

Minutes of a Meeting of
BOARD OF ZONING APPEALS
Held August 16, 2012

Members Present: Burke, Bruno, Dostal, Norton, Taylor, Tyo

Absent: Campbell

Also Present: Dan Galli, Director of Building and Engineering
Bob Lyons, Building Inspector, City of Bay Village

The following persons signed in this evening: Dave Campbell, 400 Fordham Parkway,
Georganne Vartorella, 23718 Cliff Drive, Richard Statesir, 23718 Cliff Drive

Chairman Norton called the meeting to order at 7:33 p.m.

A copy of City of Bay Village Codified Ordinance 1127.01 was posted and Mr. Norton advised that the code states that the Board shall consist of seven electors of the City not holding other municipal office or appointment. If all members are not present at a meeting, the applicant may request a delay so that all members may be present. An applicant may delay a decision up to two times.

Motion by Taylor, second by Dostal, to approve the minutes of the meeting held August 2, 2012 as prepared and distributed. **Motion carried 6-0.**

**Jim & Susan Flynn
613 Welshire**

**C.O. 1350.03 –Variance of 48 square
to construct shed**

The request of Jim and Susan Flynn of 613 Welshire was not heard due to a lack of representation on the part of the applicant. The applicant will be contacted and notified that the item will be placed on the agenda for the September 6, 2012 meeting, if they so wish. That will be the final opportunity for this application to be heard, since they have had two previous opportunities to be heard and were not present. {C.O. 1127.01 (c)}

**Richard A. Statesir, MD
Georganne Vartorella, MD
23718 Cliff Drive**

**Letter of Objection
to proposed plans for new home
cabana, and swimming pool at 23724
Cliff Drive**

Mr. Norton advised that this application is relevant to the next item on this evening's agenda, which is an application for a special permit to build a cabana at 23724 Cliff Drive

Bridget O'Donnell
23724 Cliff Drive

C.O. 1141.04 (J) Special Permit to
build a cabana

Mr. Norton stated that it is his understanding that the cabana is no longer being considered for construction. Alice O'Donnell addressed the Board and stated that she does not want the cabana to block her view. Her husband and she have decided not to proceed with the cabana.

Mr. Norton advised that the objection of Richard Statesir and Georganne Vartorella to the construction of the home and swimming pool will be addressed, taking the cabana out of the discussion.

A copy of a letter dated August 13, 2012, to Mrs. Alice O'Donnell, P.O. Box 450651, Westlake, Ohio, regarding the property at 23724 Cliff Drive, from George Hess II, P.E., was submitted to the Board this evening by Daniel E. Galli, Director of Building. Mr. Norton stated that the information contained in the letter indicates that the pool will not present a problem for the following reasons as outlined in the letter:

- “1. The geotechnical report lists weathered shale at a depth of 5 ft +/-, which is a very solid structural material, which will have more than adequate bearing capacity for the pool and deck.
2. The plan will be to set the foundations for the deck well back from the top edge of the bank and then cantilever the deck out close to the edge of the slope (similar to the neighbors to the east). This will provide a stable, long-term foundation for the deck so that slight weathering of the slope will not affect the deck.
3. The pool will be well back from the edge of the slope and will be installed pursuant to the geotechnical report and all zoning requirements.
4. The design of the deck and pool foundations will be completed by a registered professional engineer.
5. All zoning regulations and engineering standards will be followed as required.”

Mr. Norton asked Drs. Statesir and Vartorella if they had obtained an engineering report that would present evidence that differed from that presented by Hess and Associates.

Mr. Dave Campbell, 400 Fordham Parkway, attorney-at-law, and neighbor of Dr. Statesir and Dr. Vartorella, addressed the Board, stating that the engineering report of Hess and Associates indicates that the geotechnical survey only went to a depth of 5 feet. Dr. Statesir stated that when they built their patio and erosion project, they hired a company that does tunnel work for the State of Ohio, and when they excavated they had to go down 14 feet to reach anything solid to tie the beams for the patio. The weathered shale has very poor lateral shear strength. Direct weight bearing directly on top is probably fine, but because it is a sedimentary rock it can split it quite easily horizontally. If there is any lateral movement it fractures and falls apart. Dr. Statesir stated further that his company felt it was better to go through all that to reach solid bedrock to tie the steel beams and build the Statesirs cantilevered project.

