

**September 13, 2016**  
**City of Erie, Pennsylvania**  
**ZONING HEARING BOARD**  
**1:00 P.M.**

The regular meeting of the Zoning Hearing Board was held Tuesday, September 13, 2016 at 1:00 P.M. in City Council Chambers, Municipal Building, 626 State Street.

**-- MINUTES --**

**Continuation of Appeal No. 12,083 by S.O.N.S. of Lake Erie Fishing Org. and Edward Kissell (4148-100)** concerning property located at 216 Bayfront Road in a WC district. The Erie City Zoning Hearing Board shall receive “any further testimony Appellants deem necessary for their case,” as court ordered on February 8, 2016 by the Court of Common Pleas of Erie County. The appellants appealed the Erie Zoning Office’s determination regarding a public access walkway constructed on the property. The Zoning Office has determined that per Section 306 and 306.10 of the Erie City Zoning Ordinance, the public access walkway met the provisions set forth in the Zoning Ordinance for width and materials used for the constructed public access walkway.

**Procedural History**

The public access walkway in question was constructed by the Erie County Convention Center Authority (hereafter referred to as “E.C.C.C.A.”) at the old G.A.F. (asphalt and asbestos shingle plant) site. Upon completion of the walkway, Mr. Edward Kissell, on behalf of the S.O.N.S. of Lake Erie Fishing Organization (hereafter referred to as “S.O.N.S.”), informed the Erie City Zoning Office that the S.O.N.S. believed that the walkway was not compliant with the Erie City Zoning Ordinance (hereafter referred to as “City Code”). In response to Mr. Kissell’s claim, the chief Zoning Office official for the City inspected the site, and determined that it was in fact compliant with the governing sections of the Code (306 and 306.10).

In response to the Zoning Office’s determination, the S.O.N.S. and Edward Kissell jointly appealed the decision to the Erie City Zoning Hearing Board. On November 11, 2014, the Zoning Hearing Board (hereafter referred to as “the Board”) heard the case. In the decision that was officially released on December 19, 2014, the Board unanimously voted to uphold the Zoning Office’s decision that the walkway was compliant with the City Code. The Board’s decision was then appealed to the Court of Common Pleas, in appeals filed separately by the S.O.N.S. and Edward Kissell. The appeal was docketed by the court as *Save Our Native Species (SONS) Of Lake Erie, Inc., and Edward Kissell, Appellants, vs. Zoning Hearing Board of The City of Erie, Appellee*, no.

10048-2015. The Erie County Convention Center Authority then intervened as a third party, making the case *S.O.N.S. of Lake Erie and Edward Kissell, Appellants vs. Zoning Hearing Board of The City of Erie, Appellee and The Erie County Convention Center Authority, Intervenor*.

The case was heard by Judge John Garhart of the Court of Common Pleas for Erie County, Pennsylvania, who held a status conference in March, 2016 attended by the attorneys for the parties, Mr. Kissell and the chief Zoning Official, and the court subsequently issued a briefing schedule. Upon completion of the filings by the parties, the court heard oral arguments on October 20, 2015. The court issued its decision on February 8, 2016. The City of Erie then joined the case as another intervenor, now making the case *S.O.N.S. of Lake Erie and Edward Kissell, Appellants vs. Zoning Hearing Board of The City of Erie, Appellee and The Erie County Convention Center Authority, Intervenor and The City of Erie, Intervenor*.

In the court's February 8, 2016 decision, it remanded the case back to the Zoning Hearing Board for the presentation of additional evidence. The two-part Court Order specified 1) that all of the parties formally view the property together, and 2) that the Appellants be permitted to present further evidence at another Board hearing. On May 13, 2016 four of the Board members, together with representatives of all of the parties and their attorneys, viewed the site as per the Court Order. The fifth member of the Board viewed the property with Mr. Kissell on June 10, 2016, together with representatives of the other parties.

In compliance with the Order, the S.O.N.S. and Mr. Kissell were listed on the Board's regularly scheduled hearing on August 9, 2016, to present additional evidence. Given the voluminous evidence to consider, the Board indicated that they would announce their vote at their next monthly hearing, on September 13, 2016.

