

SPECIAL MEETING

PLANNING COMMISSION
City and Borough of Juneau

APPEAL HEARING

February 18, 2014
5:00 p.m.

HEARING OFFICER
Dan Miller

APL2013 0004: Appeal of the Director's determination to allow fences within the "no disturbance to 20' natural green belt and visual buffer easement" and "30' 'no-build' structure setback" in the Montana Creek subdivision.

LOCATION: Montana Creek Subdivision

APPELLANT: William Yankee

APPELLEE: City and Borough of Juneau Planning Department

INTERVENORS: Chris and Ann Gilberto

Commissioners present: Dan Miller, Appeal Hearing Officer; Mike Satre, Chairman; Dennis Watson, Vice Chairman; Nicole Grewe; Ben Haight; Karen Lawfer; Gordon Jackson

Commissioners absent: Bill Peters, Paul Voelckers

A quorum was present

Staff present: Travis Goddard, Planning Manager; Laura Boyce, Senior Planner; Rob Steedle, Deputy City Manager; Chris Orman, Assistant City Attorney; Robert Palmer, Assistant City Attorney II

Mr. Orman told the Commission that Appellant William Yankee had provided a witness list. He said procedure indicated that Mr. Yankee question the witnesses first, followed by argument heard from each side. The questioning of witnesses would not detract from the 30 minutes

allotted Mr. Yankee to present his case. Mr. Orman said the City and the Intervenors, Chris and Ann Gilberto, shared 30 minutes for statements, questions and rebuttal, and the Appellant, William Yankee, had 30 minutes to divide as he liked between statements and rebuttal. After argument for both sides concluded, the Commission would retire into Executive Session to deliberate, said Mr. Orman. He said the written decision should be completed within about 30 days.

Mr. Yankee had requested that Hal Hart, Community Development Department (CDD) Director, be called as a witness, as well as Laura Boyce, Senior Planner. Mr. Hart, currently out of town, was unable to make contact with the hearing as a witness for Mr. Yankee.

Mr. Goddard said that the letter from the Planning Director to the Appellant, was drafted by Laura Boyce, the other individual called as a witness by Mr. Yankee. Mr. Goddard said that he was familiar with the materials, and would be qualified to give his opinion and to answer questions on behalf of the Planning Department.

APPELLANT WITNESS QUESTIONS

Mr. Yankee began his questioning of Laura Boyce, Senior Planner, by stating that when Mr. Gilberto asked questions about his fence on May 6, 2013 and showed her the two plat notes, that she determined the fence was “ok” due to a “CDD” policy of do-not-disturb.

Mr. Yankee asked Ms. Boyce if she was satisfied the fence satisfied the “one plat note”.

Ms. Boyce responded that she had asked another planner who had been with the department longer than she about the two plat notes and fences in Montana Creek, and that she was told the policy for fences in Montana Creek was that fences are allowed in areas subject to those plat notes as long as there is minimal disturbance, only hand tools are used to place the fence, and that if any vegetation is removed that it is replaced. She was told this had been a long-term, ongoing policy for the subdivision.

Mr. Yankee clarified his question by stating there were two plat notes and the decision was based upon only one plat note.

Ms. Boyce responded this was not a decision that she made, but information that she was conveying about CDD building permits which are not required for fences, so there was no approval necessary on the fence by CDD. If a fence is over six feet then a building permit is required, otherwise fences can be erected with certain limitations, she explained.

Mr. Yankee stated that in an email by Mr. Gilberto dated June 10, (2013) to Mr. Hart and Ms. Boyce, that he was told the greenbelt was the only one of its kind in Juneau.

Mr. Yankee asked Ms. Boyce if this was the case in her opinion.

Ms. Boyce said from what she has come across so far she has not seen plat notes similar to this for other subdivisions.

If this is the case, said Mr. Yankee, why was the area lumped in (this particular fence) with the other do-not-disturb areas.

Ms. Boyce answered that there are two plat notes in question. She said there are other do-not disturb areas throughout the Borough, specifically adjacent to wetlands. She said her understanding was the policy was derived from something related to that policy.

