Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00021-CV

BOARD OF ADJUSTMENT OF THE CITY OF SAN ANTONIO,
Appellant

v.

Michael and Theresa **HAYES**,
Appellees

From the County Court at Law No. 10, Bexar County, Texas
Trial Court No. 2014CV00284
Honorable David J. Rodriguez, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Marialyn Barnard, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: February 24, 2016

REVERSED AND REMANDED

On March 4, 2014, the Director of the City of San Antonio's Development Services Department revoked a permit issued for the construction of a metal railing. The Director's letter stated that the permit was issued in error because the Board of Adjustment of the City of San Antonio previously determined on January 13, 2014, that the railing would be a sports court fence subject to a 20' setback requirement. The permit was revoked because it did not require the 20' setback. The homeowner who sought the permit, Michele Pauli Torres, appealed the Director's decision to the Board of Adjustment which unanimously approved a motion granting the appeal

and rescinding and modifying the Director's decision by allowing the railing to be constructed as the design was presented to the Board of Adjustment.

This appeal challenges the trial court's finding that the Board of Adjustment lacked jurisdiction to consider the appeal of the Director's decision to revoke the permit. On appeal, the Board contends: (1) the appellees, Michael and Theresa Hayes, failed to timely petition the trial court for judicial review of the Board's decision; (2) neither the Board nor the trial court had jurisdiction to consider whether the Board lacked jurisdiction to hear the appeal of the director's decision; and (3) if the trial court's judgment is affirmed, the cause must be returned to the Board of Adjustment for consideration of a variance application which was pending with the appeal of the Director's decision but was not decided.

BACKGROUND

In 2011, Michele Pauli Torres and Allan Torres hired an unlicensed contractor to construct a stadium-size sports/tennis court in their backyard. The Torreses did not obtain a permit from the City of San Antonio before undertaking the construction.[1] The Torreses' neighbors, Michael and Theresa Hayes, who are the appellees in this appeal, sued the Torreses because the sports court was placed as close as two feet from their common property line and its height allows those using the court to see over the Hayeses' fence into their backyard. The Hayeses obtained a temporary injunction precluding the use of the sports court.[2]

In April of 2013, the Torreses submitted a permit application (AP #1876879) for a removable ball containment netting system designed to keep tennis balls from entering abutting properties when the tennis court was in use. In August of 2013, the Torreses submitted a general

[1] The record contains references to the fact that a permit was obtained after the construction was completed.
[2] When the trial court entered the order being appealed, this separate lawsuit in which the injunction was granted was still pending.

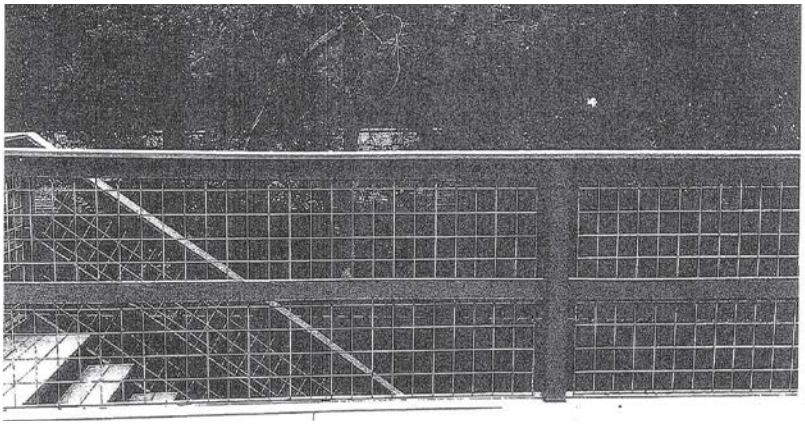
repair permit application (AP #1908870) for the installation of a railing around the sports court. The railing, as described, would be forty inches in height and have round metal posts, wire mesh, and a flat top surface comprised of Trex material. With the applications, the Torreses submitted an affidavit from the Director in which he concluded:

> . . . . According to the San Antonio Unified Development Code ("UDC"), this type of railing and netting barrier system is not a "fence" as defined in the UDC; therefore, the twenty-foot setback for a sports court fence does not apply. Further, this type of railing and netting system does not require a variance from the City. In addition, this type of railing and netting system requires only a general repair permit for installation of the railing, but the netting does not require a permit.

The general repair permit application (AP #1908870) was approved by the Director, and the permit was issued.

