



CITY OF MILWAUKIE

October 17, 2023

Land Use File(s): VR-2023-005

NOTICE OF DECISION

This is official notice of action taken by the Milwaukie Planning Manager on October 17, 2023.

Traducciones de este documento e información sobre este proyecto están disponibles en español. Para solicitar información o preguntar en español, favor de email espanol@milwaukieoregon.gov.

Applicant(s):	Josh and Sara Samuelson
Location(s):	9631 SE 42 nd Ave
Tax Lot(s):	11E36AC01200
Application Type(s):	Variance
Decision:	Approved with Conditions
Review Criteria:	Milwaukie Municipal Code: <ul style="list-style-type: none">• MMC 12.24 Clear Vision at Intersections• MMC 19.502 Accessory Structures• MMC 19.911 Variances• MMC 19.1005 Type II
Neighborhood(s):	Ardenwald-Johnson Creek

Appeal period closes: 5:00 p.m., November 1, 2023

This notice is issued in accordance with Milwaukie Municipal Code (MMC) Section 19.1005 Type II Review. The complete case file for this application is available for review by appointment between 8:00 a.m. and 5:00 p.m. on regular business days at the Planning Department, Milwaukie City Hall, 10501 SE Main St. Please contact Adam Heroux at 503.786.7658 or heroux@milwaukieoregon.gov if you wish to view this case file or visit the project webpage at <https://www.milwaukieoregon.gov/planning/vr-2023-005>.

This decision may be appealed by 5:00 p.m. on November 1, 2023, which is 15 days from the date of this decision.¹ (Note: Please arrive by 4:45 p.m. for appeal payment processing.) Any person who is adversely affected or aggrieved by this decision may appeal the decision by filing a written appeal. An appeal of this decision would be heard by the Milwaukie Planning

¹ As per MMC Section 19.1010, if the 15th day falls on a weekend or legal holiday, the end of the appeal period shall be extended to the end of the next business day.

Commission following the procedures of MMC Section 19.1010 Appeals. This decision will become final on the date above if no appeal is filed during the appeal period. Milwaukie Planning staff can provide information regarding forms, fees, and the appeal process at 503-786-7630 or planning@milwaukieoregon.gov.

Per MMC Subsection 19.1001.7.E, this land use approval expires unless the applicant has: (1) obtained and paid for all necessary development permits and started construction within 2 years of land use approval, and (2) passed final inspection and/or obtained a certificate of occupancy within 4 years of land use approval. Extensions can be granted per MMC Section 19.908.

Findings in Support of Approval

The Findings for this application are included as Exhibit 1.

Conditions of Approval

1. The applicant agrees to remove and/or modify the fence to address clear vision issues as described in Finding 5 in Exhibit 1.
2. The applicant agrees to modify the existing fence Section B so that the fence has at least 90% transparency above 42 inches above sidewalk grade (see Exhibit 1, Attachment B). Section B may be as tall as 72 inches if the 90% transparency is met.
3. Since the fence was established prior to the issuance of this Notice of Decision, the applicant must satisfy Condition 1 and Condition 2 within 4 months of this decision, by February 16, 2024.

Other requirements

None.

Manager's Declaration of Impartiality

I certify that neither I nor any member of my immediate family has a material, personal, or financial relationship with the applicant. I further certify that no other relationship, bias, or ethical conflict exists which would have prevented me from evaluating the land use application solely on its merits and in accordance with the Milwaukie Municipal Code.

Decision

- Approved
 Approved with Conditions
 Denied



Laura Weigel, AICP
Planning Manager

Exhibits

1. Findings in Support of Approval with Conditions
Attachment A - **9631 SE 42nd Ave Site map with existing fence heights for various sections**
Attachment B – **9631 SE 42nd Ave Site map with existing sections labeled**
- cc: Josh and Sara Samuelson (via email)
Planning Commission (via email)
Joseph Briglio, Community Development Director (via email)
Steve Adams, City Engineer (via email)
Engineering Development Review (via email)
Patrick McLeod, Building Official (via email)
Stephanie Marcinkiewicz, Inspector/Plans Examiner (via email)
Harmony Drake, Permit Technician (via email)
Tim Salyers, Code Enforcement Coordinator (via email)
Shawn Olson, CFD#1 (via email)
NDA(s): Ardenwald-Johnson Creek (via email)
Interested Persons
Land Use File(s): VR-2022-004

EXHIBIT 1
Findings in Support of Approval with Conditions
File #VR-2023-005, 9631 SE 42nd Ave Fence Variance

Sections of the Milwaukie Municipal Code (MMC) not addressed in these findings are found to be inapplicable to the decision on this application.

