

TOWN OF WELLESLEY



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ZONING BOARD OF APPEALS

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ZBA 2000-54  
Petition of Cornelia Company, LLC.  
58 Hundreds Road

Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, June 15, 2000 at 7:30 p.m. in the Selectmen's Meeting Room (Conference Room B) at the Town Hall, 525 Washington Street, Wellesley, on the petition of CORNELIA COMPANY, LLC. requesting a Special Permit/Finding pursuant to the provisions of Section XVII and Section XXV of the Zoning Bylaw that the construction of a new 54 foot by 60 foot two story dwelling, which complies with all setbacks, height and percentage of lot coverage at 58 HUNDREDS ROAD, in a Single Residence District and a 20,000 minimum lot size district, on a 15,980 square foot lot, which is nonconforming as it has less than the area required in a 20,000 square foot district, shall not be substantially more detrimental to the neighborhood than the prior nonconforming structure.

On May 30, 2000, 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 was Douglass Stiles, principal of Cornelia Company, LLC., who was accompanied by his engineer and land surveyor, George Giunta; and his attorney, Peter Brooks.

Mr. Stiles stated that the changes made from the previous plans are a genuine attempt to meet the Board's expectations. The lot coverage has been reduced to 15.5 % by removing the deck. No further reduction is possible as the house would be rendered inadequate by modern standards. The original house covered 10.2% of the lot.

Mr. Stiles explained that retaining walls have been added at the rear. There is no dramatic change in the grade at the rear or for the driveway. The height of the house has not been raised relative to the street, in comparison to the previous house. Fill has been brought to the site, which is to be used to improve the grading around the house. Prior to bringing the fill, there was a large depression on the left side of the lot. The Blackwood home at 112 Woodlawn Avenue, directly across the street, is a cape with a low profile; and the abutting house at 54 Hundreds Road is also lower. The ridge line of the proposed house will be lower than that of the original house.

The Board stated that there appear to be substantial changes in the grades as reflected in the changes between the plot plan revised May 20, 2000 and the February 25, 2000 revision.

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Mr. Stiles said that the fill is necessary in order to regrade the proposed house in a way that it will allow the house to fit in with the surrounding land. The previous house had a trough around the perimeter with a sunken patio in the back. When the existing piles of fill are graded out, they won't amount to much, or change the height. The house will not be raised higher than the previous house relative to the street.

The Board stated that from the beginning, it and the neighbors have been concerned with the mass and bulk of the proposed house, which will not be set in the natural hollow as was the prior house, because the hollow has been filled. In fact, because of the natural contour of the land where the original house stood, and the homes at 54, 48 and 44 Hundreds Road were built, the land is lower than Hundreds Road, and the homes are in a valley.

Mr. Giunta explained that the grading on the Woodland Avenue side is changing two feet. There is no change in the grading from the 160 contour at Hundreds Road to the proposed house. The contours in the rear will be changed considerably because they are regrading to connect into the proposed stone walls which will be coming off the proposed house. "The fill that one sees is not fill – It is residual spreading of material from when the house was taken down."

The Board stated that the site is not what it was when the prior house was there, and objected when false representations are made to the Board. Mr. Stiles said that Mr. Giunta was mistaken. However, some of the fill stored on the site will be used to raise the grade for another lot on which he will be doing remodeling work.

The Board stated that much of the fill on the site does not qualify as fill, but is material from another site on which Mr. Stiles destroyed a house. Mr. Stiles said that other contractors have been dumping on the site. It is not his material. The Board stated that it is Mr. Stiles' responsibility to protect the site properly. Currently, it is an eyesore, with dust blowing everywhere, and is very detrimental to the neighborhood.

The Board asked how the maximum height of the house had been determined. Mr. Giunta said it is being measured from the proposed grades. The Board said that basing the height on the proposed grades permits the house to be higher than on the original grades. Mr. Stiles has raised the grade sufficiently around the proposed house and the measurement is being taken from the average of the proposed grade to determine the height as opposed to setting the house in the natural hollow which was the site of the prior house.

Mr. Stiles stated that at the front of the house both the existing and proposed grades are 158 coming into the tower, and 154 coming to the front corner. The Board stated that the current grade at the rear of the proposed house is between 152 and 154, while the proposed grade is 160, which is a substantial raising of the lot in that area. Mr. Stiles agreed to this statement.

