

**ZBA Meeting and Public Hearing
December 15th, 2008, 7:00pm
Village Municipal Center**

Attendance: ZBA Members: Chairman Stephen Lynch, Members Harry Haldt and George Macura; absent: Members Edward Fish and Kenneth Taylor.

Village Officials and Staff: Mayor Jay Niles, Code Enforcement Officer Edward Harrington, Village Attorney Michael Martin, Village/ZBA Clerk Rick Roberts.

Press: Matthew Rice, *The Granville Sentinel*

Others: Mr. Ronald and Mrs. Candace Combs

Ratify Meeting Minutes: Mr. Haldt moved acceptance of the Minutes of the November 18th Meeting as circulated. Mr. Macura seconded the motion and it carried unanimously.

Training Reminder: Chairman Lynch advised that the Saratoga County Planning Conference was to be held on January 28th at 9:00am. This one-day workshop represents an excellent training forum, and any members with interest were encouraged to speak with staff from the Village Clerk's Office to register them accordingly. The Village pays the cost of registration and travel to and from the conference.

Chairman Lynch called the Public Hearing to Order at 7:05pm concerning Mr. Ronald & Mrs. Candace Combs' appeal of the Village Code Enforcement Officer's Stop Work Order issued for their property on East Potter Avenue. Said order was issued in October pertaining to the accumulation of earthen fill at this location. The Chairman reviewed the rules for speakers at all Public Hearings conducted by the Village and requested the sign-in sheet located at the rear of the room. Mr. Ronald Combs was the only person listed and he was so acknowledged by the Chairman.

Mr. Combs stated his position that there were no State, County or Local Laws in existence which required he and Mrs. Combs to obtain a permit in order to accumulate fill on their property. Therefore, he asserted that the Stop Work Order issued by the Code Enforcement Officer (CEO) in October was invalid and he asked the ZBA to reverse the order accordingly.

Chairman Lynch inquired of Mr. Combs as to how much fill had been accumulated on the property prior to the issuance of the Stop Work Order. Mr. Combs replied that 3-4 dump truck loads containing approximately 20-30 cubic yards of material had been placed prior to the work stoppage. Chairman Lynch inquired if Mr. Combs knew how much more fill was to be accumulated. Mr. Combs advised that it would be difficult to estimate the quantity of additional material as he wants to be able to make use of any free material that becomes available to level up existing low spots on the property. Mr. Combs also stated that he had been advised previously by the CEO that no further

excavation or building activity could be commenced on the property, he was never warned regarding the accumulation of fill.

There were no other speakers listed on the sign-in sheet. As a result, Chairman Lynch asked the Board if they were willing to proceed with general discussion with the CEO and/or Mr. & Mrs. Combs concerning the matter at hand. All members agreed to this course of action.

The Chairman inquired of the CEO as to his rationale in issuing the Stop Work Order. Mr. Harrington advised that the Village Zoning Law (Article 9, Section C1-2a-1, page 75) was his primary reasoning for the issuance of the order. This section states “No building or structure shall be constructed...nor shall any excavation be made ...nor shall the use of ...land be changed until a building permit has been issued by a Code Enforcement Officer.” The CEO stated further that he feels that the actions taken amount to construction activity on the property in his opinion, and because the building permit applications filed by Mr. & Mrs. Combs had previously been denied (and said denials were upheld by the ZBA), he felt that consistency dictated the stoppage until the matter had been resolved (Mr. & Mrs. Combs have appealed the ZBA’s denial of the building permit applications to the NYS Supreme Court).

Village Attorney Michael Martin then asked to be recognized. He was acknowledged by Chairman Lynch. Mr. Martin advised that Mr. & Mrs. Combs had excavated cellar holes on the property and that letters had been remitted to them and to their counsel requesting that the cellar holes be filled in. The Village maintains that this development is a Realty Subdivision and as such it is subject to local Planning Board review, the State Environmental Quality Review Act (SEQRA), SPEDES permitting, and Dept. of Health (DOH) and Dept. of Environmental Conservation (DEC) review. Mr. Martin speculated that the stockpiling of fill was just another example of trying to operate outside of the permitting process. He asked what would happen if Mr. & Mrs. Combs began to accumulate other building materials (plywood, piping, etc.) on site. The Village Attorney feels that the “Reasonable Man Standard” should be applied in this case—any reasonable person would conclude that the purchase of the property, combined with the subsequent subdivision of the same, excavation of cellar holes, installation of water/sewer pipes, and now the accumulation of fill amounts to a “building project” that would be subject to Planning Board review and numerous other NYS and Local regulations.

