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April 22, 2022

Bronxville Zoning Board of Appeals
Bronxville Village Hall
200 Pondfield Rd.
Bronxville NY 10708

Re: 115 White Plains Rd
OPPOSITION: ZBA 004-22

Dear Board Members:

This is a simple case that is all too common. Ms. Ashley Ross sought and the Building Department issued a permit for construction that required compliance with the Zoning Code and with specific listed conditions. Her contractor built the fence without complying with the Code and the permit's listed conditions.

Ms. Ross now seeks a variance to allow her and her contractor to escape the consequences of their actions. She would have this Board make the Village and her neighbors bear the costs of what they did.

Point V of Ms. Ross's lawyer's submission of March 21, 2022, concedes the case against her application:

"Although the Applicant built the fence, the Applicant proceeded in good faith to retain a fence company who in turn filed a permit for approval by the Village. It was only after the permit was approved did the Applicant proceed and then again after inspected by Village, based on an initial complaint on or about January 27, 2022, concluded the installation of the fence. It is our position the Applicant did not create the condition that gave rise to the need for the variance."

The 8 ½ foot solid stockade fence Applicant concedes building violates Code and permit. Code § 310-10 D (4) limits fences or walls anywhere on the lot to 6 1/2 feet in height; it requires that "any such fence or wall erected in any front yard shall be not more than 1/2 solid."

The permit *affirms* Code requirements. Applicant did not provide the Board a copy of the permit; I do as an Appendix. Its conditions (p. 8, below) explicitly prohibit the fence Applicant concedes building:

Maximum combined height of fence **and retaining wall** may not exceed 6 1/2 feet.¹

FRONT YARD FENCING TO BE MAXIMUM 50% SOLID, SPACING TO EQUAL WIDTH OF PICKETS.²

Ms. Ross's lawyer refers to her as "Applicant," so shall I. I am the "Complaining Neighbor."

¹ Emphasis added.

² Emphasis in original.

1. Applicant and her contractor are responsible for their actions violating the Code and the Permit.

If an applicant is not responsible for complying with the terms of a building permit, who is? If a speeding taxicab strikes a law-abiding pedestrian, either the driver of the cab or the party directing the driver is responsible for the resulting injury and not the government that posted the speed limit, the policeman who enforced it or the pedestrian who was injured.

Section 310-10 D (4) is clear: no fences over 6' 6" high anywhere and no fences more than half-solid in front yards. The permit issued resolved possible issues about how this fence is to be measured. A wall counts toward height limit and half-solid means pickets and spaces of equal size. If there were any ambiguity, it was incumbent on Applicant—a litigating lawyer—or on her contractor—a renowned fence firm—to clarify what was allowed *before* beginning construction of a very expensive fence.

2. The Building Department did not cause Applicant or her contractor to build an unlawful fence.

Applicant's problem is not with the Village that issued the permit, but with her contractor who failed to comply with the Code and with the conditions of the permit.

Applicant's suggestion that she substantially relied on an inspector's preliminary site visit January 27, 2022, is implausible. Contemporaneous photos I took show that on the 27th contractor had completed almost all of the Stockade and that only two panels remained. My photos show workmen installing the last two panels in little more than an hour on the morning of the 28th. Later that day the Department appropriately cited Applicant.³

3. The Complaining Neighbor is not responsible for Applicant's errors or those of her contractor.

Applicant's problem is not with her Complaining Neighbor, i.e., me, but with herself.

Applicant suggests that I was dilatory in not complaining to the Building Department before January 27, 2022. That is chutzpah! January 27, 2022, was the day that Applicant's contractor **began** construction of the portion of the stockade that directly concerns me, i.e., five panels in her front yard adjacent to my home. I contacted the Department immediately. Applicant had been contemplating this project with her contractor and this vinyl material since at least May 28, 2021 (the date of her submitted survey). Eight months later she built the fence without ever saying one word to me about it.

Code § 112-9 F (3) required Applicant to serve notice on me of her planned construction within ten days of applying for the building permit, i.e., by December 31, 2021. She did not. After the Building Department rejected that application on January 6, 2022, for being over height, when she amended it, she should have served notice on me within ten days of that application. She did not. Failure to notify is ground for denying a variance.⁴

Here in ZBA 004-22 Applicant repeats her acts of ZBA 013-21 seeking to build a front yard garage: keep plans secret until seeking a variance.

³ Section 112-15.

