

Meeting Minutes of  
Board of Zoning Appeals  
Held November 3, 2022

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

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

Audience: David & Sheila Francati, David Campbell, John Monroe, Elize Auvil, Terry Schordock

*\*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. He announced that the first two agenda items, 24736 Lake Rd and 536 Glen Park, have been postponed and introduced the first item on the agenda, the approval of the minutes that were held October 20, 2022.

**Motion** by Mr. Bruno, **Second** by Mr. Burke, to approve the minutes as prepared and submitted.

**Motion Passed 7-0**

1) Terry Schordock on behalf of Bay Presbyterian Church 25415 Lake Rd	Applicant is seeking a variance to section <b>1163.05 (d)</b> to install a 4' fence in the front yard of the property to keep Daycare children safely away from traffic.
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Mr. Norton introduced the next item as 25415 Lake Rd. Explaining that previously they've used a special permit for instances like these because if the business was to stop acting as a child care service, then the variance is no longer applicable. He also explained they'd seen this previously at the Bethesda Childcare center on Wolf Rd.

Ms. Young confirmed that the style of fencing is the same that was used at the Bethesda Childcare center.

Mr. Schordock remarked that every time they do any sort of event in that area, they have to set up temporary fencing and clarified where the fencing would go with Mr. Burke.

Mr. Norton remarked that in the past they required it to be 75% open and that if it ceases to be used for that purpose that it be removed.

Mr. Miller suggested that there be a larger buffer off the sidewalk. Partially for snow removal, but also because of the intersection there. People could come cruising through and people would be partially looking through the corner of that fence.

The board concurred and confirmed that 3' off the sidewalk would work with the applicant.

**Motion** by Mr. Burke, **Second** Mr. Bruno, that the Bay Presbyterian Church property located at 25415 Lake Rd. be granted a special permit for the placement of a fence not to exceed 4'4" in the location specified in the application except that the north portion of the fence, along Lake Rd, be at least 3' from the sidewalk. Further

provided that if the property ever ceases to be used as a church property, or for children’s activities, that the permit would cease and that the fence be 75% open.

**Roll Call Vote:**

**Yeas – Miller, Bruno, Gess, Norton, Burke, Saurman, Young**

**Nays –**

**Motion Passed 7-0**

2) Sheila M. Francati 384 Fordham Parkway	<b>1127.03 (a) Appeals</b> - Applicant is appealing the Building Directors interpretation of <b>1163.03 (b)</b> as to what a fence is and what can be enforced in section <b>1163.05 (g)</b> . This particular situation pertains to the shrubs and fencing in the rear yard of 23920 Lake Road.  <i>Postponed from 10.20.22</i>
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Mr. Norton introduced the next item on the agenda as 384 Fordham Parkway adding that the board has had an opportunity to visit the site and review the application

Mr. Burke remarked that he has a question for Mr. Tuck-Macalla before they get started. Is he correct in his interpretation that Mr. Tuck-Macalla determined that the arborvitaes are not enclosing and therefore not subject to the ordinance?

Mr. Tuck-Macalla replied in the affirmative.

Mr. Bruno pointed out that there are a few arborvitaes so perhaps they should be specific. They’re referring to the three large ones in the rear yard.

Mr. Burke went on to discuss the hedge/fence. As he understands it, Mr. Tuck-Macalla’s determination was that the hedge in the back is enclosing and therefore must comply with the ordinance meaning that it has to be at the level required by the ordinance up to a point that it’s 20’ north to the back of the fence. From that 20’ point forward it’s not permitted?

Mr. Tuck-Macalla replied in the affirmative.

Mr. Burke inquired if Mr. Tuck-Macalla determined where that 20’ point is?

Mr. Tuck-Macalla replied that he had. He had marked it previously, with some string, but that was a while ago and it’s no longer there. He also clarified that the 20’ begins at the northwest corner of the house, which sticks out further, but does not include the deck in that calculation. He also pointed out that he has not yet issued a violation for the hedge, but it can technically be enforced.

Mr. Burke inquired if they can review an appeal for a decision that has not yet been issued?

