

**Town Of Warrenton  
Community Development Department  
Board of Zoning Appeals**

**Subject:** Variance BZA-23-2 576 Galina Way Follow-Up Information for August 1, 2023 Meeting

**Reference:** 1) Variance BZA-23-2 576 Galina Way Staff Report Dated June 6, 2023  
2) Variance BZA #2023-1 545 Solgrove Road Staff Report Dated April 4, 2023  
3) BZA-23-2 576 Galina Way PowerPoint  
4) Additional Information for June 6<sup>th</sup> Zoning Appeals Meeting Letter Dated June 6, 2023  
5) June 6, 2023, Zoning Appeals Meeting  
6) July 6, 2023, 576 Galina Way On-Site Meeting with Zoning and Storm Water Management  
7) Line of Sight Survey provided via email on July 17, 2023  
8) Land Disturbance Permit ZNG2022-0635 – 576 Galina Way – Approval With Conditions  
9) LDP22-0003 – Fences across swales – 576 Galina Way - Agreement in Lieu  
10) ZA #2023-2 Staff Report Dated August 1, 2023  
11) 576 Galina Way Lot Survey, With Easement Depicted  
12) Pictures depicting Easement  
13) Neighbor Letters

To Whom It May Concern,

This letter is a follow-up to our letter dated June 6, 2023, and the subsequent June 6 Zoning Appeals meeting. We are also in receipt of the revised Staff Report dated August 1, 2023. This report acknowledges the submitted line-of-sight confirms no impact with the fence. Since the rest of the Staff Report doubles down on the initial assessment, we've structured this response mapping to the original Staff Report (Reference 1) and associated PowerPoint presentation (Reference 3).

As you recall, after the Board reviewed the information contained in our June 6, 2023, Letter (Reference 4) and various discussions took place at the June 6<sup>th</sup> Zoning Appeals Meeting (Reference 5), the parties agreed that a continuance be granted as more information was needed in order for the BZA to make a final determination on our submitted Variance Request.

This letter:

- 1) Summarizes the additional actions taken since that meeting, and the additional information received from those actions.
- 2) Provides further contextual information to supplement our iterative Variance Submission, and is in direct response to the PowerPoint (Reference 3) presented at the June 6<sup>th</sup> meeting.
- 3) Describes, in detail, an additional circumstance since the June 6<sup>th</sup> meeting of impactful importance to the purpose of our variance request.

Finally, this letter is a formal request for the BZA, once it has reviewed all of the additional information provided in this Letter and the information provided in the Referenced 1-13 documents/meetings, to respectfully and rightfully reject the recommendation contained in the June 6, 2023 and August 1, 2023 staff report, and approve our Variance request.

### Summary of Positions

As a reminder, we are requesting this variance to accommodate a 6-foot fence (thus, the request is for the variance of two feet) to alleviate safety, security and protection concerns and associated stress by providing an increased visual and physical barrier. The Town's effective counter position for how we are able to proceed (moving the fence 12 feet inwards) in fact, *increases* our safety, security and protection concerns, not decreases them. The counter position also increases the hardship already in existence due to the uniqueness of the property. As reflected in the Staff PowerPoint Presentation (Reference 3) that was presented at the June 6<sup>th</sup> meeting (Reference 5), the Staff recommended rejecting our Variance Request because it does not believe we meet:

- 1) Any of the three (3) Requirements contained in Sec. 11-3.11.1.1; and
- 2) Does not/may not meet two (2) of the mandatory five (5) criteria contained in Sec. 11-3.11.1.2.  
*\*Our interpretation of the August 1<sup>st</sup> Staff Report is that it is now contending we do not meet one (1) of these five (5) criteria.*

As previously indicated, we strongly believe the Staff has erred in its judgment in this collective assessment, particularly as it pertains to its rejection of facts in substantiating 11-3.11.1.1, as well as its collection and rejection of facts pertaining to Sec. 11.3.11.1.2.c.

**Pertaining to Sec. 11-3.11.1.1**, the same hardships presented in this Variance request (safety, security, protection and visual barrier) have already been approved as an underlying component of a hardship on other Variance Requests.

*\*\*We respectfully request this point be reread through in entirety. It was initially misinterpreted to indicate that we are suggesting the properties themselves are comparable. That is not what we are advocating. We are suggesting that the Staff and BZA accepted the argument that safety, security, protection and visual barrier equated to a hardship caused by a physical condition related to another property, with regular pedestrian traffic and continuous neighbor parking. We are only asking that the same hardship definition be applied consistently and appropriately, as we also have significant pedestrian and neighbor traffic and parking concerns, which are physical attributes related to our property, similar to the other properties with variance approvals. If you find that we meet all five (5) requirements pertaining to Sec.3.11.1.2, the accepted examples of hardships on other variance requests should be applied consistently and appropriately here, to ensure the integrity of each stand-alone assessment. Inconsistent application undermines not only this Variance request, but others that have already been approved.*

**Also pertaining to Sec. 11-3.11.1.1** we contend the staff has misevaluated the application of the Ordinance and its impact on property utilization. As described in the following pages, strict application of the Ordinance, specifically the 2014 amendment which addresses secondary front yard setbacks on *standard* corner lots, significantly restricts utilization of the property by meaningfully limiting the available space (by moving the fence inwards) that was *already* significantly limited due to the existence of the drain, easement and swale. **It's really important to note here that nowhere in the Staff Report is there any reflection of the easement or swale/slope. The drain is the only item depicted at all or even considered in the Staff's analysis. They didn't even use the complete picture of the circumstances for their evaluation.** For demonstration purposes, we're providing 576 Galina Way Lot Survey, With Easement Depicted (Reference 11). (The green and orange depict the area of our property that was

entirely unusable or restricted use due to the existence of the drain, swale and easement. We had to restructure our backyard additions within the yellow area to work with in the existing physical hardships.) We are also providing actual pictures of our backyard with the easement depicted (Reference 12).

**Finally, pertaining to Sec. 11-3.11.1.1** and since the last meeting, **[Confidential- PHI]** Jordyn Simoes experienced a catastrophic heart event, further substantiating the need to immediately alleviate additional external stressors, which includes chronic stressors at home. During surgery on June 29<sup>th</sup>, 2023, Jordyn suffered cardiac arrest and had to be resuscitated. She did not have a heart attack. Rather, her heart simply stopped beating. This was considered to be a Pulseless Electrical Activity (PEA) cardiac arrest, which is “non-shockable” (meaning a defibrillator will not correct it). She was hospitalized in critical care for several days before being released to go home.

Our concern about safety, security, intrusion and visibility directly and significantly increases the stress on Jordyn utilizing the backyard space. Specifically, as Jordyn continues to heal from her cardiac arrest, she is uncomfortable utilizing the space in the way it was intended due to the lack of privacy and significant visibility issues from high pedestrian traffic and parking immediately next to the property. Although the concerns existed before, they are even more critical now that Jordyn must maintain a low stress level to ensure her heart heals and she does not have a recurrence. In addition to alleviating a the defined hardships (as follows) due to physical conditions of the property, approving the Variance for a 6-foot fence would also alleviate a hardship by granting a reasonable modification requested by, or on behalf of, a person with a ‘disability’.