⁴ Section 112-9 F (4).

Applicant has an imaginative argument to blame me. She would measure the lawfulness of a fence in **her** front yard by the size of **my** front yard. Her Point III is that her house is set back further from the street than is mine. It is frivolous argument; she did not try in in ZBA 013-21. Our lots have been in the same relationship since 1947 when my house was built. It was 74 years later that she bought her house.

4. The variance sought is “substantial”; it is not “very minor in nature.”

The variance sought would leave standing an unlawful solid fence that is 8 feet 4 inches in height.⁵ That is more than **twice** the height allowed for front yard fences in our neighboring communities of Eastchester, Larchmont, Mount Vernon, New Rochelle, Pelham, Tuckahoe, White Plains and Yonkers.⁶ Their norm for front yards is **four feet**. Not all those communities have half-solid requirements. The much higher Bronxville limit of 6 ½ feet is semi-tolerable only because it is tempered a bit by a half solid requirement. The Applicant’s “fence” feels like a military stockade, suitable for defense but not Bronxville front yards!



Complaining Neighbor and Applicant’s 8 ½ foot Solid Vinyl Stockade

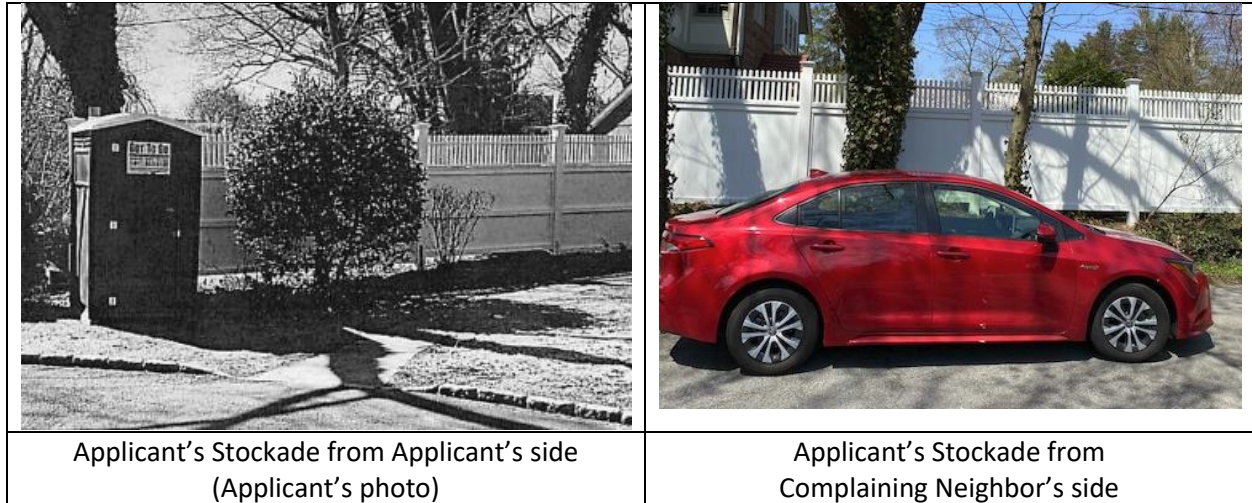


Complaining Neighbor and two Half-Solid Wooden Screens, left 7 feet, right 5 feet

⁵ According to the survey submitted by Applicant. In part it may be higher than 8 feet 4 inches.

⁶ Eastchester Local Law No. 5, Section 8 C 1, Larchmont § 381-33 (b)(6)(a), Mount Vernon § 267-14 (B)(1)(a), New Rochelle § 331-16, Pelham § 98-104 G (4), Tuckahoe § 5-1.3, White Plains § 4.4.16.1, and Yonkers § 43-41 (D)(3)(a).

The variance sought would leave standing a fence of a height that treats my property as if it were commercial or an Interstate highway.⁷ Applicant shows how the fence looks from her side, but not mine.



The variance sought would leave standing an unlawful solid vinyl fence that requires regular power washing to deal with accumulating dirt.⁸

The variance sought would leave standing a solid vinyl fence that damages the historic charm of Applicant's house and of our neighborhood. Modern vinyl fences and Tudor style homes are not compatible.⁹ Applicant told the Board as much last October in ZBA 013-21.¹⁰

5. The cost of removing the unlawful fence solid vinyl fence is not prohibitive or unfair to Applicant.

The cost of removing the unlawful fence is not prohibitive. Applicant could easily find someone who would remove the unlawful fence without charge in exchange for the fence parts removed.