The Hayeses appealed the Director's decision to the Board of Adjustment. On January 13, 2014, the Board of Adjustment held a hearing on the appeal. At the conclusion of the hearing, a motion was approved reversing the Director's decisions that: (1) the railing was not a fence or a sport court fence; and (2) the netting system is not a fence or sport court fence. Based on this motion, both the railing and the netting system were considered a fence or sport court fence requiring permits and were subject to a minimum 20-foot setback requirement.

On February 12, 2014, the Torreses submitted a permit application to the City of San Antonio for the same railing with wire mesh previously described but without any netting system. The following is a picture depicting the type of railing the Torreses wanted to construct:



On February 13, 2014, the Director initially issued the permit (AP #1951114); however, in a letter dated March 4, 2014, the Director rescinded the permit. In his letter rescinding the permit, the Director stated:

> The purpose of this letter is to advise that Development Services revoked Permit No. 195114 [sic] issued on February 13, 2014 for a "40" metal railing to rear & right side of the property" [sic] at 151 Algerita. This permit was issued in error due to the Board of Adjustment's determination on January 13, 2014 that the structure would be a Sports Court Fence and subject to the 20' setback requirement. As such the department cannot issue the permit without a variance from the Board of Adjustment.

On March 20, 2014, the Torreses submitted a request for a variance to the Board of Adjustment. The same day, the Torreses appealed the Director's decision to rescind the permit to the Board of Adjustment, asserting the railing is not a sport court fence.

On April 21, 2014, the Torreses' appeal was presented to the Board of Adjustment. The record reflects the Hayeses's attorney appeared and participated. The agenda described the appeal as "an appeal of the Director's decision to rescind building permit #1951114 for a guard rail & classifying it [as] a sport court fence." The Torreses request for a variance was also on the agenda to be considered if the Board of Adjustment denied the Torreses' appeal and upheld the Director's revocation of the permit. The agenda described the variance as "a variance from the 20-foot setback to allow installation of a guard fall protection system on the property line."

The Development Services Department Staff Report presented to the Board of Adjustment included the following summary:

> The subject property is a 40,000 square foot lot created in 1949 with the recording of the Algerita Park Subdivision. The property improvements include a single family home, a swimming pool, a pool house, outdoor patio and a tennis court. The tennis court has been the subject of an on-going dispute between the owners and a neighboring property owner. As such, it has not been used in years and has no fencing surrounding it. Because of natural grades and construction leveling, the court is elevated above the neighboring property 10 to 12 feet and needs some guard fall protection.

The staff recommended the appeal be denied based on the following findings:

> Board of Adjustment already ruled to reverse the Director's decision that a guardrail was not a fence or a sport court fence. Therefore, this decision requires the property owner to seek a variance to permit a guardrail within the 20 foot setback.

The staff recommended the variance be granted based on the following findings:

> 1. The guard fall protection system should be located on the edge of the slab.
> 2. The setback of 20 feet leaves the edge unprotected.

Following the staff's introduction of its recommendations, Rob Killen made a presentation for the Torreses. Killen asserted the railing was not a sport court fence because the railing would have openings of four inches and tennis balls, which have a diameter of two inches, could freely pass through the openings. One of the members of the Board of Adjustment, Gabriel Velasquez, commented, "The — you know, to my looking at the pictures it's kind of a rail with a fence." A short time later, the following exchange occurred between Velasquez and Killen:

> MR. VELASQUEZ: — just one question in terms of the rail — the railing.
> Are you open to a more conventional rail system that takes into consideration children right —
> MR. KILLEN: Yeah.
> MR. VELASQUEZ: And leaving off the grilling — the — what I consider fencing or —
> MR. KILLEN: Absolutely.

After additional discussion, Velasquez further commented:

> MR. VELASQUEZ: . . . .
>
> But it's clearly a rail. Okay? Now the fact that the picture is a rail fence, that's another subject. Right? Because it's a rail with fencing. You take the fencing out, there's a lot of ways to build a rail. It's clearly a rail. If it's — if it's intended to keep people from falling over, that's different than a fence that keeps people from moving in. Right?

