

# City of NAPOLEON, OHIO

255 WEST RIVERVIEW AVENUE, P.O. BOX 151  
NAPOLEON, OHIO 43545-0151  
(419) 592-4010  
FAX (419) 599-8393



April 24, 1998

Mr. William Moden Jr.  
1525 Thershan Dr.  
Napoleon, Ohio 43545

Mayor  
Donald M. Stange

Re. Fence in utility easement.

Members of Council  
Michael J. DeWit, President  
Robert G. Heft  
James Hershberger  
David F. Miller  
Travis B. Sheaffer  
Char Weber  
Terri A. Williams

Dear Mr. Moden

This letter is to inform you that fences, plantings, buildings and the like are not permitted in a utility easement according to City Code 1127.11 (attached).

Please be informed you are hereby requested to remove the fence posts currently occupying space in the utility easement along the rear of your property. City Code also requires that in-ground swimming pools be enclosed by a fence no less than four (4) feet in height. Therefore, you are also advised to replace the section of fencing which was removed. The fencing shall be installed so that it encloses the swimming pool area as it was prior to its removal.

There is an appeal procedure through the Board of Zoning Appeals whereby you may appeal the decision of the Zoning Administrator as it relates to the interpretation of the City Zoning Code. (copy attached)

Please call if you would have questions regarding this notice.

Sincerely

Brent N. Damman  
Zoning Administrator

cc. Mr. Jon A. Bisher, City Manager  
Mr. Adam C. Hoff, P.E., City Engineer  
Mr. David M. Grahm, City Law Director

City Manager  
Jon A. Bisher

Finance Director  
Gregory J. Heath

Law Director  
David M. Grahn

City Engineer  
Adam C. Hoff, P.E.



# Memorandum

City of Napoleon Building & Zoning Department

**To:** Adam H. Hoff, P.E., City Engineer  
**From:** Brent N. Damman, Zoning Administrator *BND*  
**Date:** Wednesday, April 29, 1998  
**Subject:** Bill Moden, Fence in utility easement.

I am opposed to the proposed resolution which would allow Mr. William Moden Jr. to place a fence in a utility easement along the south line of lot 53 of the Twin Oaks 3rd addition. The resolution sites a certain uniqueness of the subject property implying that these certain unique characteristics do not exist on neighboring lots. The fact of the matter is that one of the unique characteristics sited, which made the property unsafe was self imposed (removal of the south fence wall). The other unique characteristic sited in the resolution is that there is a ten (10) foot utility easement on the lot. Upon review of the Twin Oaks Subdivision, I find that there are forty four (44) other building lots that share the same unique character related to a ten (10) foot wide utility easement. Does this mean we will need to write forty four (44) more resolutions once we have set the standard ?

I admit that I was the person who presented the fence code change to the Planning Commission in 1993, in an effort to improve the health safety and welfare of the community at large. The issue came to light when I received a call from a concerned citizen explaining that her neighbor was digging holes in the ground in a utility easement to place fence posts. She was concerned that they may get electrocuted if they continued. I went out to investigate and found that they had dug a hole and had actually ran into an underground high voltage electric line. They had skinned the outside coating of the line and essentially came within an eighth of an inch of cutting into the conductor. If they would have cut to the conductor they would have been electrocuted. This to me warranted a change of code, which the Planning Commission and City Council eventually approved in August of 1995. When the 1979 code was written most of the high voltage lines were overhead and posted no real danger to a person digging in the utility easement. Now however most subdivision have installed underground high voltage lines, making a utility easement area a very dangerous area to be placing fences, trees, shrubs, etc.

By allowing people to enclose underground high voltage electric lines in their back yards, we are showing that we really don't care about the health safety and welfare of the citizens of this community. We are in fact giving them permission to make their back yards areas a more hazardous place to be.

