Appeal of persons aggrieved
from issuance of permit to
Gerald E. Butterworth

Pursuant to due notice the Board of Appeal held a public hearing in the hearing room on the second floor of the Town Hall at 8:30 p.m. on July 24, 1969, on the appeals of William H. MacCrellish, Jr., of 29 Croton Street, and Allister William Shepherd, of 30 Pine Street, each claiming to be aggrieved by the action of the Inspector of Buildings in issuing a permit to Gerald E. Butterworth for the construction of a dwelling and garage at 26 Croton Street. These appeals were represented as taken under the provisions of Section XXIV-B of the Zoning By-law, claiming that the permit appealed from had been issued in violation of Section XVI-C of the Zoning By-law.

The Inspector of Buildings, upon application of Gerald E. Butterworth, issued a permit on July 8, 1969, for the construction of a dwelling and garage at 26 Croton Street. The proposed dwelling and garage were in conformity with the Zoning By-law and the Building Code.

On the same date William H. MacCrellish, Jr., 29 Croton Street, filed an appeal with this Board alleging that the construction of the proposed dwelling would be materially detrimental to property values in the area and that the grant of the permit appealed from consequently constituted a violation of the provisions of Section XVI-C of the Zoning By-law.

On July 14, 1969, Allister William Shepherd, 30 Pine Street, also filed an appeal under the provisions of Section XVI-C of the Zoning By-law. Mr. Shepherd stated that the two lots each with 75' frontages are considerably less (presumably in frontage) than the other lots on the street and asserting that it is obvious the character of the area will be altered to the point where an adverse effect will result in the value of property in the vicinity.

Due notice of the hearing was given by mailing and publication.

At the hearing, Henry D. White, attorney, represented William H. MacCrellish, Jr. Leo J. Hession, attorney, represented Gerald E. Butterworth, and the appellant Shepherd was not represented by counsel.

Joseph E. Scammon, Inspector of Buildings, stated at the hearing that he issued the building permit applied for by Mr. Butterworth, since the proposed dwelling was in compliance with all applicable provisions of the Zoning By-laws and the Building Code.

The following persons spoke in opposition to the construction of the dwelling involved: Mr. William Bradshaw, 37 Croton Street; Virginia Watkin, representing Dr. and Mrs. Stewart Armstrong, 15 Croton Street; Mr. Albert F. Sise, 32 Croton Street; Mr. Sumner W. Ferris, 16 Croton Street; Mr. and Mrs. Allister W. Shepherd, 30 Pine Street; Claire D. Wilson, 32 Pine Street; Mr. and Mrs. Andrew Petersen, 23 Elm Street; and Mr. Robert Forbes, 4 Croton Street. All expressed the opinion that the construction of a house on the lot at 26 Croton Street would be damaging to the neighborhood and would depreciate property values.

A letter was received from Mrs. Eleanor B. Nickerson, 24 Croton Street, stating that she believed construction of a house on the lot adjoining

her property would be damaging to the neighborhood and to her land and its value.

Statement of Facts

The lot involved, which contains 15,379 square feet, is located within a Single-residence District requiring a minimum lot area of 10,000 square feet.

Attorney White, representing Mr. MacCrellish, alleged that Mr. Butterworth had purchased a parcel of land, which at the time of purchase comprised one lot containing 30,993 square feet, and subsequently divided it into two lots, one containing 15,581 square feet and the other, the subject of this appeal, containing 15,379 square feet. While the zoning district in which the land is located requires a minimum lot area of only 10,000 square feet, it was represented as of some significance that across the street the minimum requirement is 15,000 square feet and that most of the neighborhood has been developed by homes above the average, principally on lots in excess of 15,000 square feet, with frontages of considerably more than the lot involved. The appellant's attorney conceded that the house for which the permit was issued complied with all specific requirements of the Zoning By-law and Building Code relative to area and setbacks from the street and boundary lines. However, he argued that the placement of houses on each of the two newly established lots would change the character of the neighborhood and be objectionable to the community.

Mr. White described the two lots as narrow and deep, with the lot which is the subject of the appeal having a frontage of only 74.79'

and the adjoining lot a frontage of only 77.65'. However, it should be noted that these frontages exceed the legal requirements for the district by about 15 feet. At the time of the hearing, the first house was almost completed and a second house had been started on the lot involved in the appeal.

The attorney for the appellant MacCrellish stated his case as follows: The Zoning Enabling Act, Chapter 40A, General Laws, provides that a town may by a zoning by-law establish regulations for the purpose of promoting the health, safety, convenience, morals or welfare of its inhabitants. The Town of Wellesley has enacted a Zoning By-law, and under Section XVI-C has provided that "no building or structure shall be constructed or used for any purpose which would be for any reason injurious to the health, safety, morals or welfare of the community or harmful to property therein." It is therefore asserted on behalf of the appellant MacCrellish that constructing a house on a lot which, although of legal size, has a frontage less than most of the lots in the neighborhood, will result in overcrowding and degrading the neighborhood and be contrary to the purpose of the Zoning By-law.

The brief on behalf of the appellant MacCrellish suggests that under the authority possessed by towns to enact zoning by-laws for certain specified purposes the standard of "harmful to property" which appears in Section XVI-C of the Wellesley by-law but not in General Laws Chapter 40A and which appeared to be the stated ground of appeal may not be a lawful ground for appealing from the grant of a permit. It was indicated that the appellant therefore wished to rely on the additional grounds of potential

injury to the "health, safety, morals or welfare" of the community.