**Please note, only high-level information on Jordyn’s health diagnosis and condition is provided within this letter. Even though we are marking this letter as containing confidential information, we are not comfortable or confident that the entirety of this letter won’t become part of a public record, not generally exempt from FOIA. Jordyn’s health diagnosis and associated information is subject to HIPAA protections. To the extent the BZA decides approval of this Variance is solely contingent upon the necessity of additional Personal Health Information (PHI) that substantiates Jordyn’s medical concerns, we would like to provide the requested PHI/supporting documentation with advanced, written confirmation of FOIA exemption and/or that it would be, at minimum, heavily and appropriately redacted prior to any public release. (In other words, if the BZA decides to reject our arguments around restricted use and hardship, we’d request the opportunity to provide medical documentation, subject to full protections, to support our Variance request).**

**Related to Sec. 11-3.11.1.2.b** and in accordance with discussion at the June 6<sup>th</sup> meeting, line-of-sight was the most critical concern of all parties. Confirming no impact to line-of-sight resolves the concerns with Sec. 11-3.11.1.2.b. We contracted, at our expense, a professional line-of-sight surveyor and confirmed our proposed 6-foot fence has no impact to line-of-sight at the Meadowview/Galina intersection. The results have been provided as Reference # 7. The Surveyor has confirmed that there are zero line-of-sight impacts if we erect a 6-foot fence in the proposed location as defined in the original submission. It should also be noted that the Surveyor performed his assessment based on a 25 MPH speed limit, as that is the lowest speed VDOT apparently offers line-of-sight formulas for. The speed limit in Monroe Estates is actually 15MPH. The lower the speed, the less line-of-sight impact. Therefore, it is a reasonable assumption that applying the actual speed limit of our neighborhood would have a further, positive impact on line-of-sight as pertaining to our proposed fence.

**In reference to Sec. 11-3.11.1.2.c** we strongly contend the staff has erred in its assessment of the requirement to determine that the condition or situation of the property is not so general or recurring in nature as to be adopted as an amendment to the Ordinance. The Staff literally indicates that the fact that our property is a corner lot with an amendment defining standard practice means it doesn't meet the requirements. Let's think this one through: Being a non-corner lot would also be a recurring condition- far more common than a corner lot. This Ordinance was originally written for application across all Town properties relating to residential fences. If this logic is applied consistently, there is zero opportunity for variance approvals. However, we know for a fact that there have been variance approvals. Therefore, the single argument presented in the August 1<sup>st</sup> and June 6<sup>th</sup> Staff Reports on this topic does not answer the question. Further, the Staff neglected to acknowledge collectively, all of the unique features of our property that have 1) significantly impacted our entire backyard; and 2) were the direct cause of multiple meetings with the Town to try to address in the context of our project. The Staff has erred in its review of each of these unique circumstances individually. It's the collection of all of these features together that makes this property unique enough to justify this Variance.

Additional clarifying information on all the points above is provided in the following pages.

For assessment ease, we've structured this follow-up letter to map directly to the Staff's PowerPoint presentation presented at the June 6<sup>th</sup> Meeting, with applicable excerpts from the Staff Reports sprinkled throughout, where appropriate. For comprehensiveness, I've denoted where we agree and where we request you review additional information.

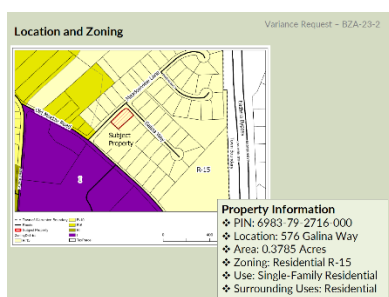
### **Supplemental Information to Staff Analysis**

#### **1. Slide 1: Cover**



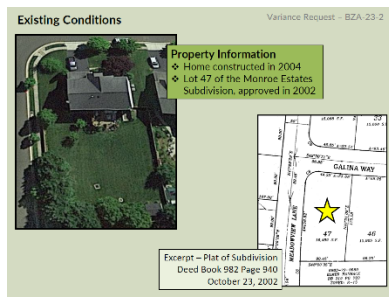
No concerns with this slide.

#### **2. Slide 2: Location and Zoning**



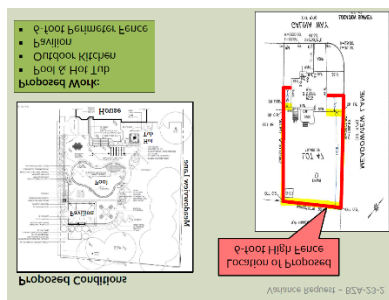
No concerns with this slide.

### 3. Slide 3: Existing Conditions



No concerns with this slide.

### 4. Slide 4: Proposed Conditions



No concerns with this slide. However, the following additional context is hereby provided:

It should be noted that the entire reason for the location of everything in our backyard (and why it is left side heavy) is due to the existence of the drain, easement and swale. Our entire project has been modified repeatedly due to the unanticipated hardship these unique, physical circumstances have presented, and continue to present. Our Land Disturbance permit (Reference 8) was approved *with conditions*, stating “the applicant will not build any structure in the drainage field easement and will not change the existing grading to avoid issues with drainage”. Our project was structured from the beginning considering the feedback from the Town around the drain, easement and swale. The physical conditions of the property have created hardships, and granting this Variance will help to “relieve [some] of these hardships [reduce stress by providing privacy and security that would have been achievable through other means had the drain, swale and easement not existed in the backyard] or lessen an inequitable condition due to a physical condition of the property that equates to privation [the Towns iterative guidance around the backyard project, and now its guidance around the fence (in relation to the easement, swale and drain) has created an inequitable condition in comparison to other properties that equates to privation].” (circumstances mapped to Merriam-Webster cited definition in Staff Report).

***We request that as part of your assessment of hardship, you consider that the fence is not a standalone feature of our backyard. It is one piece of this project that has been modified repeatedly due to the hardship of the easement, drain and swale. We have worked with zoning, stormwater management, building officials and inspectors over the past year due to the unique constraints of***

***this property and the evolving information that continues to impact our approved plans, as more information is discussed collectively with the Town (Example 1- we were first told there was no easement or drain on record- clearly this was incorrect but was the only information the Town could initially provide us. We were able to provide documentation to the Town and the Town eventually found the documentation as well. Example 2- We just received finalized information on 2-inch clearance requirements for fences across swales from Stormwater Management on July 13, 2023 (Reference 9).***

To say there is no physical hardship is respectfully shortsighted and amnesic. We have had so many meetings with the Town centered around this drain, the easement and swale. The plans were constantly in flux due to the fact that no one has really experienced a project of this magnitude, in combination with the unique, physical circumstances of this particular property. To now say there is no hardship misses the entire point. Yes, we did work within the hardship to improve our backyard. Working within the hardship does not mean the hardship doesn't exist or disappears. We were able to make it work, and many times, at our additional expense. However, we continue to be asked now to make further modifications around this existing hardship.

*Granting this Variance helps to alleviate some (not all) of the hardships created by the physical conditions of the property by giving us privacy, safety and security that could have been addressed through other means had those physical hardships not existed.*

Removing trees and moving the fence 12 feet inwards **does** impact our ability to use our backyard. Moving the fence 12 feet in **creates** additional hardships: Removing the trees **removes** the only current visual barrier we are looking to extend and could cost us (estimated) \$20,000 to remove them. We lose 12 feet of (somewhat) usable space, and it moves the fence (and therefore pedestrian traffic) 12 feet closer to our pool and hot tub (further reducing privacy and increasing safety concerns). On the point of pedestrians, the approach the Town is asking us to pursue effectively donates 12 feet of our property to the pedestrians that walk next to our yard daily. This significantly increases our stress level (impacting health issues) around safety and security, and we are frustrated that this is being considered as a reasonable and viable option given the circumstances. **All of this ties back to the fact that strict application of the Ordinance (the one the Staff keeps saying applies here because it's for a corner lot) will create additional hardships and will continue to further restrict our ability to use our property in the way it was intended.**

Respectfully, and although we don't know for sure, we doubt that any of the other homeowners who requested variances for their properties were continually told that they had to spend more money and donate their property for common usage to accommodate the additional needs created by the unique circumstances of their yard. After a reasonable assessment, the variances were likely, simply approved. By not doing the same here, equitable application of the Variance process and consistent treatment of requests are put in jeopardy.

At one point, we brought up concerns about drainage *if* we moved the fence in (which potentially creates a conflict between storm water management and building/pool code- which precipitated the July 6, 2023, onsite meeting (Reference 6)). We just recently received additional instruction from Zoning dated July 13, 2023 (Reference 8). We have now been told Zoning recommends a clean 2 inches of space under our fence to "prevent surface stormwater from being blocked by fences." "However, if installing a new fence changes the drainage pattern or the existing grading, a stormwater specialist or

an engineering consultant can help analyze and recommend ways to avoid an improper fence installation that can block storm flows and cause water ponds in the property owner's or neighbor's yard."

