

Meeting Minutes of
Board of Zoning Appeals
Held January 19, 2023

Members Present: Jack Norton, Clete Miller, Jan Saurman, Dan Gess, Carolyn Young, Scott Bruno

Excused: Terry Burke

Also Present: Lauren Oley (Secretary), Eric Tuck-Macalla (Building Director), Mark Barbour (Law Director)

Audience: Rob Haladay, John Monroe, Elise Auvil, David Campbell, Matthew Schafer

**Full recording of the meeting is permanently available on the City of Bay Village website under Government/Board of Zoning Appeals/View Most Recent Agendas and Minutes/Media*

Mr. Norton called the meeting to order at 7:30 p.m. and introduced the first item on the agenda the approval of the minutes that were held January 5, 2023.

Motion by Mr. Bruno to approve the minutes as prepared and submitted.

Motion Passed 6-0

1) John Monroe on behalf of Elise & Steve Auvil 23920 Lake Rd.	Applicant is appealing a decision made by the Building Director pursuant to section 1127.03. A violation was issued by the Building Director November 4, 2022 regarding the required removal of the hedges on the Auvil's east property line. They are seeking a variance to CO 1163.05 (g) to maintain the hedges at a height not to exceed 4'4" due to the topographical conditions at the property.
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Mr. Norton introduced the next item on the agenda as 23920 Lake Rd.

Mr. Monroe introduced himself as representation for the homeowner Elise & Steve Auvil. He'd like to ask the board to hear from the building director as to whether or not the issue has been corrected. They believe it's a threshold issue. If the building director indicates that the alleged violation has been corrected then there is no point to the appeal. As you know, the appellant was cited for having a hedge that exceeded the codes limitations for opacity and height, but as you can see from the recent photos the applicant spent \$1,700 to have the hedges cut down and thinned out. As you all know, these are perennials, but they have no leaves for up to 5 months of the year. They believe that they comply with the spirit, intent, and letter of the code. Obviously, the code doesn't want a situation where people have 10' high bushes and you can't see the vista looking out to the lake. Everyone can see from the photographs that the hedges have been trimmed and thinned out and they may comply with the city ordinance.

Mr. Tuck-Macalla commented that they appear to be in compliance with the code as he understands it. It's 75% open right now. He can't say what they'll be in the spring or summer or moving forward, but if they're maintained where they are now, they'll be code compliant.

Mr. Norton commented that they'd be simply putting off the resolution. They may look like this now and be 75% open presently, but their very nature for 6-7 months of the year they'd be in violation as a hedge that did not have the opacity requirement. It may take it off the table temporarily.

Mr. Monroe stated that they're appealing the notice of violation so if the inspector is now saying there is no violation, then he's not sure what the next step is. Secondly, it's not just that the leaves are gone - if you look at the spacing between the plants and you look at what the landscaper did, they're thinned out so it won't be a wall of bushes. They'll be ornamental plantings. If this board feels it's necessary, they'd request a variance to maintain the bushes in a code complaint manner less than 4'4" tall and the basis for the variance is the erosion study that was submitted. Page 8 of the KS Engineering report the engineer specifically request that the bushes be maintained so as to help with the erosion problems. A lot of the erosion problem can happen from above - those bushes are helping to stabilize the cliff and we'd request a variance to maintain them in compliance with the code.

Mr. Norton replied that the erosion study is a factor as it is for all lakefront properties. In this case, there is also a thought to be considered that this land, as it goes to the west, drops away quite quickly and in effect now and even in the future it's not going to act as a visual barrier. The neighboring property has vegetation just beyond their pool that does some blockage - not uniform, but as they mature, they'd become more of an issue. He believes they'd be determined not to be a hedge arrangement. This bears some consideration, but they still have the fact that a determination was made that they did violate, at the time they were observed, so now it becomes an issue of- should it be 2' so it reduces the blockage and still maintains the integrity of the root system?

Mr. Barbour stated that if it's a complaint fence it can be 4'4". So, if you're contemplated a reduction in height, you should keep that in mind.

Ms. Young added that a fence would need to be 75% open.

