

City of Bay Village
PLANNING, ZONING, PUBLIC GROUNDS AND BUILDINGS COMMITTEE
April 4, 2016
City Hall Conference Room 6:30 p.m.

Member Present: Councilwoman Karen Lieske, Chairman
Councilman Marty Mace
Councilman Paul Vincent

Others Present: Councilman Dave Tadych
Director of Public Safety/Service Thomas
Mr. Bob Lyons, Property Maintenance Inspector
John Cheatham, SAFEbuilt, Inc.,
Law Director Ebert (arrived at 7:20 p.m.)

Audience: Dick Majewski, Lydia DeGeorge, Richard Fink, Kit Newell, 573 Humiston; Karen Winter, 475 Humiston; Mary Walsh, 604 Humiston; Jenny and Chris Hartzell, 577 Humiston.

Mrs. Lieske called the meeting to order at 6:30 p.m. Mrs. Lieske welcomed the residents of Humiston Road in Bay Village to this meeting. The purpose of the meeting this evening is three-fold. First, we are going to ask general questions to clarify Codified Ordinance 1351, and what was done in a particular situation on Humiston Road, and offer the residents an opportunity to speak their concerns. If time permits, there will be review of additional items on the agenda: Codified Ordinance 1373.01, Storage in front of building line, and Codified Ordinance 521.12, Rubbish deposit and collection.

Mrs. Lieske thanked her Council colleagues, Safety/Service Director Thomas, and Chief Building Official Cheatham for their presence this evening,

Review of Codified Ordinance Chapter 1351 – Determination of Grade Lines

Mrs. Lieske asked Safety/Service Director Thomas what his normal protocol is in the determination of grade lines.

Mr. Thomas referred to Chief Building Official Cheatham to state the process that begins with an application for a building permit for the construction of a new home.

Mr. Cheatham stated that when an application for a new home is submitted, it is accompanied by the submission of a topographical map which is prepared by an engineer. Mr. Cheatham displayed the topographical map for the property on Humiston that is under scrutiny presently. In the past, Mr. Cheatham explained, there was a City employee, Jim Wasniak, who viewed the property and set grade. When Mr. Wasniak retired, Mr. Jim Resar was contracted independently to perform this service. After Mr. Resar's contract expired, the City asked CT Consultants, the

City's consulting engineer, to set grade at the direction of the Safety/Service Director. CT Consultants set the grade prior to construction and after construction. The cost they were charging was running high, and the builders were unhappy. The City decided to allow the builders to hire their own engineer and verify to the City that the grade was in accordance with the requirements of the ordinances, which is essentially that all drainage must stay on the property in question. As long as water is kept on your own property, even though the house is higher than others, it is technically to code. Mr. Cheatham stated that the purpose of the meeting tonight is to discontinue this practice, and noted a worst-case scenario on Humiston Road that recently occurred. He has spoken with Director Thomas and Mr. Bob Lyons about making the code stricter and putting some parameters whereby there is only a maximum properties can be above adjacent neighbors. Mr. Cheatham stated that he has put a hold on construction on the two adjoining lots on Humiston which are owned by the builder in question.

Mrs. Lieske asked for a review of the steps which occurred when this particular builder applied for a permit for construction on the lot on Humiston Road. Mr. Thomas stated that the builder hired Polaris Engineering to do the topo work for him, and submitted the topographical map with the plans for construction. Mr. Cheatham stated that the plans were reviewed and everything appeared to be in order. The first indication that it was not in order was when the inspector went out for the foundation inspection and relayed that it was high in the ground. At that point they contacted the builder and said the topo that was submitted did not match what was on site. The builder made the comment that it was because of gravity drainage so they would not have to put a lift station in for the sanitary sewer, and he determined himself that he was going to set it higher. He did not inform the City or bring it in for re-review. SAFEbuilt, Inc. had no knowledge until it was done. The builder then submitted a revised as-built topo and that technically has never been accepted. There was nothing they could do at the house at that point. Mr. Cheatham stated that you can't make them tear out a foundation and put a whole new one in. It would have cost approximately \$25,000 and that probably would not have been supported if we would have taken it to court. At this point it is all about fixing the ugly situation that exists and stopping it from happening again.