This is one more example of how **strict application of this Ordinance in our unique backyard has continued implications that no one really understands**. We are being told that moving the fence is our answer, but now we have to lift it up, move it in, take down trees and now, if that creates bigger issues for us or our neighbor related to "draining patterns on existing grading", we have to hire a stormwater specialist to deal **with the problem created by strict application of the Ordinance**. This doesn't even acknowledge the fact that we now have received conflicting guidance from the Town that we should not "build any structure in the drainage easement *and will not change existing grading to avoid issues with drainage*" (Reference 8). At this point, we are respectfully requesting an end to this continuous spin and ever-changing and conflicting guidance that has yet to tell us what we are actually able to do. As far as we can tell, it may now actually be impossible to comply strictly with the application of the Ordinance and all the formally issued guidance (some conflicting) from various Town departments. It's certainly not feasible to do so without continuing to restrict the usage of a fairly significant part of our property. We are being set up for compliance failure.

## 5. Slide 5: Ordinance Requirements

**Ordinance Requirements**

**Article 3 & Article 2 Requirements:**

- ❖ § 3-4.1.4: 25-foot required front setback & 12-foot required side setback
- ❖ § 2-13.2.2: Primary front yard is the shortest boundary fronting on a street.
- ❖ § 2-19.2: Fences along the secondary front yard must meet the side yard setback if over 4-feet in height

Variance Request - BZA-23-2

**Fence Setback Requirements:**

- ❖ No setback if 4 feet or lower
- ❖ If over 4 feet:
  - 25 foot front setback on Galina Way
  - 12 foot secondary front setback on Meadowview

Figure - Section 2-13.2 Regular lots, determination of front yard

We disagree with the contention that our lot is a "Regular Corner Lot". (Unsure if this is a standard graphic or not). We do not have any other specific concerns with this slide.

## 6. Slide 6: Variance Request

**Variance Request**

Construct a 6-foot-tall fence within the secondary front yard setback along Meadowview Lane.

- Requires a Variance to increase the allowable height of the fence from 4 feet to 6 feet.

Variance Request - BZA-23-2

**Applicant's Justification:**

- ❖ Provide privacy and security for the back yard area.
- ❖ Increase the safety of neighborhood children.
- ❖ Significant foot traffic along the sidewalk.
- ❖ No neighboring properties will be negatively impacted.

**Application Materials - Attachment C**

- Statement of Justification
- Photographs of Existing Conditions

We have the following comments:

- a. Applicant justification neglects to reference the communal parking that occurs daily parallel to the entire side yard.
- b. Clarify that our concerns are to “increase the safety and security for the property owner and their guests, as protection against intrusion, a visual barrier to increase privacy within the yard area behind the house, and as a safety measure to prevent access to a newly constructed swimming pool.” This includes neighborhood children, but is not entirely about the children on the outside of the property. Our safety concern is equally about protecting the individuals living inside of the property (including multiple children under 18) from external factors (and people).
- c. Clarify that addressing the privacy, safety and security of the backyard will alleviate intense stress that exacerbates a new, significant medical issue (See discussion around Slide 12, 3 below, as well as Summary of Positions, page 2 above ).
- d. Clarify that we believe we meet **all three Ordinance Requirements that authorize a Variance (the BZA only needs to accept one here);**
  - i. We are requesting a variance due to the fact that the proposed solution of moving the fence 12 feet in (thus strict application of the Ordinance) **unreasonably restricts the use of the property;**
  - ii. We are requesting a variance to **alleviate hardships due to physical conditions relating to the property** (drain, easement, swale/steep topography, significant pedestrian traffic, continuous overflow parking) (privacy, security and visibility could have been addressed through alternative project layout had the drain, easement, swale/steep topography not existed. Thus the existence of pedestrian traffic and continuous parking exacerbates the safety, security and visibility hardships that could not be addressed due to the physical circumstances of the property) ;
  - iii. **(New Addition) We are requesting a variance to alleviate a hardship by granting a reasonable modification requested by, or on behalf of, a person with a disability.**



## 7. Slides 7-10, Existing Conditions- Photographs



We do not take any issue with these slides. We provided these pictures.

## 8. Slide 11, Staff Analysis 1 of 4

Variance Request – BZA-23-2

### Staff Analysis

**Ordinance Requirements - Sec. 11-3.11.1.1 - Variances Authorized**  
*A Variance shall be granted if the evidence shows that the strict application of the terms of the Ordinance would impose one of the following:*

1. ***Unreasonably restrict use of the property; or***
  - The use of the property is not restricted, as it is currently being utilized for a dwelling.
  - Building Code requires a minimum 4-foot tall fence surrounding a pool for safety, which has been approved with BLDG-22-1172.
  - If a 6-foot tall fence is desired, it could be set back to meet the reduced 12-foot setback allowed by Sec. 2-19.2.

*Staff does not find that the use is unreasonably restricted.*
2. ***Granting the Variance would alleviate a hardship due to a physical condition of the property; or***
  - The property is a corner lot, with reduced secondary front setbacks to allow property owners flexibility for locating fences.
  - The condition of the property does not restrict the applicant's use of the property for a residence and accessory uses.

*Staff does not find that there is a hardship due to a physical condition of the property.*

We disagree with both positions the Staff has taken here.

The writeup from the Staff Analysis states: (*black text is Staff Analysis. Red text is our response.*)

- ***(Restricted Use)*** *Staff does not find that the applicant has proven by a preponderance of the evidence that the four-foot-high fence height limitation within the front yard setback area unreasonably restricts the utilization of the property as a single-family residence. The four-foot-tall fence meets the building code requirement, and the applicant has the option to adjust the location of the fence to be outside of the 12-foot*

setback area should a six-foot tall fence be desired. Staff therefore recommends that the BZA deny the requested variance based on the absence of evidence that constructing the permitted four-foot-tall fence instead of a six-foot tall fence within the secondary front yard setback constitutes an unreasonable restriction on the applicant's use of the property as a residence.

*Applicant comments: Please see below for substantiation of the preponderance of the evidence.*

- **(Hardship due to physical condition)** A hardship, is "something that causes or entails suffering or privation" (Merriam Webster, 2023). Within the context of a Variance, an applicant must demonstrate that a variance would relieve a hardship or lessen an unequitable condition due to a physical condition of the property that equates to privation.

The subject property does not contain any physical restrictions on developable area such as steep topography, irregular shape, significant drainageways, restrictive easements or other physical conditions that would unduly impact the ability of the property owner to use the property for residential purposes. The specific condition of the property from which the applicant is seeking relief is that the property is a corner lot, with two front yard setbacks, which prohibits a six-foot high fence within 12 feet of one property line.