Mr. Yankee asked why the 30 foot no-build structure setback was ignored when the fence determination was made.

Ms. Boyce answered that she did not ignore it. She said when she asked someone else in the department about fences in this area, that she was told the policy for fences in Montana Creek.

Mr. Yankee said that Ms. Boyce expressed some surprise when he discussed this issue with her on May 6, (2013), about the 30 foot structure no-build setback. Mr. Yankee said the very next day after this encountered, Ms. Boyce called him back and said that researching this issue was going to take a while.

Mr. Yankee said that Ms. Boyce opened an inquiry file on May 7, 2013, regarding if fences are allowed in the greenbelt and visual buffer easement for Montana Creek Phase 4 and for all of Montana Creek. He asked that it be noticed there was no mention of the 30 foot structure setback. Mr. Yankee said that even when he brought this to the attention of CDD staff, that it was still ignored.

Mr. Orman interjected and said that his concern was that this portion of the Appeal hearing had been reserved for questions from Mr. Yankee, and that there was a lot of argument inserted with the questions. Mr. Orman said that Ms. Boyce cannot object since she was the witness being questioned. Mr. Orman said he did not know if Mr. Goddard could object. However, said Mr. Orman, the main purpose in providing testimony questions was to find information to items that either could not be argued or be elicited from the record. Mr. Orman said quite a bit of this information sought by Mr. Yankee is already in the record. Mr. Orman said if there is argument which Mr. Yankee wishes to make then it should be made during the portion of the hearing reserved for argument. Mr. Orman said if there are questions that need to be asked and become part of the record then he was all for that.

Chairman Satre said he was going to follow the advice of their attorney, and directed Mr. Yankee to make sure that his questions of Ms. Boyce are intended to bring out information that is not part of the record.

Mr. Yankee asked Mr. Boyce if she could explain why she left the 30 foot no-build structure setback plat note off of the answer to Mr. Yankee's question, after he had specifically asked about it.

Ms. Boyce said she wrote up the Inquiry application form quickly to initiate the case. When the official Director's Decision was formulated, it clearly states that they looked into the issue of whether fences are allowed in areas subject to the two plat notes.

Mr. Yankee said in the August 7, (2013), memo from CDD to the Planning Commission, it was stated that it was CDD's belief that when the term structure was used it was not intended to include fences. The memo further stated that CDD wanted guidance regarding the definition "structure", as well as the intent of the conditions placed on the Montana Creek Subdivision, that resulted in the two plat notes.

Mr. Yankee asked when Ms. Boyce or CDD came to this belief.

Ms. Boyce stated this was all in the record.

Chairman Satre added this was in the record and that it would also be covered as part of the arguments, so there would be a chance for this to be on the record, and for Mr. Yankee to rebut.

Mr. Yankee asked Ms. Boyce if she recalled her email discussion with Charlie Ford, who is the building official, regarding the definition of "structure" and Title 19. He asked Ms. Boyce to tell the Commission what she learned as a result of this discussion.

Ms. Boyce replied that this is in the record.

Chairman Satre asked Mr. Yankee if there was something unclear in the email that he was trying to place on the record in addition to what already existed.

Mr. Yankee said there was not; he guessed it was already in the record.

Mr. Yankee asked Ms. Boyce that relative to her belief that "structure" was misused, meaning the conditions portion as well, if they were to believe that everyone else was wrong, and that CDD has had its finger on the "proper fix" on fences in the Montana Creek Subdivision perimeter.

Ms. Boyce responded that she was not sure how to answer that question.

Chairman Satre said in the interests of clarity Mr. Yankee may want to rephrase his question.

Mr. Yankee said that CDD believes that the definition of "structure" was misused, and that it was asking guidance from the Planning Commission what the definition of "structure" was.

Ms. Boyce said in 1996 that staff had made a policy interpretation of the plat notes. The interpretation was that fences were allowed in the areas under discussion. This is a long standing CDD policy that Ms. Boyce said she was carrying forward; it was not a decision that she made.