1. The applicant, Josh Samuelson, has applied for approval to retain a sight-obscuring wood fence that is between 48 and 72 inches tall in the front yard of 9631 SE 42nd Ave. This site is in the Moderate Density Residential (R-MD). The land use application file number is VR-2023-005.
2. The proposal requires a variance to the 42-in maximum height of a fence in the front yard.
3. The proposal is subject to the following provisions of the Milwaukie Municipal Code (MMC):
 - MMC Section 12.24 Clear Vision at Intersections
 - MMC Section 19.502 Accessory Structures
 - MMC Section 19.911 Variances
 - MMC Section 19.1005 Type II Review
4. The application has been processed and public notice provided in accordance with MMC Section 19.1005 Type II Review.
5. MMC Chapter 12.24 Clear Vision at Intersections

The purpose of this chapter is to maintain clear vision areas at intersections in order to protect the safety and welfare of the public in their use of City streets.

- a. MMC 12.24.030 Requirements
 - (1) MMC 12.24.030.C – A clear vision area shall contain no planting, fence, wall, structure, or temporary or permanent obstruction, except for an occasional utility pole or tree, exceeding three (3) feet in height, measured from the top of the curb, or where no curb exists, from the street centerline grade. Trees exceeding this height may be located in this area; provided, all branches and foliage are removed to the height of eight (8) feet above the grade. Open wire fencing that does not obscure sight more than ten percent (10%) is allowed to a maximum height of six (6) feet.
- b. MMC 12.24.040 Computation
 - (1) MMC 12.24.040.A – The clear vision area for all driveway accessways to streets, street intersections and all street and railroad intersections shall be that area described in the most recent edition of the “AASHTO Policy on Geometric Design of Highways and Streets.”

- (2) MMC 12.24.040.B – Modification of this computation may be made by the City Engineer after considering the standards set forth in the most recent edition of the “AASHTO Policy on Geometric Design of Highways and Streets” and taking into consideration the type of intersection, site characteristics, types of vehicle controls, vehicle speed, and traffic volumes adjacent to the clear vision area.

The applicant is seeking approval of a variance application to retain an existing sight obscuring wooden fence. The fence is between 48 inches and 72 inches in height in the front yard at various points. Along the 42nd Ave frontage, the fence is located approximately 3 ft from the property line and approximately 5 ft from the back edge of the sidewalk. Site visits by Engineering staff found that Section B (see Attachment B) of the established fence violates clear vision standards in the southeast corner of the property where the fence stands 72 inches tall and obscures sight 100% beginning at the southern property line and extending North along the fence line approximately 30 feet. The remaining fence sections that exceed 30 inches in height above sidewalk grade do not violate clear vision standards. Engineering staff identified modifications to the fence location in that area that resolve the clear vision issue. The applicant, Josh Samuelson, has agreed to implement the proposed modifications to Section B of the fence. These modifications to the fence location are represented by the red line in Attachment A and Attachment B.

As conditioned, the Planning Manager finds that this criterion is met through the proposed modification.

6. MMC Chapter 19.502.2.B Accessory Structures – Fences, Walls and Plantings

- a. MMC 19.502.2.B.1.a Residential Zones and Residential Uses in All Zones

Maximum height is 6 ft for rear, street side, and side yards; 42 in for front yards, except that for flag lots fences in the front yard may be 6 ft. No electrified, barbed, or razor wire fencing is permitted.

The applicant is seeking approval of a variance application to retain an existing sight-obscuring wooden fence that exceeds the maximum 42-inch standard in multiple sections in the front yard.

A variance application has been submitted to allow for the retention of a fence between 48 inches and 72 inches tall. Subject to the approval of the variance, the Planning Manager finds that this criterion is met.