*Applicant comments: This is categorically incorrect and a misstatement of the entirety of the circumstances. At minimum, the subject property contains 3 of the 4 specified physical restrictions the Staff specifically identified as not existing in our property (but then calls them common). We also have a significant number of trees that make application of the ordinance an additional financial hardship (tree removal) (not to mention the negative impact on the environment) and if we move the fence inwards, our ability to utilize the property as intended is restricted as we lose even more space than we have lost due to the existing physical hardships. The facts are that:*

*1) Yes, we are a corner lot.*

*2) Yes, we have two front yard setbacks that, by strict application of the ordinance, prohibit a six-foot tall fence within 12 feet of a property line;*

*3) However, (contrary to the Staff Report), we are actually seeking relief from the impactful visibility, safety and security concerns and associated stress related to our backyard due to the significant pedestrian traffic that runs right next to our entire property; and*

*4) However, (contrary to the Staff Report), we are actually seeking relief from the impactful visibility, safety and security concerns and associated stress related to our*

*backyard due to the communal parking that occurs right next to our entire property (which does not just include neighbor parking); and*

*5) However, (contrary to the Staff Report), we are actually seeking relief from the impactful visibility, safety and security concerns and associated stress related to our backyard that could not be otherwise addressed through alternative backyard layouts **due to the existence of the drain, easement and swale** (thereby making the increased fence height the requested relief); and*

*6) We are actually seeking relief from strict application of the Ordinance (inclusive of the December 2014 amendment) which creates a significant hardship and restricts our ability to use the backyard even more than the physical conditions have already restricted it.*

*We laid out our entire backyard based on the physical conditions/hardships of the property. Had those physical conditions/hardships not existed, our entire backyard would be designed differently. We would have used the existing trees as natural barriers for the pool and hot tub, and likely wouldn't have needed to pursue this Variance. We also would have had our Pavilion built on the right side of the property to act as a visual barrier to the pool. However, due to the existence of the drain, easement and swale (which we were told by the Town we could not build in); we were unable to leverage the features of the property that would have minimized visibility, safety and security concerns and associated stress. Therefore, the physical conditions of the property have created these hardships. A four-foot fence does not alleviate the hardship. Only a higher fence (6-foot) will provide appropriate relief.*

*Numerous residential lots within the Town are corner lots, where they have frontage on at least two public streets. Within the Monroe Estates subdivision, there are a total of eight lots that are corner lots with two front yard setbacks. Within a 2,000-foot radius of the subject property, there are an additional 19 lots that consist of corner lots with both a primary and secondary front yard setback. The condition of the property is not unique or uncommon.*

*Applicant Comment: Except that, again, the existence of the drain, easement and swale make our property different from most, if not all, of the other properties the Staff just used as comparison. And again, the existence of these three factors specifically impacted the layout of our entire backyard. It also impacted what we could and could not do. It is unfair and unreasonable to minimize the unique circumstances of our backyard and the impacts of the drain, swale and easement and say that the condition of our property is not unique or uncommon. It is just as physically comparable to the other properties the Staff are comparing it to, as it is to 545 Solgrove Road. It is not reasonable or realistic to reject a comparison because the physical attributes aren't identical and then also reject the physical attributes unique to this property.*

*The physical condition of the property, as a corner lot developed with a single-family residence, does not equate to privation or hardship.*

*Applicant Comment: Please see above and below. We are not requesting reprieve due to the fact that we have a single-family corner lot. This is a poor misstatement of our request.*

*The lot size and shape are such that the property owner is in the process of further developing the property with a pavilion, pool, hot tub, and other accessory structures, none of which are impacted by the physical condition of the property.*

*Applicant Comment: Again, absolutely untrue. In fact, ALL of the stated developments were impacted directly by the physical condition of the property. Just because we worked within the hardship doesn't mean the hardship doesn't exist. And just because we didn't raise issues with the hardship, doesn't mean we forgo our right to assert the hardship now and request appropriate reprieve.*

*Staff does not find that the Ordinance provision that restricts the height of a fence to no more than four feet high within 12 feet of Meadowview Lane to be a hardship. Staff therefore recommends that the BZA deny the requested variance based on the absence of evidence that constructing the permitted four-foot-tall fence instead of a six-foot tall fence within the secondary front yard setback constitutes a hardship.*

*Applicant Comment: We are not suggesting that the Ordinance, in and of itself, is a hardship. We are indicating that the application of the Ordinance based on the unique circumstances of our property creates a hardship and further restricts utilization of our property. \*Note that we cannot use the back corner of our property due to the drain, swale and easement. Application of the Ordinance further restricts property that is already restricted due to circumstances outside of our control.*

(Sub bullets below are intended to directly respond to each sub bullet (unnumbered) in the slide, re-provided for reference).

Staff Analysis

Variance Request – BZA-23-2

**Ordinance Requirements - Sec. 11-3.11.1.1 - Variances Authorized**  
A Variance shall be granted if the evidence shows that the strict application of the terms of the Ordinance would impose one of the following:  
**1. Unreasonably restrict use of the property; or**

- The use of the property is not restricted, as it is currently being utilized for a dwelling.
- Building Code requires a minimum 4-foot tall fence surrounding a pool for safety, which has been approved with BLDG-22-1172.
- If a 6-foot tall fence is desired, it could be set back to meet the reduced 12-foot setback allowed by Sec. 2-19.2.

*Staff does not find that the use is unreasonably restricted.*  
**2. Granting the Variance would alleviate a hardship due to a physical condition of the property; or**

- The property is a corner lot, with reduced secondary front setbacks to allow property owners flexibility for locating fences.
- The condition of the property does not restrict the applicant's use of the property for a residence and accessory uses.

*Staff does not find that there is a hardship due to a physical condition of the property.*

**1) The terms of the ordinance do reasonably restrict the use of the property.**

- a. The lack of privacy and significant visibility directly into the backyard makes homeowners and their children uncomfortable and less likely, and/or completely unwilling to utilize the space as intended.
- b. Building code is a minimum and does not restrict the BZA's ability to apply reasonable judgment to individual circumstances. Building code also does not consider individual circumstances or make recommendations in situations where context matters.

The U.S. Consumer Product Safety Commission (CPSC) has issued the "Safety Barrier Guidelines for Residential Pools Preventing Childhood Drowning": [362 Safety Barrier Guidelines for Pools.pdf \(cpsc.gov\)](#). According to the CPSC, *"Some states and localities have incorporated these guidelines into their building codes. Check with your local authorities to see what is required in your area's building code or in other regulations."*

Key excerpts from the Guidance include: (*black text are the excerpts. Red text are our comments.*)

*"CPSC staff has reviewed a great deal of data on drownings and child behavior, as well as information on pool and pool barrier construction. The staff concluded that the best way to reduce child drownings in residential pools is for pool owners to construct and maintain barriers that will help to prevent young children from gaining access to pools and spas."*

*"The guidelines provide information for pool and spa owners to use to prevent children from entering the pool area unaccompanied by a supervising adult. They take into consideration the variety of barriers (fences) available and where each might be vulnerable to a child wanting to get on the other side. The swimming pool barrier guidelines are presented with illustrated descriptions of pool barriers. The definition of pool includes spas and hot tubs. The swimming pool barrier guidelines therefore apply to these structures as well as to above ground pools and may include larger portable pools."*

*"Barrier Locations*

*Barriers should be located so as to prohibit permanent structures, equipment or similar objects from being used to climb the barriers."*

*Applicant Comment: Due to the physical condition of the property, we were unable to place barriers, such as the Pavilion on the side to block visibility to the pool. Due to the location of the easement, drain and swale, placing the Pavilion on the right side near the fence would push the pool back and block visibility from the house to the pool. Switching the location of the pool and the pavilion blocks almost all visibility between the house and the pool. Each item is positioned in its only possible*

*location due to the drain easement and swale. The Town has suggested we should comply strictly with the Ordinance as stated, which indicates that we can move the fence 12 feet inward to increase our fence height. We've contended that in order to do so, we have to remove a significant amount of trees. The Staff Report rejects this statement, saying we can move the fence to a location that doesn't require tree removal (presumably, further in than 12 feet). **Doing this would leave mature trees right on the outside of our fence. This equates to a "permanent structure" that could ultimately be used to climb the barriers. The Town is providing an alternative that directly conflicts with federal safety guidance (and potentially building code) and undermines the intent of a fence barrier around the pool. Moving the fence so far inward that the trees are no longer an issue essentially unfences all of the remaining grassy area in our backyard. If this isn't a demonstration of "strict application of the Ordinance unreasonably restricts the use of the property", then we don't know what could possibly qualify.***

*Leaving the trees and moving the fence creates even more of a safety and security concern, which conflicts with federal safety guidance. Removing the trees creates a significant financial and environmental hardship, and increases the impact of the safety, security and visibility hardship this Variance is requested to relieve. The existence of the trees in their current locations (near the drain, easement and swale) constitute a unique condition of the property not acknowledged in the Staff Report.*

#### *"Fences*

*A fence completely surrounding the pool is better than one with the house serving as the fourth side. Fences should be a minimum of 4 feet high, **although fences 5 feet or higher are preferable.***

*If the home serves as one side of the barrier install door alarms on all doors leading to the pool area. Make sure the doors have self-closing and self-latching devices or locks beyond the reach of children to prevent them from opening the door and gaining access to the pool."*

*Applicant Comment: The federal government acknowledges building code as the minimum but recommends higher based on safety to children. We are complying with all other safety mechanisms defined above.*

Ultimately, the fact that there is a Variance process at all demonstrates that the BZA has the ability to consider other factors over and above the minimum requirements. Simply citing the fact that the 4-foot fence Ordinance complies with minimum requirements doesn't provide additional contextual value here.