The O'Donnell pool will be built to a depth of six feet. The patio will be constructed to a depth of five feet. Mr. Campbell stated that since the engineering report of Hess & Associates has just been received, they would raise the question of whether this would be sufficient to be approved today, considering the reference to the neighbors' construction to a depth of 14 feet to reach solid bedrock. Mr. Campbell added that based on what they have done they would question whether they are deep enough to get to bedrock and whether the construction would potentially cause erosion. He asked that the Statesirs be given the opportunity to review the Hess & Associates report just received this evening.

Mr. Campbell stated that the Statesirs are unclear as to the Board's position as to the large oak tree on their property. He stated that it is clear that the tree is still going to be at risk. According to the minutes of the previous Board of Zoning Appeals meeting, some members recognize that risk and others say it is something between the homeowners. There has been no discussion about what would be done if the tree is damaged.

Mr. Taylor asked if the pool is at existing grade, or going down six feet and the foundation is going to be six feet below that. Mr. Taylor was informed that there is a huge difference between the cantilevered terrace next door and the pool. The terrace is cantilevered over the hillside so it makes good sense to go down to bedrock. The pool is being constructed 15 feet away from the cliff. The pool will be constructed to a depth of six feet. The edge of the pool will be at current grade.

Mr. Norton stated that the June 7, 2012 report of Solar Testing Laboratories, Inc. refers to the fact that Solar Testing Laboratories did test borings, and the test borings would support the decision that the pool is not going to be a problem. The report also goes on to say that prior to the pool being constructed, but after the excavation has been done, "All foundation bearing surfaces should be inspected by a qualified geotechnical engineer to verify suitability of the bearing materials for support of proposed loads, and to ensure that no unsuitable materials are present." Because they can make assumptions by test borings, sometimes those assumptions

don't bear out. They are suggesting to the homeowner that it be inspected after the excavation. Mr. Norton stated further that as it relates to the swimming pool, the pool is divorced from the edge of the cliff, and at this point the Board must rely on the document written by George J. Ata, P.E., President of Solar Testing Laboratories, Inc., dated June 7, 2012. Mr. Norton noted that it appears that from an engineering standpoint, the pool is a safe pool as far as it affecting neighboring properties. Mr. Norton advised that this does not address the patio.

Mr. Taylor asked if the house is next to the tree, or the pool is next to the tree. He was informed that the house is next to the tree. The pool is irrelevant to the tree. Mr. Taylor stated that it has a tap root down, and digging can be done close to it without hurting it, but the tree must be nursed.

The architect for Mrs. O'Donnell stated that they are not planning on having heavy equipment drive across the property on a regular pace during construction. They are going to try to be as gentle as they can towards the roots that are able to be saved on the property, but there will be over-dig for the basement.

Mr. Taylor noted that the letter from the Forest City Tree Protection Company dated July 23, 2012 to Dr. Georganne Vartorella and Dr. Richard Statesir advises that "Any roots, 2 inches and larger in diameter, that need to be cut should be cut cleanly with an appropriate tool such as a chainsaw, handsaw or cutoff saw. These roots should not be cut or removed with a backhoe or other construction equipment as this generally leads to splitting the root, and sometimes the root splits all the way back to the truck. Cleanly-cut root ends will regenerate fine roots, torn or split ends do not regenerate roots very well."

Mr. Norton stated that he is not sure that the issue of the tree is something that belongs in front of the Board of Zoning Appeals. He asked the law regarding trees with roots wandering beyond the property line.