⁷ See, e.g., Eastchester Local Law No. 5, Section 8 E 2 (nonresidential property six feet instead of four feet allowed); Rye § 90-8 ("Side line fences where residential use adjoins I-95 or I-287". Six feet instead of four feet allowed.).

⁸ See Lee Wallander, "PVC Plastic Fencing vs. Wood," *The Spruce*, updated 02/18/2022, <https://www.thespruce.com/wood-vs-vinyl-fences-1822360> ("Be aware that vinyl fences get dirty—very dirty. Many owners come to regard this as the single worst thing about a vinyl fence. Most vinyl fence owners say that owning a [pressure washer](#) is essential if you have a vinyl fence. At least once a year, vinyl fences need a thorough power washing to remove dirt that splashes onto the lower section from rain, as well as fungus, mildew, and moss. Wood fences also get dirty, but wood textures and colors are much better at hiding grime than the shiny white surfaces of PVC fencing.")

⁹ Palmetto Fence Company, "Styles of Fence to Complement Your Tudor House," July 29, 2019, <https://www.palmettofencecosc.com/styles-of-fence-to-complement-your-tudor-house> . See also Lee Wallander, "PVC Plastic Fencing vs. Wood," *The Spruce*, updated 02/18/2022, <https://www.thespruce.com/wood-vs-vinyl-fences-1822360>

¹⁰ October 25, 2021, she wrote the Board: "So important was it to us that our proposed garage continue the aesthetic charm of our home, that we sought an architect who could make the garage look like the existing Tudor-style house, and have sought out antique terracotta shingles to ensure the roof looks the same as the main house."

There is no practical need for the fence built. Applicant has not identified one. There was no fence when we moved here in 1989. Hedges provided privacy. Evergreen hedges still do for most of Applicant’s front yard. Hedges are more attractive than fences and better than fences as windbreaks and for wildlife.



Applicant’s 8 ½ Foot Unlawful Vinyl Stockade
[Complaining Neighbor’s Half-Solid Wood Screen lower left is 3’6”]

Applicant’s Front Yard Evergreen Hedge
[Complaining Neighbor’s Wrought Iron Gate lower center is 4’ 4”]

Applicant asserts that it would cost her “at least \$38,788” to replace the unlawful fence with a lawful one. If so, it still would be only 1.6% of the \$2,375,000 purchase price of the house and lot.

I question the estimate. The \$38,788 quotation comes from the contractor who built the unlawful fence contrary to the permit issued. It is startling: \$484.85 per linear foot. Websites provide estimates for up-scale fences. None of them that I visited comes remotely close to this figure. They suggest a maximum cost for the five unlawful panels adjacent to my lot of \$2000 (40 linear feet @ \$50 linear foot).

I question whether Applicant must pay the whole cost of a replacement. Does she have a claim against contractor for not reading the permit? Will she have to replace more than the five unlawful panels (40 feet) adjacent to my lot? She asserts that the northerly neighbor has no objection to the unlawful fence.

To grant Applicant the sought variance would be unfair to me. The life-expectancy of the fence built is longer than my own. (I am 69).

Conclusion

Applicant offers “only generalized conclusions that her proposed project will “look nice” and that it won’t bother her neighbors.”¹¹ As this Board in its application guidelines warns: **“This isn’t enough.”**¹² This requirement is not Board serendipity but law of the State of New York.

New York State Village Law § 7-712-b (3) allows the Board to grant only “the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.” Section 8 A of our Town Eastchester’s zoning law explains that the purpose of fence regulation is “... to the maximum extent practicable, ... [to] continue the open appearance of the community while allowing residents to have reasonable privacy in the use and enjoyment of their homes.”

Applicant has not met her burden of showing why she needs a fence that is two feet higher than Bronxville allows and four feet higher than our neighboring communities allow. She has not met her burden of proof of showing why she needs a stockade fence instead of open pickets or evergreen hedges.

Applicant’s “need” for a variance is self-created. She bought the property with plans for a garage or stockade in mind. When this Board unanimously turned down a variance for a front yard garage, seven days later, on December 21, 2021, she filed for a building permit to build a stockade fence in the same place. The Building Department on January 6, 2022, rejected that application, observing: “The fence permit will need to be referred to ZBA — fence higher than 6’6” Please let me know how you want to proceed?” The next day, an amended permit was issued. Applicant did not give Complaining Neighbor any notice, notwithstanding the Code’s requirement of ten-day notice, here, by December 31 and January 17. Applicant proceeded directly to construction of a fence that violates the Code and the permit. She now wants a variance to allow illicit construction.