# Memorandum

*To: Jon A. Bisher - City Manager*  
*From: Adam C. Hoff, P.E. - City Engineer ACH*  
*cc: Brent Damman, Mike Heise, Jeff*  
*Marihugh*  
*Date: April 29, 1998*  
*Subject: Easement License Agreement*

In response to your request, I have reviewed the issues involved with allowing a resident to place a fence within a utility easement in the Twin Oaks Subdivision. I have discussed this issue with the Building & Zoning Administrator, Brent Damman (his memorandum is attached), the Operations Superintendent, Jeff Marihugh, and the Electrical Superintendent, Mike Heise. I have also discussed the situation with representatives of the local gas, phone and cable companies. All parties are strongly opposed to this proposal.

The concerns we have are many. However, our greatest concerns surround the possibility of members of the public sustaining serious injuries or even death resulting from excavating into buried electric cables or gas mains. One such incident nearly occurred in the Brickyard Subdivision when a resident who was attempting to place a fence over an easement without contacting the City for a permit or utility location cut the insulation on a buried primary electric line. Fortunately, Brent was contacted by a neighbor and arrived to stop the gentleman before any more damage was caused to the line or he was electrocuted.

Another concern is the fact that this action will create a precedent for all future requests to build on easements. This is not simply an isolated case. Prior to the City revising the City Code pertaining to utility easements, it was essentially a free for all. Case in point is the area behind former mayor and council member Dennis Fligor's residence in Anthony Wayne Acres. What was supposed to have been a utility and drainage easement (exactly like the one in Twin Oaks) is now covered by gardens, trees, out buildings, etc. effectively cutting off all surface drainage and making it virtually impossible to maintain any utilities that may exist within the easement. Other such examples include the Gerken-Hoeffel Subdivision where, even with the revised ordinance, we struggle on at least an annual basis simply to maintain a channel for surface drainage across the back lot lines.

Other concerns and questions are these:

1. The current resident can sign any piece of paper we produce and agree to any stipulation the City may place in the resolution, but what about the next owner? Who will inform the next owner that a high voltage cable and buried telephone and cable services lay only two (2) to three (3) feet below the surface and inside their fence? Will the restrictions and limitations of liability, if any, apply to the next owner?
2. What is the criteria by which the City will allow one (1) resident to construct a fence across a utility easement and not another? What are the deciding factor or factors?
3. Who will be responsible to repair or replace utilities damaged during or because of the installation of fences, buildings or trees?
4. Who is liable if and when a resident digs into an electric cable and is electrocuted?

Council had the courage and foresight several years ago to develop an ordinance prohibiting the construction of structures within an easement. The City of Bryan is currently heading in that direction. This decision has and will continue to greatly enhance our ability to serve the public and protect our citizens as well as our utilities. If a transformer explodes, a sewer collapses or a water main breaks in the middle of the night, we now have unimpeded access to the site to fix it. We all recognize that many people see the restrictions placed on residents pertaining to the use of easements as just that, restrictions. We also recognize that some see our ordinances as restricting individual property rights. But the fact is, the restrictions and limitations are for their protection.

Based on the above and my conversations with the different department heads and utilities, it is my recommendation that Council not pass this resolution permitting the installation of a fence across a utility easement. The floodgates were closed when the old ordinance was changed, why open them again?

If you have any questions, please let me know.



# Memorandum

City of Napoleon Building & Zoning Department

**To:** Adam H. Hoff, P.E., City Engineer  
**From:** Brent N. Damman, Zoning Administrator *BND*  
**Date:** Wednesday, April 29, 1998  
**Subject:** Bill Moden, Fence in utility easement.

I am opposed to the proposed resolution which would allow Mr. William Moden Jr. to place a fence in a utility easement along the south line of lot 53 of the Twin Oaks 3rd addition. The resolution sites a certain uniqueness of the subject property implying that these certain unique characteristics do not exist on neighboring lots. The fact of the matter is that one of the unique characteristics sited, which made the property unsafe was self imposed (removal of the south fence wall). The other unique characteristic sited in the resolution is that there is a ten (10) foot utility easement on the lot. Upon review of the Twin Oaks Subdivision, I find that there are forty four (44) other building lots that share the same unique character related to a ten (10) foot wide utility easement. Does this mean we will need to write forty four (44) more resolutions once we have set the standard ?

