

**IN RE: APPEAL OF WEILAND BUILDERS
FOR THE PROPERTY AT 2885 WALWORTH AVENUE
DENIAL OF REQUEST FOR HILLSIDE RELIEF**

**Cincinnati Zoning Board of Appeals
Case No. Z-4084-2023**

**Statement of Appellees Patricia and Cary Belyea
in Support of Affirmance of the Decision of the Zoning Hearing Examiner**

Appellees Patricia and Cary Belyea hereby submit this opposition to the appeal by Wieland Builders, LLC (“Wieland”). The Appellant has failed to meet its burden of proof on this appeal. Appellant has not identified any error of law, nor shown that the decision of the Zoning Hearing Examiner (“ZHE”) is not supported by the evidence in the record. The Belyeas urge the ZBA to affirm the ZHE’s Decision (“Decision”).

I. Factual Background and Evidence produced at the ZHE hearing

A. History of the project

When construction on this project had begun in 2022, the Belyeas had recently completed construction of their home and were residing next door at 2891 Walworth.

In the Spring of 2022, when excavation began at the subject site at 2885 Walworth Ave. (“Property”), Wieland experienced a collapse in the soil as they prepared the site. The Belyeas and numerous other neighbors in the subdivision were significantly affected by this event. The utilities were interrupted and temporary utilities were installed during this time. (Patricia Belyea, Transcript, p. 189-91). The Belyeas’ property had to be excavated resulting in their finished landscaping being torn up. (Tr., p. 189) Although Wieland committed to repairing all of the damage, at the time of the hearing, that work was still not completed. (Jeff Wieland, Tr., p. 153-54).

Wieland later poured the foundation. It was apparent to nearly anyone who observed the foundation after installation that it was abnormally high, given the grade of the street and the neighboring properties. (Patricia Belyea, Tr., p. 191). The Belyeas noticed this immediately as did other property owners. (Brendan McAndrews, Tr., p. 176-77).

The Belyeas inquired about the potential error to the Wieland project manager at the site. (Patricia Belyea, Tr., p. 192-93). At that point they were in regular contact with him because of the landscaping and utility issues. However, he assured them that there was no problem.

As the months passed, the Belyeas remained concerned that the height of the foundation was incorrect. Unsatisfied with the assurances that they had received from the project manager at the job site, they made a formal inquiry with the City zoning staff. (Cary Belyea, Tr., p. 204-05). Cary Belyea made written inquiries in June, 2022, August, 2022, January, 2023, and March, 2023. (Tr., Exhibit 4, p. 102-07). Cary Belyea received confirmation from the City that the matter was under investigation, and CAGIS ezTrak records show that Wieland was formally notified of the issue in January at the latest. (Exhibit 5, Tr. p. 108-09).¹ Throughout this time, Wieland pressed forward toward completion of construction.

Other signs indicating an error appeared. The plans for the Property showed just three steps leading up to the front door at the first floor elevation. Yet, Wieland installed eight steps to reach the first floor elevation. In addition, Wieland added a landing to the front door stairway. (*Compare* Site Drawings, front elevation (Tr. p. 47) *to* Property photos (Tr., p. 23)). The discrepancy in elevation was obvious.

After the Belyeas' inquiries, the City zoning staff required Wieland to furnish an as-built survey of the property to determine whether the height of the structure was in compliance. When

¹ Wieland incorrectly claims in its Justification that it was unaware of the issue until February, 2023. (Justification of Appeal, p. 1.

Weiland finally provided the survey, it showed clearly that the property had been built too high, in violation of the height restrictions.

Nonetheless, Wieland still offered no solutions to the Belyeas. The Belyeas were forced to retain private counsel as Wieland pressed forward with construction. (Exhibit 7, Tr. p. 113-14).

The zoning staff found that the Property exceeded the height restrictions in five different places on the structure. (Staff Report, p. 1, Tr. p. 266). Most critically, the Property exceeds the height limits on the rear top floor of the home. The roof itself is too high, as are the existing parapet walls built on top of the roof. In addition, Wieland proposes to build a handrail that would reach higher past the permitted height. (Staff Report, p. 9, Tr. p. 274).

Each of the structures which exceed the height limits lies directly in the southwestern view from the top floor of the Belyea home, and the excess height of the roof and parapet walls block light to the Belyea home.

Wieland concedes that the height violations result entirely from its own error.

B. The Belyeas' Reliance upon Restrictions and applicable Zoning restrictions.

When the Belyeas purchased their property, they did so with the specific objective of obtaining a property with a river view and city view. (Patricia Belyea, Tr. p. 187-88). The developer of the Walworth community specifically marketed the lots for the views they offered. The developer offered detailed photos and videos which depicted 360 degree views from each individual lot from varying heights. (Exhibits 1 and 2, Tr. p. 65-69). The Belyeas had to invest money to secure the best view, and the selected one of the most expensive lots available. (Tr., p. 188).

It was well established at the hearing that every homebuyer in the Walworth subdivision purchased their property based on the availability of the views. (C. McAndrews, Tr., p. 170; B.

