

CITY OF BELFAST

ZONING BOARD OF APPEALS

***Reisgo, Hill, Walls, Martin & Ahrens v. Belfast Code Enforcement Officer
(Appeal of Decision Granting Building Permit)
47-R Northport Ave.
Map 36, Lot 118-A***

NOTICE OF DECISION **AND ORDER**

I. INTRODUCTION

Appellants Tom and Nancy Riesgo, Susan Hill, Barbara Walls, Jeremy and Courtney Martin, and Molly Ahrens (“Appellants”) challenge a decision by the Belfast Code Enforcement Officer (“CEO”) granting a building permit to Henry’s Homes LLC for the above-referenced property. Henry’s Homes submitted an application on August 10, 2021 seeking approval for a single-family residence, which the CEO granted on the same date under permit number 3-2022.

Appellants filed an application for administrative appeal dated September 7, 2021 to the Belfast Zoning Board of Appeals (hereinafter “Board”), requesting the Board reverse the permit issuance. The Board conducted a duly noticed *de novo* hearing on the appeal on November 9, 2021, which was continued to November 30, 2021. A further meeting was held on December 9, 2021 at which this Notice of Decision and Order were approved.

II. SUBJECT MATTER JURISDICTION, STANDING, & STANDARD OF REVIEW

The Board has subject matter jurisdiction of this appeal pursuant to Belfast, Me., Code of Ordinances § 102-132 (a) (ecode360.com/BE3520) (last visited July 29, 2021) (hereinafter “Belfast Code” or “Code”).

Appellants have standing as abutters or close neighbors to the subject property. The application for administrative appeal was timely filed pursuant to Section 86-190 of the Belfast Code.

Because the Appellants’ administrative appeal concerned a written decision of the CEO, the Board conducted a *de novo* hearing consistent with Section 102-134 of the Belfast Code and 30-A M.R.S. § 2691.

III. RECORD

The following evidence and written argument was submitted in advance of the hearing on July 29, 2021:

- Appellants' application for appeal submission with exhibits
- Additional exhibits (emails) submitted by Appellants on November 9, 2021

At the *de novo* hearing, Jeremy Martin primarily presented argument on behalf of the Appellants. CEO Stephen Wilson presented his case in defense of the building permit.

The Board Secretary, with support of the City's Planning Office, has retained a copy of the documents submitted and presented at the hearing, as well as a recording of the hearing, which was conducted by remote means.

IV. FINDINGS & CONCLUSIONS OF LAW

Appellants point to evidence of erosion on the building site, as well as violations related to excessive clearing and excavation, and argue that the building permit should not have been granted due to failure to comply with several provisions of the Code. The CEO defends issuance of the building permit on the grounds that while there are violations on the site today, they did not prevent issuance of the building permit at the time it was being reviewed. The Board's findings are presented below in the same order as the arguments raised by Appellants in their written appeal.

Argument #1: The CEO erred in applying Section 102-1123

Section 102-1123 provides as follows:

Erosion of soil and sedimentation of water-courses and water bodies shall be minimized by employing the following best management practices as set forth in Maine Erosion and Sediment Control Handbook for Construction Best Management Practices, prepared by the Cumberland County Soil and Water Conservation District and the state department of environmental protection, 1991."

Appellants argue that the earthwork did not follow best management practices and did not comply with more specific provisions of Section 102-1123, as set forth below.

Paragraph 1. "Stripping of vegetation, soil removal and regrading or other development shall be accomplished in such a way as to minimize erosion."

The Appellants point to photographs of erosion and sedimentation on and off the property as evidence of failure to comply with this standard. They note that there is water at the surface of utilities installations. They acknowledge that Henry's Homes has implemented some erosion controls since the appeal letter. The CEO and Henry's Homes note that this has been an unusually heavy year for rain and states that these are performance standards related to how work is conducted on the site and cannot be reviewed at the permit stage.