Mr. Campbell stated that he would not disagree if this were just a tree in a yard that was not close to the lake. But, as with the pool, there is potential impact on the properties on the cliff due to erosion. There has not been a lot of communication with the neighbors regarding what is going to be done about the tree. Mr. Norton stated that it sounds as though the neighbors are willing to try to do something, but it is unclear if they are legally obligated to do anything. Mr. Norton advised that the tree is 50 to 70 feet away from the cliff. The tree is not going to jeopardize the bank.

Mr. Mike Ward, Reminger Law Firm, representing the O'Donnells, stated the O'Donnells have the right to remove any part of the tree which infringes on their property, whether it be overhanging branches or tree roots. He stated that they did make an overture at the last Board of Zoning Appeals meeting when they offered to work with the neighbors, or their arborist, in

taking reasonable steps to do what possibly can be done to preserve the tree, but they do not have a legal obligation to do so.

Mr. Taylor stated that he had always heard that if you did anything to hurt the roots of your neighbor's tree you were responsible for anything that died on the tree. Mr. Ward offered to give Mr. Taylor the case citation from the Ohio Supreme Court.

Mr. Tyo asked if the same law applies if there is potential erosion in existence on the property as it is situated near the lake. Mr. Ward stated that the tree is well back from the cliff. He reiterated that the O'Donnells are willing to work with the Statesirs to try to resolve whatever issue is seen with the tree.

Mr. Norton stated that the Board of Zoning Appeals is obligated by ordinance to hear an objection to a building permit. That is being done this evening. As it relates to the tree, the Board of Zoning Appeals has no authority to change the law. The tree is subject to State of Ohio Law and the Board of Zoning Appeals has no authority over that.

Regarding the swimming pool, the pool is an allowed item. Mr. Norton stated that because the lot is tight, the Board of Zoning Appeals must follow the engineering report that says that the pool is acceptable and after it is excavated it needs to be professionally inspected to confirm that it is acceptable and will not hurt the neighboring properties.

Mr. Norton addressed the question of the patio, noting that the Hess & Associates Engineering, Inc. report dated August 13, 2012, refers to "Center the pool on the rear of the lot and add a 'structural' deck around the north side of the pool similar to the deck that the neighbors to the east have constructed." Mr. Norton noted that a variance or special permit is not needed from the Board of Zoning Appeals for the swimming pool. A special permit or variance from the Board of Zoning Appeals is not required for a deck. Building permits are required. The design of the deck around the pool, and as it extends north to the edge of the bluff needs to be submitted to the Building Department along with the engineering studies. The Building Department will determine whether there is any reason to involve the Board of Zoning Appeals.

Mr. Bob Lyons of the Building Department agreed that there is nothing for the Board of Zoning Appeals to do in regard to this construction as long as the construction meets zoning requirements. Mr. Norton stated that if there is a new objection, the Board would then have to hear the objection. At this point it is an engineering and design question that the Building Department can oversee, as well as the excavations and inspection of the swimming pool.

Ms. Michelle Lafferty asked if the same residential zoning requirements are being used for the properties on Cliff Drive or any lakefront property as are used for any other house or building in

residential areas in Bay Village. Ms. Lafferty was informed that the same residential zoning requirements are being used. Ms. Lafferty stated that there are serious concerns about the erosion question and whether or not the same zoning requirements can be applied to property where erosion problems have been acknowledged and have been dealt with and may be dealt with in the future, especially with the tree issue. Ms. Lafferty related that she does not know if Ohio law is settled on the question of whether or not the issue of how your building affects your neighbor's tree and what the liability is when the erosion question is inserted in that. She stated that she is not convinced that the issue is a resolved issue when you are talking about lakefront property with hundreds of narrow trees and erosion issues.

Mr. Norton stated that the tree that is under discussion is at least 60 feet away from the cliff.