Mr. Tuck-Macalla replied that it was a decision of his. They’re appealing a decision that will be turned into an order based on tonight’s discussion. The whole point is not to issue a violation order that is going to be challenged. He’s looking for clarification/agreement on what is going to be enforced.

Mr. Norton clarified that the firebush within the 20' span must be maintained at 4' – correct?

Mr. Tuck-Macalla replied that it's possible to make the argument that the 4' rule doesn't apply because there is a pool. That part of the bush can be maintained whether that's 4' or 6'.

Mr. Norton stated that in the past they've determined that the swimming pool doesn't change the Lakefront determinations. He reconfirmed that Mr. Tuck-Macalla's determination that the arborvitae and other large shrubs 'don't count' because they're not enclosing. He pointed out that there are shrubs on the Fordham property that could be in violation if this board determines the arborvitae are in violation. In other words, since he determined the arborvitae on the Auvil property are not in violation neither are those.

Mr. Tuck-Macalla replied in the affirmative.

Mr. David Campbell, attorney for the Francati's, stated that they have some additional information/photographs for the board.

Ms. Francati provided additional photographs and information about green giants for the board.

Mr. Campbell stated that the key point here is 'what is a fence'. He proceeded to read from the definition of 1163.05(g) a 'Lakefront Yard, fence means any enclosing structure, permanent or planted, including walls, windbreaks, privacy screens, sight barriers, dog runs, hedges, shrubs or vines planted so as to constitute a fence.' These green giants were clearly planted to strategically so that as they grow, and they will continue to grow, to block the view of the Lake. If those green giants, and other shrubs/trees that are above 4'4", can block the view – then he, who lives on the Lake, wants to know. Can he plant green giants throughout his yard and block the view? He doesn't see how someone can strategically plant green giants to block the view. There is no view to the West. There should have been an order number 1. Number 2 when he's seen an email, not making a decision, but saying that this is draconian. They've got somebody who has reversed course and determined that this is draconian, but there are rules on the lakefront because people are paying a premium and a lot of taxes for those lakefront properties. It's there to protect everybody. If they don't want to have protection then they need to be clear about it. We can't have someone out here calling the rules, that should be enforced, draconian. He's never read such a thing. He's voted on these rules – the thought that they all voted on them. For him to read this and hear someone say, 'this is draconian and I'm not going to follow it'. These are not ornamental – these are green giants. If they come back in here in 2 years there won't be any view. Their rule, and he heard him say, once you give them this variance it's there. These green giants can grow and block this view entirely. What they should be coming in and say that they need a special permit, which should be rejected, but not somebody saying this is draconian. My tax dollars go to this person. He would just ask that it be applied and be applied evenly. If our city officials think it's draconian then present it to us on the ballot to vote and change it. That email troubles him as a tax payer in Bay Village and he hopes it troubles them as well.

Mr. Burke inquired if there was an order to be considered by the board tonight?

Mr. Campbell stated that they just heard that Mr. Tuck-Macalla considers it to be an order – he gave them the right to appeal. He would be especially troubled to appeal and then they have to wait until he goes and issues the order. Mr. Tuck-Macalla should have issued an order with consistent with reading the regulations and not on him believing it's draconian.

Mr. Barbour commented that it's his understanding that Mr. Tuck-Macalla determined that the green giants did not constitute a fence so there is no order to issue. The order, that would be issued to the Auvils, would be if he determined that the green giants needed to be trimmed down to a certain height. In that case, it could be the

Auvils in front of this board saying that they don't believe the green giants constitute a fence. In this instance, as it relates to the green giants/arborvitaes, the building department, within their discretion, interpreted the ordinance to read that those particular plantings do not constitute a fence. From that, the joining neighbors who are the affected parties, under our ordinance have a right to appeal his decision to not issue an order. They're appealing his interpretation of the order because they would like those plantings removed down to the 4'4" level and Mr. Tuck-Macalla is saying they don't have to be because it doesn't constitute a fence under 1163.03 as he's applying it.

Mr. Burke inquired, as to the hedge and fence, are they able to consider that this evening?