On this Argument, the Board finds and concludes as follows:

- While the performance standards of Section 102-1123 are incorporated by reference into the building permit issuance standards by virtue of Section 102-404, this

particular standard applies to how the work is actually conducted and could not have been evaluated at the time of permit issuance.

- Violations of this standard are properly addressed under the enforcement provisions of the Code, and fall outside the ZBA's jurisdiction.
- The CEO properly involved DEP once problems were found, and the work is being monitored by the CEO and DEP to bring the property into compliance.
- The permit was not issued in error as to this standard.

Paragraph 3. "Temporary vegetation and/or mulching shall be used to protect critical areas during development."

The Appellant argues that Henry's Homes has not provided or installed vegetation or mulching to protect such areas. Henry's Homes notes work that has been done **sine** the appeal to address erosion.

On this Argument, the Board finds and concludes as follows:

- Again, this performance standard relates to the conduct of excavation and earth moving, and could not have been evaluated at the time of permit issuance.
- Violations of this standard are properly addressed under the enforcement provisions of the Code, and fall outside the ZBA's jurisdiction.
- The permit was not issued in error as to this standard.

Paragraph 5. "Until a disturbed area is stabilized, sediment in runoff water shall be trapped by the use of debris basins, silt traps, or other acceptable methods as determined by the code enforcement officer."

Appellants argue that the site is unstable and sediment in runoff water is not being trapped by these methods. Appellants note an open ditch line from the catch basin on the property to the city ditch.

On this Argument, the Board finds and concludes as follows:

- Lack of debris basins / silt traps may have contributed to the problems noted on site, but these problems were not necessarily foreseeable at the time the permit was issued.
- Appellants are looking to the Board to address problems that have occurred in the course of development. There is opportunity to work with acceptable methods as determined by the CEO and in keeping with this standard to address the runoff that has been observed.
- The permit was not issued in error as to this standard.

Paragraph 8. "Those areas with soil unsuitable for construction shall be utilized for open space."

The Appellants argue that the amount of erosion and sedimentation noted on the property indicates that the soils are not suitable and that those areas therefore cannot be developed pursuant to this standard.

On this Argument, the Board finds and concludes as follows:

- Henry's Homes was not required by the Code to submit a soil study as part of the application.
- The Appellants have not presented proof that the soils are unsuitable; evidence of pooling or erosion is not in itself proof that the soils are unsuitable.
- If erosion control methods, once implemented, do not address the problems noted on site and it becomes apparent to the CEO that the soils are unsuitable, this standard may be invoked.
- Much of the land mentioned as containing unsuitable soils is not being developed.
- The permit was not issued in error as to this standard.

Paragraph 9. "Trees and other vegetation shall be preserved wherever possible."

Appellants argue that the developer has stripped the lot of all trees and vegetation, and has altered more vegetation than allowable under the Natural Resources Protection Act.

On this argument, the Board finds and concludes as follows:

- There has indeed been excessive cutting, clearing and alteration of wetlands on the site as evidenced by communications from DEP submitted into the record by Appellants.
- All of the cutting and clearing had occurred prior to issuance of the permit and Henry's Homes was already working with the DEP in resolving the violation at the time of permit issuance.
- The CEO was aware of the remediation plan at that time and, as Henry's Homes was actively working with DEP to resolve the violations, this did not justify denying the building permit.
- The permit was not issued in error as to this standard.

Argument #2: The CEO erred in applying Section 102-1124 Control of Stormwater Runoff.

Section 102-1124 provides as follows:

Surface water runoff shall be minimized and detained on-site if possible. If it is not possible to detain water on-site, downstream improvements to the channel may be required to prevent flooding. The natural state of watercourses, swales, floodways or rights-of-way shall; be maintained as nearly as possible. The stormwater design shall be for a fifty-year storm, that is, the largest storm which would be likely to occur during a fifty-year period.

Appellants argue that Henry's Homes has failed to minimize or detain stormwater and surface water runoff on site, and has neither contemplated nor made any downstream

improvements. They further argue that Henry's Homes did not propose any stormwater controls or retain a civil engineer to ensure that surface water runoff is minimized. They state that they have experienced additional water in their basements as a result of the development.

