



ZONING BOARD OF APPEALS

TOWN HALL • 525 WASHINGTON STREET • WELLESLEY, MA 02482-5992

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ZBA 2015-60
 Petition of Thomas & Caroline Hodge
 38 Bay View Road

2015 JUL 23 P
 TOWN OF WELLESLEY
 WELLESLEY MA 02482

Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, July 9, 2015, at 7:30 p.m. in the Juliani Meeting Room, 525 Washington Street, Wellesley, on the petition of THOMAS & CAROLINE HODGE requesting modification of a Variance, ZBA 82-30, that was granted on September 15, 1982, pursuant to the provisions of Section XIVE, Section XIX and Section XXIV-D of the Zoning Bylaw for demolition and reconstruction and enlargement of an existing deck with less than required left side yard setbacks, at 38 BAY VIEW ROAD, in a Water Supply Protection District and a 10,000 square foot Single Residence District.

On June 22, 2015, the Petitioner 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 were Thomas and Caroline Hodge, the Petitioner. Mr. Hodge said that when they first submitted their application they assumed that they were applying to alter an existing nonconformity at the eastern property line between 38 and 36 Bay View Road. He said that the house was built 7.5 feet away from the lot line in 1941. He said that whenever they tried to do construction on that side of the house, they had to seek a special permit. He said that the last time was in 2012 to extend six feet toward Bay View Road.

Mr. Hodge said that the reason for this request is to repair a deck that is behind the house and is falling down. He said that the past winter did it in. He said that the deck is very low at approximately one foot off of grade level. He said that it extends straight back behind the house. He said that the deck was there when they moved in January of 1996. He said that it looked like it had been there a while.

Mr. Hodge said that after submitting the application, he was informed that the request should be for modification of a variance that was granted in 1982 to allow the existing nonconforming structure to become legal. He said that the variance that was granted was for the garage, not the deck. The Board said that it was a variance for the property. The Board said that the garage and deck are part of the house because they are attached to it.

The Board said that, based on the documentation that the Board saw, it is not clear how the house got built that close to the lot line. The Board said that the owner in 1982 came before the Board and asked that the Board fix it to make it legal. The Board said that since the property had a variance, it is different from a special permit to alter a structure that was built prior to enactment of the Zoning Bylaw. The Board said that the rules for granting variances in 1942 and 1982 are quite different from today. The

Board said that the Zoning Bylaw talks about specific requirements for granting a variance today. The Board said that the Zoning Bylaw does not address modifications to variances. The Board said that many lots were granted variances on a different basis from today's standards.

Mr. Hodge said that the request is to rebuild the deck and extend it slightly on the eastern side lot line. He said that it will not encroach any closer but will head south along the lot line. He said that they presented the plans to the neighbors at 36 and 40 Bay View Road and they are happy with everything. He said that they submitted an email from the Mariannis at 36 Bay View Road stating that they are happy with the plan.

The Board said that this is a replacement deck. The Board said that the 1941 building permit shows a porch in the location of a portion of the current deck. The Board said that sometime between that point and 1982 the deck expanded to what is shown on the existing conditions of the permit. The Board said that it knows that years ago, often times building permits were not sought for decks. The Board said that there is no documentations one way or another that tells the Board if the deck is legal. The Board said that it should have been there since at least 1982. The Board said that the statute of limitations to remove it has passed.

The Board said that the deck is separated from the neighbors by a significant distance. The Board said that there is a shed between this and the neighbor's property. The Board said that what is proposed would not seem to have a negative impact on the neighbors. The Board said that the rear property line is close to the pond and is quite a bit away and lower. The Board said that it will not have adverse impact. The Board said that it does look like they will lose some nice plantings by extending the deck but they are so far onto the property, no one else will notice. Mr. Hodge said that the plantings will be transplanted.

The Board said that a variance was sought and granted for the distance to the side lot line. The Board said that at the time the variance was sought and granted it was grandfathered retroactively. The Board said that subsequent to that, dates were established for which the town was precluded from taking legal action to cause something to be removed, even if it did not have a permit. The Board said that during that timeframe there was case law that said the Board could no longer consider as special permits what should be modifications to old variances.

The Board said that the property does have topographic conditions that would preclude the Petitioner from extending the deck further to the back of the property. The Chairman said that, recognizing that the criteria for a variance has changed, what does it mean to consider a modification to an old variance. He said that it is unlikely that a variance would be granted under today's standards but that has nothing to do with the variance that was granted.

