

## BOARD OF ZONING APPEALS

July 21, 2011

The Board of Zoning Appeals met in Courtroom No. 1 for their regularly scheduled meeting. Mr. Behrens, the Chairperson, called the meeting to order at 7:30 p.m. and asked the Secretary to call the roll. Members in attendance were Mr. Callender, Mr. DeLeone and Mr. Horacek. Also in attendance were the Law Director, James Lyons; the Assistant City Manager, Doug Lewis; the City Planner, Russ Schaedlich and the Secretary, Tina B. Pomfrey.

**MINUTES:** The minutes of June 16, 2011 were not voted on at this meeting.

Mr. Behrens explained the procedures for this meeting and swore in those who planned on speaking for or against the variance requests.

### NEW BUSINESS

#### ADMINISTRATIVE APPEAL

**APPLICANT/OWNER:** Joseph & Lauren Audino

**DISTRICT:** R-2 Multi-Family Residential

**LOCATION:** 1799 North Ashwood Lane

In accordance with the Zoning Code of the City of Painesville, Ohio, an appeal has been submitted by Mr. and Mrs. Joseph Audino appealing the decision of the City Engineer regarding conditions of fence installation within a storm water easement. The Board of Appeals will meet to consider the appeal of the notice dated June 8, 2011.

Mr. Joseph Audino, 1799 North Ashwood Lane, was present for the meeting. Mr. Audino presented photos of the property and explained each of the photos to the Board. Mr. Audino stated that as his wife is a school teacher and he is a former school teacher, they are very familiar with rules and realize they are put in place for a reason and not made to be broken. He explained that they became familiar with the rules of the City via the City website. Since the City's website states that fences can be placed along the property line, Mr. Audino said he started to dig the post holes for the fence while filing for the permit. A City employee stopped by and informed him that a permit is required. When Mr. Audino told the inspector that the process had been started, the inspector replied "As long as you are aware, go ahead". In the meantime, he stated that he had set 7 posts in the ground with cement. Mr. Audino stated that the drain cap in the storm easement may be accessed without touching a fence panel, and additionally, the fence panels can be completely detached from the fence posts with removal of a few screws if the City must gain access to the easement.

Mr. Behrens stated that the concrete pad is the bigger issue. Mr. Audino replied that he poured the cement pad always with the intent to install the shed at a later date due to financial reasons. He said he went online and saw there were no requirements for a building permit for a cement pad. He thought he would pour the cement pad first, this year. Mr. DeLeone asked that when he poured the cement pad, was it always with the intent to install a shed on it eventually. Mr. Audino replied yes, and he read the restrictions for the shed that placed the setback requirements at 5 ft off the side yard and 3 ft off the rear yard. He indicated that he placed the pad at 5 ½ ft. and 4 ft. Mr. Audino said he had no problem placing the shed in the middle of the yard if it needed to be placed there, but he had no idea about the easements. And he invested \$300 into the pouring of 2 cement pads. It was recommended that he use a forklift to move the pad out of the easement and he indicated that it would be impossible to move the pad as there is 2 yards of concrete in the pad. Mr. Audino further explained that the cement pad is behind the easement, not impeding the flow of water to the easement.

Discussion ensued regarding the location of the shed pad to the storm sewer.

Mr. Horacek asked Mr. Audino if he did not see the location of the easements on the site plan. Mr. Audino said he did not have a copy of the site plan when he started the project; the City gave him a copy after he came into the office. Mr. Horacek wondered why the builder did not give them a copy of the site plan upon the house's closing. Mr. Audino replied that it might have been included in the paperwork; however, they were not aware of the easements and the easements were not completely listed on the survey that they referenced for the placement of the fence.

Mr. Behrens asked for comments from the Board and the City. Mr. Lyons commented that this is not a variance request. Easement restrictions don't have anything to do with zoning so when the property owner looked at the zoning restrictions on the website, he would not find anything in the zoning restrictions. The 20 ft. wide easement that exists is a storm drainage easement given to the City by the developer of the property for drainage purposes. This means that the City has the right to make decisions and policies. The City Engineer, Richard Lesiecki, indicated that these policies do not allow construction in the storm drainage easements. What the Board must decide is if, under section 11410.5 B under powers of the Board, the City made an error in the interpretation of the Zoning Code. Mr. Lyons said Mr. Lesiecki was not making a decision based on the Zoning Code, but rather, a policy decision from an engineering standpoint to benefit the City of Painesville and the subdivision as a whole. Although the property owners have made a strong argument that they suffered a disadvantage because of the location of the storm easement, those arguments are only germane to the Zoning Code and not on policy decisions as a result of the engineering of the property. Mr. Lyons commented that had the property owners come

into the Building Department before beginning work on the property, they would have been alerted to this situation before posts were set and pads poured.

