on Knox boxes that Mr. Burney described but he takes issue with being able to manually lift a vertical gate out of the way. He does not think that Mr. Hessler gave a fair representation of his interaction with Dr. Heavey. Dr. Heavey did not have any idea that the gate was even being discussed and he had no notice in terms of conversation. The notice arrived on business day 8 and they were informed the permit had already been issued. He disputes whether proper legal notice was issued because there was no posting that was visible. He believes his reference to wanting to have a neighborly process was when he invited Mr. Hessler to have a beer at his house and he declined. He attempted to offer a compromise of the removal of the gate when Ms. Jochum is no longer residing there. He cannot stop her if she wants to take on the risk of her own safety in terms of medical rescue. He witnessed how distraught Ms. Jochum is as a result of this process. He agrees that that stress is not helpful for an elderly woman, which is why they spoke with her on multiple occasions, in person, including with an interpreter to help facilitate communications. He did not ever believe that Ms. Jochum is the source of the problem here. He is not an attorney and he is not familiar enough to dispute the specifics of the terms and conditions that were attached to the agreement in principal that was discussed. They discussed permission to remove the fence if this is no longer her primary residence. There were no more questions of Dr. Heavey and he was dismissed.

The next witness is Jeremy Thompson, by phone (no video). The following information was conveyed by Mr. Thompson: Mr. Thompson moved into his current house at 20942 Avalon Dr. in November, 2019 and it is located on the other side of the shared driveway, across from Dr. Heavey's house. He lived in Tremont prior to moving to Rocky River and the reason they moved to Rocky River is because Tremont is not a safe community. He has not had any safety concerns with respect to his current property. They stay up until Midnight or 1:00 a.m. every night and he does not see a lot of traffic in the common drive and if they do ever see someone drive down there, they know it's not right and would say

something about it. He runs at night anywhere from 10:00 or 11:00 p.m. until Midnight or 1:00 a.m. He is currently in the process of purchasing the home directly behind his current property, which is 365 Wagar Rd., directly to the west of Ms. Jochum. The sale is set to close in the next 30 days. It is his understanding that he has access from his property to the shared driveway that goes out through Avalon Dr. In speaking with Bob Titmus, the former owner of the property he is purchasing, who conveyed that this was originally an Avalon Dr. address, and Mr. Titmas moved it to be off of Avalon Dr. Mr. Titmas told him that they originally entered his property through this same shared driveway off of Avalon Dr. and he told Mr. Thompson that he could connect the two again and they may consider moving it back to an Avalon Dr. address when they build a house on that property. He did not have sufficient time since the contract signing to obtain all of the necessary surveys to see exactly how they access the shared driveway and how the gate is going to rest. His concern is the easement to the property he is acquiring and he wants to make sure that if they have the opportunity to connect the driveway that they can do this without bumping into this gate. He has seen some of the pictures of gates that were submitted to the Board and he has not witnessed any vertical lift gates of this type when he is out running.

Through cross examination by Attorney Michael O'Malley, the following information was conveyed by Mr. Thompson: Mr. Thompson owns a financial consulting company that is not involved in real estate titles in any way, as a surveyor, an appraiser or in the real estate development business. He really does not know if he has an easement right and that is not before the Board of Zoning and Building Appeals. It is his understanding that a portion of the gate is granted on an easement, which is a driveway that is granted to her because she has a landlocked piece of property, similar to the easement that he is talking about for his property at 365 Wagar Rd. When Mr. O'Malley explained the property lines for his property and Dr. Heavey's property, saying that they both own half of a driveway, Mr. Thompson said he is not a surveyor but he said she has a landlocked piece of property. Ultimately, there was likely an easement granted for her to access that property years ago. He wants to make sure the gate is not in the way when he goes to access his property. He does not acknowledge the security concerns that Emma Jochum has like Dr. Heavey has acknowledged. He feels the same way Dr. Heavey feels in that he would withdraw his objection to the gate so long as certain terms and conditions were satisfied. Attorney Lauricia said that he is satisfied at this point to move forward.