Mrs. Candace Combs then asked to be recognized. Chairman Lynch acknowledged her and asked that she step to the front of the room. Mrs. Combs stated that their property is basically flat—there are no substantial areas that need to be “filled in”. The excavation to date has just been a general “flattening” of a few low-lying spots and the fill that has been drawn in is just going to be used as topsoil for a lawn in the front section (the portion of the property closest to East Potter Avenue). This fill was being drawn in from another project—The Haynes House of Hope—as a courtesy to this entity. Mrs. Combs stressed that she placed a different emphasis on the passage cited above by the CEO. She advanced that “the use of an existing facility...shall not be changed” and feels that they are not altering the use of the property—it is still vacant land—and thus the CEO had no

standing to issue the Stop Work Order. In addition, Mrs. Combs stated for the record that she felt that they would be within their rights under the Village Zoning Law to erect a single one-family home on the parcel, so they should certainly have the right to put in a lawn and maintain it for the single residence.

Mr. Ronald Combs then requested to be recognized again. The Chairman acknowledged him, and he reiterated that there were no Local or NYS Laws to prohibit the accumulation of fill on his property.

Chairman Lynch then cited page 13 of the Village Zoning Law (where Major Subdivisions are defined) as well as Article 11, Subsection D3-a-7 (page 102) where it is stipulated that “Contours with intervals of five feet or less, as required by the Planning Board [shall be submitted]”. Thus, in the Chairman’s view, a grading plan is required to be submitted to the Planning Board prior to the issuance of any building permit(s) for the property.

A discussion ensued between the Village Attorney and Mr. Combs relating to the necessity of obtaining a building permit to accumulate fill and/or operate machinery/equipment on the subject property.

Chairman Lynch then inquired of Mr. Combs as to the size of the property/development. Mr. Combs responded that the lot encompassed approximately 1.5 acres.

Matthew Rice left the Meeting at 7:40pm.

The Village/ZBA Clerk asked to be recognized and the Chairman acknowledged him for comment. The Clerk advised that the Village Attorney had been consulted by the CEO prior to the issuance of the Stop Work Order. The Clerk also commented that it would seem that the designation of the development as a Realty Subdivision could be a distinguishing factor relating to the accumulation of fill—because the property was subdivided into five or more lots to be offered for sale, State Regulations require that the developer obtain the necessary approvals/stamps through the DOH and DEC, as well as a SPEDES permit, SEQRA filing, etc. However, because the applicants filed the subdivision without obtaining these stamps/permits, and without obtaining Planning Board approval, the CEO/Village is unaware of what fill needs to be drawn in or what other expectations exist for the property. Without such approved plans, how is one to judge what is appropriate? Can the property accommodate 10 loads of fill? 20 loads? 200 loads? What would be done to control erosion onto adjoining properties? Without the submission of the necessary plans to the proper authorities who review and subsequently approve the proposed plans, it is just not possible to determine what is “reasonable”. Perhaps the Planning Board or DEC would have required a silt fence, etc., but we just don’t know the answers to these questions as proper procedure was not followed.

Mr. Combs then commented that the DEC has no authority to regulate the drawing of fill onto his property. He feels that the Village is singling him out. He pointed to another

constituent on East Main Street who has drawn in a large amount of fill, but he is not being censured. Mr. Combs feels that the Village is making every effort to stonewall his project.

The Village Attorney then asked to be recognized and the Chairman granted his request to speak. Mr. Martin stated that the property mentioned by Mr. Combs on East Main Street represents a different situation—that constituent has not submitted plans to the Village for a development, installed piping for water or sewer services, excavated cellar holes, etc. He has simply drawn in fill and leveled up a portion of the property. Mr. Martin also advised that the stockpiling of fill was considered to be an activity directly correlated to the building/development process for this property by the CEO. Finally, the Village Attorney addressed a prior comment made by Mrs. Combs relating to the erection of a single home on the property. He feels that if the applicants wish to re-combine the subdivided lots back into a single parcel and build a single family home, this is not an issue. They just have to complete the transaction and apply for a building permit—this would be handled through the Village Code Enforcement Officer.