McAndrews, p. 178). They all testified that the lots were marketed and priced based on the views (C. McAndrews, Tr., p. 170). The homeowners were also aware that there would be height limitations to ensure that each property owner was able to enjoy the view from their property. (B. McAndrews, Tr., p. 175, 178).

The entire Walworth subdivision had previously received a height variance to permit the expanded height limitations that exist today. (T. Ackerman, Tr., p. 132-33). In addition, a set of private covenants and restrictions give the property owners further assurance that their property rights would be protected. (Exhibit 3, Tr. p. 70-101, Sections 7.1.1, 7.1.4, 7.2.15). The homeowners each expected that the rear construction of each succeeding home would accommodate the views of their neighbors. (B. McAndrews, Tr., p. 178) At least one homeowner testified that the construction of the subject home is noticeably disruptive of the views, even before the additional construction for which the Appellant seeks approval. (B. McAndrews, Tr., p. 178).

The testimony of the property establishes that that interference with the views in the subdivision would detrimentally effect both the property owner's enjoyment of the property, and the property value. (C. McAndrews, Tr., p. 170-71; L. Silverthorne, Tr. p. 183-84).

The Belyeas explicitly relied upon the City's enforcement of the zoning code and the applicability of private covenants and restrictions governing the height and construction of neighboring properties.

C. The relief requested by the Appellant

In its Statement of Justification, Wieland misstates the scope of the relief that it is requesting. Wieland claims that "the home is approximately 2' taller than what was previously approved." (Statement of Justification, p. 2). But the Staff Report states clearly that the structure

exceeds the height limit in five (5) different locations, which range up to 3.5' over the limit. (Staff Report, Tr.,p. 266).

II. Argument

A. Burden of Proof and Legal Standard

The Appellant Wieland bears the burden of proof on this appeal. (ZBA Rules of Procedure, §5(A)(4)).

Unless the ZBA finds that the Decision is illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of the evidence, then the ZBA should affirm the Order. (*See* Cincinnati Municipal Code §1449-17).

B. Analysis

The Appellant has made absolutely no showing that there is anything illegal or arbitrary about the ZHE's Decision. Furthermore, the Appellant has made no reference to the evidence in the record which would contravene the ZHE's Decision or suggest that the Decision was unreasonable. The Appellant has failed to meet its burden of proof, and the Decision should be affirmed.

There is no disagreement between the parties as to the basic facts. The subject home is noncompliant with the height limits in five respects. It is undisputed that the violations are solely attributable to an error by the Appellant and not in any way the fault of the Belyeas, or caused by an unfair or unreasonable zoning provision.

The evidence establishes clearly that the error was apparent to many observers very early in construction. The record also establishes that the Belyeas made diligent efforts to notify the builder about the potential error, and seeing no action, subsequently undertook formal communications to notify appropriate City agencies and the builder. The fault in this case may in

no way be attributed to the Belyeas. Yet, the Appellant asks this body to impose all the costs of the error upon the Belyeas and their neighbors.

The only argument that Appellant offers about the evidence is its repeated suggestion that it should have been allowed to physically inspect the view from the Belyeas' deck. (Justification of Appeal, p. 1, 3) Appellant's argument on this point is offensive and presumptuous. Wieland has already physically intruded into the Belyea property and imposed inconvenience upon the Belyeas when it caused the landslide. Wieland has no right to insist upon entry into the Belyeas' house. But in any case, the ZHE's Decision recites that he did in fact visit the site (Decision, p. 1, Tr. p. 282), and was apparently able to satisfactorily view the structures.

Furthermore, it is self-evident that when one builds a structure above the height limit, the result is that the view of anything behind it is blocked.

The evidence establishes that the southern and western views are important to the Belyeas, as they are to all the homeowners in the Walworth subdivision. The view is important to enjoyment of the property but also important to the value of the property. Interference with the view would negatively affect both the lifestyle of the homeowners and their economic interests.

The evidence establishes (and it is self evident) that the construction of additional structures above the height limit have and will further interfere with the views from the Belyea property.

The Belyeas reasonably relied on the protections of the City Zoning Code and the private covenants and restrictions which are applicable to the Property. The Belyeas have sought only reasonable protection of their rights in their home. They have asked only that the rules be equally applied to the Property, just as they have applied to all the other homes in the Walworth subdivision.

The Appellant has not contested any of the evidence that was submitted to the ZHE, nor pointed to any provision of any law that was violated by the ZHE Decision. The Appellant has argued only that the enforcement of the Zoning Code as written upon their Property might impose practical difficulties. Yet, the Appellant concedes, as they must, that even without the granting of any relief, the Property may still be used as originally designed. (Justification of Appeal, p. 3). Appellant's only argument is that the Property will be less valuable. Yet, the testimony of the Belyeas and the neighbors make clear that this would come at the cost of the Belyeas.

There is no injustice nor even any unforeseen practical difficulty imposed by the ZHE Decision.

The Appellant concedes readily that their request for a height variance is attributable entirely to an error for which the builder bears sole responsibility. It would be unjust and inequitable to impose the cost of this error solely upon the Belyeas and the other property owners to the east, all of whom complied strictly with the Zoning Code.

III. Conclusion

The Belyeas respectfully request that the ZBA affirm the Decision.

Respectfully submitted,

/s/ J. Robert Linneman

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