I admit that I was the person who presented the fence code change to the Planning Commission in 1993, in an effort to improve the health safety and welfare of the community at large. The issue came to light when I received a call from a concerned citizen explaining that her neighbor was digging holes in the ground in a utility easement to place fence posts. She was concerned that they may get electrocuted if they continued. I went out to investigate and found that they had dug a hole and had actually ran into an underground high voltage electric line. They had skinned the outside coating of the line and essentially came within an eighth of an inch of cutting into the conductor. If they would have cut to the conductor they would have been electrocuted. This to me warranted a change of code, which the Planning Commission and City Council eventually approved in August of 1995. When the 1979 code was written most of the high voltage lines were overhead and posted no real danger to a person digging in the utility easement. Now however most subdivision have installed underground high voltage lines, making a utility easement area a very dangerous area to be placing fences, trees, shrubs, etc.

By allowing people to enclose underground high voltage electric lines in their back yards, we are showing that we really don't care about the health safety and welfare of the citizens of this community. We are in fact giving them permission to make their back yards areas a more hazardous place to be.

---

---

# MEMORANDUM

---

---

**TO:** JON A. BISHER, CITY MANAGER  
**FROM:** MIKE HEISE, ELECTRIC DISTRIBUTION SUPERINTENDENT  
**SUBJECT:** EASEMENT LICENSE AGREEMENT  
**DATE:** 05/01/98  
**CC:** ADAM HOFF, BRENT DAMMAN, JEFF MARIHUGH

---

In response to your request regarding fence installations within utility easements, I am in opposition to this proposal. After reviewing the residence in question in Twin Oaks, I have several concerns.

For clarity, I have attached a drawing showing the easement in relation to Mr. Moden's house and pool. As you can see from this drawing, our 7,200-volt cable is located 3 foot off the edge of the easement. This line not only serves Mr. Moden's house; it also feeds other residents in this subdivision. If the fence is moved from the present location at the end of the easement to the property line, this would create the following problems for the electric department:

✍ In the event that a house is built behind Mr. Moden's house, as the preliminary plat shows, we would need a section of fence removed and would need to trench from the electric pedestal to the new resident's house. Since our secondary pedestal would be located in his back yard, we would have to be let in every time we would need to connect or disconnect an electrical service. This not only affects Mr. Moden, but also future customers. This could potentially delay service installations for new customers.

✍ In case of a cable failure, the fence would restrict our crews from quickly locating and repairing the fault. The fence would cause delays in repairing our cable, meaning longer outage times for every customer on that section of cable.

✍ In the event that a section of fence is removed or damaged during a cable repair, Who is liable if someone would fall in the swimming pool and get hurt or drown?

✍ The most important concern that I have is that of human safety. If you look at the attached drawing, you can see that the pool is very close to our 7,200-volt cable. Once the fence would be moved, it is very easy to forget that high voltage power lines are buried in the back yard. In my years working for Toledo Edison, several people died because they never called for power lines to be located on their property. One person died while using a post digger to install a deck. Another was installing a volleyball net and was driving a piece of conduit into the ground for the posts when they hit the primary wire. Finally, another died while digging a hole for a tree. To me, one dig-in death in one more than I ever want to see in my career. The ordinance that is currently in effect helps prevent this from happening. Usually when a home owner is told about the reasons that easements are needed, their reply is that of "I would always call for locates prior

to digging.” However, many people never call for locates and are very lucky to be living today. Many forget that what you cannot see can hurt or even kill you.

In Mr. Moden’s case, he and/or his contractor were lucky once already. Surveying his property, a tree was recently planted on our easement directly over our primary 7,200-volt cable. Whoever installed this tree was very lucky. However, next time they may not be so lucky. THIS TREE MUST BE REMOVED. It will not only damage our primary wire; its root system may render the easement unusable.

Again, my main concern is for the health, safety, and well being of all of Napoleon’s citizens. Allowing property owners to fence in our high voltage lines is jeopardizing this safety.

If you have any further questions, please let me know.

**OPINION NO. 97-004 - VARIANCES AS IT RELATES TO USE OF CITY  
RIGHT-OF-WAYS**

**Syllabus:** Under current law, the Board of Zoning Appeals may not issue a variance as it relates to use of City right-of-ways or utility easements. Civil complaints, injunctions and criminal charges may be filed when zoning code violations exist. License Agreements may be issued by the City Manager as it relates to the use of City properties and right-of-ways so long as it relates to a lawful act.