NOTE:

There were several changes of the participants from the November 2014 hearing (hereafter referred to as "first hearing") and the August 2016 hearing (hereafter referred to as "second hearing"):

The S.O.N.S. were represented at the second hearing by Attorney Daniel Pastore (who had filed the appeal from the first hearing on their behalf), as well as Mr. Kissell – Mr. Kissell, who represented the S.O.N.S. at the first hearing, appeared at the second hearing as both a co-appellant and as a witness.

The E.C.C.C.A. was represented at the second hearing by Attorney John Persinger. The City of Erie was represented by Assistant City Solicitor Gerald Villella.

Additionally, Board member Jaqueline Spry recused herself from the second hearing, due to a conflict of interest and a personal matter; Ms. Spry had not participated nor voted in the first hearing, as she did not join the Board until January 2015.

The Findings of Fact, Conclusions of Law and Decision from the November 2014 hearing are hereby incorporated by reference.

The following Findings of Fact and Conclusions of Law are from the August 9, 2016 hearing; and the Decision is that rendered by the Board at their September 13, 2016 hearing:

### **Findings of Fact**

1. The Board heard testimony from Ms. Lori Boughton, the Regional Manager for Waterways and Wetlands of the Pennsylvania Department of Environmental Protection (hereafter referred to as “D.E.P.”). Ms. Boughton, whose office is in Meadville, PA, was subpoenaed to the hearing by Mr. Kissell, and was accompanied by Attorney Douglas Moorhead, Regional Counsel for the D.E.P. Ms. Boughton testified to the following:
  - a. The D.E.P. issued the permit for the E.C.C.C.A. to, among other things, construct the walkway. The permit authorized the construction, and was required because of what Ms. Boughton referred to as “the water obstruction at the old G.A.F. (a.k.a. “Sasafrass”) site”.
  - b. The D.E.P. regulates the placement of any water obstructions, and evaluates the impact of the water encroachment on the land or environment as part of its permitting process.
  - c. In deciding whether or not to issue a permit, the D.E.P. thus evaluates the impact of the proposed encroachments or water obstructions on water resources
  - d. The D.E.P. is not the agency that would require a railing, walkway, or any other features on the land around the water; therefore, they would not evaluate the safety features of the walkway.
  - e. The D.E.P.’s permit authorized construction of a 900 linear foot sheet pile sea wall along the lakeshore and enclosing an open channel on the property.
  - f. Upon questioning from Attorney Pastore and Mr. Kissell, Ms. Boughton acknowledged that the walkway that was eventually constructed was different from the original design that was submitted by Ashley Porter (the design engineer of the walkway, who was working for the E.C.C.C.A.).
  - g. The original design submitted by the E.C.C.C.A. to the D.E.P. indicated that the entire walkway would have a railing and two sets of steps to the water; Ms. Boughton said that the agency’s engineers thought that the E.C.C.C.A. would construct a concrete walkway and fence along the entire length of the sea wall.



4. The Board also heard testimony from Erie City Councilman Mel Witherspoon, who was called to testify by Mr. Kissell. Mr. Witherspoon, who accompanied the parties at the June 10, 2016 viewing of the property, indicated that he believed that the stone safety barrier was a hazard, because there are no railings. Mr. Witherspoon indicated that he is not the official liaison between the Board and City Council, and that he was appearing on his own, and not in any official capacity. He further acknowledged that he was not familiar with the portion of the City Code governing the waterfront walkway.
  