Chairman Satre asked Ms. Boyce if it was appropriate for different Planning staff to come to the Commission to ask for interpretation of policy; of things that are not directly stipulated in statute from time to time.

Ms. Boyce said this was appropriate, as it was for the Director to make policy calls as well, which is what happened in 1996. Mr. Yankee asked Ms. Boyce when she first saw the Gretchen Kaiser email of May 31, 1996.

Ms. Boyce said it was recently, after the original Director's Decision was made. She said had she been aware of the written policy earlier, she would have told Mr. Yankee and Mr. Gilberto about it as well when they originally inquired about the issue.

Mr. Yankee said on page three of her reply brief that Ms. Boyce had mentioned this had been published. Where was it published, asked Mr. Yankee.

Ms. Boyce said it was in the CDD book called "Policy and Interpretations by CDD". She said this was a book recently found on the shelf of a planner left behind by an older, more senior planner. She said it houses many of the CDD written policies. She said Montana Creek Subdivision is in this book, and that she wished they had found this earlier.

Mr. Yankee asked if this was something that would be made available to the public.

Ms. Boyce said in a lot of the cases the policies were sent to the person affected.

Mr. Yankee asked how this book became lost for 17 years.

Ms. Boyce said she did not know how to answer that; she did not know how long the book was undiscovered.

Mr. Yankee asked Ms. Boyce if she agrees that the Gretchen Kaiser policy-call does not mention a fence relative to the 30 no-build structure setback plat note.

Ms. Boyce said the policy decision refers to a fence in the 20-foot natural greenbelt area. The policy decision is about two issues under the plat notes, said Ms. Boyce. The no-disturbance natural greenbelt, said Ms. Boyce, is the more restrictive of the two plats. If there is a hierarchy of the two plat notes, it would be the most restrictive plat note, explained Ms. Boyce, as that area also includes the "no build" structure setback area. She said in her opinion that is why the issue was weighed against the no-disturbance policy, because in that area trees cannot be removed. In a 30 foot structure no-setback area trees can be removed, she said.

Mr. Miller said there was no objection on the part of the Planning Department to the questioning of witnesses by Mr. Yankee because it wanted to make sure that all parties had the most potential to state their cases. However, said Mr. Miller, this line of questioning is really reading from the record, and giving opinions based upon what is already in the record that may or may not be new information. Mr. Miller said the questioning has already gone on for 30 minutes. He said he thought perhaps a time limit should be set for the remainder of Mr. Yankee's questions, and that he be urged to stick to issues that are not already in the record.

Chairman Satre asked Mr. Orman if there was anything that prevented the Commission from putting a time limit on the witness question portion of the Appeal Hearing.

Mr. Orman said he did not think there was anything to prevent the Commission from placing a time limit on the witness questioning. The issue is if Mr. Yankee has any questions that need to be answered that are not argument. The whole reason for the briefing is so the Planning Commission can make the best decision possible based upon the information presented, said Mr. Orman.

Chairman Satre said he wanted to provide individuals with as much due process as possible, but when he views the anticipated testimony Mr. Yankee has for Ms. Boyce, he believes the points have been addressed that Mr. Yankee raised in his email dated January 24, (2014). Chairman Satre said he feels that Mr. Miller was correct and that they were simply going through the record and asking opinions of Ms. Boyce. Chairman Satre said he would not be setting a time limit, but that any additional questions for Ms. Boyce needed to be intended to bring out facts, not opinions, that are not on the record.

Mr. Yankee said he was never informed that the hearing was only to deal with facts that were not on the record.

Chairman Satre this is what he understood from Mr. Orman; the witness portion of the hearing was to draw out facts that were not on the record, with argument reserved for the argument portion of the hearing.

Mr. Orman said in a courtroom questions made merely to elicit argument would result in an objection.

Chairman Satre said the Commission has substantial record in front of it, and that the Commission has spent their time to review this record.