- c. Section 2-19.2 (the December 2014 Amendment) **is part of** the Ordinance. **Implementation specifically of 2-19.2 significantly restricts the use of the property.** Moving the fence 12 feet inwards creates additional hardships and further restricts property usage over and above what has already been restricted

because of the drain, easement and swale. Removing the trees eliminates the only current (partial) visual barrier we have and could cost us \$20,000 + to remove them (additional hardship due to the physical condition of the property). We would lose 12 feet of (somewhat) usable space, and it moves the fence (and therefore pedestrian traffic) 12 feet closer to our pool and hot tub, making the safety issues worse, not better. Relying on Section 2-19.2 of the Ordinance requires us to effectively donate 12 feet of our property to the pedestrians that already walk next to our yard daily. We also purposefully left that small section of flat yard open (**it was the only place we could leave open based on the hardship restrictions of the drain, swale and easement**) to allow our children to practice soccer and tumbling in that area (and also meet the permeable space requirement by the Town). (We also couldn't build the pavilion in this location due to where the pool had to be located; it would block visibility from the house to the pool. The pool could only be located where it is due to the drain, easement and swale.) Moving the fence 12 feet inwards removes our ability to use that section of the property for the intended purpose and creates significant safety concerns for both the community and our family.

Ultimately, the argument that the 2014 Amendment addresses the issue here is actually the exact opposite. **The existence of the Amendment, which is now part of the Ordinance, solidifies our position that strict application of the Ordinance unreasonably restricts use of the property.** In essence, due to all of the unique factors of our property, the Town's "answer" to this dilemma actually opens the door for us to meet this criterion all together. (The follow-up argument that we don't have to do a 6-foot fence at all is not relevant. Anyone looking at the terms of the Ordinance related to a Variance request is seeking a modification to the 4-foot fence requirement and the only likely reason would be safety, security and visibility concerns).

**2) Granting the Variance will alleviate a hardship due to a physical condition of the property.**

- a. Although this property is a corner lot, it is not even close to a "typical" corner lot as indicated in the Staff Analysis. The drain, swale, easement, significant pedestrian traffic and daily parking (which, incidentally, does impact line-of-sight according to our surveyor) are all existing hardships created by the physical conditions of the property.
  - i. We continue to have meetings with stormwater management and zoning around the significant potential negative impacts on drainage if we move the fence to where the Staff and ordinance are saying is our "option". **The fact that this property has required so many meetings and has many questions that are so hard to answer, demonstrates this is not a typical lot and the existence of the drain, swale and easement are absolutely a physical hardship.** We've worked within this hardship the best we can. We are simply asking the BZA to grant the variance to "stop the bleeding" and the negative impact this hardship continues to have on us as homeowners



to utilize the space as desired. The pedestrian traffic and parking create a significant stress hardship based on the physical condition of the property's location, which has the ability to exacerbate Jordyn's newly diagnosed heart condition. The 6-foot fence would help to minimize this emotional/stress hardship due to the physical condition/location relative to the pedestrian traffic, daily parking, and significant visibility concerns (as well as safety and privacy).

- ii. Respectfully, "flexibility" for locating fences is overstated at best. The Staff are recommending that our "reasonable" option is to lose significant yard space, which is already restricted by the existence of the drain, easement and swale, spend \$20,000+ to remove a significant amount of trees, and put a space between our fence and the ground to then allow for drainage (which will cause significant issues with our dog).

A definition of "flexibility" from the Cambridge Dictionary is: "The ability to change or be changed easily according to a situation". A definition of "flexibility" from the Merriam-Webster Dictionary is: "Readily changed or changing; adaptable." Frankly, this situation, this fence and this backyard collectively is not flexible nor is the proposed solution in the Staff Report reasonable. This is absolutely substantiated by the many meetings we've had onsite without any clear answer or easy instruction on how we should proceed to satisfy each applicable department in the Town.

- iii. The condition of the property has been repeatedly modified due to the **hardship that already exists on the property: Easement, drain and swale.** The condition of the property is what is creating the hardship that is forcing us to tradeoff between losing 1,572 square feet of usable backyard space and spending \$20,000, or somehow tolerating the extreme stress due to our safety, security and visibility concerns.

- iv. \*Please revisit this point once you have determined that we have met all 5 mandated requirements in Sec. 11-3.1.1.1.2, specifically C. Conversely, please consider this section when reviewing Sec. 11-3.1.1.1.2, section C. A large part of this portion of the Staff Analysis is that the physical condition of this property is "typical". Once you agree that the uniqueness of our property makes the variance request process applicable, a large part of the Staff's assessment on this point becomes invalidated. Once the BZA agrees our property is different enough to substantiate the Variance Process, it only needs to apply the consistent definition of "Hardship" as it has on other approved variance requests.

- 1. It should also be noted that the idea that a property is unreasonably restricted is a stand-alone criterion from the existence of a hardship. In other words, it is not a necessity here for an applicant to demonstrate that the existence of a hardship



unreasonably restricts the use of the property. One must only show that the hardship exists due to the physical condition of the property OR that the ordinance application unreasonably restricts the property use. The fact that we can demonstrate that the hardship, due to the physical condition of the property plus the application of the Ordinance, *does* unreasonably restrict the use of the property is well over and above what is required.

Giving us the terms of the Ordinance as our only option 100% undermines the entire purpose of the Variance process. This process was *designed* to give homeowners like us an option to alleviate significantly negative impacts of Ordinance implementation in unique circumstances outside of our control. A property like ours was never contemplated when the Ordinance or the amendment were approved. Although we did buy this property understanding some (not all) of the basic, unique requirements it contained, we also understood a process existed to manage circumstances that most homeowners don't deal with because of the standard nature of most of the other properties in the Town of Warrenton. We never could have expected that the initial assessment was that our property is not unique enough to justify this process, especially when the Staff Assessment specifically identifies several of the physical circumstances contained in our backyard as reasons **"that would unduly impact the ability of the property owner to use the property for residential purposes."**

The staff wrote as part of their assessment, that: "The subject property does not contain any physical restrictions on developable area such as **steep topography, irregular shape, significant drainageways, restrictive easements or other physical conditions that would unduly impact the ability of the property owner to use the property for residential purposes.** The specific condition of the property from which the applicant is seeking relief is that the property is a corner lot, with two front yard setbacks, which prohibits a six-foot high fence within 12 feet of is that the property is a corner lot, with two front yard setbacks, which prohibits a six-foot high fence within 12 feet of one property line (reference page 7, #2, paragraph 3)."

As **clearly** demonstrated, this is incorrect. *If* the Town is now suggesting that "residential purposes" (meaning generally living and using the backyard) is the standard, then we are aware of at least one other approved variance where this standard was not applied. (i.e. If the variance was requested **after** a pool was already built, then they clearly were also working within the hardships their property presented. This is no different than what we are doing.)