Mr. Bruno commented that it certainly seems the applicant is trying to remedy the situation based on what the building director observed. Perhaps a compromise would be 3'. That's plenty of attractiveness and in the spirit of trying to maintain the site lines and compliance - perhaps this would be a good variance compromise.

Mr. Campbell introduced himself as council for the Francati family. A variance would mean that the hedge can come back. The last time they were here the discussion was that the fence was going to have to come down due to erosion. To think the fence can come down without the hedges coming down...He stated that he lives on the lake and has taken down trees that overhang the cliff. They've been told that they don't protect from erosion. KS puts that in every erosion report he's seen. From their standpoint, if the fence is leaving the hedges are coming out as well of that there is no question. To give a variance to someone on the lake that would block a view - he doesn't see how a variance could be given to a grown hedge. They'd be in here every few months. If they have remedied, for now, then it seems and issue to come up in the future, but not a variance. It appears to him that this matter is moot and it will come up potentially in the future, but maybe they keep it thinned out.

Mr. Norton clarified then that, from his client's standpoint, if the hedge is maintained at the height of the fence at 4'4" would that be acceptable?

Mr. Campbell replied that the building director has stated it's resolved so from his perspective the issue is moot and they are strongly opposed to a variance because that will give rights away. How would they ever control that? He may disagree with the building director, but he's the one making the determination.

Mr. Barbour summarized that the complaining party, building director, property owner have all stated that there is no longer a violation.

Mr. Campbell interjected to say that he isn't saying there is no violation. The building director issued the violation. If he's saying there is no violation currently – it's moot. He's not saying there isn't a violation – he wants to be clear.

Mr. Barbour stated that it appears that the matter is moot until potentially a later date. He would just caution them on entering a decision based on speculation. That could be problematic for the city going to forward in a circumstance like this.

Mr. Norton stated that Mr. Barbour's point is well taken and maybe that concludes it at this point. It's not an issue that is before this board. The original question was, 'do we uphold the building director's decision', but the building director has pulled his decision.

Mr. Saurman commented that the building director issued a violation saying 'remove it' and it has been removed to the satisfaction of the building director and so that part is moot. They also have a request before them for a variance. So, the question is will that be withdrawn?

Mr. Bruno inquired if they needed to make a finding of fact.

Mr. Monroe answered by saying that he's not so sure there was a violation in the beginning of this, but none the less it sprang out of another appeal. Does this homeowner want to be here every month? He hopes that the building director isn't going to issue a violation every time the bushes have gotten too tall, too thick, or too wide and a neighbor is unhappy. This can go on and he can tell them if it needs to go on it will go on. The neighboring revetment is 10' over their property line. That's not right or fair, but his client is not complaining about it. Look at the pictures – the neighboring bushes are 6' tall, but they're not complaining about it. They just want to be done with this process. These bushes have been in this same position since 2004. The Auvil's build a gazebo, they build two decks, they built a swimming pool – all permitted, approved, and closed out with no issues. In the fall 2022 when the neighbor is upset, because they didn't get their way, there is a violation and they corrected it. They don't want to be back every month because another citizen is complaining. If the remedy is to seek a variance, they will seek a variance. They believe they have the evidence to support the practical difficulty of compliance. At the last meeting, the neighbor stated that they don't even have a problem with the bushes except for the arborvitae which was the subject of their appeal. They're in a circular loop.

Mr. Campbell pointed that a variance would be difficult to maintain.

Mr. Norton summarized that the building director has reviewed the situation and determined that there is no violation right now. The city does not send someone out to inspect every property as to how much in or out of compliance they are. It's something that is triggered by a complaint. When a complaint is made to the department then they are obligated to go out and make a determination. At this point, there is no complaint from the city to this property based on the decision of the building director. However, if they're asking for a permanent agreement to be able to keep this then we're getting into the height and the density which is very subjective. Rather than let this issue stand as it relates to the current building director's decision. He thinks if they are saying they want them to make a determination as to a variance it's their right and they can do that. He's not sure that's in their best interest.

Mr. Monroe inquired if the building director would state, on the record, that no further action is required on this violation.