Mr. Behrens stated that the Board's function is to now determine if the City's decision was made in error. He then asked for any other comments. Mr. Lesiecki, the City Engineer, stated that the purpose of the easement is to allow the City access to the sewer and the department policy is to allow fences within these easements as long as they are 2 ft. off the property line, where the storm lines are generally located. Mr. Lesiecki commented that this is a straight application of the policy because of the drainage and it is precedent setting if the policy is changed. The reason to not allow fencing right along the property line is to protect the storm drains from puncture by the installation of fence posts.

Discussion ensued with regard to gaining access to the yard drains where the fence was allowed to be installed.

Mr. Audino commented that the drain nearest to the fence in question is off the property line. He hired a company, Decks N Effects, to help dig the post holes and they never came across the line when digging. Additionally, Mr. Audino reiterated that the panels can be removed if needed.

Mr. Lesiecki replied that 2 ft. was chosen to allow for site variables. He said that although in this case, the sewer might be off the Audino's property line a little, the variable will be made up by the neighbor's line. Mr. Lesiecki stated that the department is unable to personally supervise each fence installation in the subdivision. Two feet off the line allows "cushion" on either side of the property.

Discussion ensued. Mr. DeLeone asked how the policy came to be. Mr. Lesiecki stated that it was already a policy when he started with the City in April 2007. The secretary stated that the policy was gradually developed as the subdivision was built. The policy was developed by the former Assistant City Manager, Doug Elliot. More discussion ensued.

Mr. Audino stated that he did not come before the Board with the intent to bend the rules simply because he asked. He commented that he is going to have to now destroy his fence and said that it is unfortunate that the City employee told him to go continue on and put up the fence; he was only being polite, but that is the only reason why the posts were placed in the ground. Mr. DeLeone commented that he thought the construction of the fence had already begun. Mr. Audino replied that no physical construction of the fence had begun at that point.

Mr. Schaedlich asked Mr. Audino why he did not contact Community Development with questions before he began work to make sure everything was okay beforehand. Mr. Audino replied that he and his wife are recently married and new property owners, and just naive to the process. More discussion ensued with regard to access to the easements.

Mr. Lyons asked Mr. Audino if the cost of 7 posts at \$50 apiece and 1/2 of the pad that is located in the easement is the issue. Mr. Audino replied yes, and added that there is the added cost of digging the holes (\$10 apiece) and the concrete to fill the holes. Mr. Lyons asked how long after he started building the fence did he learn from his wife that he couldn't get a permit. Mr. Audino replied she was at the building department about 1/2 hour. Mr. Lyons asked if all 7 posts were installed in that 1/2 hour. Mr. Audino replied no, not all the posts were installed, however, he continued to install them after his wife told him there may be a problem. Mr. Audino also said that it is impossible to move part of the cement pad, without expensive machinery, to the other side (of the pad) and insure that it is going to be level. Mr. Lyons asked the City Engineer if it is possible, in his opinion, to pour a level pad adjacent to the existing pad at a reasonable expense. Mr. Lesiecki answered yes, he believed that it is possible.

Mr. Horacek moved to grant the variance as requested. Mr. DeLeone seconded the motion. On roll call, Mr. DeLeone, Mr. Horacek, Mr. Callender and Mr. Behrens answered "no". Motion failed, 4-0.

Mr. Lyons stated the City will issue a decision to the Audino's and they have a right to file an appeal with the Court of Common Pleas within 30 days of the date of the written decision.

**REFUSAL NO. 2199**

**APPLICANT:** Orwell Natural Gas Company

**DISTRICT:** Business/Residential

**LOCATION:** 933 Mentor Avenue

**VARIANCE:** 1135.01(a) (3) C

An application has been submitted by Orwell Natural Gas Company requesting a variance of Section 1135.01(a) (3) C of the Painesville Codified Ordinances. The applicant installed a fence that is six (6) feet in height within 20 feet of the public right-of-way. Section 1135.01(a) (3) C states fences within 20 feet of a right-of-way or public street shall not exceed three (3) feet in height. A variance of three (3) feet (fence height) is being requested.