The Board reminded the petitioner that he is before the Board because he had a prior nonconforming structure to begin with, and now the lot and the new structure are being made more nonconforming, as the footprint of the proposed house will be more than doubled. The Board must determine whether the increase in the nonconformity will make the project substantially more detrimental to the neighborhood.

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Mr. Brooks, counsel for the petitioner, expressed his opinion that unless one takes the existing nonconformity, which is the undersized lot, and make it more nonconforming, which is not the present case as the lot is not being made smaller by reduction in land area, the question of whether it is substantially more detrimental cannot be reached. Mr. Stiles is therefore entitled to a special permit.

The Board disagreed with Mr. Brooks' interpretation that only the lot was nonconforming. The house that existed and the proposed house are also nonconforming because the law states that if one builds a structure on a nonconforming lot, by definition, the structure is also nonconforming.

Jerry Blackwood, 112 Woodlawn Avenue, direct abutter across the street, said the prior house was proportioned for the lot. The houses descending Hundreds Road are all in a valley. If the Board allows the property owner to tear down a small house, build a huge one on a nonconforming lot while filling in the hollow in which the prior house sat, it will set a precedent that will be detrimental for the whole town.

Mary Sullivan, 35 Hundreds Road, said she also felt the project would be substantially more detrimental to the neighborhood. As one does down the line of homes on Hundreds Road, the elevation continues to drop. The houses are all on undersized lots, and they all look appropriate to their sites. The proposed house is much larger than the homes contiguous to it.

Mrs. Sullivan added there could be water problems initiated by development on this corner lot as more impermeable surface will be created and the grades will have changed. If the Board allows the project, she requested that it would be restricted in height and footprint to that of the former house.

Rich Lipsitz, 54 Hundreds Road, left side abutter, said he is concerned about the effect on their property due to the change in grade, as their house sits much lower than the proposed house. He is concerned that water will come onto his property, and questioned what protection he would have if this occurred.

Mr. Giunta responded that under state laws, they cannot dump any more water on 54 Hundreds Road than presently goes across the site. The land is graded now so that all the water from the site, plus that from the street, goes across 58 Hundreds Road onto 54 Hundreds Road. They are not increasing the flow volume or changing the flow patterns. The amount of water which will leave the site will fairly approximate that which is leaving the site now. It all ends up at 54 Hundreds Road.

Mr. Stiles said they are installing a leaching pit on his property which will mitigate the situation. There will also be a driveway with a retaining wall paralleling the property line. He added that the houses on Woodlawn Avenue are substantially larger than the ones on Hundreds Road, which are anomalies.

The Board commented that in terms of grading, there is a 9 foot difference from Woodlawn Road to the driveway. Mr. Giunta said the retaining wall will be extended 40 feet, which will direct water into the drywell, keeping more of the water on the site.

Carol Maden, representing her mother, Virginia Broggin, 126 Woodlawn Avenue, said this particular section of Hundreds Road heading down from Woodlawn Avenue to the railroad station, is totally different than crossing Woodlawn and heading up the street where there are large homes. In the Hundreds Road section, big is not better.

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The Board was of the opinion that the footprint of the house, which is more than double in size in relation to the prior house, is too large. The added fill changes the natural topography of the lot, particularly as it relates to the land east of the subject site.

The Board stated that starting at the Woodlawn/Hundreds Road intersection and proceeding easterly down Hundreds Road, one finds an absolutely different type of house and neighborhood than if one started at the corner and went west on Hundreds Road. A house this massive will be substantially more detrimental to the neighborhood east of the site.

#### Statement of Facts

The subject property is located at 58 Hundreds Road on the corner of Woodlawn Avenue, in a Single Residence District, on a 15,980 square foot which is nonconforming as the district in which it is located requires a minimum lot size of 20,000 square feet.

On July 9, 1999, Cornelia Company, LLC. purchased the property which contained a nonconforming two story dwelling sited in a natural depression on the lot. The nonconforming structure had slightly more than 1,250 square feet in footprint, with a total living area of 2,462 square feet and covering 10.2 % of the lot.