Ms. Hodge asked about applying for a special permit versus a variance. The Board said that it would have to see evidence that the deck pre-existed Zoning. The Board said that the evidence that the Board has is that the deck was put in place sometime after Zoning was enacted. The Board said that standards for granting a special permit are significantly lower but the issues that are unique to this property would not change.

Mr. Hodge said that the 1982 drawing shows the porch nestled up to the side of the garage. He said that is nonconforming. He said that it sits two feet over the setback line.

The Board said that it had no objections to the proposal in theory. The Board said that the Petitioner could build up the retaining wall just beyond the deck and make a patio as of right.

The Chairman said that he thought that it was straight forward to look at this as a modification of a variance. He said that, in this case, the Board cannot apply the current criteria for a variance to a request for modification of a variance. He said that the Board needs to decide the criteria for granting modification of a variance. He questioned if the first standard should be whether the Board found it more detrimental to the neighborhood. He said that the three variance criteria have existed since 1975 and this variance was granted in 1982. He said that there were no findings except that literal enforcement would involve substantial hardship to the Petitioner, that it would not be detrimental to the neighborhood nor be in derogation of the intent or purpose of the Zoning Bylaw.

The Board read an excerpt from the 1982 variance stating that the dwelling was constructed in 1941 but the garage was not located according to the building plans. The decision further stated that the dwelling with attached garage was an illegal structure when it was built. The Board said that the house itself does not conform. The Board said that the garage is more nonconforming but it is attached to the house.

Mr. Hodge said that the right side yard setback is 23 feet. He said that there is no way that this house could have been set on the lot to meet the 20 foot side yard setbacks. He said that the house without the garage could be moved over 3 feet to meet the setbacks.

The Chairman said that he thought that the Board should grant a modification of the variance based on the criteria in the original grant of the variance plus the existing deck is not more detrimental to the neighborhood than the existing deck. He said that the Board has no guidance as to what it means to modify a variance. A Board member said that the Board can say that it will not derogate from the intent or purpose of the Zoning Bylaw.

The Board said that the deck is getting bigger but will be getting bigger in a way that will not be bothering anybody. The Board said that the only thing nonconforming for the deck is the same for the house and garage.

The Board said that in looking at criteria for granting modification of a variance, the Board should assume that the variance is valid and it does not have to look at the basis that it was granted on, otherwise it would open up every variance that has been granted in town. Mr. Himmelberger said that, in the past the Board has looked at modifications of variances and applied the standard that the modification will not be more detrimental to the neighborhood than the existing structure. He said that there was a house on Oak Street next to Sprague School that had a second story put on. He said that the Board found that the modification would not be substantially more detrimental to the neighborhood than the existing variance. The Board said that is mixing standards. Mr. Himmelberger said that it is borrowing from one standard to create a new standard. He said that he agreed with the Chairman about finding that it will not be a derogation from the intent or purpose of the Zoning Bylaw.

The Board said that over by Longfellow Pond there was a garage with an open structure on the side that the owners wanted to enclose. The Board said that the garage was subject to a variance because it was too close to the lot line. The Board said that it did not go behind the existing variance but presumed that the

granted variance was legal. Mr. Himmelberger said that the Board might have used language stating that the modification does not intensify the existing variance.

The Board said that the issue is how the deck came into existence. The Board said that there was a smaller deck in 1982. The Board said that the Building Inspector said that there was a period of time when a previous Building Inspector did not require permits for decks. The Board said that the deck has been there for more than 10 years. The Board said that the Building Inspector cannot require that the deck be removed. The Board said that the homeowner can repair what is there or rebuild in the same spot.

The Board said that the question is whether there is a basis for the Board to approve or deny modification and extension of the deck. The Board discussed applying the current standards for variances to modify an existing variance. The Board said that there is a uniqueness to this property and it has a topographical issue where it drops way off at the back. The Board said that there is a significant difference in the kind of deck that is proposed and one that would extend beyond the retaining wall to get the same area that they would like to have. The Board said that could create a hardship to them and create an undesirable area lower on the property with a deck above looming over it. The Board said that there is a hardship associated with not being able to create a deck that serves their needs along the width of the property and that it will not derogate from the intent of the bylaw.

There was no one present at the public hearing who wished to speak to the petition.

Statement of Facts

The subject property is located at 38 Bay View Road, in a 10,000 square foot Single Residence District and a Water Supply Protection District, with a minimum left side yard setback of 7.40 feet.

The Petitioner is requesting modification of a Variance, ZBA 82-30, that was granted on September 15, 1982, pursuant to the provisions of Section XIVE, Section XIX and Section XXIV-D of the Zoning Bylaw for demolition and reconstruction and enlargement of an existing deck with less than required left side yard setbacks, in a Water Supply Protection District and a 10,000 square foot Single Residence District.