Mr. Barbour replied that it's his understanding that Mr. Tuck-Macalla stated that those hedges need to be adjusted.

Mr. Burke stated that they have been. He was on site today and they've been adjusted down to the fence height.

Mr. Norton stated that past the 20' they have to be eliminated.

Mr. Tuck-Macalla felt that before he issued that order, it had to come back to this body, his thought was 'let's get this straight' so that when he issues that order they all know what they're talking about. He's spoken about it with Ms. Francati. He told her that he would issue the order and she expressed a desire to try to work it out with the neighbor prior to his doing that. At one point, they came to an understanding that the hedge could continue all the way back to the lake as long as it stays 4'. Then the green giants were brought up and after reviewing the specific ordinance he determined that those green giants do not constitute a fence. He offered to both parties that they have the opportunity to speak to BZA about that part of the code rather than throwing a violation offer out there.

Mr. Barbour commented that there is a history of trying to work a resolution out and respectfully to both councils that have made an appearance tonight they are relatively late to the game. They were not able to come to a resolution between themselves so rather than have this come before this board twice the thought was they'd do it this way.

Mr. Burke stated that the ordinance reads you can appeal any 'decision' related to any ordinance. Would Mr. Barbour say that what Mr. Tuck-Macalla has done here is a 'decision'?

Mr. Barbour replied in the affirmative.

Ms. Young inquired when the green giants were planted.

Ms. Francati replied that they were planted two years prior to the Auvil's moving in – which was about 6' years ago. They were 6' or 7' height and they were the only things there besides the gazebo and they've grown tremendously. They grow to be 40-60' high with a 12'-25' width. They grow 3-5' per year and they have grown tremendously since they've been there. The Auvil's have filled in that area with privacy screen to contain the pool equipment and another screen in front of green giants. Those green giants are currently about 5' apart. They will be touching in 2 years and you cannot see through them. The one is within the 20' area and the other is within the area that is supposed to be open 75%.

Mr. Campbell added that the key point is that the homeowner that proceeded the current home owner clearly strategically placed them. You can't sit in the Francati's kitchen and not see that they were strategically planted with the intent that they would be a sight barrier as to certain areas of the yard. Clearly what that has done, at

this point, is that there is almost no view to the west and soon there will be absolutely no view if this is to be permitted. Their standpoint this is, without question, that this is a sight barrier and that is what they were put up for and that is why the Auivils are fighting so hard to keep them. They are a privacy to the Auivils, but they are detrimental to their fellow property owners who are trying to see the lake to the westside.

Mr. Bruno commented that there is a gap between the two green giants that are furthest south – that’s a fact. The intent of the code, as it pertains to lakeside fencing, is trying to maintain a view of a lake. However outside of the specific lakefront fence code, in our city, a resident’s sight lines end at their property. Is there anything this board can do that can make some sort of motion, based on the decision of the building department, that these giants need to maintain some sort of gap? Because there is clearly a line of sight with 5’ between them currently. He’s not dealt with this issue in his 12’ years on the board.

Mr. Burke stated that he doesn’t recall doing that either.

Mr. Bruno added that from a maintenance perspective it’s not the building departments job to be policing landscaping. This is a unique situation where two parties are contesting the placement of arborvitaes not placed in a line. The firebush is clearly a natural fence. These arborvitaes are separate, but could certainly grow together.

Mr. Barbour stated that they may want to give the Auivil’s and their council an opportunity to respond.