---

***REQUESTER APPROVED AS NON-CONFIDENTIAL  
ATTORNEY WORK PRODUCT***

**TO: Brent Damman, Zoning Administrator**  
**BY: David M. Grahn, City Law Director** D MG

Your request for my opinion is as follows:

Is the Board of Zoning appeals an applicable board to hear a variance related to use of City right-of-ways, utility easements, or the like? What is the proper course of action when Zoning Code violations exists, specifically the improper use of utility easements?

Specifically, you have requested that I advise you as to a proper course of action related to an illegal construction of a fence over a City utility easement that is prohibited pursuant to Section 1127.11 of the City's Code which states: **"No building, structure, fence, wall, hedge, shrub or tree shall be placed or erected over a utility easement."**

City Code Section 141.01 cloaks the Zoning Administrator with the duties to: **enforce all adopted building and zoning codes pertaining to erection, addition to, alteration, repair, removal demolition, location, use, occupancy, and maintenance of all buildings and structures within the City limits.**

Under present law, a variance application with the Board of Zoning Appeals is not applicable to setback requirements since Section 1117.04 of the City's Code limits the power of the board to hear only **"dimensional variations"** not setback variations. Moreover, Section 1117.06 of the City's Code specifically states in pertinent part: **"The Board of Zoning Appeals shall hear and decide appeals and requests for dimensional variances from the requirements of this Zoning Code."**

A person may appeal a decision of the Zoning Administrator to the Board of Zoning Appeals pursuant to Section 1117.04 of the City's Code which states in pertinent part:



**“The Board is vested with the following jurisdiction, power and authority:**

**(1) To hear and decide appeals from any order, requirement, decision, or determination made by the Zoning Administrator under this Zoning Code.”**

Section 1117.05(c) of the City’s Code states:

**“(c) The Board may reverse or affirm, wholly or partly, or modify the order, requirement, decision, or determination of the Administrative Officer in its findings on appeals or requests for exceptions or interpretations of this code. The concurring vote the majority of the current members of the Board shall be necessary to reverse any order, requirements, or decision made by the Zoning Administrator.”**

It is my recommendation that you as Zoning Administrator advise, in writing, a person about to construct a structure(s) over a City utility easement of your decision as to the permissibility of construction and notify him/her of his/her ability to appeal your decision in accordance with Section 1117.05 of the City’s Code. Finally, if construction is still very likely to happen, and your decision is not overruled by the Board, you may seek injunctive relief through the Common Pleas Court through the filing of a civil complaint pursuant to Section 1115.05 of the City’s Code, and you may also proceed with the filing of criminal complaints pursuant to Section 1115.99 of the City’s Code. You should put any possible offender on notice that any person who recklessly violates that provisions of the City’s Zoning Code is subject to misdemeanor charges for each day a violation exists, punishable by a fine not more than \$1,000.00 per violation. Each day a violation continues shall constitute a separate offense.

You should be further advised that Section 133.03 of the City’s Code does authorize the City Manager to issue land use license agreements related to City property or right-of-ways. Such provision would allow the City Manager to permit the use of the right-of-way so long as the use is otherwise lawful. In the case of using the right-of-way for an unlawful purpose, such license would be an inapplicable instrument.

**In conclusion then, it is my opinion and you are advised:**

Under current law, the Board of Zoning Appeals may not issue a variance as it relates to use of City right-of-ways or utility easements. Civil complaints, injunctions and criminal charges may be filed when Zoning Code violations exist. License Agreements may be issued by the City Manager as it relates to the use of City properties and right-of-ways, so long as it relates to a lawful act.