Mr. Pempus said he would like to ask the Board the threshold question of whether or not they have heard enough information that they can now make a decision on whether the structure being proposed is a gate or a fence. Mr. Farrell thanked those present for their testimony. He visited the property a couple of times as others did, and after taking another look, there is really not a fence or a hedge there and they are talking about a gate. Other than being concerned about Ms. Jochum's safety and how safety forces would get to her, which he feels she and the Fire Department are aware of. He does not see the objection to this gate. He has sort of heard hints that perhaps it is the appearance of the gate more than anything else and he wonders if part of the issue is because it is a lift gate that raises up vertically. He said that he thinks they are talking about a gate and he does not see that this is a significant request as far as variances go. This is not a front yard this Board typically see described as a front yard that fronts on a right of way. He has no issues with this gate. He feels that it is a gate that is not a part of a fence.

Mr. Pempus asked Mr. Brandt if he would say that this is a gate that is part of a fence. Mr. Brandt said he interprets this as a gate, and gates are traditionally moving section of fences that provide access. It has no other end on either side of it does, which does not preclude the fact that it is a gate. The variance as requested is to construct an ornamental gate and as he sees it, this would require this Board's ruling on a variance for the gate. He said it is a gate that is not part of a fence.

Mr. Christ said that a lot of the discussion relative to gate or fence is a semantics discussion. Fences don't move; gates move. Gates can be associated with a fence, but there are a lot of times a gate is not part of a fence. Sometimes they are installed merely to control traffic along a road, to a parking lot, to a garage, across railroad tracks, through a tollbooth. He is of the opinion that this is a gate that is not part of a fence.

Mr. Pempus asked Mr. Wright if he thinks that this structure is a gate that is part of a fence. Mr. Wright said that the simple answer in his opinion is that this is a gate and there is no fence. A fence is meant to separate and a gate penetrates that separation.

Mr. Pempus said that he believes this structure is not a gate that is part of a fence. He asked if someone from the Board is willing to make a Motion.

Mr. Christ moved to close the public hearing. Mr. Wright seconded.

5 Ayes – 0 Nays
Passed

Mr. Christ looked to Law Director Bemer for his input on how to frame a Motion. Law Director Bemer said that the predicate question they have before them is to determine if this is a gate or a fence. Mr. Farrell questioned the height of the gate because it was stated by Mr. Burney that it is a 5' tall gate, even though the drawing says 6'. It was agreed to go with the height of the fence as written, which is 6' tall.

Mr. Christ moved that the Board has reviewed all of the information that has been provided by the applicant and by the neighbors in rebuttal and that this is serving as a gate. It is not part of a fence and it is not termed a fence and therefore, it is a gate. Mr. Farrell seconded.

5 Ayes – 0 Nays
Passed

Mr. Pempus said that since this is not part of a fence, we do not need to look at the practical difficulties because they are not applicable. Law Director Bemer said that the Chairman is correct and the issue regarding the need for a variance was whether or not this is a front yard fence. Our Code does not address front yard gates, and the determination is that this is a gate. This Board can indicate to the Zoning Administrator through a Motion that the issuance of a permit to construct a gate adjacent to the front of Emma Jochum's driveway is proper.

Mr. Christ moved to instruct the Building Commissioner/Zoning Administrator to proceed with the reissuing of the permit as applied for a gate and that the project can proceed once all of the paperwork, reviews and confirmations are completed. Mr. Wright seconded.

4 Ayes - 1 Nay (Brandt)
Passed

Mr. Pempus said that this hearing is finished because there is no variance for them to grant or deny. He thanked all of the people involved, including counsel on both sides and all of the witnesses.

The meeting adjourned at 8:35 p.m.

Eric Pempus, Chairman

Richard Christ, Secretary

Date: _____