Ms. Lafferty stated that it seems as though the soil samples were tested in and around the pool, but there doesn't appear to be any soil samples around the extension of the home itself. Since there is an extension onto a greater footprint, is there a question of structural durability? Shouldn't that soil be tested as well to insure that there is not going to be disruption in the waterfront area and is it unreasonable to ask for testing closer and farther down to where this home's footprint is going to extend to quite a larger residential unit? Ms. Lafferty continued, stating that she has also been made aware that there are incredible cement footings and enforcements in the foundation around the lakefront property of the home, and what kind of disruption is going to be caused when that is attempted to be removed. That is not something that is common knowledge, but is knowledge from the historical perspective of the people who live on the street. There seems to be other underground issues that should be examined that could potentially cause problems or structural difficulties. It may be a requirement that further testing be done to see what is there after excavation that may be necessary for removal to make sure there is not disruption to the foundation of neighbors' homes. Ms. Lafferty noted that she is providing this information because it has not been addressed and she believes it to be essential, especially given the location of the building site.

Mr. George J. Ata, P.E., President of Solar Testing Laboratories, Inc., stated that Solar Testing Laboratories was founded in 1969. They are a consultant to the City of Bay Village, and a consultant to many of the residents with homes on the lake, to assess erosion control issues, assess homes built on the lake with potential problems, and assess and design retaining walls. They have a massive amount of information about what type of soil there is in Bay Village. The three soil borings were drilled and hit refusal, meaning they could not drill any deeper with the equipment they brought in because the ground is so hard. The second issue to answer is the concern about whether the house will be situated on stable soil, which will be addressed by the Building Department when they inspect all the footings before they place any concrete or steel. If the Building Inspector has any doubt about the soil, they will raise a flag and the homeowner will need to resolve the issue with a soil testing company. Mr. Ata stated that they are very

comfortable that the shale is at 4' to 6' at the highest from the three borings. Away from the lake, the shale will be higher. The house is sitting on shale. There is no issue regarding the stability of the structure. The tree has stable soil and good ground around it. If it were anywhere closer to the cliff it could be a detriment to the erosion, not an enhancement, because the weight of the tree would push the cliff down with the tree.

Mr. Norton stated that the homeowner is given a building permit for the swimming pool. That requires an inspection by the city of the excavated area. At that point, the Building Department determines if there is any question. The foundation of the new home has to be inspected by the city and if the city has any question, because of the location on the shore line, the Building Department will tell the builder that they would like further analysis.

Mr. Bruno addressed Mr. Ata and pointed out that the first paragraph of his report dated June 7, 2012, reads that "The borings were drilled utilizing hand held equipment, the bottom of the borings (probes) encountered refusal at various depths." For the record, Solar Testing Laboratories, Inc. could not go any further than 6.7 feet for Probe 1; 5.7 feet for Probe 2; and 6.1 feet for Probe 3. From a stability standpoint, that is what the report is stating. Mr. Ata confirmed, in his opinion, that the soil is stable.

Mr. Norton noted that the borings were 23 feet, 18 feet, and 38 feet, respectively, away from the cliff.

Ms. Lafferty stated that the same standard applies to a piece of waterfront property as it would to an inland piece of property; this was not clearly stated here this evening. There is a difference in those properties that has to be considered.

Mr. Campbell stated that they disagree with the statement of Mr. Ward regarding the ability to do whatever they want with the roots of the tree that come onto the neighboring property.

Mr. Ward stated that the property owner has the right to eliminate any parts of trees that encroach upon their property so long as they use reasonable care. He reiterated that they are willing to proceed reasonably and work with an arborist to take reasonable steps. The existence of the neighbor's tree does not give them the right to prohibit the O'Donnells from building on their property.

Mr. Tyo noted that the issue of the cabana is off the record. The letter of objection remains to be voted on regarding its logic and legitimacy. Mr. Tyo invited Mr. Campbell to table the voting to give him more time to inspect the law. Mr. Campbell agreed to proceed this evening.

Mr. Burke stated that the Board at this point does not know where the pool will be located. The idea is to turn the pool sideways. The pool is permitted to be built in accordance with the zoning code. The Building Department will conduct their inspections before anything is poured or anything is put into place.