A short time later, the following exchange occurred:

> MR. MARTINEZ [Board member]: I understand. But what you're showing us is an example of a fence instead of just a safety rail. What I'm saying — what I'm trying to get across here is: The definition of a safety rail is not a guardrail, it is not a fence. It is a device that prevents people from falling off a platform, like any rail going downstairs or around a deck or anything like that. But once you put a fencing material on, then, you've changed the definition.
>
> MS. HERNANDEZ [staff member]: Could you — Tony could you show [Killen's] picture of the guardrail.
>
> MR. FELTS [staff member]: (Complies.)
>
> MR. MARTINEZ: Exactly. And what they've utilized here is welded fencing panels into the fence — into the rail, which converts the definition. What I'm saying is if it was a true safety rail it would have balusters and rail and that's it.
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> MS. HERNANDEZ: Let me confer with staff very quickly.
>
> (Off-the-record discussion)
>
> MS. HERNANDEZ: All right. We've conferred. The Applicant is —
>
> THE CHAIR: Order from the Board. Please, continue.
>
> MS. HERNANDEZ: So we've conferred with staff and, yes, it is fencing material along — along the post. And so the Applicant is here to clarify what he's requesting and clarify what it will look like.
>
> MR. KILLEN: Yeah, I just conferred with Mr. and Mrs. Torres. If the concern is the material between the slats, that can be removed.
>
> Now, what we will need is probably a few more slats, of course, to keep kids — like I said, they've got a newborn and so they want to keep it safe. But we would take out that wire material, that kind of mesh there. So we would take that out of the equation so that it's purely a rail.

In response to another Board member's question regarding whether an approval of the proposal then presented would go against the January ruling, Ms. Hernandez stated, "I believe, based on — based on what — especially since the Applicant has changed what it looks like, it is a different request than what you saw in January."

David Earl then made a presentation for the Hayeses and argued the following:

> This Board does not have authority or jurisdiction to hear the [appeal which is the] first matter before you today. The [Torreses] had an obligation to exhaust through [sic] administrative remedies. When Mr. [Hayes] got a favorable ruling from this Board of January 13th, [the Torreses] had an obligation to appeal that ruling, that was adverse to them, to the district or county court. They failed to do so.

After further discussion, the following exchange occurred regarding the January decision:

> MR. VELASQUEZ: The appeal makes sense — I mean, it makes sense to rescind [the decision on the January] appeal, but then that's where you said that, well, we would be — we would be reversing a decision that we made or a —
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> MS. HERNANDEZ: No, what's presented in front of you now, based on the Applicant's —
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> MS. PAHL [staff member]: Amended request.
>
> MS. HERNANDEZ: — amended request is an entirely different guardrail that's in front of you today. So a motion to reverse the director's decision wouldn't reverse the same decision or wouldn't contradict the same decision that you made in January, because you were looking at a different guardrail and you were looking at a different — at a netting system.
>
> ***
>
> MR. MARTINEZ: I just wanted to make sure that it wouldn't be interpreted to also include this fencing that we considered back in January.
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> MR. HERNANDEZ: No, no.
>
> MR. MARTINEZ: And only that which we're seeing today.
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> MS. HERNANDEZ: Yes, amended by the Applicant to remove that wiring.
>
> MR. MARTINEZ: To what? To remove the wiring?
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> MS. HERNANDEZ: To remove the wiring. He amended it here at the podium to remove that wiring.
>
> BOARD MEMBER: There's no wire mesh.
>
> MS. HERNANDEZ: There's no wire mesh anymore.

At the conclusion of the hearing, the following motion was made:

> I would move . . . to rescind and modify the director's decision on Permit No. 195-1114 [sic] and allow a railing, such as the one that has been presented to the Board, to be erected in the location that has also been presented to the Board along a facility that has been identified as a sport court, a tennis court. … And that it's this member's opinion that that is not to be considered a sports fence, as was discussed and described in previous hearings. End of motion.

The motion unanimously passed.

The Hayeses sought judicial review of the Board of Adjustment's decision by filing a Petition for Writ of Certiorari asserting the decision on permit application #1951114 was "arbitrary, capricious and illegal, and constitutes an abuse of discretion" for the following reasons: (1) the Board of Adjustment did not have jurisdiction to hear and rule on the Torreses' appeal because the Torreses failed to exhaust their administrative remedies with regard to the January decision; (2) the Board of Adjustment did not make findings of fact required by section 35-801(k) of the San Antonio Unified Development Code to grant a variance; and (3) the Torreses did not prove the six conditions required to be shown to enable the Board of Adjustment to grant a variance. The Hayeses also asserted claims relating to the Torreses' initial construction of the sport court. The Board of Adjustment filed an objection to the Hayeses' pleading, asserting the writ of certiorari was untimely filed. The Hayeses filed a response asserting their pleading was timely filed.