Mrs. Lieske asked where it says in the existing ordinance that we can have the builder provide their own engineer to set grade. The existing ordinance states specifically that this is the responsibility of the Director of Public Service and Properties.

Mr. Vincent asked the role of Jim Wasniak, the employee who used to set grade in the City. Mr. Lyons stated that Jim Wasniak's title was City Planner. He was neither an engineer nor a surveyor, but he would set grades on new projects. Mr. Vincent stated that we have then, for a long time, ignoring verbatim the ordinance. It is not like this is the first time the Public Service Director hasn't gone out to set grade. Mr. Wasniak retired eight to ten years ago. Mr. Vincent asked when it was switched over that we would rely on these builders. Mr. Lyons stated that this occurred just over a year ago. Mr. Cheatham explained that Jim Resar, who was contracted independently to set grade after Mr. Wasniak retired, was charging per house about \$150 or \$200 to the builder. CT Consultants came in and charged an average of \$1200 to \$1600 per house. There was a meeting of those in the City in authority and they suggested having the builders provide their own engineering services.

Mr. Cheatham explained that the builder pays a \$750 deposit. Jim Resar would bill the City for his services. The Finance Director would refund the difference in what Jim Resar billed and the amount of the deposit. The builder was used to getting back several hundred dollars out of the deposit, and then all-of-a-sudden they were not getting anything back and having to pay additional monies because of the high fee of CT Consultants.

Mr. Thomas stated that it is common practice among many cities for the builder to provide their own engineer to give back to the City their plans for review.

Mr. Cheatham stated that the revision of the ordinance will require that the grade is set before the footers are poured which will prevent the builder from doing what was done in this instance on Humiston. He said it would be unreasonable to ask the builder to tear out a \$15,000 basement and redo it all. Mr. Tadych commented that he does not think this would be unreasonable. Mr. Cheatham stated that he does not think it would hold up in court. Mr. Tadych stated that this is the second time this has happened in his ward. The first time was on Lake Road. This is the second time within four months that we have had this problem. It is a problem that has been existing. Mr. Tadych stated that it is ridiculous that we did not make that builder tear out that basement. There was a house on Lake Road, next to the cemetery that was out of code and he was made to do a lot of extra work to bring that house to code. The builder was held responsible. Mr. Tadych stated that he does not understand the reasoning to save a builder \$20,000.

Mr. Cheatham stated that the Ohio Revised Code that regulates the building codes, in this case the Residential Code of Ohio, has added language to Chapter One that says anytime we make them go backwards we have to look at the economic feasibility, and if it is going to cost more than what it is worth we cannot make them do it. Mr. Cheatham consulted with Law Director Ebert; this would not hold up in court. Mr. Cheatham stated he called Columbus and they said no judge or magistrate would ever make them tear that basement out when they could put in drains, retaining walls, or something at a lot less expense. Mr. Cheatham stated legally he cannot make the builder take out the foundation.

Mr. Vincent stated that Mr. Cheatham said earlier that when this happens it is permissible as long as the storm water stays on the property. Can we honestly say that everything stays inside the property without harming the neighbors? Mr. Cheatham stated that you can never honestly say that everything stays within the property unless it is bowl shaped. There will probably end up being retaining walls and long yard drains. They will have to find a way to get all that water out to the storm sewer without going north, south, or west.

Mrs. Lieske stated that depending on the cost for the builder of rectifying the situation, the builder would have an option to take out the foundation.

Mr. Vincent stated when they are excavating, they obviously have to pour a foundation. Do we ever review at that stage? Right now, there is a whole house over there.

Mr. Cheatham stated that typically they call for a footing inspection. An inspector goes out, he doesn't look at how deep it is, he is not shooting grade, he is merely saying here are the plans, the footing is this wide, it is this deep, and the soil is solid. That is all he is looking at. Next inspection the foundation is in and we are looking at water proofing, drain tile, and gravel. At that point it is what it is. That is what happened on Lake Road and some other places. We get out there and it is done at that point. We are trying to stop that by having someone go out before they pour a single drop of concrete. They would shoot that grade, and say this measurement, plus the thickness of the footing and the height of the wall is going to make it too high – dig deeper. A majority of builders would be in favor of having grade shot before the footings are poured.