**Using what we have isn't a precursor for a denial here.** If this were the case, then every property for which a variance has been requested should have zero utilization of the property space for which they are seeking the variance. Even the existence of a basic deck could "qualify" as "residential purposes". **This interpretation punishes property owners and disincentivizes homeowners from investing in their property to lessen hardships on their own before leveraging the variance process that was meant to alleviate homeowners from going through exactly what we are going through right now.**

*Based on the above, Slide 11 should be revised to reflect:*

Variance Request - BZA-23-2

**Staff Analysis**

**Ordinance Requirements - Sec. 11-3.11.1.1 - Variances Authorized**  
*A Variance shall be granted if the evidence shows that the strict application of the terms of the Ordinance would impose one of the following:*

1. **Unreasonably restrict use of the property;** or
  - The use of the property is not restricted, as it is currently being utilized for a dwelling.
  - Building Code requires a minimum 4-foot tall fence surrounding a pool for safety, which has been approved with BLDG-22-1172.
  - If a 6-foot tall fence is desired, it could be set back to meet the reduced 12-foot setback allowed by Sec. 2-19.2.

~~Staff does not find that the use is unreasonably restricted.~~  
 Strict application of the terms of the Ordinance DOES unreasonably restrict use of the property.
2. **Granting the Variance would alleviate a hardship due to a physical condition of the property;** or
  - The property is a corner lot, with reduced secondary front setbacks to allow property owners flexibility for locating fences.
  - The condition of the property does not restrict the applicant's use of the property for a residence and accessory uses.

~~Staff does not find that there is a hardship due to a physical condition of the property.~~  
 Granting the Variance WOULD alleviate a hardship due to a physical condition of the property

**9. Slide 12, Staff Analysis 2 of 4**

Variance Request - BZA-23-2

**Staff Analysis**

**Ordinance Requirements - Sec. 11-3.11.1.1 - Variances Authorized**  
*A Variance shall be granted if the evidence shows that the strict application of the terms of the Ordinance would impose one of the following:*

1. **Unreasonably restrict use of the property;** or  
~~Staff does not find that the use is unreasonably restricted.~~
2. **Granting the Variance would alleviate a hardship due to a physical condition of the property;** or  
~~Staff does not find that there is a hardship due to a physical condition of the property.~~
3. **Alleviate a hardship by granting a reasonable modification requested by, or on behalf of, a person with a disability.**  
~~No accommodation is being requested.~~

Staff does not find where the applicant meets any one of the above three criteria for the BZA to grant a Variance.

We disagree with all three (3) positions the Staff has taken here.

1. As stated in our analysis in #8 (Slide 11), we contend that we have demonstrated that strict application of the Ordinance **would unreasonably restrict the use of the property.**
2. As stated in our analysis in #8 (Slide 11), we contend that we have demonstrated that **granting the (requested) Variance would alleviate a hardship due to a physical condition of the property.**
3. We contend that approval of this Variance will **alleviate a hardship by granting a reasonable modification requested by, or on behalf of, a person with a disability.** Since our initial application, after the initial June 6<sup>th</sup> meeting and as stated above, Jordyn Simoes suffered a cardiac arrest on June 29<sup>th</sup>, 2023. We are still working to determine the exact causes of her cardiac arrest and as a result, her medical team has approved return to work and all other general life activities *to the extent stress is kept low*. The Variance approval for an additional 2 feet of fence height is a reasonable accommodation to alleviate the additional stress of using her backyard due to safety, security and visibility concerns defined herein. While the stress of

these circumstances existed before June 29<sup>th</sup>, 2023 (which were the initial reasons for this Variance Request), the profound impact of the stress on Jordyn's heart condition has fundamentally added to the necessity of this approval. Due to the visibility and safety concerns, Jordyn specifically has only used the pool twice and the hot tub once since she came home from the UVA Cardiac Intensive Care unit. She doesn't enjoy much of the outdoor space with her family, because of the stress caused by lack of privacy. She also worries about her children utilizing the space due to external visibility of the kids in bathing suits. (Recall this was a concern of another requestor- regarding grandchildren).

It should also be noted that Alwington Manor was just posted for auction. While no one knows yet what will happen to that property (or the parcel behind it), it would be reasonable to assume that external traffic to this area of Old Meetz, especially impacting the front side of our neighborhood, will continue to get worse, not better. We have (possibly) the most visible backyard location in the neighborhood, which is visible from the entrance. Parking along side our property has been utilized by individuals not associated with the neighborhood, and this will continue. Two (2) feet of extra fence height has been approved in other areas of the Town of Warrenton through the Variance process. Thus, two (2 feet) of fence height has already been determined reasonable.

The Ordinance does not have a standard definition of "Disability". There are different definitions of "disability" based on various medical or legal requirements. However, since the Staff used "Marriam Webster" for the definition of "Variance", we can use it here as well. "Impaired or **limited by a physical**, mental, cognitive, or **developmental** condition; incapacitated **by illness** or injury; or rendered inoperative (as by being damaged or deliberately altered)." Significantly limiting stress due to a significant heart condition in fact impacts/limits essentially all major life activities. Jordyn has to continue to alter everyday activities to minimize the stress and overall impact on her heart.

Given that Jordyn's medical condition reasonably meets an appropriate and acceptable definition of "disability"; and the BZA has already determined a 2-foot increase in fence height (total 6 feet) around a pool to be "reasonable" (as indicated through other Variance approvals), we contend that we do meet this requirement.

**As stated above**, we believe we in fact meet **all three** items contained in Section 11-3.11.1.1. However, we only need to meet **one** of them. The BZA would need to disagree with our assessment of all three items individually in order for them to agree with the Staff's original evaluation. Should the BZA accept one, two or three of our positions here, it must reject the Staff's original recommendations here.

Based on the above, Slide 12 should be revised to reflect:

Variance Request – BZA-23-2

### Staff Analysis

**Ordinance Requirements - Sec. 11-3.11.1.1 - Variances Authorized**  
A Variance shall be granted if the evidence shows that the strict application of the terms of the Ordinance would impose one of the following:

1. **Unreasonably restrict use of the property; or**  
~~Staff does not find that the use is unreasonably restricted.~~  
Strict application of the terms of the Ordinance would reasonably restrict use of the property
2. **Granting the Variance would alleviate a hardship due to a physical condition of the property; or**  
~~Staff does not find that there is a hardship due to a physical condition of the property.~~  
Granting the Variance would alleviate a hardship due to a physical condition of the property
3. **Alleviate a hardship by granting a reasonable modification requested by, or on behalf of, a person with a disability.**  
~~No accommodation is being requested.~~  
Granting the Variance would alleviate a hardship by granting a reasonable modification requested by, or on behalf of, a person with a disability.

~~Staff does not find where the applicant meets any one of the above three criteria for the BZA to grant a Variance.~~

Although only one (1) of the criteria is required for purposes of granting a Variance, the facts demonstrate that the applicant has met at least one (1) (in fact, more than one (1)) of the criteria for the BZA to grant a Variance.

#### 10. Slide 13, Staff Analysis 3 of 4

Variance Request – BZA-23-2

### Staff Analysis

**Ordinance Requirements - Sec. 11-3.11.1.2 – Standards for Variances**  
A Variance request must meet all five criteria:

- a) **The property was acquired in good faith, and the applicant did not create the hardship.**  
The property was acquired in good faith by the applicant.  
This criteria is met by the applicant.
- b) **The variance would not be a substantial detriment to neighboring properties.**  
Fences greater than 4-feet in height could impact the line of sight for vehicles approaching the Meadowview and Galina intersection.  
A 2014 amendment to the Ordinance addressed the issue of fences obstructing vision near intersections, where Town Council found that meeting the required side setback was appropriate.  
It is unclear whether this criteria has been met by the applicant. The applicant could choose to submit additional materials or documentation to demonstrate the line of sight at the intersection; however, the applicant is responsible for providing evidence to support a requested variance.