Mr. Yankee said in a May 23, (2013), email to Hal Hart, Director, and Jane Sebens, City Attorney, that the position was that the fence (of Mr. Gilberto) did not create a change in the use of the lot. He asked Ms. Boyce if her position was that the fence did not create a use in the lot.

Ms. Boyce responded that the reply brief was written by both Mr. Goddard and herself, and that she felt Mr. Goddard could answer that question better than she.

Mr. Orman said that Mr. Goddard was not a witness.

Chairman Satre asked Ms. Boyce if the answer was in the reply brief.

Ms. Boyce said the CDD countering argument is in the reply brief.

Mr. Yankee said the answer was only about fences in general, not specific to the Gilberto fence.

Mr. Yankee said the privacy fence BLD99 00143 in the building permit contains a development permit attached to its building permit. It has the information on it listed in the Director's decision. Mr. Yankee asked Ms. Boyce if this privacy fence also does not constitute a change in the use of that lot.

Ms. Boyce said that Mr. Yankee incorrectly used the term “development” and that there is a portion of it that refers to the change in the use of a lot. She said Mr. Yankee was applying that term to the use of a fence on a property, and the CDD was saying that is not what the term “change in the use of the lot” means. The term “use” refers to Title 49 of the Land Use Code and the Table of Permissible Uses, said Ms. Boyce. A fence is not a listed use within the Table of Permissible Uses.

Mr. Yankee asked Ms. Boyce if she considered a fence designed to contain a dog in the yard a change in the use of the lot.

Ms. Boyce responded that she did not, since it was still a single family residential home being used for single family residential use, which is listed in the Table of Permissible Uses.

Mr. Hart could not be contacted to testify as a witness of Mr. Yankee. Mr. Goddard objected that the issue in this case is whether a lot of questions are in the record, and whether the Planning Director could add anything not in the record. Mr. Hart’s testimony and information is part of the record already, said Mr. Goddard. If there are any questions, Mr. Goddard said he should be able to answer those questions for this hearing as Mr. Hart’s designee. There should be no need for further testimony from additional witnesses, said Mr. Goddard, since the question was whether or not staff erred in interpreting the information that was in the record.

Chairman Satre asked Mr. Orman if the witness was being summoned Mr. Hart, the individual, or if the witness was Mr. Hart as Planning Director, in which case Mr. Goddard could sit in his stead.

Mr. Orman said he felt it would be appropriate if Mr. Yankee responded to Mr. Goddard’s objection that any testimony sought from Mr. Hart was in the record, if he would be comfortable with Mr. Goddard providing any information in Mr. Hart’s stead as the representative of CDD.

Mr. Yankee said two of his questions for Mr. Hart were regarding telephone conversations between Mr. Hart and himself. He said it would be difficult for Mr. Goddard to answer those questions. He said it would probably work for his other questions.

Chairman Satre verified that Mr. Yankee had specific questions on the May 23, (2013) phone call with Mr. Hart.

Ms. Grewe asked Mr. Yankee to verify that the questions he wanted to ask Mr. Hart regarding that phone conversation were not already on the record. Chairman Satre asked Mr. Yankee what his questions were regarding the May 23, phone conversation with Mr. Hart.

Mr. Yankee said that his first question for Mr. Hart how facts submitted to the legal department “looked”. Mr. Yankee said that Mr. Hart replied that it looked like the fence, meaning the Gilberto fence in this situation was in violation of the plat. Mr. Yankee said he was talking about the 30 no-build structure setback.

Mr. Yankee said he wanted to know what had changed between the time of his phone call May 23, and the Director's Decision handed down on Juneau 19, (2013).

Mr. Yankee said his second question regarded a statement of Mr. Hart's during an earlier phone call that he didn't want to "buy the fence". Mr. Yankee wanted to know how this feeling on his part influenced his decisions.