7. MMC Chapter 19.911 Variances

- a. MMC 19.911.3 establishes the review process for variance applications.
MMC 19.911.3.B.8 establishes the limits of the Type II variance to fence height to allow up to a maximum of 6 ft (72 inches) for front yard fences and 8 ft (96 inches) for side yard, street side yard, and rear yard fences.

The applicant has requested a variance to the maximum height of a fence in the front yard to retain an existing sight-obscuring wooden fence in the front yard with sections measuring

between 48 and 72 inches tall. The request meets the procedural requirements for a variance through the Type II review process.

The Planning Manager finds that the application is subject to Type II Variance review for exceeding the 42-in height standard for fences in the front yard.

c. MMC 19.911.4.A establishes criteria for approving Type II Variance applications.

An application for a Type II Variance shall be approved when all the criteria in 19.911.4.A have been met.

- (1) The proposed variance, or cumulative effect of multiple variances, will not be detrimental to surrounding properties, natural resource areas, or public health, safety, or welfare.

The intent of the 42-inch maximum front yard fence height is to maintain visibility between structures and the street and to prevent fences from “walling off” the street. Attachment A includes a site map with the location and heights of the existing fence. Attachment B labels the fence sections.

The fence along the 42nd Ave frontage is located five feet back from the back edge of the sidewalk and has a downward sloping grade toward the subject property. This five-foot-wide area between the sidewalk and fence includes shrubs and trees that help prevent the effect of a “walling off” of the street.

Along the 42nd Ave frontage, the fence has two sections with different heights—a northern section (A) measuring 50 inches and a southern section (B) measuring 72 inches. The 50-inch northern section (A) of fence is approximately 55 feet long and begins approximately 20 feet south of the north side lot line. Because the fence is located below sidewalk grade, this section of the fence is approximately 42 inches above sidewalk grade. This section (A) of fence is not tall enough to create a “walling off” of the street and allows direct views of the single detached dwelling structure on the property. There is no evidence that allowing a slightly taller fence in this area will be detrimental to surrounding properties.

The 72-inch section (B) of fence along the 42nd Ave frontage begins approximately 45 feet from the south side lot line, continuing south until a point 7.5 feet from the south side lot line before it continues at a 120-degree angle to the southwest until it meets the south side lot line. This section (B) of fence is tall enough to contribute to a “walling off” of the street since it does not allow for direct views of the single detached dwelling structure for significant stretches of sidewalk. In addition to the proposed clear vision modifications identified in Finding 5, this sight-obscuring aspect of the fence must be reduced to 42 inches above sidewalk grade along the entire 42nd Ave frontage. This section (B) of fence may be as tall as 72 inches provided that the sections of fence taller than 42 inches are 90% transparent. As conditioned, there is no evidence that allowing a taller fence in this area will be detrimental to surrounding properties.

The fence continues with a 72-inch section (C) along the south side lot line into the side yard. This section (C) of fence does not create “walling off” effect and is up against trees

and a neighbor's fence. The single detached dwelling on the subject property is set back more than 55 feet from the front lot line, creating an abnormally large front yard. This means that the neighbor to the south is already allowed to have a 72-inch fence along at least 35 feet of this section (C) of fence. There is no evidence that allowing a taller fence in this area will be detrimental to surrounding properties.

There is an interior section (D) of fence in the north side of the front yard that ranges from 48 inches to 55 inches tall and connects to the northernmost point of the fence section (A) that runs parallel to the front lot line. Three portions of this section (D) of the fence increase in height as they get closer to the side yard, but none obscure the sight of the single detached dwelling structure on the site. The property to the north is separated from the subject property by a 10-foot-wide right-of-way access, making it more than 30 feet away from this interior section of fence. There is no evidence that allowing a taller fence in this area will be detrimental to surrounding properties.

As conditioned, the Planning Manager finds that the approval criteria are met.

- (2) The proposed variance will not interfere with planned future improvements to any public transportation facility or utility identified in an officially adopted plan such as the Transportation System Plan or Water Master Plan.

The Engineering Department has confirmed that the fence will not interfere with any future right-of-way improvements.