- a. We agree that the property was acquired in good faith, and that the applicant did not create this hardship.
  - i. However, we'd like to point out that there is an acknowledgement by the Staff in answering this criterion that **there is a hardship existing that we did not create.**
- b. Based on the additional information we provided in support of the June 6<sup>th</sup> meeting and the discussions that occurred as a result, we collectively agreed that line-of-sight impact is the key piece of information needed to meet the intent of this criteria.
  - i. At our sole expense, we hired a surveyor who performed a line-of-sight assessment on the impact of a six-foot fence at the locations described in our application. This

line-of-sight assessment was submitted to Ms. Heflin and Ms. Jenkins on July 17<sup>th</sup>, 2023. As stated in the email:

*Amber, Apologies for the delay. As I assume you recall, my wife went into cardiac arrest on June 29th and was in the cardiac intensive care unit for several days. She's home and we're trying to keep stress low. As a result, things are just taking a little longer these days.*

*Per your request, please see attached for the line-of-sight assessment. Per our discussion and as supported by the attached, based on a speed limit of 25 (ours is 15 so the impact is actually less than demonstrated here) the proposed increase in fence height and location have zero impact on line-of-sight on the Meadowview/Galina intersection, which was the concern expressed in the meeting.*

*Also, per our chat, the surveyor did express concerns about the impact on line-of-sight of the Town maintained trees, as well as the daily parking along our side of Meadowview. Although not within our purview, we wanted to share this information with the Town for review.*

*We plan to submit another document summarizing the additional information received since the last meeting. We will get this to everyone before the next meeting (hopefully, at least, a few days prior). Again, we appreciate the Town's patience as we continue through this process in conjunction with my wife's new circumstances.*

In summary, while increasing our fence at the proposed locations to 6 feet will **not** impact line-of-sight at the Meadowview Lane/Galina Way intersections, both the Town maintained trees and regular parking along Meadowview (which happens to be one of our several stated hardships for which we're seeking relief via a 6-foot fence) **do** impact line-of-sight. While the Town maintained trees are not within our purview (per prior emails exchanged with Zoning) and we also cannot control the parking that runs the entire length of our property, we wanted to provide this additional information to the Town for awareness and potential action.

Although this supplementary discussion now has nothing to do with our Variance request, given that everyone is incredibly concerned about the line-of-sight impacts of this intersection and given that this information is free of charge to the Town, we are hopeful it will assist in formulating next steps on this separate topic.

- c. Just to drive home the fact that there is no detrimental impact to neighboring properties, we are also providing several letters from neighbors confirming they have no concern about our installation of a 6-foot fence.

As a result of the above, Slide 13 should be revised as follows:

Variance Request – BZA-23-2

### Staff Analysis

**Ordinance Requirements - Sec. 11-3.11.1.2 – Standards for Variances**

A Variance request must meet all five criteria:

- a) **The property was acquired in good faith, and the applicant did not create the hardship.**
  - The property was acquired in good faith by the applicant.
  - This criteria is met by the applicant.*
- b) **The variance would not be a substantial detriment to neighboring properties.**
  - Fences greater than 4-feet in height could impact the line of sight for vehicles approaching the Meadowview and Galina intersection.
  - A 2014 amendment to the Ordinance addressed the issue of fences obstructing vision near intersections, where Town Council found that meeting the required side setback was appropriate.

~~It is unclear whether this criteria has been met by the applicant. The applicant could choose to submit additional materials or documentation to demonstrate the line of sight at the intersection; however, the applicant is responsible for providing evidence to support a requested variance.~~

Line of Sight survey confirms no negative impact to line of sight at the Meadowview and Galina Intersection. Further, neighbors have confirmed no concern with the installation of a 6 foot fence at the proposed locations. Consequently, it is confirmed that the variance would not be a substantial detriment to neighboring properties and that the criteria is met by the applicant.

#### 11. Slide 14, Staff Analysis 4 of 4

Variance Request – BZA-23-2

### Staff Analysis

**Ordinance Requirements - Sec. 11-3.11.1.2 – Standards for Variances**

A Variance request must meet all five criteria:

- c) **The condition isn't of a general nature so that the Ordinance should be amended.**
  - The Ordinance was amended on December 9, 2014 to reduce the secondary front yard setback on corner lots. This text amendment was directly in response to multiple variance requests for fences in the secondary front yard area.
  - Staff does not find that the applicant meets this criteria. This issue has already been addressed with a reduced setback for fences on corner lots.*
- d) **The variance would not allow a use that isn't permitted in the district.**
  - The residential use will not change.
  - This criteria is met by the applicant.*
- e) **The relief requested isn't available through a special use permit.**
  - There is no special use permit available.
  - This criteria is met by the applicant.*

c) We disagree with the Staff's assessment that we do not meet this criterion. It is our position that the Staff has neglected to appropriately assess the uniqueness of the property, which has a direct

impact on their incorrect assessment here. We have provided significant commentary on this in the 21 pages above.

The Ordinance and its December 9, 2014, amendment are absolutely both intended for general use. That is literally the entire purpose of laws and ordinances: to set standards that apply to the preponderance of circumstances. Equally, the entire purpose of the Variance process is to consider unique circumstances that make the application of the Ordinance inappropriate or unreasonable. The fact that there is an Ordinance that exists that discusses secondary front yard setbacks on corner lots is entirely standalone from the fact that there may be hardships or utilization restrictions that may exist that make that property unlike the “preponderance of the circumstances”. Our circumstances do not fit with the “preponderance of the circumstances”.

d) We agree that the criterion is met that the variance wouldn’t allow a use that isn’t permitted in the district.

e) We agree that the criterion is met that relief requested isn’t available through a special use permit.

As a result of the above, Slide 14 should be revised as follows:

Variance Request – BZA-23-2

### Staff Analysis

#### Ordinance Requirements - Sec. 11-3.11.1.2 – Standards for Variances

A Variance request must meet all five criteria:

**c) *The condition isn’t of a general nature so that the Ordinance should be amended.***

- The Ordinance was amended on December 9, 2014 to reduce the secondary front yard setback on corner lots. This text amendment was directly in response to multiple variance requests for fences in the secondary front yard area.

~~Staff does not find that the applicant meets this criteria. This issue has already been addressed with a reduced setback for fences on corner lots.~~

The properties unique circumstances make application of the Ordinance impractical/impossible. Although the December 9, 2014 amendment addresses secondary front yard setbacks on corner lots, it does not address them for corner lots that include drains, easements, steep topography and swales, significant pedestrian traffic and communal parking right next to the property. These circumstances are so unique that it is unlikely that any other property in the Town of Warrenton has the same or similar combination of hardships/circumstances/unique factors. Therefore, this condition is not so general in nature so that the Ordinance should be amended. This criteria is met by the applicant.

**d) *The variance would not allow a use that isn’t permitted in the district.***

- The residential use will not change.

*This criteria is met by the applicant.*

**e) *The relief requested isn’t available through a special use permit.***

- There is no special use permit available.

*This criteria is met by the applicant.*

## 12. Slide 15, Criteria for BZA Decision

Variance Request - BZA-23-2

**Criteria for BZA Decision**

The BZA must find that:

The applicant meets at least **one** of the following 3 criteria:

1. The terms of the Ordinance unreasonably restricts use of the property; or
2. Granting the variance would alleviate a hardship due to a physical condition of the property; or
3. The variance would alleviate a hardship by granting a reasonable modification requested by, or on behalf of, a person with a disability.

AND

The applicant must meet **all five** of the following 5 standards:

- a) The property was acquired in good faith; and
- b) Granting the variance would not be of substantial detriment to nearby properties; and
- c) The condition is not so general or recurring so that a text amendment to the Ordinance should be adopted; and
- d) The variance would not authorize an unpermitted use; and
- e) The relief is not available through a Special Use Permit.

We have no concerns with the requirements as stated on this slide.

## 13. Slide 16, Additional Applicant Materials Submitted on June 6, 2023

Variance Request - BZA-23-2

**Additional Applicant Materials Submitted June 6, 2023**

**Staff Review:**

- 1) Comparison to BZA-23-1 – Variance for 545 Solgrove Road
  - Property conditions are different – dead-end road vs. street that serves multiple lots.
- 2) Ordinance limitation on fence height unreasonably restricts use of the property.
  - A 4-foot tall fence meets building code requirements.
  - The residential use of the property is not restricted by fence height.
- 3) The physical condition of the property constitutes a hardship.
  - The presence of a storm drain is a common feature.
  - A 4-inch gap along the bottom of a fence both meets building code requirements and permits unrestricted stormwater flows to the storm drain.
  - Mature vegetation could be preserved by adjusting the location of the fence.
  - The location of the fence can be adjusted to accommodate steep slopes.