**RESOLUTION NO. 43-98**

**A RESOLUTION AUTHORIZING THE ERECTION OF A FENCE ON A CITY UTILITY EASEMENT AT THE LOCATION OF 1525 THERSHAN, NAPOLEON, OHIO; AND DECLARING AN EMERGENCY**

**Whereas**, the City has provided in Section 1127.11 of the City's Zoning Code that, "No building, structure, fence, wall, hedge, shrub or tree shall be placed or erected over a utility easement", and

**Whereas**, a request has been made by William Moden, Jr. that he be permitted to construct a fence upon the utility easement due to an alleged uniqueness and condition of his property; and,

**Whereas**, a fence is required pursuant to 1127.08 (b) of the City's Zoning Code to restrict entrance to a swimming pool and currently no fence is erected at the rear of the lot where a swimming pool exists, thereby creating a public health, safety and welfare concern;

**BE IT RESOLVED BY THE COUNCIL OF THE CITY OF NAPOLEON, OHIO:**

**Section 1.** That, notwithstanding the provisions of Section 1127.11 of the Codified Ordinances of the City of Napoleon, Ohio, it shall be permissive for a fence to be erected on or erected over the City's utility easement at the rear of the address known as 1525 Thershan, Napoleon, Ohio within the boundaries of Lot No. 53 of Twin Oaks Subdivision 3rd Addition.

**Section 2.** That, access to the easement area must be provided by means of a gate or by removal of the fence by the owner, or at the owner's expense, immediately on the request of the utility company or municipality.

**Section 3.** That, such permission may be withdrawn by the City upon the passage of a resolution by Council at any time without penalty or recourse, and without liability whatsoever to the City, its officials, agents or employees or any other utility company.

**Section 4.** That, the owner has been put on notice of underground utilities, including but not limited to electric power lines, telephone communication lines, television cable lines, natural gas lines, and storm drainage lines; that no digging shall commence without proper notification to all utility owners; and that all construction, erection, digging and the like shall be at the sole risk of the owner.

**Section 5.** That, it is found and determined that all formal actions of this City Council concerning and relating to the adoption of this Resolution were adopted in open meetings of this City Council, and that all deliberations of this City Council and any of its committees that resulted in such formal actions were in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code and the Codified Ordinances of Napoleon Ohio.

**Section 6.** That, if any other prior Ordinance or Resolution is found to be in conflict with this Resolution, then the provisions of this Resolution shall prevail. Further, if any portion of this Resolution is found to be invalid for any reason, such decision shall not affect the validity of the remaining portions of this Resolution or any part thereof.

**Section 7.** That, this Resolution is declared to be an emergency measure necessary for the immediate preservation of the public peace, health or safety of the City and its inhabitants, and for the further reason that this legislation must be in effect at the earliest possible time to allow for erection of a fence that will enclose an inground swimming pool, a fence that is required to prevent injurious conditions to the public; therefore, provided it receives the required number of votes for passage as emergency legislation, it shall be in full force and effect immediately upon its passage; otherwise, it shall be in full force and effect at the earliest time permitted by law.

Passed:

5/4/98

Michael J. DeWit  
Michael J. DeWit, Council President

Approved:

\_\_\_\_\_

\_\_\_\_\_  
Donald M. Stange, Mayor

VOTE ON PASSAGE 5 Yea 2 Nay \_\_\_\_\_ Abstain

Attest:

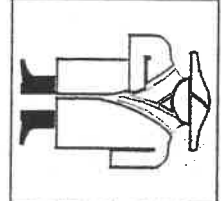
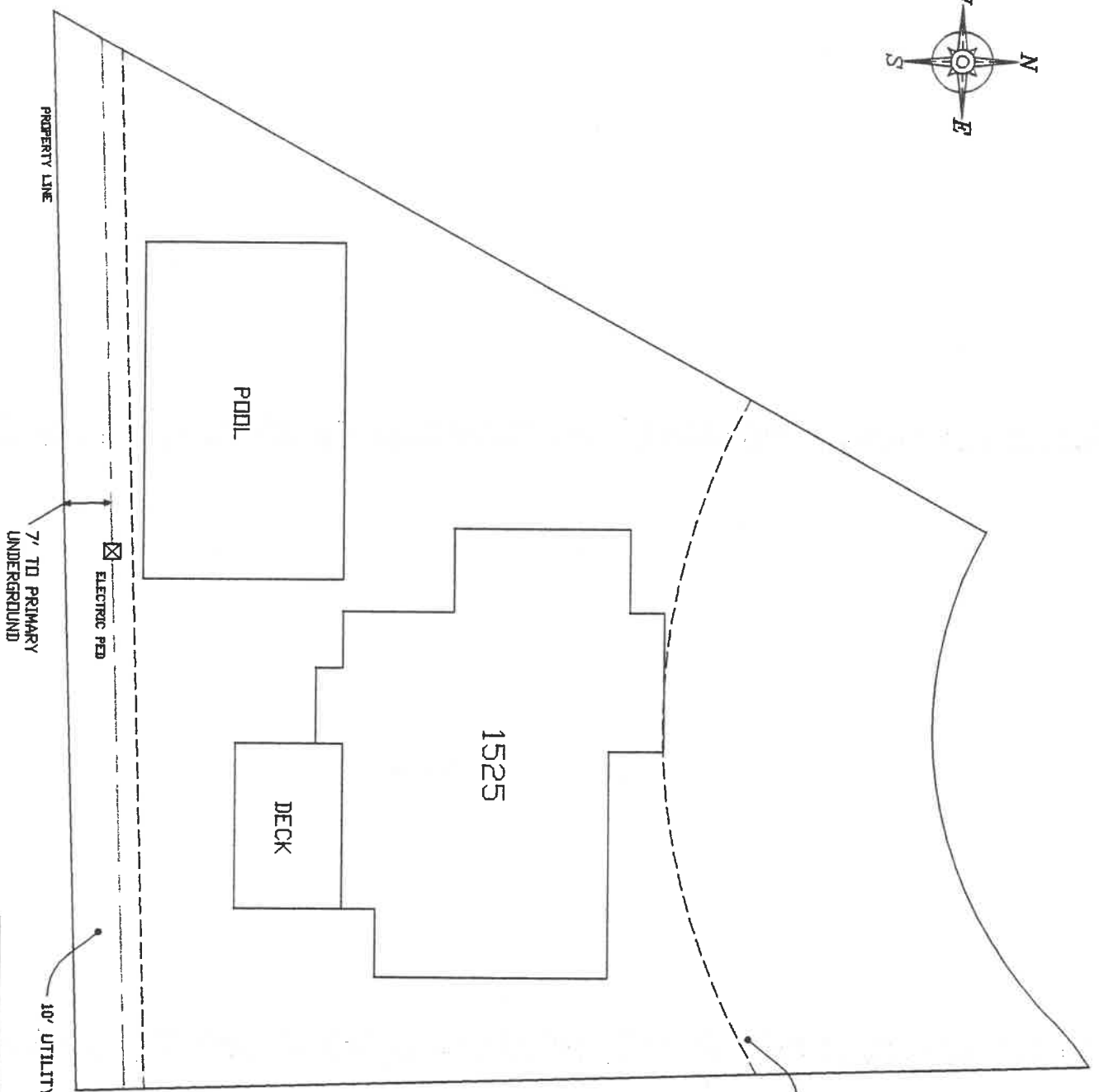
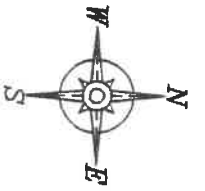
Gregory J. Heath  
Gregory J. Heath, Clerk/Finance Director

I, Gregory J. Heath, Clerk/Finance Director of the City of Napoleon, do hereby certify that the foregoing Resolution No. \_\_\_\_\_ was duly published in the Northwest Signal, a newspaper of general circulation in said City, on the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_; & I further certify the compliance with rules established in Chapter 103 of the Codified Ordinances Of Napoleon Ohio and the laws of the State of Ohio pertaining to Public Meetings.

\_\_\_\_\_  
Gregory J. Heath, Clerk/Finance Director

FenceUtility N:\lotus\wordpro\lawdir\resoluti 5/1/98 2:25PM

Presented to Mayor Stange on May 4, 1998.



<b>Napoleon Power &amp; Light</b>			
17775 Industrial Drive Napoleon, Ohio			
ITEM	1525 TERSHAN DRIVE		
DATE	W.O.#	J.O.#	DRAWN BY
4/29/98			MTD