The trial court conducted a hearing on the objection and the Hayeses' pleading. During the hearing, the trial court overruled the Board of Adjustment's objection, ruling the Hayeses' pleading was timely filed. The trial court then heard arguments regarding the merits of the grounds presented in the Hayeses' pleading for reversing the Board of Adjustment's decision and took the matter under advisement. The trial court subsequently signed an order finding the Board of Adjustment lacked jurisdiction to consider the Torreses' appeal and reversed the Board of Adjustment's decision. The trial court's order stated permit #1951114 remained revoked and the Board of Adjustment's January decision remained final.

The Board of Adjustment appeals.

TRIAL COURT'S REVERSAL OF BOARD OF ADJUSTMENT'S DECISION

The Board of Adjustment contends the trial court erred in reversing its decision on the basis that the Board did not have jurisdiction to consider the Torreses' appeal because the Torreses failed

to seek judicial review of the Board of Adjustment's January decision that the railing in question was a sport court fence.

A. Methods to Challenge Board of Adjustment's Decision

A distinction exists between whether a board of adjustment has the power to act and whether it exercised its power illegally. *City of San Antonio v. El Dorado Amusement Co.*, 195 S.W.3d 238, 250 (Tex. App.—San Antonio 2006, pet. denied). If a board of adjustment does not have the power to act, its decision can be collaterally attacked. *Id*. If a board of adjustment has the power to act, the only means to challenge whether the board exercised its power illegally is through the statutory writ of certiorari proceeding. *Id*.

1. Writ of Certiorari

"The legislature has expressly provided a means for challenging an action taken by . . . a board of adjustment." *Id*. at 249 (quoting *West Tex. Water Refiners, Inc. v. S & B Beverage Co.*, 915 S.W.2d 623, 626 (Tex. App.—El Paso 1996, no writ)). That means is by filing a petition for a writ of certiorari asserting the decision by the board of adjustment is illegal. *See id*. at 249-50. "The only issue to be determined in a writ of certiorari proceeding is the legality of the board's order." *Id*. at 250. To establish that a board of adjustment's decision is illegal, "the party attacking the order must present a very clear showing of abuse of discretion." *Town of Bartonville Planning & Zoning Bd. of Adjustments v. Bartonville Water Supply Corp.*, 410 S.W.3d 23, 29 (Tex. App.—San Antonio 2013, pet. denied) (internal citations omitted). In exercising its discretion, a board of adjustment has no discretion to determine the validity of an ordinance but only has authority to ensure the ordinances are followed. *Id*. at 30.

2. Collateral Attack

"A board of adjustment derives its power from both the statute and the city ordinance establishing it and defining its local function and powers." *El Dorado Amusement Co.*, 195 S.W.3d

at 250. "A board of adjustment must act within the strictures set by the legislature and the city council and may not stray outside its specifically granted authority." *Id*. (internal citations omitted). "Any action exceeding this authority is null and void and subject to collateral attack." *Id*.

B. The Hayeses's Challenge

The Board of Adjustment contends the trial court erred in reversing its decision based on the Torreses' failure to exhaust administrative remedies. Because the Hayeses filed a writ of certiorari proceeding, the Board of Adjustment's argument is that the only issue presented for judicial review was whether the Board of Adjustment acted illegally in applying the definitions in the City of San Antonio's Uniform Development Code to the proposed railing to determine whether the Director properly rescinded the permit.

We do not read the Hayeses's petition so narrowly. Although the pleading is styled as a petition for writ of certiorari, we look to the substance of a pleading not merely its title. *See Surgitek, Bristol-Myers Corp. v. Abel*, 997 S.W.3d 598, 601 (Tex. 1999); *Hamblin v. Lamont*, 433 S.W.3d 51, 55 n.1 (Tex. App.—San Antonio 2013, pet. denied). Although portions of the Hayeses' petition challenge the legality of the Board of Adjustment's decision, the petition also alleges the Board of Adjustment had no jurisdiction to hear the Torreses' appeal because the January decision was not challenged in the trial court and was final. This allegation challenges the Board of Adjustment's power to act and constitutes a collateral attack on the Board of Adjustment's decision.[3]

[3] The trial court's judgment states the trial court considered the Hayeses' request for review of the action by the Board of Adjustment "pursuant to Sec. 211.011 of the Texas Local Government Code (the "Act") and on other grounds." Section 211.011 governs the filing of a petition for writ of certiorari; therefore, the trial court's reference to "other grounds" can be read as the trial court construing the petition to contain a collateral attack.

