

TOWN OF WELLESLEY



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ZONING BOARD OF APPEALS

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2002 OCT 23 P 12:45

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J. RANDOLPH BECKER
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ZBA 2002-94

Appeal of Paul and Barbara Calhoun, et al

23 Abbott Road

Re: 26 Abbott Road

Pursuant to due notice, the Permit Granting Authority held a Public Hearing on Thursday, September 19, 2002 at 7:30 p.m. in the Selectmen's Meeting Room (Conference Room B) at the Town Hall, 525 Washington Street, Wellesley on the appeal of PAUL AND BARABARA CALHOUN, ET AL pursuant to the provisions of Section XXIVC and Section XXIVD of the Zoning Bylaw, of the decision of the Inspector of Buildings to issue a building permit on August 6, 2002 to SAI Realty Trust to convert the existing building at 26 ABBOTT ROAD, in a Single Residence District, to meet daycare facility requirements, a use allowed in a Single Residence District, pursuant to Section II A 3 A of the Zoning Bylaw, on the basis that the plan submitted is not adequate to determine whether the project meets the requirements of Section II A 3 A of the Zoning Bylaw.

On August 28, 2002, the petitioners filed a request for a hearing before this Authority, and thereafter, due notice of the hearing was given by mailing and publication.

Presenting the case at the hearing was Paul Calhoun, 23 Abbott Road, who said the grounds for his appeal are according to the legal notice. To his knowledge, there was no change in the plans for the project from those submitted for 28 Abbott Road, on which an appeal was heard on August 15, 2002.

Stanley Brooks, counsel for SAI Realty Trust, said they are working on the same set of plans as had been used for 28 Abbott Road. For the record, he and his client disagreed with the Board's decision regarding 28 Abbott Road. The same issues are present in this case as were present before. In their opinion, the Building Inspector made a thorough review of the plans, and after multiple revisions to the plans based on his comments and concerns, he was satisfied that the plans were in full compliance with the applicable sections of the Zoning Bylaw. The questions regarding the parking spaces, the children's play areas and other matters addressed in the decision were duly addressed, either in the plans, or by the Building Inspector during his review. He would assume that the Board's concerns regarding #26 would be the same as those regarding #28.

Arthur Kreiger, co-counsel, stated that after reviewing the Board's decision on #28, he believes the Board made several legal errors in its decision. The submitted plans did show the data the Board said was missing. The scale shown on the plans could have been used to verify the dimensions of the parking spaces.

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Mr. Kreiger discussed the Board's reliance on the internal lot line, "internal" meaning the lot line between two properties that are part of the same project and in substantially common ownership, in the issues of overlapping parking spaces, play areas and setbacks. However, in Site Plan Approval for both the Bates School and the Town Library, the Board and Town Counsel took the position that internal lot lines can be disregarded for purposes of the setback. He did not feel that it was appropriate to take one position in regard to Town projects, and the opposite position in this case.

Mr. Kreiger discussed the issue of site plan approval in regard to day care centers, and expressed the opinion that due to the "Dover Amendment", no town could require site plan approval in regard to such use and that the Appeals Court and Land Court have supported that position in recent case law.

Mr. Seegel, Board Chairman, disagreed, stating that recently the courts have ruled that site plan approval is allowed in towns having a specific requirement for site plan approval in its zoning bylaws. In the Wellesley Zoning Bylaw, one of the triggers for site plan approval is the disturbance of 5,000 or more square feet of vegetative cover.

Mr. Kreiger stated that pursuant to Chapter 40A, Section 3, he believes the Board is not authorized to regulate open space for specific issues such as square footage for play area and play equipment for the number of children involved.

Mr. Seegel disagreed, stating that the submitted plans did not furnish sufficient information because none of the play equipment intended for use was shown on the plans. The zoning bylaw specifically states that the number of children that can use the play area at any one time depends on the area remaining after the space taken for play equipment is deducted. The Board did not have and still does not have that information. It is the Board's duty to enforce the Zoning Bylaw as written, not to rewrite it.