Mr. John Monroe, with the Lawfirm of Mansour Gavin, introduced himself and advised that he represents Steve and Elise Auivil who live at the property immediately west of the appellants property located at 23920 Lake Rd. They are asking the BZA to uphold the decision of the building inspector to not issue a notice of violation and uphold the fact that he found this property complies with the ordinances. The board recognizes that there may be a jurisdictional issue, as Mr. Burke pointed out, whether there is an actual decision to appeal, but putting that aside- the issue before the board tonight is ‘Are these arborvitaes a fence under the code?’. Clearly, they’re not - they’re ornamental trees. Everyone seems to agree that the Auivil’s didn’t plant them, so they can’t really talk about the intent of the parties, they were there. What he would suggest to the board is that this would be a dangerous precedent for this board to set to then have to police what trees need to be cut down on a neighbor’s property and go up and down lake front determining which trees need to go, etc. It’s a dangerous precedent and he doesn’t think they need to go there. The question is, really, are these couple trees a fence under the codified ordinances and he doesn’t think the answer is yes to that. Furthermore, he also thinks it’s important to recognize that he Auivils have had a study done by KS Engineering regarding erosion control and being careful about that. Obviously, that’s an issue. The engineer specifically stated that the existing vegetation should not be cut down as to keep that clay section between the sandstone intact so that there aren’t erosion problems. Based on all that, he asks this board to uphold your building commissioners report and determine that Mr. Tuck-Macalla was correct in not issuing an order and to uphold his decision and deny the appeal.

Mr. Norton stated that they’ve got two different things here. Would they agree that the firebush is a hedge?

Mr. Monroe replied that he doesn’t know if that’s in front of the board tonight.

Mr. Norton commented that the building director has indicated that the firebush, past 20’ north, needs to be removed. Because that forms and a hedge which is a deliberate way to make a 4’ fence.

Mr. Monroe replied that issue is not his appeal. He can’t tell you what they would do in another situation. They are here on the issue on whether or not the arborvitaes constitute a fence. In answer to his initial question, he’s not saying that they need to be removed – might they have to be cut down to a certain level?

Mr. Tuck-Macalla commented that if they leave this room and he sends a violation letter it would say that they have to be removed after 20'.

Mr. Campbell stated that, had they seen that order, they may have been able to get a settlement from the Auvils, but they didn't.

Mr. Norton interjected to say that the building director has been trying to mediate this issue. The reason he didn't issue that order is that he's thinking – these are called trees and they're okay and these are called hedges and are not okay. He's indicated to everyone that is what his order is going to be and he's given them an opportunity to question what it's going to be.

Mr. Tuck-Macalla confirmed saying that he's been clear with both parties. Last time he spoke with the Francati's he was perfectly willing to say that from 20' to the lake those firebushes need to be taken out and at that point, it became clear that the Francati's also wanted those green giants taken out and that is when he went and checked the definition of a fence. That's really the reason they're here. It wasn't because he didn't want to send the order or he wasn't sympathetic or understanding. They've sent a lot of emails between both parties trying to resolve this issue before they got to this point.

Mr. Campbell commented that if they were to say that green giants were ornamental and every lake front owner can put up ornamental green giants wherever they'd like to that is not going to work. As soon as they start talking about how they need to be kept a certain distance apart then it's a fence and they need to come to 4'4". They are sight barriers on a lake front property.

Mr. Burke stated that the key term in the ordinance is 'enclosing'.

Mr. Campbell reread that the lakefront fence is 'any enclosing structure permanent or planted...' If the argument is that he can plant any green giants up – he's hearing that they're called ornamental and also that they have to be all the way across. He wants to be clear – can he plant green giants? Because he will do it. He would like to create more havoc for the board. He wants to know – the board is saying that he can plant green giants as long as they're not all 2' apart?

Mr. Bruno reiterated that the most important part in the definition of a fence is 'enclosing'. Have they had any other definition in the ordinance of the word enclosing?

Mr. Barbour replied that in that instance, 1163.03 says it has to be an enclosing structure. It clearly states that – it's not ambiguous. An enclosing structure can be a variety of things.

Mr. Burke went on to say that it seems to him that if it's 'x' number of feet it's not enclosing, but if it's more than 'x' number of feet it is? He questions, even if the two should grow together if it is enclosing.

Mr. Barbour replied that the enclosing factor is not defined in the code.

Ms. Young commented that how they're planted now they're not enclosed and she understands that the Auvil's didn't plant them – so there was no intent. Both parties have pools – is there anything to stop them from filling in the gap?

Mr. Tuck-Macalla remarked that they're not here to decide whether or not lake front owner can have green giants. If they were to plant more, in a line that enclose – then they'd be an enclosing structure.

Mr. Campbell inquired if they continue to grow are they supposed to come back in 3 years? They can plant green giants, and block the view, but until they actually touch...