We could find no authority that would preclude the Hayeses from combining both types of challenges in their petition. Because we hold the Hayeses' petition incorporated a collateral attack, we need not address the Board of Adjustment's first issue regarding the timeliness of the petition because the portion of the petition containing the collateral attack is not subject to the 10-day filing requirement.

C. Board of Adjustment's Jurisdiction

The Hayeses contended the Board of Adjustment did not have jurisdiction to reconsider its January decision because the Torreses did not seek judicial review of that decision.[4] This contention rests on the premise that the Board of Adjustment reconsidered its January decision at the April hearing. As detailed in the background above, however, the Torreses amended their application to remove the wire mesh from the proposed railing during the course of the Board of Adjustment's proceedings. The amended application sought approval of the proposed railing without the wire mesh. The Board of Adjustment's decision was based on this amended application.

In *Anthony v. Bd. of Adjustment of City of Stephenville*, Jay Anthony owned property in the City of Stephenville on which he wanted to build a 7,811 square foot convenience store with two enclosed drive-through lanes. No. 11-12-00159-CV, 2014 WL 3398139, at *1 (Tex. App.—Eastland July 10, 2014, no pet.). The Director of Community Development for the City, Betty L. Chew, met with Anthony and informed him the proposed use was not a classified use under the City's zoning ordinance and therefore was not permitted. *Id*. Chew did, however, place an item

[4] The Board of Adjustment notes the January minutes were not approved until February 5, 2014. Because February 15, 2014 was a Saturday, the Torreses would have been required to file a petition to seek judicial review no later than February 17, 2014. TEX. LOC. GOV'T CODE ANN. § 211.011(b) (West 2008) (petition must be filed "within 10 days after the date the decision is filed in the board's office"). Before that deadline, however, the Director issued the Torreses the permit on February 13, 2014, which allowed them to install the railing. The Director did not revoke the permit until March 4, 2014, which was after the deadline for filing a petition to seek review of the January decision had passed.

on the agenda of the planning and zoning commission for its December 2010 meeting to consider amending the zoning ordinance to allow the use. *Id*. The motion failed to pass. *Id*.

In August of 2011, Shawn Felton, a general contractor, filed an application for a commercial building permit to construct "Cowboys Convenience Store" with drive-through service on Anthony's property. *Id*. By letter dated September 30, 2011, the city attorney informed Anthony's attorney that the proposed use was not allowed under the zoning ordinance. *Id*. No appeal was taken from this decision. *Id*.

In November of 2011, Anthony's wife filed an application for a commercial building permit to construct a business called "Cowboy Convenience Store" on the same property. *Id*. The city attorney again notified Anthony's attorney the use was not allowed and also informed Anthony's attorney that the matter had already been decided and "there was no meaningful difference between the August application and the November application." *Id*. Anthony appealed the decision on the second application to the Board of Adjustment, and the Board of Adjustment denied the appeal. *Id*.

Anthony filed an original petition and application for writ of certiorari in district court. *Id*. at *2. The City filed a plea to the jurisdiction asserting Anthony's applications were not materially different, and, since Anthony did not exhaust his administrative remedies with regard to the first application, the trial court was without jurisdiction to consider his claims. *Id*. Anthony responded that the second application was materially different from the first one. *Id*. The trial court granted the plea to the jurisdiction. *Id*. Anthony appealed the trial court's decision. *Id*. at *1.

The Eastland court of appeals examined the two applications and held the second application was essentially the same as the first application. *Id*. at *3-4. Because Anthony did not appeal the denial of the first application, the Eastland court held the trial court properly granted the City's plea to the jurisdiction. *Id*. at *4.

In the instant case, although the second application for the railing was essentially the same as the first application, the Torreses amended the second application during the course of the Board of Adjustment's proceeding to remove the wire mesh. Accordingly, the Board of Adjustment was not reconsidering its prior decision but was considering whether the railing without the mesh was a sport court fence subject to the 20 foot setback requirement. Because the Hayeses's jurisdictional argument was based on the Board of Adjustment reconsidering its prior decision and the record establishes the Board of Adjustment's decision was not a reconsideration of the same railing, the trial court erred in concluding the Board of Adjustment was without jurisdiction to act. *See id*.