Christine Lanagan, 19 Abbott Road, expressed opposition to the petition, as did Ingunn Sturlaugsdottir, 30 Abbott Road.

Jennifer Cornelsson, 44 Abbott Road, expressed support for the petition.

Mr. Seegel stated that the neighbors must understand that pursuant to State statute, no town can prohibit or impose special permit requirements for the use of the property as a day care center in a Single Residence District. The Board was of the opinion that there was not sufficient information regarding 28 Abbott Road in the submittal for the Board to make a determination, or for the Inspector of Buildings to make a determination as to whether or not the project was in compliance with the bylaw. The Board appears to have a similar opinion as to most of the issues on 26 Abbott Road. However, the Board believes that if sufficient information was submitted, the proposal could meet the requirements of the bylaw.

Mrs. Hibbard commented that she still had concerns as to whether the parking calculations had been done on separate lots, or if they had been computed on the total area. A critical issue to be addressed is the amount of land to be disturbed in order to determine whether or not site plan approval is required. In requiring revocation of the building permit for #26, the Board is seeking that an application with information showing compliance with the zoning bylaw be submitted to the Building Inspector.

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Mr. Seegel added that based on the submitted plans and information, the Board cannot determine whether or not the project will involve grading or regrading of land to planned elevations and/or the removal or disturbance of the existing vegetative cover over an area of 5,000 or more square feet, which would trigger site plan approval. That is one of the reasons why the Building Inspector has been ordered to revoke the building permit issued on #28. Assuming that site plan approval was required, it would be very unusual that the applicant could not satisfy the Board and the zoning bylaw to obtain that approval.

Robert Mandel, 16 Abbott Road, raised the issue regarding two residences on separate lots being combined into one day care facility.

Mr. Seegel responded that the lots have not been combined, and could not legally be combined and continue to have two structures on one lot. Two side-by-side single family residences can be used for day care purposes, but the zoning bylaw mandates that certain requirements be met by each one.

The Board moved and voted to uphold the appeal regarding the issuance of a building permit for 26 Abbott Road and to direct the Building Inspector to revoke the building permit issued within 10 days of the effective date of the decision.

The Board then moved and voted to amend the decision (ZBA 2002-73), which upheld the appeal of Paul and Barbara Calhoun Et Al in regard to 28 Abbott Road to direct the Inspector of Buildings to revoke the building permit issued for renovation within 10 days after the expiration of the 20 day appeal period following the date of time stamp of the decision.

Statement of Facts

The subject property is located at 26 Abbott Road, in a Single Residence District, on a 10,017 square foot lot, and contains a single family dwelling with sole access from Abbott Road and shared access to Abbott Road and Seaward Road through a 24 foot drive running along the northern lot line of both properties. The abutting property at 28 Abbott Road on a 23,794 square foot lot also contains a single family dwelling. The properties are held in common ownership by SAI Realty Trust, Jyotsma Sawhney, Trustee.

On July 24, 2002, the petitioners filed an appeal to the decision of the Inspector of Buildings to issue a building permit for the upgrading of the existing structure at 28 Abbott Road for use as a Child Care Facility. At a Public Hearing held on August 15, 2002, the Board of Appeals heard the petition and voted unanimously to uphold the appeal, and issued its decision (ZBA 2002-73) on September 10, 2002. On September 30, 2002, Ms. Sawhney filed an appeal to this decision with Land Court.

On August 28, 2002, Paul and Barbara Calhoun filed an appeal to the decision of the Inspector of Buildings to approve the application for a Building Permit issued on August 6, 2002 to SAI Realty Trust to convert the existing building at 26 Abbott Road in a Single Residence District, to meet Daycare Facility Requirements, on the grounds that the plans submitted were not adequate to determine whether or not the project meets the requirements of Section II A 3 A of the Zoning Bylaw.