We disagree with multiple points contained in this slide.

- 1) We never contended the property conditions are the same. We contend that the accepted hardships are similar. Also, this begs a few questions: Does this mean that 545 Solgrove Road being on a “dead-end road” is a unique feature or that the dead-end road constitutes the hardship? I cannot imagine that is the case. Interestingly enough, the Staff recommended approval due to safety, security and visibility concerns *on a dead-end road*. If those concerns are valid on a dead-end road, wouldn’t they be even more of a pressing issue on a more heavily traveled one? The only logical point the dead-end road makes, is that there is minimum impact to the surrounding location. In this case, being a dead-end road is not the only way to have a minimum impact.
  - a. We respectfully request the BZA revisit the writeup from Additional Information for June 6<sup>th</sup> Zoning Appeals Meeting Letter Dated June 6, 2023, specifically related to the comparison to the 545 Solgrove approval, with the new understanding that the comparison is not about the property conditions, but rather the accepted argument around what constitutes a hardship and what constitutes restricted utilization. Since they were accepted there and we’ve demonstrated no negative impact on our surrounding area, the same arguments should be accepted here.
- 2) Again, we are not simply stating that the Ordinance limitation on 4-foot fences unreasonably restricts the use of the property. We are saying that based on the preponderance of facts and



the unique features of the property (and circumstances around the property) that the *strict application* of the Ordinance (moving the fence 12 feet to have a 6-foot fence in order to address the safety, security and visibility concerns and related stress) impacts utilization and creates an additional hardship. This hardship could have been minimized had the drain, easement and swale not been a factor in our yard design. However, we were told by the Town we couldn't build in the vicinity or change the grading (Reference #8) which further impacted our backyard layout. To be told after we build that we should now move the fence, but IF we change grading, we need to take additional actions is not a fair or reasonable application of the Ordinance.

- 3) Given the assertion that our drain and backyard are "common", we respectfully request an understanding of how many backyards in the Town of Warrenton have a storm drain. In addition to that statistic, we'd respectfully request additional information on how many of those backyards have the swale and easement at the same or similar angles contained within our backyard (please see Reference 12). I would assume "common" would mean several similar and citable circumstances (at least more than a few). Calling the drain a "common feature" without context or statistics isn't a full picture of this particular scenario and therefore, should not be considered as part of this assessment.
  - a. Moving the fence 12 feet in *does not* allow for the preservation of mature vegetation. If the Town is suggesting we move the fence in even more than 12 feet, we will begin to encroach on the hot tub and pool itself. Every foot we move the fence further restricts utilization of the remaining open space in our backyard. Also, moving the fence so the trees are unfenced next to the common sidewalk creates greater safety and security concerns. **We would literally be giving children natural ladders to climb the fence to get to the pool. Further, it provides easy access to backyard intruders. This should not be considered a viable or reasonable option.**
  - b. Yes, the location of the fence can be adjusted, but at what cost? So much of our backyard has been dictated by what we can and cannot do around the drain, easement and swale. Having the "sole solution" of using even less of our backyard does not seem like a valid or reasonable option to us.

We believe this slide should be removed in entirety. The contents of this slide do not accurately reflect the circumstances, and include incomplete, inaccurate assessments surrounding this Variance request.

#### 14. Slide 17, BZA Decision

Variance Request - BZA-23-2

**BZA Decision**

**Decision on Variance Application**

- ❖ Approval is required from a majority of the BZA - a minimum of **three votes**.
- ❖ If three approving votes are not received, the **request is denied**.
- ❖ The BZA has **60 days** in which to render a decision once the hearing is complete.
  - The BZA may act on the request **today**; or
  - The BZA may defer their decision until the next scheduled meeting on **August 1, 2023 (57 days)**.
    - There is no meeting scheduled for July.
- ❖ **Appeals** to a BZA decision must be made to the Circuit Court within **30 days**.

Pattern Motions of Approval and Denial  
➤ Provided as attachments.

We have no concerns with this slide.

**15. Slide 18, End**



No concerns with this slide.

**Closing**

11-3.11.1.1 Variances Determined by the Board of Zoning Appeals, Variances Authorized states:

*The Board of Zoning Appeals **shall** grant a variance if the applicant proves, by a preponderance of the evidence, that the strict application of the terms of the Ordinance would unreasonably restrict the utilization of the property or that the granting of the variance would alleviate a hardship due to the physical condition relating to the property or improvements thereon at the time of the effective date of the Ordinance.*

Based on all of the information presented, we have met, by the preponderance of evidence submitted to the BZA and as discussed with the Town, 11-3.11.1.1 a (1, 2 **and** 3 (although we only need to meet **one**) as well as 11-3.11.1.2 a, b, c, d and e.

As a result, we respectfully request the BZA deny the Staff's recommendation and (**shall**) approve the BZA-23-2 576 Galina Way Variance Request. The Staff Report includes a copy of the Pattern Motion To Approve Variance as Attachment A, page 1.

We continue to appreciate your time and willingness to listen and read through our extensively documented position. Please let us know if you have any follow-up questions for us or need additional information in order to issue your approval.

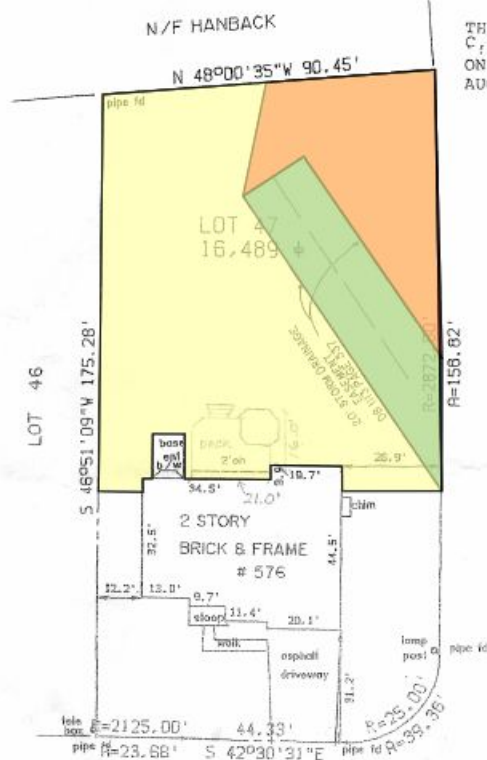
Respectfully,

*Travis a Simoes Jordyn V. Simoes*

Jordyn and Travis Simoes  
576 Galina Way Homeowners and Variance Requestors

N137788

THIS IS TO CERTIFY THAT ON MARCH 29, 2005 I MADE AN ACCURATE SURVEY OF THE PREMISES SHOWN HEREON AND THAT THERE ARE NO EASEMENTS OR ENCROACHMENTS VISIBLE ON THE GROUND OTHER THAN THOSE SHOWN HEREON.



THIS LOT IS LOCATED IN HUD FLOOD ZONE C, AREA OF MINIMAL FLOODING AS SCALED ON FIRM MAP # 510055 0285 B EFFECTIVE AUGUST 19, 1991.



HOUSE LOCATION SURVEY  
LOT 47  
MONROE ESTATES  
TOWN OF WARRENTON  
FAUQUIER COUNTY, VIRGINIA  
227 PLAT REF. DB, 982 P 940

GALINA WAY (50' WIDE)

	Easement	1612.8 SQ FT
	Slope/swale	2093.8 SQ FT
	Backyard	9718.2 SQ FT

FURSTENAU SURVEYING (540) 662-9323  
111 SOUTH LOUDOUN STREET  
WINCHESTER, VIRGINIA 22601

EST. 1986

MEMBER VA. ASSOC. OF SURVEYORS

DATE: MARCH 29, 2005

SCALE: 1" = 30'

TAX ID 6983-07-79-2716

WO. 0240