The Planning Manager finds that this approval criterion is met.

- (3) Where site improvements already exist, the proposed variance will sustain the integrity of, or enhance, an existing building or site design.

By installing a wooden style of fence that is similar to a pre-existing fence already on the property, the proposal sustains the integrity of the existing site design.

As conditioned, the Planning Manager finds that the approval criteria are met.

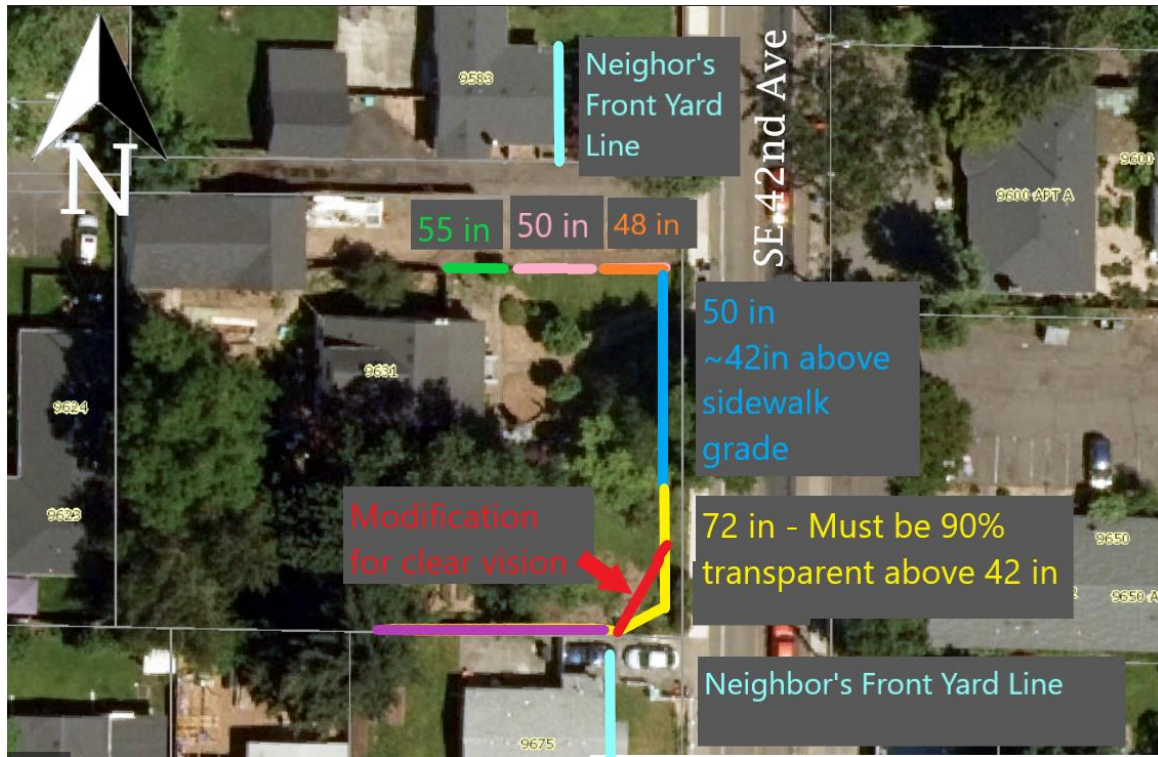
- (4) Impacts from the proposed variance will be mitigated to the extent practicable.

No impacts from the proposed variance as modified have been identified.

As conditioned, the Planning Manager finds that the approval criteria for the Type II Variance are met.

8. As per MMC 19.906.2.C, the proposed development is exempt from the requirement to submit a development review application and the other requirements of MMC 19.906 Development Review. However, the proposal must still comply with all applicable development standards.
9. As per MMC 19.1001.7.E, this variance request shall expire and become void unless the proposed development completes the following steps, if applicable:
 - a. Obtain and pay for all necessary development permits and start construction within 2 years of land use approval (by October 17, 2025).

Attachment A. 9631 SE 42nd Ave Site map with existing fence heights for various sections



Attachment B. 9631 SE 42nd Ave Site map with existing sections labeled