Chairman Satre said the objection had been raised by Mr. Goddard, and that he felt the Commission as a whole should rule on this objection. Chairman Satre said personally he viewed the objection made by Mr. Goddard as sustained. He said he felt the two questions raised by Mr. Yankee regarding the phone calls with the Director were seeking opinions from Mr. Hart. Chairman Satre said unless there were objections from the Commission that he would sustain the objection from staff and move on to the remainder of the hearing without testimony necessary from Mr. Hart.

There were no objections from the Commission, therefore the objection by Mr. Goddard was sustained.

APPELLANT'S ARGUMENT

Mr. Yankee chose to present his oral argument for 20 minutes reserving ten minutes for rebuttal.

Mr. Yankee said the fence he was appealing was the Gilberto fence measuring 2 by 4 inch mesh which completely encloses the greenbelt and setback on his property. Mr. Yankee said his biggest concern is the effect on the wildlife in the area. Mr. Yankee said that the fence basically stops the movement of any wildlife through the natural greenbelt. In the definition, said Mr. Yankee, natural wildlife is included in the term "natural" as well as vegetation. If the fence would have been a barbed wire fence there would be no issue, said Mr. Yankee, because wildlife can pass through that type of fence.

The mallards are stopped from moving through the waterways by the Gilberto fence, said Mr. Yankee, and it prevents their movement into the large wetland area which includes the Mendenhall River. The privacy fence mentioned in the record (BLD99 00143) is not a surround fence, said Mr. Yankee, and does not approach the waterway.

Mr. Watson said he could not follow Mr. Yankee's comments about the reason and location for the Gilberto fence.

Mr. Yankee responded the Gilberto fence is composed of 2 by 4 inch wire mesh, and it completely surrounds his back yard, completely enclosing the greenbelt and setback area.

Mr. Yankee said the privacy fence is supported by adjacent property owners. Since it is not a total enclosure, it does not restrict the wildlife totally.

Mr. Watson asked Mr. Yankee what area the privacy fence encompassed.

Mr. Yankee said it is an eight foot high building-permitted fence that was built in 1999, going only across two thirds of the property owner's property.

Mr. Gilberto never mentioned anything to Mr. Yankee about the erection of his fence, said Mr. Yankee. Mr. Yankee said Mr. Gilberto did not remember who gave him permission to build the fence, said Mr. Yankee.

Mr. Yankee said they were straightforward plat notes.

He said Mr. Gilberto did not obtain a survey prior to the erection of his fence. Mr. Yankee said when the fence was erected, the western one fourth to one third of his fence is outside of his property on his neighbor Mr. Brown's property. It is not significantly outside of the property line, said Mr. Yankee, but that landowner is worried that if it is in that location for a set number of years then the property will become the property of the Gilberto's.

Mr. Yankee said he wished to make four points in order of their occurrence:

1. Gilberto fence decision by Laura Boyce in May of 2013; ignored one plat note and lumped the other plat note incorrectly into an obscure CDD policy of "do not disturb".
2. Director's decision of June, 2013, attempted to "boot-strap" its decision to a reference by Laurie Sica in 1999 to an unwritten, unpublished policy that to this day no one has seen.
3. After Mr. Yankee's appeal was filed, CDD "changed its tune" to reflect its belief that the definition of "structure" was used incorrectly, and asked for guidance from the Planning Commission, along with the intent of the conditions placed on the subdivision due to the rezone resulting in the two plat notes. There is nothing in the Director's decision which alludes to any problems with the definition of "structure", said Mr. Yankee.
4. There is the discovery of the Gretchen Kaiser email of May, 1996, that was discovered by CDD in December, 2013, and entered into the record. This links the May, 2013 decision and the Director's decision of June, 2013, for the CDD, said Mr. Yankee, with the CDD policy call of 1996.

All of these decisions of CDD essentially ignore the 30 foot no-build structure setback plat note, said Mr. Yankee. The Director's decision does mention the plat note, but all of the other decisions completely ignore it, said Mr. Yankee. CDD has chosen to ignore the 30 foot no-build structure plat note that it doesn't like, said Mr. Yankee, so it acts like it doesn't exist.