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The Appeal was joined by Rebecca and Richard Killigrew, 34 Seaward Road, Mark and Nancy Claflin, 21 Abbott Road, and Veronica and Giovanni Castellucci, 29 Abbott Road.

On August 30, 2002, the Executive Secretary of the Board of Appeals requested from the Inspector of Buildings copies of all documents and papers constituting the record of the case in which the appeal was taken from the decision of the Inspector of Buildings, pursuant to Section XXIV-C of the Zoning Bylaw.

No response to this request was received. As no new information or plans were received, the Board is of the opinion that the Inspector of Buildings based his decision to approve the building application for 26 Abbott Road on the information and plans submitted for the building permit issued for 28 Abbott Road, which are as follows as to those pertaining to 26 Abbott Road: copy of a letter from Jyotsna Sawhney to Brian Judge, project architect, regarding a traffic analysis for 26 and 28 Abbott Road; a copy of the traffic analysis regarding Morning Afternoon and Evening Pick-up Times dated July 18, 2002, from Jyotsna Sawhney to Brian Judge; a copy of Site Plan/26 & 28 Abbott Road (S-1), prepared by Brian Judge, dated 5/15/02, revised 7/19/02, revised 7/22/02.

Decision

This Authority has made a careful study of the materials submitted and the information presented at the hearing. It is the opinion of this Authority that the letter dated August 27, 2002 from Paul and Barbara Calhoun constitutes an appeal to the decision of the Inspector of Buildings to approve the building application submitted by SAI Realty Trust to convert the existing dwelling at 26 Abbott Road to meet daycare facility requirements, based on his determination that the use of the property at 26 Abbott Road, in a Single Residence District, was in compliance with Section II A 3 A of the Zoning Bylaw.

The Board makes the following findings:

1. The 10,017 square foot lot numbered 26 Abbott Road and the 23,794 square foot lot numbered 28 Abbott Road, although held in common ownership by SAI Realty Trust, constitute two separate lots, which have not been joined, but are being used together to satisfy requirements of Section II A 3 A in violation of the Zoning Bylaw.
2. No information supporting the decision of the Inspector of Buildings to approve the building application to convert the existing building at 26 Abbott Road, in a Single Residence District, to meet Daycare Facility Requirements was submitted to the Board of Appeals pursuant to its request on August 30, 2002.
3. Subsection d. of Section II A 3 A requires that a fenced outdoor play area, set back a minimum of 10 feet from any abutting land in a single residence use, shall be provided at a ratio of not less than 75 square feet for every child at play, exclusive of the area occupied by play equipment. The Site Plan (S-1) is not in compliance with Subsection d. for the following reasons:
 - Play areas A and B shown on the submitted Site Plan are not only not set back from the abutting land of 28 Abbott Road, but cover portions of both properties.

