

**ZONING HEARING BOARD OF WARWICK TOWNSHIP
BUCKS COUNTY, PENNSYLVANIA**

Docket No. 17-02

Applicants: Steve A. Brun and Megan C. Leary
1331 Memorial Drive
Warwick, PA 18974

Owners: Same.

Subject Property: Tax Parcel No. 51-003-209, which is located at the address of the Applicants set forth above.

Requested Relief: The Applicants have filed an appeal from a zoning enforcement notice of violation of a fence permit by location of a portion of the fence within the 10 foot wide storm drainage easement on the subject property. Alternatively, the Applicants request a variance from §195-16.B.12.f.5 to permit the location of a fence within a drainage easement.

Hearing History: The application was filed in Warwick Township on March 13, 2017. The hearing was held on May 2, 2017 at the Warwick Township Administration Building, 1733 Township Greene, Jamison, PA 18929.

Appearances:

Applicants by:	John A. VanLuvanee, Esq. Eastburn and Gray, PC 60 E. Court Street P.O. Box 1389 Doylestown, PA 18901
Warwick Township by:	Peter Nelson, Esq. Grim, Biehn & Thatcher 104 S. 6th Street P.O. Box 215 Perkasie, PA 18944

Mailing Date: June 8, 2017

DECISION

FINDINGS OF FACT:

1. The Zoning Hearing Board of Warwick Township met the requirements of the Zoning Ordinance, the Municipalities Planning Code, and other relevant statutes as to legal notice of the hearing held.

2. The Applicants are the Owners of the Subject Property and therefore possessed of the requisite standing to make application to this Board.

3. The Subject Property is located in the RG, Residential Golf Course Zoning District of Warwick Township. It is one of several single-family residential lots known as "The Woodlands at Warwick" that is currently being developed pursuant to final subdivision plan approval from Warwick Township (Exhibit A-2). It is 12,600 square feet in size and accommodates the Applicants' single-family detached dwelling with typical residential access walkways and a driveway.

4. According to the testimony of Steve Brun, one of the Applicants, it is one of the first homes being constructed in the development.

5. The Applicants have filed a timely appeal from a zoning enforcement notice issued by Ashley Thompson, the Warwick Township Zoning Officer, on February 9, 2017 (Exhibit T-8). Alternatively, the Applicants request a variance from Ordinance §195-16.B.12.f.5 which is the basis of the enforcement notice. That section states as follows: "No fence, retainer wall or other structures shall be erected or maintained upon any drainage easement, swale, road right-of-way, sight distance easement or within deed restricted open space."

6. Warwick Township participated as a party in this hearing in opposition to the application.

7. At the outset of the hearing, Ms. Thompson established that, after several years of service as the Assistant Zoning Officer in Warwick Township, she was appointed to the position of Zoning Officer in January of 2017. She is a Certified Zoning Officer. Among her duties are the issuance of zoning, building, and use and occupancy permits; the processing of Zoning Hearing Board applications; and the issuance of zoning enforcement notices, if she determines an Ordinance violation.

8. The Applicants acquired title to the Subject Property on October 28, 2016 (Exhibit A-1).

9. On October 18, 2016, the Applicants submitted a zoning permit application for the installation of a 5 foot high aluminum fence and gates to enclose the rear yard on the Subject Property (Exhibit T-4).

10. Exhibit T-4 proposed the construction of the fence on the property lines of the Subject Property. As originally proposed, the fence would be constructed over a 10 foot wide storm drainage easement along the west side of the Subject Property.

11. Thompson testified that after reviewing the permit application and the Zoning Ordinance, she contacted Mr. Brun by telephone and advised that the fence was not permitted to encroach upon that storm drainage easement pursuant to the above cited Ordinance section.

12. In response, Mr. Brun sent an email to Ms. Thompson dated October 31, 2016 indicating that he was going to install the fence as shown on the originally filed plan and across the storm drainage easement. Mr. Brun indicated in that email that he works in commercial construction and testified during the hearing that he is a senior project manager for Target Building Construction, a commercial general contractor.

13. On November 1, 2016, Thompson replied to Brun's email that she could not approve the submitted plot plan for the proposed fence, as a portion is located within the 10 foot drainage easement. That email cited §195-16.B.12.f.5 and provided a link to the Zoning Ordinance.

14. On November 3, 2016, the Applicants sent a revised plot plan to Thompson which proposed that the fence be located in compliance with the Ordinance and set back 10 feet from the western side property line to accommodate the storm drainage easement.

15. On November 4, 2016, Thompson issued a zoning permit (Exhibit T-5) that approved of the revised plot plan and fence location containing a stipulation as follows: "The fence is not permitted to encroach in the 10' storm drainage easement on the left side of the property. The fence must be at least 10' from the left side property line."

16. On December 13, 2016, Thompson set an email to the Applicants inquiring as to whether the fence had been constructed and, if so, to arrange for an inspection of its construction.

17. Having received no reply from the Applicants, Thompson sent them an email dated February 2, 2017 containing the same inquiry and request.

18. On February 6, 2017, the Applicants responded that the fence had been constructed.

19. Thompson testified that she made a site visit to the property and inspected the fence on February 8, 2017. By email of that date to the Applicants, she advised that she measured the fence on the left side of the property and determined that it had been erected in the 10 foot wide storm drainage easement in violation of the revised plot plan and the above referenced stipulation.

20. On February 8, 2017, the Applicants sent an email to Thompson apologizing that the fence had been installed in a different location from the approved plan and permit and requesting that an exception be made referencing that the Ordinance allows for an easement holder to provide a written letter allowing the fence to be constructed within the easement. The provisions of §195-16.B.12.f.5 state that: “Fences may be erected in *sewer easements or easements for underground storm sewer facilities* (emphasis added) only with written permission of the holder of the easement.”