5. In addition to Mr. Kissell, the other person who testified at length at both the first and second hearings was Mr. Casey Wells, the executive director of the Erie County Convention Center Authority. Both Mr. Kissell and Mr. Wells were also present at the formal viewings of the site. At the second hearing, Mr. Wells was questioned by the attorneys for all of the parties, by Mr. Kissell, as well as by the Board members themselves:
  - a. The walkway site is located where the former G.A.F. asbestos/asphalt plant stood. As such, there were many environmental contamination issues related to the property.
  - b. The contamination issues required environmental remediation, and the E.C.C.C.A. had to obtain permits from the Pennsylvania D.E.P. (see no. 1 above) and the U.S. Army Corps of Engineers.
  - c. The E.C.C.C.A. spent a total of seven (\$7) million dollars on the remediation and walkway construction project; money received from two redevelopment assistance grants by the Commonwealth of Pennsylvania. The state provided the money for the purpose of acquisition and environmental remediation of the contaminated property.
  - d. The E.C.C.C.A. added sewer piping to an existing creek running under the property. In addition to the sewer piping, the environmental remediation project included a sea wall placement, a cap on the soil, along with several other actions taken by the E.C.C.C.A. during the construction of the walkway.
  - e. Neither the Corp of Engineers nor the D.E.P. required the public walkway. It was the E.C.C.C.A. that wanted to include the walkway as part of the remediation process. The walkway would serve the dual purpose of covering over the formerly contaminated property, in addition to providing access to the water for the general public.
  - f. Mr. Wells asserted that the E.C.C.C.A. was always diligent to obtain all necessary permits, and comply with all applicable rules and regulations (local, state or federal). If approval from the Erie City Council was required, then it

would have been sought; but they would not have involved Council if their participation was not required.

- g. The E.C.C.C.A. sought legal advice to assure that the project would comply with the City's Zoning Ordinance regulations regarding waterfront districts. The designers drafted the asphalt walkway to comply with the City Code, Mr. Wells said; it was at least 12' in width for its entire nine hundred foot length (in places up to 18' wide), and is parallel to and abutting the water.
  - h. The walkway is not directly up to the water along its entire length, because it was intended that other members of the public, in addition to fishermen, be able to utilize the walkway. Mr. Wells said that the architects felt that there should be places where the view is not obstructed by a fence.
  - i. The architects and design engineers were aware that the City Code required that the walkway be contiguous and parallel, and abutting the water. The designers also sought to include the safety barrier, which the Code allows. However, the Code does not specify any specific type of safety zone – the term "safety barriers" is not defined in the Code.
  - j. The E.C.C.C.A. designers included two types of safety barriers at the water's edge: a) a three-foot high fence, and b) large stones embedded in a cement flooring, stretching approximately two to three feet out from the water's edge, and visible from a distance.
  - k. To remove the entire stone safety barrier, and replace it with cement and additional fencing, it would cost more than \$100,000.00; the E.C.C.C.A. does not have any more money from the state grants for further construction.
  - l. Mr. Wells contends that the E.C.C.C.A. has not attempted to keep City Council out of the walkway construction process, but have actually worked with City Council throughout the project, and tried to comply with their wishes. For example, at the request of Council, in order to receive the building permit for the hotel, the E.C.C.C.A. added an additional 800 square feet of cement, and additional fencing, at the part of the walkway nearest the hotel. Additionally, Mr. Wells answered the concerns of Councilman Witherspoon, writing him a letter in August 2014 in response to concerns brought to Mr. Witherspoon by Mr. Kissell upon the project's completion.
7. The attorneys for the Appellants, as well as for the two Intervenors all made closing remarks to the Board. Attorney Pastore, on behalf of the S.O.N.S., told the Board that the walkway does not comply with the City Code for at least two reasons: it does not abut the water, and in the places where it does it is not 12' wide. Mr. Pastore said that "abut" means to touch, as in having a common boundary; whereas there are three separate boundaries in the E.C.C.C.A. design, he said. Both Attorneys Persinger and Villella rebutted Attorney Pastore's

contention. Attorney Persinger said that nothing has changed since the first hearing that would warrant the Board to change their vote. Attorney Villella said that “abut” means as close to the water as is reasonably possible, and that City Council need not have been involved in the project since there was not a structure (i.e. no development) in the design. Also, both Persinger and Villella formally challenged the standing of the S.O.N.S. and Mr. Kissell to bring this action.

### **Conclusions**

1. The Board complied fully with the February 2016 court order by Judge Garhart. The Board viewed the walkway together with the other parties, and heard additional testimony from the Appellants regarding whether the E.C.C.C.A. walkway is compliant with the Erie City Zoning Ordinance.
2. The portion of the City Zoning Ordinance that governs the construction of the walkway along the waterfront are Sections 306 and 306.10.