Mr. Watson said that Mr. Yankee mentioned Ms. Boyce's decision, and he thought it was the Community Development Director's decision.

Mr. Yankee said Ms. Boyce's decision was the response to Mr. Gilberto's inquiry on the status of his fence. This decision was based upon only the one plat note, said Mr. Yankee.

At this point Mr. Yankee made the decision to reserve only five minutes of rebuttal time so that he could proceed.

Ignoring the plat note by CDD has resulted in an enormous bait and switch, said Mr. Yankee. The Planning Commission earlier gave two plat notes, neither of which permits a fence inside that perimeter, said Mr. Yankee. The bait was clearly to get the rezoned and the subdivision approved, said Mr. Yankee. CDD now says the perimeter can be hacked up with a bunch of fences, said Mr. Yankee. So far, it has only been the CDD to participate in this bait and switch, said Mr. Yankee. In asking for guidance from the Planning Commission, the CDD is asking the Commission to “get on board”, said Mr. Yankee.

Mr. Yankee said that he is asking that the Commission avoid that. “No-build structure setback” means no structures, said Mr. Yankee. Its meaning is not ambiguous. Even though the words are unambiguous, CDD took a wrong turn years ago by allowing a fence in 1999, and now is subsequently trying to “boot-strap” its decision to the Gilberto fence to its earlier, erroneous decision.

In 1996 Gretchen Kaiser even states that the intent of the restrictive setback is “no structures”, period. “No disturbance” plainly means no disturbance, said Mr. Yankee. A fence disturbs, said Mr. Yankee. Any hand tool requirement tossed in by CDD has nothing to do with the record, said Mr. Yankee. That is an attempt to mitigate disturbance, but the no-build setback states there be no disturbance, said Mr. Yankee.

CDD

The CDD staff allotted 15 minutes for CDD argument, and 15 minutes for Intervenor argument.

Ms. Boyce showed renderings of the area in Montana Creek to the Commission. All of the four phases of Montana Creek Subdivision are subject to the same two plat notes in question, said Ms. Boyce.

Ms. Boyce indicated that the first 20 feet from the rear property line is a no-disturbance 20 foot natural greenbelt and visual buffer easement. That 20 feet is also within the 30 foot no-build structure setback, said Ms. Boyce. Ms. Boyce said she wanted to repeat that when they are talking about the no-disturbance area, they are also talking about the 30 foot no-build structure setback area, because they are overlaid upon one another.

Neither the Planning Director, the Planning Manager or herself were on the staff when the original decision was made, said Ms. Boyce. She said they are in a position where they have to go back and understand how the original decision was made.

In 1994, said Ms. Boyce, Montana Creek Subdivision, after being appealed through a lengthy process, was approved. In 1995 and 1996 the first phase of the final plat was approved, and that is where the plat notes appear, she said. Less than a year after the final plat was approved, a question came up regarding fences, said Ms. Boyce. In the recently discovered Gretchen Kaiser policy decision, there is mention of a fence within a 20 foot greenbelt, explained Ms. Boyce. It states that they are allowed as long as hand tools are used, there is minimal

disturbance, and any vegetation that gets removed is replaced. This is the same thing they have been telling the public for years, said Ms. Boyce. Staff made the call that fences were allowed, said Ms. Boyce.

In 1999 there was a building permit issued for an eight foot tall fence, said Ms. Boyce. Only fences over six feet in height require a building permit from the city, she said. There was only one fence in Montana Creek Subdivision that was issued a building permit and that was in 1999, said Ms. Boyce.

Mr. Watson said that Mr. Yankee mentioned the fence constructed in 1999 was not built all the way across the property. Would the applicant have been required to show that there was a gap in the fence or where it was to be constructed, asked Mr. Watson.

Ms. Boyce said it does show where the fence was going to be constructed. The applicant could have built the fence all across the property if they desired, said Ms. Boyce.

In 2012 the Gilberto's constructed their fence, and then Mr. Gilberto came to the Permit Center in May of 2013. Ms. Boyce said that she was the planner on call that day, which is why she responded to the question. She said she consulted with other planning staff and was told that fences were allowed as long as hand tools were used, there was minimal disturbance, and any vegetation removed be replaced.