21. The easement in question is a storm drainage easement and not a sewer easement.

22. On February 8, 2017, Thompson issued an email to the Applicants indicating that the Ordinance section they had referenced applied to sewer easements owned by the Warwick Township Water and Sewer Authority. The storm drainage easement on the Subject Property is owned by the Township and she indicated that the Township has not consented to the construction of fences or other structures across storm drainage easements.

23. The storm drainage facilities include underground pipes that accommodate runoff through inlets that allow surface water to drain into those pipes.

24. The storm drainage easements on the Subject Property and throughout this residential development are designed to accommodate the stormwater runoff. Exhibits T-7, A-17, A-18, A-19, A-20, and A-21 are photographs of the Subject Property and the fence as constructed.

25. The photographs received evidence that there are swales and grading designed to accomplish access to the inlets. The fence as constructed crosses those areas of access to the inlets. As a result, any debris within surface runoff will be blocked by the fence as constructed over the storm drainage easement and would negatively impact the ability of the overall stormwater management facility to operate as designed.

26. Mr. Brun testified that upon receipt of the permit (Exhibit A-12) based upon the revised plot plan, he told his fence contractor to proceed with construction. He testified that the fence was erected when neither he nor his wife were present and that he forgot to tell the contractor that the fence should not be constructed over the 10 foot wide drainage easement. He indicated that he failed to communicate that to the contractor and that it was his mistake. Despite his experience in the construction industry, he testified that he saw the plot plan revised by Ms. Thompson that shows the easement on the Subject Property and that he didn't take note of it.

27. The overwhelming evidence presented during the hearing, leads the Board to find that Mr. Brun's testimony lacks credibility. As an experienced construction contractor, the Board finds that he was aware of the prohibition of the construction of a fence across the drainage easement and allowed it to be built in violation of the Ordinance on the mistaken belief that it would be allowed to remain after its construction.

28. As one of the first houses being built in this development, the Board further finds that allowance of the continued existence of the offending portion of the fence will reduce the efficiency of the storm drainage system on the Subject Property and within the development generally.

29. The Board finds that Mr. Brun intended, or negligently permitted the fence to be constructed as he had originally proposed and in violation of the applicable Ordinance provision.

30. The Applicants take the position that note number 23 of the general notes on the final subdivision plan (Exhibit A-3) permits the placement of the fence across the drainage easement. No evidence was presented during the hearing that the Applicants were aware of the language of this plan note prior to construction of the fence.

31. The Board finds that this position ignores the permitting process required by the Township and conducted by the Applicants.

32. The evidence establishes that Mr. Brun, at least, was aware of the permitting process for the fence and, in fact, submitted a revised plan for construction of it consistent with Ordinance requirements.

33. Further, the Board finds that, in order to access the underground pipes, stormwater must flow across the Subject Property or in swales adjacent to it to access those inlets and that the flow of stormwater to the inlets would be impeded by the existing fence.

34. The Board finds that the construction of the fence, in violation of the Ordinance, was done so either intentionally by Mr. Brun or he negligently failed to advise his contractors of the actual permit issued that precluded its construction across the storm drainage easement.

35. The Applicants' further position was that the fence cannot be constructed consistent with the Ordinance that would allow access to the back yard by typical lawn equipment. The Board rejects this assertion also and finds that an Ordinance conforming fence can be constructed on the property that would provide access to the rear yard.

CONCLUSIONS OF LAW:

1. The Board concludes that the testimony and evidence presented by the Township establishes that its zoning officer followed all prescribed procedures in the issuance of the February 9, 2017 zoning enforcement notice and correctly applied the valid provisions of the Ordinance.
2. Accordingly, the appeal from that zoning enforcement notice must be denied.
3. No evidence was presented that establishes any unique condition on the Subject Property which precludes construction of a fence in conformity with Ordinance §195-16.B.12.f.5.
4. The competent and credible evidence leads the Board to conclude that the fence was constructed in violation of this Ordinance provision either intentionally by the Applicants or by their failure to advise their fence contractor of the permit issued in response to the Applicants' revised fence plan.
5. Plan note number 23 on the approved final subdivision plan does not permit the construction of the fence in violation of the applicable Ordinance provision.
6. A fence can be constructed, enclosing the rear yard of the Subject Property, in conformity with the provisions of the Ordinance and the variance requested is not necessary to enable the reasonable use of the property.
7. Any hardship that exists on the Subject Property has been created by the Applicants.
8. The variance relief requested will alter and substantially or permanently impair the effectiveness of the stormwater drainage system designated by the developer's engineer and approved by the Township to the detriment of the Subject Property and its adjacent properties.
9. The variance requested does not represent the minimum variance or least modification of the Ordinance regulation at issue.
10. Accordingly, the Warwick Township Zoning Hearing Board determined, unanimously, to DENY the Applicants' request for relief, as is set forth hereafter.

ORDER

Upon consideration and after hearing, the Warwick Township Zoning Hearing Board hereby DENIES the Applicants' appeal from the Warwick Township Zoning Enforcement Notice dated February 9, 2017 and further denies the request for a variance from §195-16.B.12.f.5 of the Warwick Township Zoning Ordinance to permit the continued location of a fence within a drainage easement.

**ZONING HEARING BOARD OF
WARWICK TOWNSHIP**

/s/ Kevin J. Wolf

Kevin J. Wolf

/s/ Dave Mullen

Dave Mullen

/s/ Lorraine Sciuto-Ballasy

Lorraine Sciuto-Ballasy