Mr. Paul Lehtonen, Operations Manager for Orwell Natural Gas Company, stated the company's position is to listen to the recommendations of the City.

Mr. Behrens asked the City of a decision was made whether or not this installation is a structure.

Mr. Schaedlich answered that the City's recommendation is approval of 933 Mentor Avenue as this installation is in a Business/Residential area. He stated the City has not reached a decision yet on whether or not this is a structure, but the fence is really the issue.

Mr. Lyons said that at the last BZA meeting he indicated it was his opinion that these above ground piping gas regulator systems are structures per the definition of Painesville City Zoning Code. Mr. Lyons said what he suggested at the last meeting is that Orwell should apply for a permit for each of these piping systems at each of these properties and the Zoning Administrator would make a decision if it needed a variance for installation; it then could be set for a variance request for a fence at the same meeting. Mr. Lyons indicated that Orwell did not apply for a Zoning Permit for the piping systems. This is a new situation for the City and for Orwell Natural Gas Company as well. Consequently, what exists now is a variance request for a fence that has already been installed around a structure that does not have a permit. Mr. Lyons stated that he thought that the Board could approve the variance request for the fence if they thought that the fence in this location was acceptable and make a condition of the approval that they apply for a zoning permit within so many days. The City then can enforce the conditions of the approval.

Discussion ensued regarding character of the neighborhood. The Chairman asked if the secretary if there was correspondence from the neighborhood. The secretary replied no, however, she received a letter from Dominion asking about permits regarding installation of metering devices within the City right-of-way. She showed the letter to the members of the Board.

More discussion ensued. Mr. Horacek moved to approve the variance request with the stipulation that 1.) Orwell Natural Gas Company maintains the enclosure and the plantings around the fence and 2.) Orwell Natural Gas Company applies for a permit for the installation of the meter piping within 7 days of the receipt of the letter to be sent by the City Planner. The letter will inform Orwell that permits for the meter piping are required. Mr. DeLeone seconded the motion. On roll call, Mr. Horacek answered yes. Mr. Callender, Mr. DeLeone and Mr. Behrens answered no. Motion denied, 3-1.

Mr. Behrens asked if it is possible, in the future, all (metering) installations be brought to the City before installation. Mr. Schaedlich replied that these installations were brought to the City prior to installation. The protocol is to bring all utility installations plans to the City Engineer. He reviewed the plans but was not aware of the need of a variance for the fence. He reviewed it and gave them the approval. Most of the time the utilities are in the City right-of-way and there is no need to get approval from any Board. The difference is that these installations are out of the right-of-way, on private property.

Mr. Lyons stated that Orwell has the right to file an appeal. Orwell could take the fence down and put landscaping around it. The issue of whether or not this installation is a structure will still be the decision of the City, however, that issue is not before the Board of Zoning Appeals. The only thing before the Board is the fence.

**REFUSAL NO. 2200**

**APPLICANT:** Orwell Natural Gas Company

**DISTRICT:** Single Family Residential

**LOCATION:** 521 Mentor Avenue

**VARIANCE:** 1135.01(a) (1) B

An application has been submitted by Orwell Natural Gas Company requesting a variance of Section 1135.01(a) (1) B of the Painesville Codified Ordinances. The applicant installed a fence within the front setback of the property that is six (6) feet in height. Section 1135.01(a) (1) B prohibits installations of fences taller than 3 feet within the front setback. A variance of three (3) feet (fence height) is being requested.

Mr. Behrens asked if the above ground piping is now installed at this time. Mr. Lyons established, through Mr. Lehtonen, that the piping that is approximately 4-5 feet tall was not installed until 2 weeks ago but the underground piping was already in place with a small connecting stub showing above the ground.

Mr. Behrens asked for comments from the Board or neighborhood. There being none, he asked for comments from Mr. Lyons. Mr. Lyons asked Mr. Lehtonen what the intent of Orwell is in this case. Mr. Lehtonen stated Orwell would like to withdraw the variance as requested but he does not have the authority to do so. He indicated that Orwell has no intention of installing the fence but instead, would like to plant fir trees and paint the structure green to camouflage it.

Mr. Horacek moved to approve Refusal 2200 as requested. Mr. DeLeone seconded the motion. On roll call, Mr. Callender, Mr. DeLeone, Mr. Horacek and Mr. Behrens answered no. Motion denied, 4-0.

**ADJOURNMENT**

There being no further business, the meeting was adjourned at 8:40 p.m.