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March 15, 2023

Via Hand Delivery

Rick Swig, President
Board of Appeals
49 South Van Ness Avenue, Suite 1475
San Francisco, California 94013

SCOTT EMBLIDGE
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Direct: (415) 362-3591

Re: 146 23rd Avenue

Dear President Swig and Members of the Board of Appeals:

I am writing to let you know the extremely unfortunate way in which the Department of Building Inspection has handled this matter since Appeals 22-076 and 22-077 were before you on December 14, 2022. If recall, the owners of 146 23rd Avenue (the "Monahans") performed work without permits, including excavation work that the DBI determined had undermined at least one of two neighboring properties.

The two neighboring property owners, the Maher family and the Lysenko family, came before you on December 14. They expressed their concerns about the safety of their respective homes. The Board expressed its own concerns about the work done without permits and the need to put steps in place to make sure the neighboring properties are safe.

The Monahans agreed at the hearing to allow the neighbors' engineers to inspect work at the site. The Board then passed a motion granting the appeals, stating:

"the Board of Appeals hereby GRANTS THE APPEAL AND ORDERS that the ISSUANCE of the subject permit by the Department of Building Inspection (DBI) is UPHeld on the CONDITION IT BE REVISED TO REQUIRE: (1) DBI shall perform a Start Work Inspection prior to work commencing under the appealed permits, (2) the permit holder shall have site monitoring in place for both adjacent properties on or before DBI's Start Work Inspection, (3) the permit holder shall have a soils engineer perform a soil compaction test and prepare a report with the findings of the test; this report shall be shared with DBI and the appellant, and (4) the soil compaction work that must be performed in response to the Notice of Violation must be completed to DBI's satisfaction prior to any work being performed under the permit."

The permit holder and DBI have not adhered to these conditions stipulated by the Board of Appeals. Instead, here is what has happened:

On January 5, there was a site inspection at the Monahan's property, attended by Brett Howard and David Szeto from DBI, the Monahans, the neighbors, the neighbors' engineers, and me. At that meeting it was agreed that (1) a plan would be developed for the removal of soil that covered up the unpermitted excavation work so the parties could determine whether the neighboring foundations were undermined, (2) once it was determined that the foundations were protected, new permits would be obtained to do further work at the site; and (3) before any work would proceed at the site, the Monahans and the neighbors needed to come to written agreement about this work.

Mr. Howard sent all the parties the following email on January 5 (emphasis added):

"I am sending this email to reiterate what was discussed during the meeting this morning that was attended by all three neighbors, the engineer and legal representative for the Maher's, a soils engineer, as well as myself and DBI Associate Engineer David Szeto. **A written agreement signed by all parties must be in place prior to commencing what I shall refer to as Phase 1.** Phase 1 entails excavating (on the Maher side) down to the bottom of the previously poured caissons and removing any loose soil in between ALL poured caissons to expose the condition of the 'native' undisturbed soil. **Once that is done, a meeting between the aggrieved parties and myself shall be scheduled in order to discuss and agree upon the work going forward.**"

Five days later, on January 10, Mr. Howard forwarded to the parties the recommendations of Mr. Szeto, DBI's engineer. Those recommendations included a requirement for a new permit to perform exploratory work, a new underpinning/shoring permit if DBI determines the neighboring properties were undermined, and revised permits and plans for any additional work.

On January 12, I sent a written agreement to the Monahans' attorney, incorporating the language from Mr. Howard's emails and Mr. Szeto's report.

So far so good. Nothing would happen without an agreement of the parties and without further meetings among the parties and DBI.

Over two weeks then went by without word from the Monahans or DBI.

Then, on January 30, the Mahers observed work being done at the Monahan's property. Later that day after extensive work already started, Laura Monahan sent an email to the Mahers stating, "I wanted to let you know we are moving forward with the conditions set by the Board of Appeals. DBI has approved us removing the loose soil, so they can inspect the previous work done. No additional work will be done until DBI performs the inspection. Our soils engineer will do a report, which we will share with you."