Mr. Mace asked how the City will be doing the determining of the grade. Mr. Thomas stated that City employees Bob Lyons and Dave Banjoff will handle the responsibilities of setting grade. There will be a fee affixed which will cover their time. This will allow the City to have more control, and the recommendations of Mr. Lyons and Mr. Banjoff will come right back to John Cheatham.

Mr. Mace asked if Mr. Lyons or Mr. Banjoff are engineers or surveyors. Mr. Thomas stated that they are not. Mr. Banjoff has the necessary training – he is the City's construction crew leader, has been for years, and is very well qualified. He will be working with Mr. Lyons to make sure it is done correctly. If someone doesn't agree with their findings they would have to pay and go out and have it done themselves. Mr. Cheatham stated that the builder would still have to present all of the engineering. It is just a matter that we are not trusting them to say it meets the approved engineering.

Mr. Vincent asked if we are going to determine how we are going to deal with this grade issue on Humiston. Even with the new ordinance, is there something that addresses a mistake and who will pay for it. Mr. Cheatham stated that he has talked with the builder's agent. Their engineer sent a two page letter on how to fix it with a new topo that reiterated what they would do. Those documents were referred to Bob Greytak of CT Consultants on Thursday, March 31, 2016. Mr. Greytak has rejected the proposal for remediation and said it actually makes the situation worse. They will have to go back to ground zero and start all over again. We are not letting anything go forward on the next two lots at all, until the situation on Lot No. 10 is rectified and confirmed by CT Consultants that all the water will be directed on that property. The next two lots, Lot 9 and Lot 11, will not be permitted for construction until CT Consultants accepts this as a fix for all three lots. Mr. Tadych asked Mr. Cheatham what he meant when he said "ground zero." Mr. Cheatham stated that he meant just going back to the beginning with new engineering.

Mr. Vincent asked if we have to accept permits for building from every builder or do we have the power to restrict certain builders. Mr. Cheatham stated that his understanding, although he would have to refer this to the Law Director, is that we could not, short of a crime, take his registration and not allow him to build in the City. The builder in question owns a number of lots in the City.

Mr. Vincent stated that the existing ordinance has minor misdemeanor language for violations and asked if the Law Director has considered this. Mr. Vincent noted that there must be a monetary penalty for the ordinance to have any teeth.

Mr. Cheatham stated that the governor of the state put in the “Common Sense Initiative” which requires looking at the technical and economic feasibility.

Mr. Vincent noted that builders have insurance for this type of thing.

Mrs. Lieske asked Mr. Cheatham to forward to the members of the committee any of the paperwork and correspondence with the engineer that the builder provided concerning this particular situation on Humiston. Mr. Thomas stated that when the information is received they would forward it to all the members of the Planning and Zoning Committee. Mrs. Lieske asked for any paperwork that is already there and any type of documentation that shows this was reviewed by Mr. Thomas or Mr. Cheatham and everything looked okay. Mr. Thomas stated that he did not review anything after it was submitted.

Mrs. Lieske stated that the ordinance will have to be changed to reflect that the Building Department will review and verify the grade.

Mr. Mace asked if there is a record of when the Building Department went out and communicated that the foundation was off and you were not happy at that time and then they came up with this new topography map. Mr. Cheatham stated that at that point the communication was verbal. Mr. Cheatham stated that he called the builder and said they needed to talk about this. The builder came in and said he would submit an as-built topo.

Mr. Mace said that in the meantime between getting that new topo we went from a foundation to a house now standing. Mr. Cheatham stated that there was nothing to make him stop building. He stated that if he had the option to tell him to take the foundation out, he would have. But, he knew he didn't have that option so he allowed him to continue to build upward but told him and his agent, Melissa Wank, that we have to have this ordinance fixed but your house will probably be built by then.

Mr. Mace stated that the whole street goes downhill to Lake Road. He asked how the topography was beforehand. It looks like this lot was on an angle. He asked if the former house was built into part of the hill, or was it because there was a half basement underneath it. Looking from Lincolnshire, it seems to be level with the house at the corner. He built up to that. The problem is that the house to the north is at the three foot mark on the windowsill. It almost seems like he added to the hill. A resident stated the original house was a much smaller house. It was one of the first houses on the street. There used to be a creek next to the house.