During oral argument, the Hayeses's attorney made reference to a comment made after the motion was made and seconded during the Board's hearing on April 21, 2014. As previously noted, the following was the motion made at the hearing and is the motion contained in the Board of Adjustment's minutes:

> I would move . . . to rescind and modify the director's decision on Permit No. 195-1114 [sic] and allow a railing, **such as the one that has been presented to the Board**, to be erected in the location that has also been presented to the Board along a facility that has been identified as a sport court, a tennis court. … And that it's this member's opinion that that is not to be considered a sports fence, as was discussed and described in previous hearings. **End of motion**.

(emphasis added). After the motion was seconded, the following exchange occurred:

> BOARD MEMBER: Do we need to have findings or discussion?
> MS. HERNANDEZ [staff member]: You would have discussion.
> BOARD MEMBER: We had discussion.
> MR. CAMARDO [board member who made the motion]: Yeah, I was going to say, I didn't think there were findings necessary and that we're not acting on a distance variance or whatever.
> MS. HERNANDEZ: That's correct. There's no specific findings required by the code. But discussion or a continued dialogue would be helpful.
> MR. CAMARGO: From a discussion standpoint, I think what has been pointed out by the majority of the members here is that safety is a big factor. We may or may not agree whether this tennis court should have been allowed at this elevation at this location, but it has been permitted and it is there in existence.

> Now it's our — it falls on our shoulders to provide protection for the — for [the] general public. And for that reason I feel that the — the railing, the fencing, whatever you want to call it — this barrier —
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> BOARD MEMBER: Not a fence.
>
> MR. CAMARGO: — is — is for the protection of the general public.
>
> THE CHAIR: That you, Mr. Camargo.
>
> I would just like to add: I'm going to be in support, as well. The guardrail, in my opinion, is a safety issue. It provides safety. I think with the planting of the bamboo it kind of rectifies some of that — some of that visual down into the pool area. I think it's a — it's a — it's a — you know, it's a good remedy. It's not the best. But, you know, that's what we're here for. So I am supporting Mr. Camargo's motion.
>
> MR. CAMARGO: Mr. Camargo.
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> THE CHAIR: Yes, Mr. Camargo.
>
> MR. CAMARGO: And I guess for purposes of clarification, so we don't have to come back again as we did the last time, I had understood that Mr. Killen had amended — I don't know if it was an amendment or just a statement of fact that the cattle wire or whatever on that fencing would be removed.
>
> My motion does not include that. Whatever acceptable material from the UDC standpoint should be allowed and we should not be dictating whether cattle paneling or hog paneling or whatever. I just wanted to clarify that for the future.
>
> THE CHAIR: Thank you.
>
> Sandra, would you like to call for the vote.

All of the board members then voted in favor of the motion. We do not read Camargo's subsequent comment as amending the motion he previously made. Having read the transcript of the Board of Adjustment's hearing in its entirety, we hold the motion made, seconded, and approved by the Board of Adjustment was a motion to allow a railing "such as the one that has been presented to the Board" which was the railing presented in the amended application without the wire mesh,[5]

[5] During the hearing before the trial court, the Board of Adjustment's attorney informed the trial court of the amendment made to the application during the Board's hearing, stating, "… this is important, Your Honor, because what happened in the Board, and I have a copy of the transcript, is that there was a modification of the railing on — during the hearing of the guardrail and — and that modification was the one that was accepted by the Board. That was the one they voted on. That's why Mr. Camargo's motion reads such as the one that has been presented to the Board …." The Board of Adjustment's attorney further explained, "Now, the — a controversy during the meeting came up because of that grill that you have there, that mesh, metal mesh. Okay? With that metal mesh some board members expressed on the record that that looks like a fence. Okay? And then Mr. Killen made an amendment to the request for a permit to put up the railing that he would remove that metal mesh, so that's why the — the motion reads the way it reads."

and this opinion should not read as allowing the Torreses to construct the railing with the wire mesh.

CONCLUSION

The trial court erred in concluding the Board of Adjustment was without jurisdiction to act because the Torreses' application, as amended during the Board of Adjustment's April hearing, was materially different than the January application. Accordingly, the trial court's judgment is reversed, and the cause is remanded to the trial court for further proceedings.

Sandee Bryan Marion, Chief Justice