This, of course, was a shock. It turns out that DBI issued the Monahans a new permit to remove soil on January 27. DBI did so even though:

- there was no written agreement between the parties, as required by Mr. Howard and confirmed in his January 6 email;
- the neighbors' engineers were given no opportunity to inspect the site as soil was being removed to determine whether shoring or underpinning was needed; and
- DBI communicated absolutely nothing about this with me, the Maher family or the Lysenko family.

How could this happen? Why would DBI allow this work to go forward without an agreement and without communicating with the neighbors?

When this came to light on January 30, the neighbors' engineers emailed DBI asking for access to the site, the Maher family filed appeals of the new permit, and I wrote to Mr. Howard, Matt Greene and Joe Duffy stating:

"I'm told that the Monahan's have begun work at the site again even though they have ignored our attempts to negotiate an agreement. I have heard nothing from their attorney since January 12 when I sent them a draft agreement incorporating DBI's requirements. Can you please help stop Monahan from ignoring stop work orders and the requirements Brett and David Szeto told them they had to comply with, especially monitoring by our engineering team."

Having heard nothing in response, I wrote again on January 31, stating:

"Could we please talk about this situation? It appears a permit was issued and work performed yesterday even though no agreement has been reached and without our engineers being able to observe the work. I'm scratching my head about this since that is the opposite of what we all agreed would happen."

I heard nothing from Mr. Howard or Mr. Greene. However, Joe Duffy wrote to me on February 1 asking: "Are DBI staff being responsive to you on your emails? I did not see any replies and want to make sure they are getting back to you." I explained to Mr. Duffy that I had heard nothing.

On February 6, Mr. Greene responded, apologizing for being "remiss in responding." He and I then spoke by phone. Mr. Greene expressed concern about what had transpired but also pointed out that the permit being appealed involved work (removal of soil) that had already been completed so the appeal served no purpose.

Mr. Greene said he looked at the agreement I sent to the Monahans on January 12 and didn't think it was unreasonable. He said he would talk to the Monahans about getting the agreement signed. He also agreed that he would prevent any permits from being issued without his personal review.

I confirmed this in an email stating: "Matt, If we withdraw the appeal can I count on DBI not to issue additional permits until the parties have an agreement and the neighbors' engineers are given access for inspections?" Mr. Greene responded: "I can put an address restriction in our permit tracking system. This would prevent any permit from being issued without my approval."

On February 10, Mr. Green asked me if an agreement was in place. I responded, "I wish. I haven't heard anything from the Monahans or their attorney, but I didn't see the point in going forward with an appeal of a limited permit for dirt removal when the removal has already occurred. If DBI tells them that they can't do additional work until we have an agreement in place, I think that protects the neighbors."

So, despite Mr. Howard not following through on the requirement of a written agreement, and his not communicating with the neighbors about approval of a new permit, the neighbors now had additional assurances that Mr. Greene would make sure no further work would occur until a written agreement was in place. The neighbors knew that additional permits and substantial revisions to prior permits were needed based on Mr. Howard's and Mr. Szeto's emails, and that Mr. Greene would not let that work proceed without his personal review.

Two weeks went by with no word from the Monahan's attorney or from DBI. Then, on February 21, significant new work began at the Monahan property without any notice from the Monahans or DBI.

I wrote the Mr. Howard, Mr. Greene, and Mr. Duffy on February 24, stating:

I do not understand what is going on here. The permit holder performed dangerous work without permits, potentially undermining neighboring foundations. The Board of Appeal understandably threw the book at them. In early January we all agreed on what should happen next. By "we," I mean the permit holders, the impacted neighbors, the neighbors' engineers, and Brett and David Szeto. Brett followed up that meeting with the following email:

"I am sending this email to reiterate what was discussed during the meeting this morning that was attended by all three neighbors, the engineer and legal representative for the Maher's, a soils engineer, as well as myself and DBI Associate Engineer David Szeto. **A written agreement signed by all parties must be in place prior to commencing what I shall**

refer to as Phase 1. Phase 1 entails excavating (on the Maher side) down to the bottom of the previously poured caissons and removing any loose soil in between ALL poured caissons to expose the condition of the 'native' undisturbed soil. **Once that is done, a meeting between the aggrieved parties and myself shall be scheduled in order to discuss and agree upon the work going forward.**" (The bold emphasis is mine)

On January 12, I sent an agreement to the attorney for the permit holders the draft agreement Brett asked for. To this day, I have not heard one word back from the permit holders about anything they perceived as wrong/improper with the draft agreement. I tried to make it as simple as possible, incorporating language from Brett's email and a subsequent email from David Szeto.

Despite no agreement being reached, DBI gave the permit holder a new permit to remove soil, the Phase 1 work Brett said that could not take place until a written agreement was in place. This permit was issued without notice to the impacted neighbors or their engineers, so the engineers had no ability to observe this work and make sure the neighboring foundations were protected. WHY?

Now Brett says DBI is going to issue further permits even though there is not agreement between the parties, even though the neighbors apparently are engaging in unpermitted work as I write this, and even though the "meeting between the aggrieved parties" and Brett that Brett required in his email has never taken place. WHY?

All the neighbors want is have their engineers inspect the work and come up with an agreed-upon plan to protect their homes. What is wrong with that? Isn't that how you want neighbors to act, rather than how the permit holders have acted - unilaterally engaging in unpermitted excavation in violation of the Civil Code?

If DBI goes ahead and issues a permit for more work at the site, the neighbors will need to appeal that permit to the Board of Appeal and ask the Board whether it thinks DBI has acted appropriately. Instead of that, why not do what you said you would do in January - get everyone together to agree on a plan of action?

What the heck am I missing here?

Mr. Greene wrote back a few days later, copying Ms. Monahan, saying "I wish to do a site visit to get a straight answer what happening out there." I tried to schedule such a

site visit, including the neighbors' engineers, on February 28. DBI did not respond, and no joint site visit even occurred.

How could this possibly happen? It turns out that DBI agreed to let the Monahans cover up the exposed soil and move forward with their project under previously issued permits. DBI let this happen even though:

- DBI had earlier made clear that a written agreement was required, but no written agreement had been signed;
- DBI had earlier made clear that new permits and/or revised permits would be required, but none had been issued; and
- DBI knew that the Monahans **had not complied with this Board's requirement** to "have a soils engineer perform a soil compaction test and prepare a report with the findings of the test."

And, perhaps worst of all, DBI let all this take place without any communication with the neighbors.

I don't know if this Board has the ability to do anything about this specific situation. DBI has allowed work to proceed without complying with this Board's requirements, and without complying with its own written requirements. Have the neighboring properties been undermined? We don't know because the neighbors' engineers were not given the promised access and no soil compaction tests were ever performed.

What I do know is that DBI has done a grave disservice to the Maher family and the Lysenko family. Think about Ms. Lysenko. She received a Notice of Violation from DBI stating "It has been determined that approx. 20' of your foundation has possible undermine [sic]." I am told that Ms. Lysenko tried repeatedly to contact DBI after the NOV being issued but has heard nothing from their department. She asked this Board for help at the December hearing. Mr. Greene stated he would follow up with Ms. Lysenko during the hearing, but I am told that this promised follow up and help from never happened for the Lysenko family.

I was Deputy City Attorney for 10 years and, rightly or wrongly, I still consider myself part of the City family. I was taught that while we serve an entity call the City and County of San Francisco, one of the privileges and responsibilities of being a City employee is that we also serve the people of this City. In this case, DBI not only failed to serve the neighbors, but it also affirmatively misled them and me.

Members of the Board of Appeals
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Thank you for taking the time to read this letter.

Sincerely,

G. Scott Emblidge

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ccs: Board of Appeal Members
Julie Rosenberg
Matthew Greene
Joseph Duffy