A Plot Plan, dated 6/16/15, stamped by Alphonse D. Haley, Professional Land Surveyor, Floor Plans and Elevation Drawings, dated 6/16/15, prepared by LaConte Construction, and photographs were submitted.

On July 7, 2015, the Planning Staff reviewed the petition and recommended that the petition be deferred.

Decision

This Authority has made a careful study of the materials submitted and the information presented at the hearing. The subject structure does not conform to the current Zoning Bylaw, as noted in the foregoing Statement of Facts.

The Board is of the opinion that modification of a previously granted Variance, ZBA 82-30 may be granted to allow for demolition and reconstruction and enlargement of an existing deck with less than required left side yard setbacks, in a Water Supply Protection District and a 10,000 square foot Single

Residence District, due to the uniqueness of the topography of the lot and that it does not generally affect the zoning district in which it is located, that literal enforcement would involve substantial hardship, financial or otherwise, and desirable relief may be granted without substantial detriment to the neighborhood and without derogating from the intent or purpose of the Zoning Bylaw.

Therefore, the requested modification of the Variance from the terms of Section XIX and pursuant to the provisions of Section XXIV-D of the Zoning Bylaw is granted to allow for demolition and reconstruction and enlargement of an existing deck with less than required left side yard setbacks, in a Water Supply Protection District and a 10,000 square foot Single Residence District, in accordance with the submitted plot plan and construction drawings.

The Inspector of Buildings is hereby authorized to issue a permit for construction upon receipt and approval of a building application and detailed constructions plans.

If construction has not commenced, except for good cause, this modification shall expire one year after the date time stamped on this decision.

RECEIVED
TOWN ENGINEER'S OFFICE
WILLESTON, MA 02480
2015 JUL 23 P 3:40

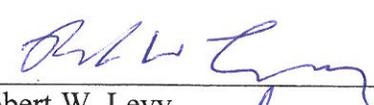
ZBA 2015-60
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38 Bay View Road

FILED
TOWN CLERK'S OFFICE
WELLESLEY MA 02448
2015 JUL 23 P 3:40

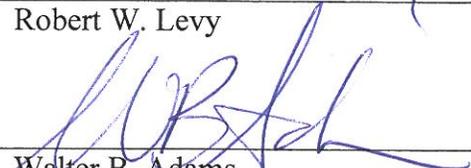
APPEALS FROM THIS DECISION,
IF ANY, SHALL BE MADE PURSUANT
TO GENERAL LAWS, CHAPTER 40A,
SECTION 17, AND SHALL BE FILED
WITHIN 20 DAYS AFTER THE DATE
OF FILING OF THIS DECISION IN THE
OFFICE OF THE TOWN CLERK.



J. Randolph Becker, Acting Chairman



Robert W. Levy



Walter B. Adams

cc: Planning Board
Inspector of Buildings
lrm

CERTIFIED PLOT PLAN

PROPOSED DECK

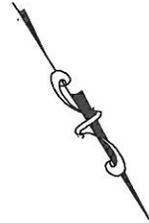
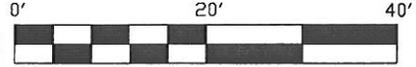
IN

WELLESLEY, MASS.

MIDDLESEX SURVEY INC. LAND SURVEYORS

131 PARK STREET NORTH READING, MA. 01864

SCALE: 1" = 20' DATE: JUNE 16, 2015



$R = 241.30'$
 $L = 45.46'$ (CALC.)

33.66'

LOT 15A
11,950±sf
(CALC.)

PROPOSED DECK
818±sf

RET. WALL

7.41' 13.0' 23.05' 1.9' 14.2' 3.7' 20.0'

EXISTING DECK
TO BE RAZED

SHED

139.32'

ZONE: SR10
MIN. SETBACKS
30' STREET
20' SIDE
10' REAR

LOT CREATED JUNE 1941
BOOK 2334 PAGE 541

DWELLING COVERAGE = 1,124±sf (9%)

PROP. DECK COVERAGE = 818±sf (7%)

7.40'

(2) STORY
WOODFRAME
NO. 38

27.0'

20.1'

3.7'±

7.71'

23.71'

17.53'

DRIVEWAY

31.79'

I CERTIFY THAT THE EXISTING DWELLING IS
LOCATED AS SHOWN.

DATE: 6/16/15

REVISED: 6/16/15

Registered Land Surveyor



CB/DH
FOUND

$R = 50.00'$
 $L = 32.17'$

41.47'

BAY VIEW ROAD