A resident stated that she lives next door, across from Lincolnshire, and they can look right into her house. She could never see the former house before.

Mr. Mace asked if looking from the Lincolnshire angle, to the west at the property line, is there a natural swale; does the water drain to the back of the property. He noted that part of this solution may be going in that direction.

Mr. Vincent asked what it is costing for the CT Consultants review of the Humiston property. Mr. Thomas stated that he does not know. Mr. Vincent suggested that any charges of the new topographical map and the review be charged back to the builder. The City should not pay for this poor engineering. Mrs. Lieske stated that CT Consultants is paid a monthly fee by the City, and she would agree with Mr. Vincent.

Mrs. Lieske called upon the residents present to express their concerns. She stressed that all of the Council members have been by the property and taken a close look because they feel it is important to see first-hand what the situation really is. Mrs. Lieske expressed that she can totally sympathize and understand their feelings about what this has done to their street, to their neighborhood, and to their own property. The Planning and Zoning Committee is taking a close look at the ordinance and will continue to take a closer look after the things heard this evening and having a revised ordinance to present to the Council of the Whole.

Chris Hartzell, 577 Humiston, stated that it sounds like we are all on the same page. The negative piece of that is that it doesn't do them any good whatsoever. The committee is going to have to put something with teeth in it because this builder knows what he is doing. He is doing it because it benefits his pocket. That's why he made the change. He didn't want to pay the money and he knew that no one here was going to make him do anything to withdraw his foundation. He knew what he was doing. To think otherwise is silly. He builds a ton of houses; he is no fool. He is making fools of us; we are watching this happen and he is just going to do it and keep doing it. That is extremely frustrating. Mr. Hartzell noted that he does not know the rules and guidelines and he knows that the City wants to stop him and do what is necessary and he appreciates that. But, to not say put a stop on it until we can figure this out, or could you have sent a threatening letter. Make him respond. Say get that foundation out of here. It doesn't meet the code; you chose to skip it, get it out of there. Make him pay an attorney. Make him come to you and say my attorney says we can do this anyway because of this law or that law. Why are we the ones sitting back and saying we can't win that fight so we won't even send a letter dictating what he should be doing? Maybe he would have torn it out, it is doubtful but why not put it on his onus and make him figure it out. We have every right to put a stop to something that is not being done the right way, and let him figure out why he should keep proceeding. As far as the grade, the existing ordinance states that the grades are to become level with the property next to it. Mr. Lyons stated that it never really said that; it talks only about containing water. Mr. Hartzell read a section of the code that states "When a lot or section of the ground is graded it shall be incumbent upon the owner of such lots to provide that the lot is graded to the natural grade of lots adjoining such lot." Mr. Lyons said that partially gets you there, but it speaks mostly to drainage. Now, what we want to put in is something that says your house can't be any higher than about six inches from the property line. As long as he does a contour down to meet those other lines adjoining his he would technically meet that code.

Mr. Hartzell continued, stating that these lots are 45 feet wide and the home is going to be a heinous looking part of the street. Many people have commented on what a beautiful street Humiston is with a mixture of homes and what he has done there is going to look ridiculous. The only person winning is him; he is making a fortune. He is putting up a bad project. He is going through the City of Bay Village because Bay Village is really sought after right now. People are dying to get in Bay Village. I am all for people doing that, but we need to take more control over what is being built in the City because people are making a ton of money on our City by doing exactly what he is doing. In twenty years when the windows are failing and there are cracks in the foundation those values are going to go down and I will have a 3,000 square foot home across the street from me that is selling for less than the person paid for it. People want to get into this City and builders know that. The builders need to have a few more hoops to jump through or a Board to review plans before the houses are built. Tremont does that and they are very picky when you build there. Builders will jump through those hoops because they know the money is in Bay to build. They can pay an extra \$1,200 for a grading thing to be done by whomever we choose.

Kevin Moriarity, 569 Humiston Road, stated that he concurs with everything Mr. Hartzell said. Mr. Moriarity's concern is the storm sewer capacity and the potential problems by tripling the amount of water from those three lots. Mr. Moriarity asked if the builder was grandfathered into having a 45 foot width on his lots. Someone said there is a 50 foot minimum in Bay Village.