Mr. Norton stated that they can, based on the date today – he’s already stated that right now, in its present condition on this date there is no violation. That has already been stated – as of today. That does not preclude a neighbor from saying, ‘they violated the spirit of it and now it’s not 4’ it’s 5’, etc.’ A neighbor can say whatever they want asking for relief from the city based on ordinances. When it was filed it was a clear violation of the ordinance, on lake front properties due to the density and the height. It doesn’t mean that everyone that is in this same situation in the city is going to get that letter, but when it is raised to the city, they’re obligated to address it. Personally, he’s not comfortable giving a variance that lives with the city.

Mr. Bruno interjected to inquire if the building director would prefer, that they have a finding of fact that the violation issued on 11/4/2022 has been remedied as of today’s date and they move with an affirmative vote to that point and leave it at that.

The board proceeded to discuss the standard method of resolving violations, the best path moving forward, and if the finding of fact is necessary.

Mr. Barbour stated that since this is a public meeting, with minutes, whatever the condition was that led to the violation of November 4th no longer exists that the condition is now satisfactory to the city of Bay Village.

Mr. Norton stated that what he believes Mr. Barbour is stating is that in effect it’s sort of been pulled from their agenda because there is no violation currently as determined by the building director. If it’s been pulled from our agenda then there is no further action required on their part. It’s all moot.

Mr. Saurman inquired if the applicants’ request for a variance withdrawn?

Mr. Monroe replied in the affirmative.

2) Robert Haladay 30508 Maple	Resident is appealing a decision made by the Building Director pursuant to section 1127.03. Mr. Haladay is questioning the Building Director’s approval of a sidewalk at 30516 Maple Drive. It is the resident’s opinion that a sidewalk is a structure, as defined in C.O. 1149.01, and should be 3 feet from the property line. <i>Tabled 1/3/23</i>
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Mr. Norton introduced the next item on the agenda as 30508 Maple adding that the board has had opportunity to review the application and visit the site.

Mr. Haladay inquired if everyone got the materials he sent over today.

The board confirmed they received copies, but Mr. Norton hadn’t had an opportunity to review the documentation. Ms. Oley provided him with a paper copy.

Mr. Haladay stated that he understands the idea of the applicant of other instances. His main problem with Mr. Barbour’s memo is that this will depend on prior applications of the building code. He thinks there are no similar situations. This is above grade. This clearly violates the chapter 1351 where it talks about the

continuation of grade. He'd ask Mr. Tuck-Macalla if on his, phone call approval, of this 2' slope pathway if it was a grade permit that was issued. His assumption is that it wasn't because it was put in above grade. All these other words, these non-structure structures that were in Mr. Barbour's memo they all have mention in the code specifically. They still don't have a good title for this entity or structure. It's simple that they don't have a good title for it because there haven't been a lot of things like this because they're considered the foundation. In fact, it was poured as a foundation. It was presumed that it was a violation, to be so close to 3' of his lot line, that the solution was to not call it a foundation by putting a cut into it, but for all intents and purposes it's still a part of the foundation. Per Mr. Barbour's memo, he stated that the applications in the pasts of these other name entities considered of entities that were not above grade. Last time Mr. Norton stated that all these other things mentioned were level with grade. This is clearly above grade where he can show that it's at least 8" above his property line. He took a few pictures that he thought would be the most dramatic. There are two different spots that he measured. No matter what they do if they put dirt in to level it will be a 45-degree angle straight down. There is no way that water will not be coming onto his property. He has another picture from this morning, after 5 minutes of rain, and it shows puddles. He knows there are going to be downspouts, but the issue is that they have an above ground permanent garden structure only 3' to the north behind the concrete platform – which he's not complaining about. So, if there are 3 downspouts they will have to run east or west because it cannot run north and be disbursed there because its above grade. With a hard rain he doesn't see how it's not going east to the lowest point. If you go further west, onto their property, that 3' alleyway created by the concrete of the accessory structure and garden structure it actually rises a little bit more. The middle of the property is higher. Unless they create a French drain or a retaining wall right there it's coming onto his property. He anticipates that all these potential solutions are going to be more expensive than just removing what is illegal. It's clearly in his mind against multiple ordinances it's a building and it was poured as a foundation and it's not supposed to be within 3' of his property line. He assumes the homeowner, who is an engineer according to his wife, designed this concrete pad to drain onto his property. On the original plans it was 5' of grass and somewhere along the line it went to 3'. At that point there is 3' of grass to absorb all the water, but now there is only 11" before it hits his property. The applicant continued to discuss the water distribution, his disappointment in the memo, violation of ordinance, the fact that it's above grade, and property damage to him.