The Village Attorney then asked a hypothetical question relating to the activity seen on the subject property. When is it reasonable to assume that one is proceeding with the construction process? Could Mr. Combs store large quantities of lumber on site? Could he store cement and/or other building materials? Could he erect a roadway? Driveways? Mr. Combs could represent that he may proceed with each of these steps without a permit, but the fact of the matter is that he submitted an original development plan to the Planning Board, then withdrew it, then recorded the deeds for the Realty Subdivision without the necessary approvals, then installed piping and excavated cellar holes, etc. In his opinion, the accumulation of fill is a material step in the furtherance of the construction of the subdivision without the proper NYS permits and/or the required building permits. He feels that the “Reasonable Man Standard” dictates that one reach this conclusion.

Mr. Combs then asked to be recognized and the Chairman allowed him to proceed. Mr. Combs reiterated that he understood that his applications for building permits had been denied, but said denials did not take away his rights on his property. If there is a law that prohibits him from accumulating fill or operating an excavator, he wants to see it. Mr. Combs feels that a double standard is being applied.

Chairman Lynch then inquired if Mr. Combs had a contour map of the property in addition to the survey map that had been provided. Mr. Combs advised that he did not have a contour map. The Chairman then pointed to the site review process contained in the Village Zoning Law (see Article VII, Section F-3 & 4, page 57) regarding ground cover, grading, drainage, etc.

Mrs. Combs then interjected that Site Plan Review was only necessary for commercial properties, not residential developments. A period of discussion then ensued between Mrs. Combs and the Board.

The Chairman then inquired if there was any further public comment. No one else requested to be recognized. As a result, Mr. Haldt moved that the Public Hearing be closed at 8:10pm. Mr. Macura seconded the motion and it carried unanimously.

The Chairman then inquired if the Board wished to commence deliberations for the matter at hand and all parties agreed to proceed.

Chairman Lynch provided the following initial comments in the deliberation process:

1. It would seem that one of the central questions that must be answered revolves around the approval process for a subdivision. If an application for a subdivision (and/or associated building permits) is denied, does that require that all activity cease on the property?
2. It is evident that other permits may also be required (from other agencies or authorities) relating to this project.
3. Building Permits should be a vehicle to an end; building permits are not required for all activities on every property.

The Chairman then asked if any other members wished to make comments or observations.

Mr. Haldt stated that his position was that the essential question with this case related to the subdivision. If this development is not a subdivision subject to Planning Board review, then there probably is no law that pertains to the accumulation of fill. Mr. Haldt concurred with the Village Attorney concerning the constituent on East Main St.—he feels that this property, a single parcel, with no known or stated plans to subdivide the same—represents a totally different case than that of Mr. & Mrs. Combs. While everyone should be treated equally, if someone expresses and intent to do something, e.g. build six houses, this does distinguish their case from a single family home. As to the authority of the CEO to issue the Stop Work Order, Mr. Haldt referenced page 75 of the Village Zoning Law (Article IX, Section C-2-a1) as a basis for the CEO's decision.

Following Mr. Haldt's comments, the Village Attorney advised the Board that the subdivision issue had been raised previously in Mr. & Mrs. Combs former appeal to the ZBA concerning the denial of their building permit applications, and that the ZBA had determined that the proposed development was a Realty Subdivision subject to Planning Board review. While this decision is being appealed to the NYS Supreme Court, the Village Attorney advised that the ZBA's decision remains in effect until it is considered by the Court. Thus, the ZBA's prior determination is the determination of law at present.

Mr. Macura commented that the location of the work on the subject property was a factor to him. This work is proposed to be performed on the property's southern boundary and this is away from the proposed location of the single family homes to be constructed. Given that the building permits have been denied, Mr. Macura feels that work in the area of the proposed building sites should be restricted, but that a limited accumulation of fill and/or planting a lawn would not be objectionable. While he feels that the CEO has

acted in good faith, Mr. Macura advised that a fence could be erected if the neighbors have objections relating to erosion, dust, or construction noise. A period of discussion then ensued between Mr. Macura and the other members of the Board.