Mr. Norton pointed out that the gap between the one that is further north and the ones further south is substantial. Even the other two have to be very close to the 20' mark and those two are already pretty close.

Mr. Campbell commented that the two are strategically planted in front of the kitchen. He doesn't believe it to be the intent of this homeowner, but the clear intent was to block the kitchen and the gazebo.

Mr. Bruno inquired, of the building director, if either of the two green giants are within the 20' from the northwest corner?

Mr. Tuck-Macalla replied in the negative.

Mr. Bruno reclarified his request and Mr. Tuck-Macalla confirmed that he believes the two arborvitaes in question are likely within the 20'.

Mr. Miller commented, along the lines of the firebush needing to be removed, firebush tend to be single stalk or trunk – do they all have to be removed or can portions be removed to provide open space?

Mr. Tuck-Macalla replied that he's sure that is possible, he's not an arborist.

Mr. Miller if they have to remove all of the firebush, past 20', because it constitutes a fence and disrupting sight lines, what about the large plants on the Francati property that provide the same obscure view conditions that are over 4'.

The board and building director discussed the fact that the shrubs on the Francati property would be something to be discussed at a later date, but they're clearly not enclosing.

Mr. Tuck-Macalla pointed out that if he issues the order for them to be removed then the Auvils could come back and say, 'What if I did x,y or z', but it's not his decision right now to determine what is sufficient to satisfy his order.

Mr. Gess clarified that on lakefront properties you're permitted to have a 4' fence, but it has to be 75%. So, the height can and perhaps has been addressed, but the transparency is the issue at play here. It's not the fact that the hedge exists it's that it's not 75% open.

Mr. Tuck-Macalla confirmed that to be correct and pointed out that the chain-link fence is permitted because it's open.

Mr. Bruno commented that if those two arborvitaes grow together and become a part of the lakefront fence – would they have to be 4'?

Mr. Miller suggested that they're individually growing separate of that hedge fence line.

Mr. Bruno stated that he feels Mr. Tuck-Macalla's decision seems correct. The trees aren't next to each other right now – neither are the ones on the Francati property. Typically, the homeowners right to sightlines ends at their property.

Mr. Burke concurred saying that the lakefront property rules are an exception to that.

Mr. Barbour stated that they haven't gotten into the original intent of the ordinance and minutes as it passed which accompanied that decision. Initially, the construction of the ordinance is that if you find it's ambiguous then you look at intent and you'd have to go back and see that. Under Ohio law your right for sight lines stops at your property line unless you created a situation through some kind of ordinance that might permit that. Those of you have who have been on this board for a while might remember the playground. Harden vs. Naughton that went through the court system for several years. There was an issue raised by one of the property owners that a playset, which was big, blocked their sight line and the court decided that there was no right to sight lines and they'd need to prove it was a public nuisance and they couldn't meet that standard. What also got dragged into that case, peripherally, was this ordinance because there were some plants in the back yard. Once it happened there was some cross accusations of code violations and there were some plantings in one of the yards and there was a request to the building department back then about the ability to plant maple trees. They ultimately received permission to plant maple trees. That was the only thing that could possibly pertain to this decision. They weren't specific to location or distance. That case does say you don't have right to sight whether that is the purpose of this ordinance or not.

Mr. Gess commented that he would agree that the key word here is 'enclosing'. Maybe prior to any decision, absence of definition in our code the defines enclosing, perhaps they could agree upon one by way of a dictionary. Do we need the board to accept a defined meaning of that word? Several include 'to enclose' or 'surround by all sides', etc. as a definition of enclosing. He thinks it's important that they are clear about whether or not trees, or arborvitaes, meet the definition of enclosing.

Mr. Saurman remarked that the word enclose is used 45 times in the Bay Village ordinances. It's standard meaning should be acceptable. He's not sure it needs to be defined in the ordinances – it's our everyday understanding of it is.

Mr. Norton summarized that they're deciding tonight about whether or not part of Mr. Tuck-Macalla's interpretation and his plan to issue the order part of it is disagreed by the Francati's. He's indicated that his order will be that the fire bush will have to be removed it from 20' on. He's assuming the Francati's don't disagree with that. The Auvil's may disagree with that, but they're not here to decide that.