Mr. Matthew Schafer introduced himself as the contractor with Schafer Development, who is completing the project in question, advising that he's here to shed light on the situation and hopefully come to a resolution. The sidewalk was not poured with the foundation there is a piece of expansion next to the one course of block that sits on a 12"x12" footer. Previously there was a shed that was probably a 1' to the property line.

Mr. Haladay interjected to say that it was absolutely not 1' from the line. He has documentation from the original shed saying it was 6', but he believes it was 4-5' from the line.

Mr. Schafer continued saying that he thought it was pretty close, but either way the existing shed had to be torn down. They had to shave the grass 12" to put the concrete pad into the building. He doesn't think they interrupted too much of the grade, but there does seem to be an existing swale that comes together on the property line and heads out towards the back. If Mr. Haladay saw a puddle there this morning that is because they have no backfilled against the concrete dirt. Right now, it is a bit of a drop off. He said that they would backfill the 4" that is there now.

Mr. Haladay stated that it's not 4", but 8".

Mr. Norton stated that it's not worth arguing out the height. The real question in front of them today is 'is this a sidewalk?', as what a city understands the definition to be, and is its location any different than if this was a driveway at the same grade. A driveway is allowed to be basically to the property line. He doesn't see any

difference. The fact that there is a potential drainage problem is just that – a potential problem. The gutters are not up so they don't know. Where the gutters go isn't to be debated because it's all hypothetical. Later if there is a drainage question then it's a fair thing for him to want to address. Right now, they're here to decide if this is considered a sidewalk in the normal thinking of the city and therefore it can go up to the property line.

Mr. Haladay stated that a sidewalk is next to the street.

Mr. Norton advised that the city doesn't use his definition. They have gone over it for years and years and it's no different than a driveway or walkway which can be right up to the property line. We're agreeing that this is a sidewalk, but we're not saying it's a structure since those need to be 3' from the line. The city interprets this as a sidewalk which can go right up to the property line.

Mr. Haladay stated that any structure does need to be 3' according to 1149.01.

Mr. Norton replied that this is not considered a structure as the city defines a structure.

Mr. Haladay remarked that the city ordinance states a structure as 'anything other than a building built or erected' – the goal posts were moved last meeting because there were things that made allowance and Mr. Barbour memo stated that they needed substantial height of a structure or other entity.

Mr. Norton inquired if he would call a driveway a structure?

Mr. Haladay replied that he would see a driveway as a structure if there was no mention of driveway in the code, but there are. It becomes clear that there are specific instances that proceed it being called a structure because it's been defined in other ways. He doesn't think driveway is a good example. It's scary when your own lawyer tells you how to vote. He continued to state his opinion that there is a problem here.

The board and applicant proceeded to discuss grade of concrete, slope of dirt, and current rainfall.

Mr. Schafer stated that they can use commercial grade gutters that would be 6" instead of 5" which will go out the northside towards his client's property. He urged Mr. Haladay to wait until he has dirt around the property.

Ms. Young made the suggestion of a French drain instead of dirt boarding Mr. Haladay's property.

Mr. Schaefer replied that he doesn't think it would be of any use. He'd have to route it all the way to the front of the property or tie in to the existing downspouts. It would be an expensive remedy that may not even be needed.

Mr. Haladay continued to explain his concerns regarding drainage and his desire to share photographs from this morning's rainfall.

Mr. Norton stated that the current conditions will not exist in the future. The rain will be collected and aimed towards the back of the structure so it's well away from this property line. He's sure the contractor is taking this into consideration to ensure this water is properly disposed of.

The board, applicant, and contractor continued to discuss if this concrete would be considered a sidewalk given the grade and pitch and the proposed gutter system which will divert rainwater.

Mr. Norton advised that they're here to appeal a decision made by the building director. If they agree with the applicant then the building director's decision is reversed. The board makes motions in the positive so if they

agree with Mr. Haladay's request, it's a yes vote and if a vote is negative then they're agreeing with the building director.