On this argument, the Board finds and concludes as follows:

- The development is a work in progress. Recent rainy conditions (including one unusually heavy rainstorm) may have demonstrated that the provisions made are not enough.
- The fact that the stormwater problems occurred after permit issuance does not necessarily mean that the permit should not have been issued. Rather, these issues should be addressed as an enforcement matter, with continued monitoring and remediation ordered by the CEO.

Argument #3: The CEO erred in applying Section 102-1134 Uses in Wetlands

Section 102-1134 provides that, "Any proposed land use located in wetland must demonstrate compliance with the provisions of the National [sic] Resources Protection Act."

Appellants argue that Henry's Homes has altered approximately 14,000 square feet of wetland, when DEP regulations only allow an alteration of up to 4,300 square feet. They assert that the property needs to be studied to determine wildlife and habitat impacts before development. Appellants refer to email correspondence from Nathan Durant at DEP confirming that the property is the subject of an active enforcement case.

The CEO responds that at the time of permit issuance, the only wetland impact (based on survey and flags on property) was for the driveway, and this only used half of the 4,300 allowed square feet.

On this argument, the Board finds and concludes as follows:

- There has been impact to wetlands beyond the 4,300 square feet allowed by law. DEP is working with Henry's Homes on a plan to bring the property into compliance.
- Testimony demonstrated that the clearing occurred prior to building permit issuance, and the CEO was aware of that.
- The CEO does not have jurisdiction over violations of the Natural Resources Protection Act.
- It was sufficient for the CEO to have relied upon the fact that the applicant was working with DEP to resolve the violations; the Ordinance does not require that remediation be fully implemented before a building permit could be issued. Remediation could take a long time and can be conducted while the residence is being built.

Argument #4: The CEO erred in applying Section 102-1136 Soils

Section 102-1136 provides that "soils must be adequate for the intended purpose."

The CEO has stated that he will withhold the Certificate of Occupancy if issues noted have not been corrected. Appellants argue that this is not good enough to prevent harms in the interim, such as standing water in the Appellants' yards. They further note that utilities were installed in wet ditches.

On this argument, the Board incorporates by reference the findings and conclusions made in relation to Section 102-1123, Paragraph 8.

Argument #5: Sufficient technical information was not submitted to ensure the standards are complied with.

On this argument, the Board finds and concludes as follows:

- The Code does not require an engineered stormwater plan nor a soils report.
- It is difficult in this case to parse violations that occurred due to poor implementation of erosion and sedimentation control practices during the development process from lack of adequate planning or review. However, at this point, the problems noted are most properly addressed through inspection and enforcement by the CEO rather than by rescinding the building permit.
- The Board has no jurisdiction to mandate enforcement or to order that work be stopped.
- The Appellants have not demonstrated their burden to prove that the CEO should not have issued the building permit due to lack of supporting technical information. The review process used was in keeping with the typical diligence applied in reviewing applications for single-family homes.

ORDER

Based on the foregoing findings and conclusions, the Board of Appeals concludes that the Appellants have not met their burden to demonstrate that the building permit was issued in error, and therefore DENIES the appeal. The Board acknowledges that the Appellants have presented evidence that violations may have occurred during the development process, but enforcement and remediation of those violation lies within the CEO's sole jurisdiction.

This Notice of Decision and the findings and conclusions set forth herein were approved by a vote of ___ to ___. The Board has authorized its Chair to sign this Notice of Decision on its behalf.

The City Clerk shall record this Notice of Decision and Order and cause it to be sent to all necessary and appropriate parties.

Dated this ___ day of December, 2021, in Belfast, Maine.

City of Belfast Zoning Board of Appeals

By:

Peter Negin, Chair

NOTICE OF APPEAL RIGHTS:

Any party may take an appeal, within 45 days of the date of the vote on the Belfast Zoning Board of Appeals' original decision, to Superior Court in accordance with the Maine Rules of Civil Procedure, Rule 80B.