Mr. Norton noted that the Building Department is equipped to monitor the construction of the pool. The Building Department deals with issues such as proper excavations and proper foundations daily. Mr. Bruno noted that the Board of Zoning Appeals has not received anything from the Building Department in regard to the application or any variance that may be required. The Building Department must do their job first before there is anything heard by the Board of Zoning Appeals.

Mr. Bill Votruba, BBC Erosion Control, stated that he knows the area very well. The erosion in the area is about one inch per year. He stated that he worked on the property quite a few years ago and he has not seen much loss due to erosion.

Mr. Martin Reuben, owner of the property immediately adjacent to the west of the property in question, stated that he has been in his home since 1985. In the past two and one-half years he has lost three feet of property on the western side of the property. Last year he lost five feet on the eastern side of the property. The loss was from the top, extending down approximately 15 feet.

Mrs. Virginia Garver stated that she lives west of Mr. Reuben and they just lost a tree this last winter, and there are two more that are soon to go.

Mr. Ata stated that the closer the tree is to the cliff the more detriment there is to the soil. The tree pulls the soil behind it.

Ms. Amy Smith stated that the experience of the neighbors on this particular lot is greater than one inch per year. Ms. Smith asked for a point of clarification in terms of the soil samples. Will there be any soil samples taken before excavation for the extended footprint of the house?

Mr. Norton stated that the soil samples are not required by the Building Department.

Mr. Bob Lyons stated that it is a matter of terminology regarding different zoning. It is not different zoning. Mr. Lyons stated that he has been with the Building Department for 14 years. Prior to that time the standard has always been anything built within 50 feet of the bluff did require soil testing, which is not required in the rest of the city. The house is not being built within 50 feet of the bluff. Soil samples were required because of the other structures.

Ms. Smith stated that her reading of the blueprints is that the end of the house is going to extend much closer to the cliff than 50 feet. The architect responded that the rear setback line shown on the drawings is 42 feet, 11 inches from the edge of the cliff. There is another 12 feet beyond that before the house even begins.

Motion by Tyo, second by Bruno, that the letter of objection to a building permit for the home at 23724 Cliff Drive be upheld as proposed and delivered to the Board of Zoning Appeals. Mr. Norton commented that motions need to be made in the positive. A “yes” vote is upholding the letter of objection; a “no” vote is rejecting the letter of objection.

Roll Call Vote: Yeas –None

Nays - Bruno, Dostal, Norton, Tyo

Abstained – Burke, Taylor

Motion denied with 0 yeas, 4 nays, and two abstentions.

Mr. Norton advised that Daniel M. Galli, Director of Building, Engineering & Inspection, has delivered this evening a memorandum to the Board of Zoning Appeals dated August 16, 2012, from Mr. Galli, attaching a copy of an Adjudication Order submitted to the property owner at 319 Glen Park Drive. Mr. Galli asked the Board to schedule a hearing regarding this order at their earliest possible convenience.

Mr. Galli’s letter to Ronald and Barbara Kryc, 319 Glen Park in regard to their home addition at 319 Glen Park was attached advising that Building Permit Number 211001266 issued July 8, 2011 expired on July 9, 2012, and the opportunity to request an extension has expired. An adjudication order is being issued in compliance with Ohio Building Code Section 109. Little or no construction progress has occurred over the past twelve months. The open excavation has remained open and continues to be poorly protected. The existing structure is inadequately secured and weatherized. As such, the current site has been deemed a “serious hazard.” In accordance with Ohio Building Code Section 109.4, the site needs to be restored to a safe condition.

Completion of the adjudication order will be required within thirty (30) days of this notice.

The Board agreed to place this item on the agenda of the Board of Zoning Appeals for the September 6, 2012 meeting.

There being no further business to come before the Board, the meeting adjourned at 8:45 p.m.

Board of Zoning Appeals
August 16, 2012

Jack Norton, Chairman

Joan Kemper, Secretary