Mr. Monroe replied in the affirmative.

Mr. Campbell inquired why aren't they here on that?

Mr. Norton stated that no one has objected to that at this point. The order would need to be issued and they would need to appeal that decision and ask for relief on that.

Mr. Barbour remarked that one thing the city tries to do is to avoid conflict between homeowners when it involves interpretation of any ordinance, but primarily it's building and zoning – just like this case. He respects councils' zeal in representing their client's best interest, but there is a long history of trying to resolve this. It didn't just get here quickly. The hope was by coming here they could reach a resolution and if the parties plan on litigating whatever decision comes from this board the decision that is here right now – is, in fact, the denial of the Francati's request that the arborvitae be considered a fence. Brought along with that is the idea that the city is going to tell the Auvil's that the firebush is a hedge and it needs to be dealt with. Technically the Auvil's property is not in front of the board because they don't want to deny them their right to appeal. The idea today is to reach a resolution – if possible.

Mr. Campbell stated that they would have had an opportunity to settle this case if they had a decision that was issued. They are not here on an appeal to reach a resolution. They should have a decision. He strongly objects to this – he can't believe that they are going to have to hope that the decision isn't going to be draconian.

Mr. Barbour replied that he appreciates Mr. Campbell's advocacy, but at this point the Auvil's haven't said anything about what they're going to do for the hedge. They've been told that the hedge doesn't meet the code, but they don't get an order telling them to comply with the code right out of the gate. Usually, you give them an option to comply. If they want to come to a resolution this is a fine opportunity to do it. The only matter that is before the board, technically, is the Francati's complaint that the green giants constitute a fence under our ordinance. If they're able to decide other matters that could be great. We're not in the business of engaging litigation, but at the same time we're fully aware of the rights both parties have and respect them.

Mr. Bruno clarified with Mr. Tuck-Macalla that his decision regarding the hedge is that anything beyond 20' needs to be removed. So, it can be discussed in conjunction tonight. He asked Mr. Monroe his thoughts on the hedge.

Mr. Bruno interjected to ask Mr. Tuck-Macalla if the Auvil's property has appropriate fencing for a pool all the way around the backyard.

Mr. Norton replied that there is a chain-link.

Ms. Auvil stated that there are the burning bushes on the northside and there is a chain-link behind it and her landscaper added the new fence on the eastside to ensure that the entire pool is fenced in.

Mr. Bruno stated that he's trying to identify if there is a conflict between our lake front and pool requirements.

Mr. Tuck-Macalla said there wouldn't be because you can have a fence that would be 75% open.

Mr. Monroe, replying to Mr. Bruno's question, stated that they're not trying to be clever, but it sounds like the appellants want all the arborvitae cut down and all the shrubs cut down.

Mr. Bruno inquired if that was correct?

Mr. Francati replied that she's asking for full compliance. The hedges all coming down past 20' and anything further than 20' to be maintained at 4'.

Mr. Monroe stated that he appreciates the Law Director trying to settle the whole dispute, but it might not be possible. They haven't been cited for the hedges. If they were cited for the hedges beyond 20' there are several options – they may pursue an appeal, they may seek a variance, they may try to comply by thinning out the hedges so that they meet the applicable requirements. That is not really before this board right now. The issue is – is the arborvitae a fence?

Mr. Norton stated that they work hard to resolve things so that it's a win win. They have a single tree up by the gazebo apparently the next two those are fairly closer together. Beyond that there are some large evergreens further south, but that's not in question.

Ms. Auvil stated that there are three arborvitae. There is one by the gazebo then there is one by the corner of the Francati's house and then a little further south of that. She thinks of them as three trees.

Mr. Norton clarified that he's referring to the two that are closest to the Francati property. Those two are fairly close together and as they grow, they will keep getting closer together.