Leo J. Hession, attorney representing Gerald E. Butterworth, stated that Mr. Butterworth purchased a lot of land on Croton Street and divided it into two lots. Mr. Butterworth then obtained a permit for a dwelling on the lot adjacent to the one which is the subject of this appeal. That dwelling is now nearly complete. Subsequently, Mr. Butterworth applied for and obtained a permit for a dwelling on the second lot.

Parties claiming to be aggrieved appealed the issuance of the permit for the first house, but at the hearing they withdrew their appeals, apparently being of the opinion that only if a second house were to be constructed would there be a violation of the Zoning By-law. Mr. Hession contended that the present appeal is the same as the previous one and the application of the law is the same. The lot involved has 50% more land than the Zoning By-law requires. Instead of the required sixty-foot frontage, it has approximately 75'. It has a front-yard setback of forty feet rather than the required thirty feet. The side yards on each side meet the requirement of twenty feet. In all respects the construction applied for is within the provisions of the applicable Zoning By-law. Mr. Hession stated that, based upon current assessed values, which purport to be on a 100% basis, the majority of homes in the area do not have a value in excess of $60,000., which, he asserted, was the current market value of the dwelling involved. Therefore, the properties in the area could hardly be adversely affected by the house now under construction.

It would appear, therefore, stated Mr. Hession, that the revocation of the building permit under Section XVI-C of the Zoning By-law

would have to be based upon a ruling that the proposed dwelling would be "injurious to health, safety, morals or welfare to the community or harmful to property therein." He referred to the Zoning Enabling Act, Chapter 40A, Section 2, and pointed out that Section XVI-C of the Wellesley Zoning By-law includes the words, "or harmful to the property therein," which have no warrant in the enabling act. Whether or not the town may lawfully add this new ground of revocation, Mr. Hession claims there is nothing before the Board of Appeal to indicate that any interested person will suffer a material and tangible loss or detriment by the construction of the proposed dwelling for which the permit was issued and it could scarcely be other than an asset to the neighborhood. In his opinion, therefore, there is no evidence that the proposed dwelling will be "harmful to property therein."

Decision

The question presented to this Board for decision is whether the building permit issued by the Building Inspector should be revoked on the ground that the dwelling involved is in violation of any applicable provision or provisions of the Zoning By-law. It is contended on behalf of the appellants that there is a violation of Section XVI-C. No other specific section of the Zoning By-law is cited as a source of violation and the Board is not aware of any.

Section XVI-C prohibits the location or use of a building or structure, "For any purpose which would be for any reason injurious to the health, safety, morals or welfare of the community or harmful to property therein."

The Board being of opinion that the arguments advanced by attorneys White and Hession were basically concerned with issues of law, they were

invited to file briefs on behalf of their clients, which were duly filed and given consideration.

In the opinion of the Board, Section XVI-C is principally directed, as its language indicates, to the purpose of a proposed structure. No contention was made by the appellants that the purpose for which the proposed structure was intended was other than that of a single family residence. Since the zoning district in which the building is to be located is a single family residence district it is difficult to see how the erection in such district, in complete compliance with all the provisions of the Zoning By-law and the Building Code, of a single family residence, could be for a "purpose which would be for any reason injurious to the health, safety, morals or welfare of the community or harmful to property therein."

Concededly, it might be otherwise if, in the same district, a party applied for and obtained a building permit purportedly for a single family residence, and proceeded to construct a building in which actually he intended to conduct a boarding house, or permit 3 or 4 families to reside, or use it for a business or manufacturing purpose, or something of this nature. No such contention was made by either of the appellants herein.

Somewhat similarly, if a building for which a permit had been issued were being located on a lot, or constructed of materials or otherwise in some manner violative of the Zoning By-law or the Building Code, even though the application for the permit on its face covered a building with a lawful location and of proper construction, etc., such circumstances might justify the invocation of Section XVI-C.

It is also possible, though not clearly suggested by the appellants and others voicing objections, that they regard the proposed dwelling as

violative of the "spirit" of the Zoning By-law, even though complying with its letter. Such a contention would require the Board to assume that the "spirit" of the Zoning By-law constituted some form of legal requirement established, not by the Town Meeting which adopted the By-law, but by the majority rule of those who built under it, so that the minimum lot size is prescribed, not by the law, but by the actions of those who lay out the majority of the lots in the neighborhood.

The Board is therefore unanimously of the opinion that the provisions of Section XVI-C of the Zoning By-law do not apply to the instant situation and that in any event it has not been established that the proposed structure will be "constructed or used for any purpose which would be for any reason injurious to the health, safety, morals or welfare of the community or harmful to property therein."

Apart from the merits of the appeal, it appears that neither appellant was in technical compliance with the state law applicable to appeals of this nature, which requires that the appeal be lodged with the town clerk within 30 days of the issuance of the permit appealed from. Notwithstanding the provisions of Section XXIV-B of the Wellesley Zoning By-law, the specific authorization for appeals of this nature is contained in Sections 13 and 15 of Chapter 40A of the General Laws, and the procedure for such appeals is prescribed by Section 16 of Chapter 40A. Section 16 allows 30 days to appeal but requires that the appeal be instituted by a filing with the town clerk. The Massachusetts Supreme Judicial Court has held that the procedure prescribed by Section 16 is exclusive and must be followed, and this may be the case even though the by-law provides otherwise.

It is therefore the opinion of the Board that these appeals may be defective on jurisdictional grounds, as well as lacking in merit, and the Board therefore orders that the appeals taken from the action of the Inspector of Buildings in issuing a permit to Gerald E. Butterworth for the construction of a dwelling house and garage at 26 Croton Street be, and they hereby are, dismissed.

Philip H. R. Cahill

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