The City Code, Section 306.10, Public Access in Waterfront Districts, states in full:

“A free public access way must be regarded as an essential component of all developments in all Waterfront Districts. Every proposed site developed that has access to the Bayfront water’s edge shall show on the plans a proposed free public access way, abutting and parallel to the water’s edge. The free public access way shall be of sufficient width to comfortably handle the expected amount of pedestrians, but shall not be less than twelve (12) feet in width. The construction of the free public access way shall be of such material as to be aesthetically pleasing and in harmony with the site development, and shall not consist of gravel, stone grass or other unapproved material. When the free public access way is abutting the water’s edge, and an apparent danger exists, a safety barrier shall be installed. It shall be the responsibility of the developer and/or property owner to construct and maintain the public access way. In addition, said developer or property owner shall assume all liability. The public access way shall be made accessible to the handicapped. The free public access way shall have north/south access to a City of Erie Public Right-of-Way at maximum intervals of seven hundred sixty (760) feet. The issuance of a building permit shall be contingent upon the developer providing a performance bond in an amount equal to one hundred ten (110%) percent of the cost of the proposed free public access way.”

3. The Appellants claimed that the E.C.C.C.A. walkway was not compliant with several provisions of Section 306.10 of the City Code. Most importantly, the Appellants claimed that the public access way was not properly “abutting and parallel” to the water’s edge, and that the stone barrier does not constitute a “safety barrier” for purposes of the Code; the fence that was installed for portions of the 900 foot walkway should have been erected along the entire public access way. The Appellants also claimed that City Council should have been more involved in the project, as required by Section 306 of the City Code.
4. The City Code defines “public access walkway” and “abut”. The Code does not define “safety barrier”.

Public access way is defined as: “a constructed passage located within a Waterfront District designed for use by the general public for such activities as walking, jogging, fishing, etc..., and made available for the public’s use during daylight hours, and as mandated by City Council”.

Abut is defined as: “to have a common boundary or being along contiguous lot lines that are not separated by a street or alley”.
5. The E.C.C.C.A. treated the project as a remediation project, having received the remediation and environmental clean-up grants from the state of Pennsylvania, and not as a development. As it was not a “development”, the approval of City Council was not required.
6. Section 306 of the City Code requires City Council approval for any new structure, or modification of an existing structure. The Erie Zoning Office determined that the E.C.C.C.A. walkway was a public sidewalk, and was not a “structure” as defined in the Code; therefore, approval of City Council was not required.
7. The E.C.C.C.A. did apply for permits from the Army Corps of Engineers and the PA Department of Environmental Protection. Neither the Corps of Engineers nor the D.E.P. requires a walkway to acquire a permit.
8. The completed walkway is compliant with all D.E.P. regulations, as neither the Corp of Engineers nor the D.E.P. required the public walkway. It was the E.C.C.C.A. that wanted to include the walkway as part of the remediation process.

## **Decision**

By a unanimous decision, the Board voted to confirm their previous ruling, and to uphold the Zoning Office's determination that the E.C.C.C.A. walkway is compliant with the City Code.

Board member Patty Szychowski said that the Board did as the court required and reviewed the new evidence and testimony, and that she heard nothing new that would make her change her vote, that the Zoning Office's original ruling was correct.

Board member Edward Dawson likewise indicated that the Board reviewed exhaustive evidence in making their decision. He said that he thinks that several key points in the City Ordinance lack specificity; specifically the definition of "abut", and he indicated that he would like to see the language of the City Code improved. After careful consideration, however, he said that the construction of the walkway does meet the letter of the Ordinance, if not the spirit of the law. He said that as he must go by the language that is in the Code, and is obliged to uphold the decision that the walkway complies with the City Ordinance.

Similarly, Board member Selena King also felt that the definition of "safety barrier" in the City Code is unclear. She said that going forward she would like to see City Council take a more proactive role in defining the law regarding waterfront districts.

Board chairman Mike Hornyak said that the Board was in a difficult position in the first place in that they were asked to determine the compliance of a project that was already completed. He said that the Board did their due diligence, and made sure that they reviewed all of the information needed before making their decision. He too said that the walkway may not be the best design, but that it does meet the Code; he indicated also that he heard no new information that would cause him to change his vote.

Accordingly, all four members voted to uphold the Zoning Office's determination that the E.C.C.C.A. walkway is compliant with the City Zoning Ordinance.

**It is So Ordered.**