Mr. Bruno clarified that a vote of 'no' means they're supporting the building director.

Mr. Barbour clarified that in his memo he stated that whether they call it a sidewalk or something else doesn't matter. From his perspective it's a poured hard surface. In the 4.5 years he's been the law director, the 4.5 years he was chairman of planning commission, and 4 years as councilman under 4 different building directors the city has always allowed hard poured surfaces up to the property line such as a driveway, patio, or poured pool deck because the second part of the definition has examples of what a structure would be. Mr. Norton has been on the BZA for over 35 years and that's always the way it's been done because that's consistent with the definition. He understands that the applicant disagrees with that. He has a right to a different opinion. He's expressed that eloquently he believes it's time to make a decision. There is nothing before them about drainage because the project is not completed. Drainage and grade are not taken into account until a final product is done. Once the product is finished if there are drainage problems they can be addressed at that time.

Mr. Haladay replied that Mr. Barbour stated, 'whether it's a sidewalk or something else it doesn't matter' – it absolutely matters. Because if it isn't a sidewalk, it would be a structure which is his whole point. If they can clearly and precisely call it a word that is somewhere else in the code he wouldn't have a problem with it, but they cannot. The second half of the definition includes a whole bunch of terms that are structures and there is no implication anywhere that this isn't a structure.

The board and Mr. Barbour continued to discuss the definition of structure.

Ms. Young inquired, of Mr. Tuck-Macalla, that in recent years they've seen homes torn down and new ones put up. Sometimes they're at different grades than where they were previously. Are there any reparations that are made with neighbors?

Mr. Tuck-Macalla replied that there is generally a swale between homes and you'll see those swales which can be 2-3 which carries water in either direction – usually to the street or a catch basin.

Mr. Miller stated that there was some discussion on some Humiston properties where a builder had placed new homes on formally 3 separate properties as a mitigation effort to keep water from entering the properties to the north, at a lower grade, they did add some amount of swale and yard drains.

Mr. Tuck-Macalla stated that generally new homes have yard drains in the back.

Mr. Miller remarked that when he was Councilman one of his constituents had an issue with the Normandy property shedding a great amount of water into their properties. This resident did have a yard drain but it wasn't equipped to handle the water from Normandy. Normandy created some drenches to divert the water and they were able to retain a lot of that runoff. On a very heavy rain there is still rain that comes off of the forest, but they have mitigated a lot of the water coming off the property. The sidewalk, or structure, as it's being discussed tonight is at a fairly steep pitch away from the garage so it's underfoot it's not an ideal sidewalk, but he doesn't think it was intended to be a flat sidewalk.

Mr. Bruno commented that the contractor intends to divert the water using a directional gutter system onto the property owner's property. It feels premature to implicate there is going to be a drainage problem.

Mr. Haladay reiterated that he has pictures if anyone wants to see them before the vote.

Mr. Norton replied that it's not pertinent. If it continues once the project is finished, he can go back to the building department with his concerns.

Motion by Mr. Saurman, **Second** Mr. Bruno, the appeal of Robert Haladay at 30508 Maple Drive be granted. The appeal is questioning the building director's approval of sidewalk at 30516 Maple Drive.

Mr. Bruno clarified a vote in the negative affirms the building director's decision and a vote in the positive affirms Mr. Haladay's position.

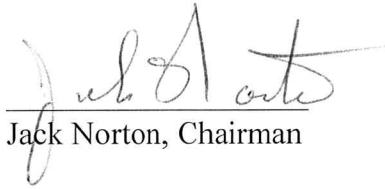
Roll Call Vote:

Yeas –

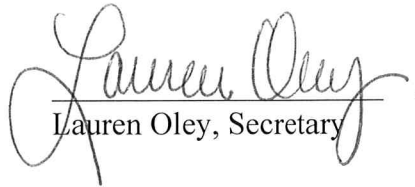
Nays – Norton, Saurman, Young, Miller, Bruno, Gess

Motion Failed 0-6

There being no further business to discuss the meeting adjourned at 8:35 p.m.



Jack Norton, Chairman



Lauren Oley, Secretary