Mr. Haldt reiterated his concerns relating to the subdivision issue—if the accumulation of fill represents a material step in the furtherance of the construction process as per the Village Attorney’s testimony (without the proper permits, etc.) and the ZBA’s previous decision is still in force until consideration by the Supreme Court, how can Mr. & Mrs. Combs be allowed to proceed? This may create a situation where one does lose the right to do something that others still can. If you ask to do something and do not receive approval, and then you still proceed without the necessary affirmation, when does the municipality say “enough”?

Following a further period of discussion, the Chairman asked the Board if they could agree to the following:

1. The ZBA’s prior determination relating to the classification of the subject property as a Realty Subdivision is still in effect until the matter is considered by the appropriate appellate jurisdiction. The Board unanimously assented to this position.
2. Have Mr. & Mrs. Combs taken enough actions to formulate a material step in the furtherance of the construction of the subdivision without first obtaining the proper permits/certifications?

In relation to this question, Chairman Lynch inquired of the Village Attorney as to the status of Mr. & Mrs. Combs’ pending case in the NYS Supreme Court. The Village Attorney advised that the Judge had requested certain motions that would seem to indicate that his decision will likely be formulated within 90-120 days.

The Chairman then inquired of the Village Attorney if Mr. or Mrs. Combs had filed any new applications for a subdivision (or building permits, etc.) since the ZBA reached their determination relating to the property’s classification as a Realty Subdivision. The Village Attorney replied that to the best of his knowledge, no such applications had been made.

A prolonged period of discussion ensued between members of the Board relating to various subject matters—the risk of permitting such activities on the property, the viability of requesting the removal of the fill (this was not supported by the Board), and the question of when a development such as this becomes a project that requires permitting and/or certification.

The Village Attorney reiterated that the “Reasonable Man Standard” dictated that the development be classed as a project requiring permits/certifications at this stage. Is the accumulation of fill a material step in the process? Mr. Martin summarized that the applicants have presented a Building Plan to the Planning

Board and later withdrew the same. Next, they filed the Realty Subdivision with a plat map that corresponded to the original Building Plan; these documents were recorded at the Washington County Clerk's Office. Mr. & Mrs. Combs then dug cellar holes on the property. This action was also viewed as a material step, and thus the Village Attorney has sent three letters to the applicants (and their counsel) requesting that the cellar holes be filled in. In addition, the applicants have installed piping for infrastructure purposes. Now they are accumulating fill. The Village Attorney thus feels that one applying the "Reasonable Man Standard" would reach a conclusion that the applicants are proceeding with the development of the property without obtaining the proper permits and/or certifications, and thus he concurs with the CEO's reasoning in issuing the Stop Work Order.

An extended period of discussion followed between members of the Board and Village Attorney concerning what minor and/or major activities were "reviewable" for the subject property. Mr. Haldt summarized the discussion in expressing that the filing of the Realty Subdivision Checklist with the Washington County Clerk seemed to distinguish certain phases of this project as "reviewable". Further, the applicants' previous appearance before the Village Planning Board would appear to establish the intended use of the property.

Mr. Macura reiterated that he feels that there is a distinction in this case because of the placement of the material—given that the proposed work is to be completed along the southern boundary of the property, he feels that this may be acceptable. Another extended period of discussion ensued between members of the Board at this time.

3. Chairman Lynch asked if the Board could agree to the following statement: "Once an applicant has filed any application defining a project with a government agency, such filing distinguishes the same as a reviewable project." The Board discussed this statement at length. Chairman Lynch also suggested the following language "Any action that changes the existing conditions of a property in a manner that is a furtherance of a project's stated goals would fall under the permitting requirements of that project." The Board did not reach a final consensus concerning the language as proposed.

Chairman Lynch and Mr. Haldt suggested that it was likely that additional deliberation would be required before the Board could render a decision. Given the lateness of the hour, Mr. Haldt moved that the deliberations be adjourned to Monday, January 19th at 7:00pm. Mr. Macura seconded the motion and it carried unanimously.

Respectfully Submitted,

Richard H. Roberts
ZBA Clerk