Mr. Lyons said it is a square footage according to the residential zone. Mr. Moriarity asked if there is a width requirement. Mr. Cheatham stated that there really isn't. If there is an existing parcel, they are legal to build on them as long as they keep the setbacks. If you make a new lot today in that district it is 50 foot wide.

Mr. Hartzell asked about the space between the homes. Mr. Lyons stated that is taken into consideration by 30% width of the lot. On that particular property, he built on the center lot and in looking it up on the Cuyahoga County GIS today his driveway and home are inside the lot lines.

Mr. Cheatham stated that there are non-conforming lots all over the City. As long as they are existing before the ordinance was written there is nothing that can be done unless they would change the ordinance.

Kit Newell, 573 Humiston, echoed the sewer concerns. The former owner of the home had mentioned to him that the area of Lot 9 to the north was built on an old creek bed or a pond when that area used to be a golf course. If I were buying that I would have extreme flooding concerns because during any type of moderate rain you would see standing water. In all the storms last year, Mr. Newell stated he was spared flooding. From a visual standpoint, it is difficult to imagine that there are going to be two more houses there. Mr. Newell stated he appreciates the fact that the committee is on their side and doing what they can moving forward.

Karen Winter, 475 Humiston, stated that she agrees with everything that has been said. Her only issue is that she is a little disappointed that we didn't catch this sooner when we could have made

a change. Especially now with these three big houses going up and there is not much we can do about it now. We are kind of stuck. I wish there is something that we could have done before to stop that process and keep the integrity of the street, especially knowing we can't stop this issue and nothing is done to even check to make sure the proper foundation was going in. We do pay a lot of taxes here and take it for granted that those things are being done.

Mary Walsh, 604 Humiston, stated that she appreciates what has been said and is wondering now that everything is on hold for the other two houses and because these other two houses will have to be lower will there be more issues there. Is there something we can do to stop that, or will that fall into the new ordinance? Their grade is going to be lower now because it is going to have to be. Is there something that is going to come into play and make this even more difficult because their grade is going to have to change? Mr. Lyons stated that it will depend on what the engineering consultant of the City, Bob Greytak, determines.

Mr. Vincent asked if plans have been submitted for the other two properties. Mr. Cheatham stated that the plans have not been presented. Mr. Vincent stated that if we were able to solve the 45 foot width minimum and increase it to 50 feet....Mr. Cheatham said that would never work.

Mr. Cheatham stated that he has testified as an expert witness in a lot of things over the years and there is just a great thing among judges, magistrates and courts that they will never take someone's right. He bought, and no matter what we feel about him, he bought three parcels with the knowledge he could build on them and there would be no way we could now come in retroactively and turn something to where he could no longer build on them. Had he come to me with one lot, he would have never been allowed to split into three. He could have split it into two. They were three existing parcels. Anybody could have bought those three parcels and built on them.

Mr. Tadych noted that the other two homes are going to cause a problem for him in grade because with the higher house in the middle it is going to be very difficult with the other two, one on each side.

Richard Fink, 30102 Wolf Road, stated that he is not familiar with this particular situation, but there are broader issues that have come up that are similar to this. He stated that he would like to make a few points that Council might want to consider. First, the fact that Polaris did the engineering and works with the builder, you would probably want to look at something related to a conflict of interest. You would want to look at having independent engineers. You might want to look at your ordinances to make sure you don't have a conflict of interest situation. Secondly, to Councilman Tadych's point, I have lived in Bay Village since 1982 and there have been numerous times that people just wontedly violate ordinances because they know they can get away with it. They flaunt the code, they build something and everybody says we can't do anything about it. It is really incumbent upon the administration and the Council that if you are going to pass ordinances have ordinances that have teeth in them. There is a difference when the law says you have to look at the comparative economics. That's true, if he had come back to you. But what he did was willfully violate the law. Every state I have done business in and

practiced in that obviates just about anything. If someone willfully violates the law then those economic protections are gone. Something to talk to the Law Director about. Mr. Fink added that if he lived in that area and knew that Lot No. 9 had been a stream and had wetlands and water on it he would call the Environmental Protection Agency. If you look at the nursing home, they had similar issues. It could possibly be that Lot No. 9 is not a buildable lot.

Mr. Cheatham stated that the Environmental Protection Agency and the Cuyahoga County Soil and Water District will not look at anything under than one acre.