Ms. Boyce said she made no decision at that time. Mr. Gilberto's fence was already up. She said she did answer Mr. Gilberto's question about the plat notes. Mr. Yankee called soon after this, and pointed out to Ms. Boyce that the definition of the word "structure" does include a fence. He raised enough of a question in her mind that she was prompted to start the inquiry case so that she could look into the issue a bit further. They had a new director on staff at the time and were down a planning manager, and did not have the institutional knowledge regarding the policy, said Ms. Boyce. That is why she wanted to look into it further. After extensive research, the Director made his decision, said Ms. Boyce.

Ms. Boyce showed the Commission photos of the area, and of the Gilberto fence. Throughout the record, said Ms. Boyce, specifically during the verbatim Planning Commission record, the Director talks about the buffer areas and uses the term "building setback". Terms are used interchangeably and sometimes with different meanings, said Ms. Boyce. But the definitions which are in place today were in place, then, said Ms. Boyce.

Mr. Goddard said that since he was not here when the Gilberto's came into the picture and when the Director wrote his letter, Mr. Goddard's job was to look at the information from a third party point of view, as to how he would have made the call had he been on staff at the time. Mr. Goddard said that Ms. Boyce performed excellent research and presented information that was very compelling, said Mr. Goddard. He added that he also performed significant wordsmithing on the brief. He said he came to the conclusion that the staff has been giving deference to the staff that was in place at the time that the application came forward for

the original Montana Creek Subdivision, and that should carry specific weight, said Mr. Goddard.

It appears there was some loss of translation when the Applicant came in, because staff had to revisit the issue and interpret the Planning Commission's intent, said Mr. Goddard. He said by looking through the records that he felt there was compelling information in the record that led to a logical conclusion that the discussion did not necessarily intend for the prohibition of fences in the area.

Mr. Goddard said that Ms. Boyce had found a couple of references in the record that showed that fences were under discussion at the time. An attorney for a neighbor had mentioned a four foot fence, said Mr. Goddard, and the Department of Natural Resources, which owned adjoining land to the property in question, specifically stated that it would like a fence because it would prevent home owners from trespassing onto its property, and would clarify the property boundary lines.

The staff at that time came up with the policy that the CDD staff has been referring to for 18 years, said Mr. Goddard. The policy specifies that fences are allowed within the greenbelt, said Mr. Goddard. It specifically states in the policy that a fence would be allowed within the 20 feet no-disturbance greenbelt. That was of significant influence to him, said Mr. Goddard.

Mr. Goddard read the policy to the Commission, and said from the record it appeared that they wanted to maintain the rural character that was part of the area. The idea was that the greenbelt was to maintain a visual and character buffer between the two subdivisions, said Mr. Goddard.

The point raised by the Appellant that it was for the purpose of a wildlife corridor may not be a leap that he would necessarily take, said Mr. Goddard, but it seems logical. The last part of the policy states that existing trees shall be retained as much as possible, said Mr. Goddard. It recognizes that some could be lost, he added. There is recognition in the policy that vegetation may be removed since it states that it must be replaced if this takes place, said Mr. Goddard. This does not necessarily imply that this is a no-touch zone or even a no-disturbance zone, said Mr. Goddard, but that there are situations in which vegetation disturbance may apply.

The plat notes which state there should be no disturbance and no structures are not necessarily consistent with the record, and the condition of approval, said Mr. Goddard, because where one said "no" it was more restrictive than what the Planning Commission intended, he said.

The last portion of the policy states that the developer may propose and the staff may require that the buffer areas be created as no-disturbance areas within the lots of greater depth adjoining the property and right-of-way, said Mr. Goddard. There was more to this than just a "yes/no" that the applicant proposed, said Mr. Goddard. Mr. Goddard said he felt this was relevant because a couple of times the Appellant brought up that the current CDD staff had made determinations that were inconsistent with the current code.