I regret that Ms. Ross seems to see me, the Complaining Neighbor, as the cause of her frustrations. The fault is not in me; the fault is not in Ms. Ross’ stars. The fault is in Ms. Ross or in her contractor. She has been planning this stockade fence since May 2021. Why did she not ever speak with me about it? I learned of it only when she built it January 27 and 28, 2022. That is not how Bronxville sees its zoning laws working among neighbors.

This Board should deny Applicant’s petition for a variance.

Respectfully submitted,

James R. Maxeiner

¹¹ E.g., “The neighbor to the north of the property is perfectly content”; “the variance is very minor ...”; “It does not affect the south neighbor’s front yard ... their front yard or even the side of their house are not impacted by the fencing at all ...”; and “The complaining neighbor to the south will not see the fence from their front yard or their side windows and will get the benefit of having privacy in their own backyard ...”

¹² Emphasis in original.

APPENDIX

FENCE PERMIT (2 pages)

Village of Bronxville
200 Pondfield Rd.
Bronxville, NY 10708

FENCE PERMIT
THIS PERMIT MUST BE DISPLAYED AT THE JOB SITE

<p>Owner: Ashley Ross Parcel Location: 115 White Plains Road Tax Map (SBL) No.: 17.12/5 Application No.: FEN 015-21</p> <p>Parcel Owner Name and Address: Ashley Ross 115 White Plains Road Bronxville NY 10708</p>	<p>Unit: _____</p> <p>Contractor: Walpole Outdoors, LLC 346 Ethan Allen Highway Ridgefield NY 06877</p>
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Date: 1/7/2022
Exp Date: 1/7/2023
Permit #: 2022-0001
Permit Type: FEN
Fee Paid: \$2200

This is to certify that permission is hereby granted for:

Fence - South edge of property - Board/topper 8'4" x 124'
Rear of property - Board/topper 6' x 108'
North edge of property - Board/topper 6' x 139'

Handwritten: 6' - 4"

Notes:

- Permission is hereby granted to the above referenced contractor to perform the work described in the above-numbered application and in the related approved plans and specifications. All work performed under this permit is subject to any conditions set forth on the attached and all work must be done in accordance with the Building Code of the State of New York and the Village Code of 1981, as amended.
- All construction activities must be executed in strict compliance with all applicable laws of the Village of Bronxville and the State of New York.
- Any amendments made to the approved plans for which this permit has been issued must be submitted to the Building Department for approval.
- All work shall commence within (6) six months of the date of it's issuance. Unless extended in writing, this permit expires (1) year from its date of issuance in the event that a substantial amount of construction has not then commenced. This permit expires (2) two years from its date of issuance unless all work has been completed and a Certificate of Occupancy has been issued.

**HOURS OF CONSTRUCTION LIMITED TO 8:00 AM - 6:00 PM
MONDAY THROUGH FRIDAY ONLY EXCEPT HOLIDAYS**

Paul Taft
Paul Taft
Building Inspector, Village of Bronxville

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VILLAGE OF BRONXVILLE
Department of Buildings
200 Pondfield Road
(914) 337-7338
(914) 337-0158 (Fax)

PERMIT CONDITIONS:

SUBMIT CERTIFICATE OF COMPLETION AND PHOTOGRAPHS WHEN FENCE IS COMPLETE.

Fence not permitted to encroach on adjoining neighbor's property or Village Right of Way.

Maximum combined height of fence and retaining wall may not exceed 6 1/2 feet.

FRONT YARD FENCING TO BE MAXIMUM 50% SOLID, SPACING TO EQUAL WIDTH OF PICKETS.

Fence enclosure to comply with Part 720 requirements as outlined below:

DESCRIPTION OF WORK : Fence - South edge of property - Board/topper 8'4" x 124'
Rear of property - Board/topper 6' x 108'
North edge of property - Board/topper 6' x 139'

APPLICATION NUMB: FEN 015-21
PERMIT NUMBER: 2022-0001
DATE ISSUED: January 7, 2022
LOCATION: 115 White Plains Road

SBL: 17.2/5