Ms. Auvil stated that they are much further than 5' apart. There is no way they're growing together. It was never their intent when they incorporated the existing landscaping with the new landscaping for those to build some sort of tree wall. They just had the landscaper incorporate what was existing, that they inherited, which were those three arborvitaes and the burning bush. They never planted any of those. She would agree to clean them up or make them smaller, but taking them down to 4' would kill those trees.

Mr. Norton commented that what he was going to ask, is that they have those two – would it be something they'd consider to remove one of them? In other words, to open up the view from the kitchen towards the lake. Those two are impeding the view. He would argue that they're a tree and they should be allowed, but he also understands that particular view is pretty important to the Francati's. It would seem that the orientation of the Auvil home it isn't a really big deal if one of those trees was there. That would open up the view considerably.

Ms. Auvil stated that she was always under the impression that Ms. Francati's number one tree was the middle tree. Is he suggesting the tree the furthest south? She would like clarification. The problem is that as they try to do the right thing by the code, take down the hedges to 4' – it's a slippery slope. She keeps trying to do the right thing, but if she's told to do one thing and remove one thing then what's to remove the ask of removing other things from her property. While she is willing to negotiate and be reasonable, she also needs some direction as to legally what they need to do and where their rights stand. There are unique challenges with lake front properties. They have inherited some of those problems and they've inherited landscaping and it was properly put in for a good reason - she can't speak to the arborvitaes. She likes the arborvitaes which is why she asked the landscaper to incorporate it into their plan. She does feel that the bushes on the northside have a much greater purpose which is stabilization which is a critical piece. There is a functional piece to it.

Mr. Norton commented that if she's willing to remove the middle tree, which would help their situation, and that if because maybe the argument of stabilization the building department says, 'You can leave the firebush, but you've got to cut it down to 3' and keep it that height'. That bush probably needs 2-3' to survive, but it could be argued as they're perhaps going to that stabilizing the bank is very important. That might be the win win that the law director has indicated might be a possibility.

Ms. Auvil replied that she is sure her and her husband are willing to be reasonable. Does she think they should be responsible for taking down all 3 arborvitaes – no.

Mr. Norton reiterated his proposal. He can't speak for the board, but it's possible the board would agree that she's not required to remove the arborvitaes. He doesn't think the burning bush blocks anything and it's attractive in the sense that it covers the chain-link, but that might be a good compromise to consider.

Ms. Auvil stated that she'd like to confer with her lawyer and her husband before making any decisions.

Mr. Norton concurred and advised that this is an important issue. He has lived on the lake for 35 years. He took two Christmas trees and put them in his backyard and they're not about 35' and 40' they're gorgeous, but they also take up a lot of space. They've moved since then and now they've got rocks in their backyard, but if you go through the lakefront properties, you'll see a lot of individual trees that form a visual impediment, but they're just trees. He would submit that the trees on the Auvil property, that are past the fence and part of the vegetation holding the bank together, could be thought of as a violation as they keep growing because they're dense. It

might be possible to consider some combination that the city has to enforce their rules and the neighbors need to try and get along and not do something that is going to negatively affect a neighbor that isn't even necessary.

Mr. Bruno suggested that since both have hired council to be here tonight that they take a recess so both parties can discuss and come back and see what can be worked out.

Mr. Norton added that they cannot speak for the building director. The trees are okay and the hedge isn't. He isn't saying that he will necessarily agree to their proposal – he is interpreting the code as it's written, but then it would be a separate part of the request that they overrule his thoughts/grant a variance as needed.

Mr. Monroe clarified the suggestion as proposed – if the Auvil's agree to cut down the middle arborvitae this board might grant a variance to allow them to maintain the firebush past 20' to the lakes edge. The question he would have to the law director is – is that appropriate?

Mr. Burke pointed out that if a variance is involved, they likely need to go through the property protocols.

Mr. Campbell inquired if it's only an issue if they make a complaint. If they don't have an issue with the firebush at 4'4" then no one would come out. Wouldn't it be better to have the two parties agree now?

Mr. Saurman replied that he thinks they're past that. The building director has already seen it and made a decision which hasn't been put into an order, but he's not sure they can walk this back. They've heard the arguments as to why the burning bush should stay, but they can't grant a variance.