That may be absolutely true, said Mr. Goddard. He said they are referring to a 1996 interpretation of a 1996 decision, he said. This is not a change of use, said Mr. Goddard, it is a single family residential. The policy was in effect in 1999 when the building permit was approved. Mr. Yankee mentioned several times that barbed wire fences and privacy fences were OK, said Mr. Goddard. The issue that Mr. Yankee said that at times barbed wire fences and privacy fences were OK, seems to support the staff's position that there is some commonsense interpretation of the Planning Commission record and the Planning Commission's condition that would show there could be some logic applied as opposed to a direct interpretation, said Mr. Goddard. A stern interpretation of those conditions would result in the outcome that if it was found the fence was improperly placed, that Mr. Gilberto would not be able to remove the fence because that would result in a disturbance to the no-disturbance area, said Mr. Goddard.

There are a significant number of fences in the area, said Mr. Goddard. Although the Appellant is arguing this case in particular, staff would need to apply it across the entire subdivision, he said, including the permitted fence which was placed in 1999. That is part of the reason why in the brief the CDD staff indicated that they would like some direction from the Planning Commission as to whether it makes sense for the staff to be interpreting Planning Commission decisions when it comes to subsequent decisions coming down the road.

Ms. Lawfer asked that regards the Planning Commission decision ZO194 there was also a number 12 which showed the boundaries of the wetlands that were subject to the jurisdiction of the Army Corps of Engineers. She asked if Mr. Goddard could point out those boundaries within the plat that is on the record.

Ms. Boyce said the boundaries are not showing on the plat.

Mr. Watson asked how far back CDD documents are electronically archived.

Ms. Boyce responded that electronic archiving began in the late 1990's.

INTERVENOR

Mr. Gilberto said most of his argument had already been defended by the CDD staff. He said he wanted to clarify that there are no wetlands on his property. The water is technically something that he could fill in, he said. He said there are neighborhood children that play on his pond, and that is the main reason he erected the fence.

Mr. Gilberto said he pays property taxes on the 30 foot setback. If the fence were to be removed and pushed back, said Mr. Gilberto, that would be 6,000 square feet of his property. He did not want to disturb his visual buffer, said Mr. Gilberto, and he felt the fence would provide as little disturbance to that as possible. The fence is not there just to keep his dogs in, said Mr. Gilberto.

This is his property, said Mr. Gilberto. He said he did obtain permission before he erected the fence. He added that he felt not having a fence could potentially devalue his home. He said he felt the CDD staff had performed its due diligence on the issue.

Mr. Watson asked if Mr. Gilberto had conversations with Mr. Yankee prior to the June 10, (2013) email that he wrote to Mr. Hart.

Mr. Gilberto responded that he had conversations with Mr. Yankee prior to that email. The day before he had asked Mr. Yankee not to contact him by email. He said he asked Mr. Yankee to take the issue up with Community Development and not with him personally.

APPELLANT REBUTTAL

Mr. Yankee said he would not have objected to Mr. Gilberto's fence if it had been a barbed wire fence, but that did not mean it would be OK as far as the plat note was concerned.

Showing a map on the wall, Mr. Yankee said the Gilberto property in back is wetlands as far as the Army Corps of Engineers is concerned.

The condition in the Director's decision basically says that the buffer must be between the adjacent property owners and the development, said Mr. Yankee. Mr. Yankee said that his position is that a fence is part of the development.

A fence is certainly another improvement, said Mr. Yankee. A fence is clearly a structure, said Mr. Yankee. Even the Gretchen Kaiser memo stated that the "intent of the plat note is no structures period", he added. Mr. Yankee said he did not see how it could be read any other way. Mr. Yankee said that the Gretchen Kaiser memo only addressed fences within the greenbelt, because she was only asked that question.

Chairman Satre said that with the conclusion of Mr. Yankee's rebuttal, that the Commission would retire into Executive Session to make its determination. The decision reached by the Commission would not be made public until there had been legal review, said Chairman Satre.