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- The Site Plan notes that the 1,145 square foot Play Area "A" can be used for 15 children. This fact is in error as the area to be occupied by play equipment is not delineated on the plan. The square footage of said area must be subtracted from the total area and then divided by 75 in order to determine the correct number of children allowed at play at any one time.
 - The Site Plan notes that the Play Area "B" containing 1,965 square feet can be used for 26 children. This fact is in error for the same reason.
 - The Site Plan notes that Play Area "C" containing 675 square feet, located totally on 26 Abbott Road, can be used for 9 children. This fact is in error for the same reason.
4. Subsection e. states that off-street parking shall be provided for every paid or unpaid employee, so there shall be no on-street parking by employees. The Board is of the opinion that there is no way to determine from the submitted Site Plan whether or not this requirement has been met.
- Although the Site Plan shows the number of employees to be 17, there is no statement regarding the allocation of employees between 26 and 28 Abbott Road, and if each lot has sufficient spaces for the number of employees to be employed on the separate premises.
 - The Site Plan shows a total of 39 spaces. Portions of 8 spaces on the 24 foot drive encroach onto the 28 Abbott Road lot, as do the two parallel parking spaces on either side of the 12 foot drive. This would reduce the number of parking spaces available on 26 Abbott Road to 7. As there is no information regarding the number of employees at 26 Abbott Road, there is no way to determine whether or not 7 spaces are sufficient.
 - There is no way to determine from the Site Plan whether the dimensions of the parking spaces meet the dimensions required pursuant to Section XXII of the Zoning Bylaw, and therefore, if the 7 spaces totally contained on the property at 26 Abbott Road are in compliance with the Zoning Bylaw.
5. Subsection f. requires that an off-street drop off and pick up area shall be provided at a ratio of one space for every 3 children, unless drop off and pick up area can lawfully be provided on a street abutting the lot. The Board is of the opinion that compliance with this requirement cannot be determined for the following reasons:
- There has been no information submitted regarding the location of a drop off/pick up area to be provided on a street abutting 26 Abbott Road.
 - No drop off/pick up area for 26 Abbott Road is shown on the Site Plan.
 - There has been no information shown as to the number of children allocated to 26 Abbott Road. Therefore, there can be no determination as to whether the 7 parking spaces shall be sufficient for both staff and drop off/pick up of children.
6. Subsection g. requires that off-street parking areas devoted to the parking of 5 or more vehicles shall comply with the SCREENING REQUIREMENTS contained in Subpart 3. Development Standards of Part D. of Section XXI. OFF STREET PARKING. This Authority finds that the submitted Site Plan does not show compliance with the SCREENING requirements for the following reasons:

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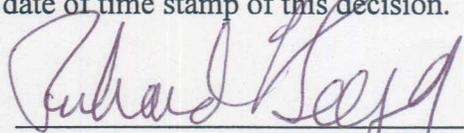
- The submitted Site Plan does not show the length of the stockade fence along the southern property boundary. It appears that the fence does not extend along the total 107.93 foot length of the property line. The width and length of the planted area extending westerly from the undimensioned stockade fence along this property line are not shown. This strip must have a minimum width of 5 feet.
- The width of the screening area along Abbott Road is not shown, nor are the proposed planting materials or the height of said planting materials shown.
- There is no screening provided along the easterly boundary or the westerly boundary of 26 Abbott Road, both of which abut residential districts or uses.
- No artificial lighting is shown on the Site Plan, and no information as to whether or not artificial lighting shall be used has been submitted.

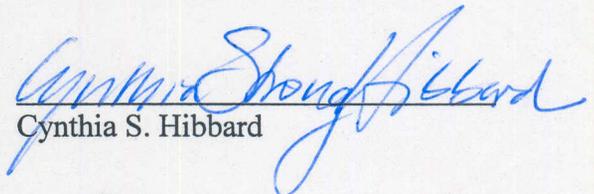
This Authority finds noncompliance, or insufficient information to determine compliance, in regard to Subsections d. through g.

Therefore, this Authority, as unanimously voted at the Public Hearing, upholds the Appeals of Paul and Barbara Calhoun, et al, and orders the Inspector of Buildings to reverse his decision to issue a building permit issued on August 6, 2002 to SAI Realty Trust to convert the existing building at 26 Abbott Road in a Single Residence District, to meet Daycare Facility Requirements, and to revoke said permit within 10 days after the expiration of the 20 day appeal period following the date of time stamp of this decision.

APPEALS FROM THIS DECISION,
IF ANY, SHALL BE MADE PURSUANT
TO GENERAL LAWS, CHAPTER 40A,
SECTION 17, AND SHALL BE FILED
WITHIN 20 DAYS AFTER THE DATE
OF FILING OF THIS DECISION IN
THE OFFICE OF THE TOWN CLERK.

Cc: Planning Board
Board of Selectmen
Inspector of Buildings
edg


Richard L. Seegel, Chairman


Cynthia S. Hibbard


Robert A. Bastille

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