Mr. Hartzell asked if there is any reason they shouldn't be concerned about possible flooding issues with three more homes being built. Mr. Thomas stated that he would have to look at flooding reports to see how many basements were flooded there and then look at the disbursement of water based on footage and provide some answers.

Mrs. Lieske asked the members of the committee if they want to review the proposed new ordinance for Chapter 1351 and table the other two agenda items until the next meeting of the Planning, Zoning, Public Buildings and Grounds Committee meeting. Mr. Mace and Mr. Vincent agreed.

Mr. Vincent suggested that something about conflict of interest should be included in the revision. Mr. Lyons noted that Polaris Engineering is not the builder's engineer; they were hired by the builder to perform this work. Mr. Vincent stated that it still is someone that is paid by him. Mr. Vincent would prefer that the City's engineer be looking out for the City rather than someone the builder hires. He would like to have something in the new ordinance for that protection.

Mr. Vincent stated that he would like the new ordinance to have some financial teeth. We should also be enforcing the minor misdemeanors. Mr. Cheatham stated that he agrees 100% and did suggest to Mr. Ebert that a meaningful penalty should be included in the new ordinance. He noted that \$500 means nothing to someone building an expensive home. Mr. Tadych suggested a percentage on the value of the home being built.

Mr. Vincent noted that a close eye will have to be kept on Lots 9 and 11 on Humiston to see how those progress.

Mrs. Lieske stated that an additional meeting will be scheduled for the Planning, Zoning, Public Buildings and Grounds Committee on Monday, April 11, at 6:30 p.m. in the conference room of Bay Village City Hall.

Mr. Ebert arrived at this point. He was informed by Mrs. Lieske of the concern of possible conflict of interest when the builder hires the engineer for the setting of the grade. We would want to be sure that the City actually reviews the grade. The committee also would like the penalty section reviewed to see if any more teeth for enforcement could be added.

Mr. Ebert stated that the City's engineer should not only look at the topography but how the structure being built relates to the neighboring homes.

Mrs. Lieske asked if the ordinance will need to reflect that Director Thomas won't be checking the grade, but two people on his staff will be assigned those duties. Mr. Ebert stated that there is an engineer available that will do this work for a flat fee on a contractual basis. The expense is passed onto the homeowner. If one of Mr. Thomas's staff members establishes the grade, it is still incumbent upon Mr. Thomas to actually see it and sign off on the report. Mr. Ebert stated that regardless of what application comes forward it is still going to have to have the City's engineer approve whatever is being proposed for the grade level and that then passes on to Mr. Thomas to refer that out. It is not a big delay, but that way it is earmarked in the Building Department that they have a permit that goes to the Director of Public Service for engineering before the grade being set. The ordinance would state that the Director of Public Service and Properties would set the grade, or one of his employees, or an engineer that is retained by the Department of Public Service and Properties.

Mr. Vincent noted that it will be necessary to make sure the fees get passed back to the builder, and the deposit is paid up front. Mr. Cheatham stated that the deposit is paid up front and is \$800. That amount is adequate if the new gentleman Mr. Ebert is referring to is engaged by the City to establish the preliminary grade and the finished grade. Mr. Cheatham noted that once two-thirds of the amount of the deposit is used, the Finance Director bills for additional funds.

The ordinance as it exists creates an issue for the builder of the Humiston property. There has been a red tag placed on the two adjacent lots. Work is being done inside the home. The grade of the two adjacent properties is going to have to be reflected to try to compensate for the property that is being questioned. The builder's engineering report has been rejected by the City's consulting engineer.

Mr. Ebert will prepare a draft of a revised ordinance for review of the Planning, Zoning, Public Buildings and Grounds Committee on Monday, April 11, at 6:30 p.m.

Mr. Vincent suggested strong language stating that violations of the ordinance will result in the City re-excavating. Mr. Cheatham repeated to Mr. Ebert his previous explanation that indicated that the builder cannot be held to correcting his violation if it creates an economic hardship, according to the Ohio Revised Code. Mr. Ebert noted that a Charter City can be more restrictive and is something he will look at further as it applies to this case.

The meeting adjourned at 7:35 p.m.

Karen Lieske, Chairman

Joan Kemper, Secretary