Mr. Burke stated that his suggestion would be that they try to work out a resolution even if they have to massage the details to be in compliance with the code, but he would suggest a recess for the parties to discuss with their council.

Mr. Monroe commented that the resolution seems to be they win and we lose since we have to cut down a tree which is not a fence. You're putting us in a position where the board is asking for relief that might not be possible. There are other due process concerns. If the building commission was to cite the Auvils they have non-conforming rights that they'd argue they have potential variance rights. They need to remember that part of this problem is caused by the unique nature of Fordham Parkway. The Francati's have a lot that is further forward creating a building line that is further north than all the houses to the west. There is a further situation where clearly this house was added onto multiple times and what he would suggest is that overbuilt for the lot that it's located on and it's causing part of the problem in this appeal. It's a unique situation where one sub division is backing up to another and they're not lined up in terms of where the houses are in terms of setback.

Mr. Burke inquired if Mr. Monroe is proposing that a citation be issued?

Mr. Monroe clarified that he's not inviting it, but they haven't seen it. They're asking his client to compromise on something that hasn't happened yet.

Mr. Tuck-Macalla commented that from his perspective that's the next course to take. They leave this evening and he issues a violation letter and the Auvils can proceed as they see fit.

Mr. Saurman pointed out that once that's done both issues can be before them at the same time.

Mr. Barbour pointed out that they can review the issues concurrently because they do arise out of the same facts and properties. Council raises good points about the Auvil's right to their due process and while settlement would be great and what the city certainly wants the genie is out of the bottle.

Mr. Tuck-Macalla advised that he will issue the violation tomorrow.

Mr. Campbell stated that he personally feels they have a responsibility to determine the appeal before them, but he's not the city law director.

Mr. Burke suggested tabling this pending the issuance of a violation by the building director and what transpires based on that.

Mr. Monroe stated that gives them the best opportunity otherwise they're just headed towards litigation. There is nothing that stops that.

Mr. Norton commented that once the building director issues a notice that the fire bush needs to be removed...

Mr. Monroe stated that it's possible his client will issue complaints about the shrubs on the Francati's property – where does it end?

Mr. Barbour stated that there is no prohibition about having a single tree that blocks a line of sight. The enclosing language is the most important part.

Mr. Bruno inquired if they can submit the erosion study to this board.

Mr. Monroe replied that they have a study completed October 4, 2022 from KS Engineering.

The board, law director, and building director discussed the different between issuing an order and not.

Mr. Tuck-Macalla clarified that he'd issue an order saying that the hedges past 20' have to be removed by such and such a date, 30 days from the date of the letter, and it would not include the trees they're discussing tonight. He doesn't feel the trees are a part of that. He can do that tomorrow.

Mr. Monroe stated that part of the recommendations that this engineering firm made was to maintain the overhanging vegetation which partially stabilizes the bluff crest by holding in soil via its root systems and retarding run off of the bluff crest it also provides a safety barrier along the edge of the bluff to residents and guest. For these reasons vegetation along the edge of the bluff should not be removed except where needed to relocate the existing fence.

Mr. Francati stated that a good thing about burning bushes is that they have very short dense roots and you can pull up a burning bush pretty easy.

The board requested a copy of the erosion report before the revisit this issue.

**Motion** by Mr. Bruno, **Second** Mr. Burke, the application of Mr. and Mrs. Francati, through their attorney, for the building director to reverse his decision regarding this property on this matter be tabled to the December 1<sup>st</sup> meeting in order for the building director to issue an order, by letter, to the Auvils and to give both parties sufficient time based on the receipt of the letter from the building director what their rights and duties are in this matter.

**Roll Call Vote:**

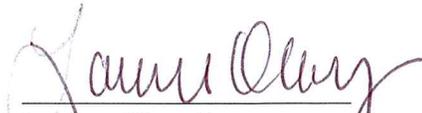
**Yeas – Bruno, Norton, Burke, Gess, Miller, Saurman, Young**

**Nays –**

**Motion Passed 7-0**

There being no further business to discuss the meeting adjourned at 8:54 p.m.

  
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Jack Norton, Chairman

  
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Lauren Oley, Secretary