The neighborhood of Hundreds Road descending easterly from the subject site is composed of homes of similar size: 54 Hundreds Road has a total living area of 1,986 square feet on a 13,466 square foot lot; 48 Hundreds Road has a total living area of 2,600 square feet on a 13,440 square foot lot; 44 Hundreds Road has a total living area of 1,376 square feet on a 10,000 square foot lot.

The dwellings on Woodlawn Avenue proceeding southerly from the site, although generally on larger lots, have comparable total living areas: 89 Woodlawn Avenue has a total living area of 2,204 square feet on a 41,870 square foot lot; 93 Woodlawn Avenue has a total living area of 1,743 square feet on a 10,000 square foot lot; 97 Woodlawn Avenue has a total living area of 2,059 square feet on a 36,500 square foot lot, and 101 Woodlawn Avenue has a total living area of 2,624 square feet on a 41,850 square foot lot.

On October 7, 1999, the petitioner applied for a demolition permit (Permit #31958) and razed the structure some time between October 7, 1999 and January 20, 2000, when the permit was closed out without inspection.

At Public Hearings held by the Board of Appeals on January 29, 2000 and on March 23, 2000, Cornelia Company, LLC. presented petitions for Special Permit/Findings for construction of a two-story dwelling, which the Board voted unanimously to allow the petitioner to withdraw without prejudice, enabling him to return to the Board with a new petition without waiting the required two years or undergoing the repetitive petition process.

During the six month period between January 29, 2000 and June 15, 2000, the petitioner has brought tons of fill to the unenclosed site, a portion of which has been used to fill in the natural depression in which the previous dwelling was sited, thus raising the grade in that location six to nine feet above the original grade. The remaining piles of fill are uncovered, creating a public nuisance.

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The petitioner is now requesting a Special Permit/Finding that the construction of a 54 foot by 60 foot two story dwelling, with a total footprint of 3,424 square feet, which meets the required setbacks, height and percentage of lot coverage on said nonconforming lot, shall not be substantially more detrimental to the neighborhood than the prior nonconforming structure.

A Plot Plan dated November 13, 1999, revised February 25, 2000, revised May 20, 2000, stamped by George N. Giunta, Registered Professional Land Surveyor; Garage & Basement Plan (A.0), First Floor Plan (A.1), Second Floor Plan (A.2), Roof Plan (A.3), Woodlawn Elevation (A.4), Garage Elevation (A.5), Hundreds Road Elevation (A.6), Garden Elevation (A.7), and Comparative Elevations Along Hundreds Road (S.1) were submitted.

On June 6, 2000, the Planning Board reviewed the petition requested the Board to refer to its letters dated January 19, and March 15, 2000. On January 19, 2000, the Planning Board reviewed the first petition and was of the opinion that consideration should be given to limiting the size of the reconstructed building to the size of the building which was torn down.

In its letter to the Board of Appeals dated March 15, 2000, the Planning Board reaffirmed its position and reiterated that the footprint of the reconstructed building should not exceed the footprint of the building that was torn down.

#### Decision

This Authority has made a careful study of the materials submitted and the information presented at the hearing. The subject lot does not conform to the current Zoning Bylaw; and therefore any structure constructed on the lot will be nonconforming as well.

During the past fifteen years, clarification of Section 6 of the Zoning Act has been accomplished by judgements in the following cases:

- *Willard v. Board of Appeals of Orleans*, 25 Mass.App.Ct. 15, 21-22 –An application for changes to a residential structure “requires a Board of appeals to identify the particular respect or respects in which the existing structure does not conform to the requirements of the present by-law, and then determine whether the proposed alteration or addition would intensify the existing nonconformities or result in additional ones.” Should the board conclude that there will be no intensification or addition, the applicant will be entitled to the issuance of a special permit. If the conclusion is otherwise, the applicant will be required to show that the change will not be “substantially more detrimental than the existing nonconforming structure or use to the neighborhood.”
- *Goldhirsh v. McNear*, 32 Mass.App.Ct. 455 – In assessing modifications to single- and two family structures a Section 6 finding may be required even in a situation involving a vertical expansion that did not enlarge the nonconforming foundation footprint. “Whether the addition of a second level will intensify the nonconformity is a matter which must be determined by the board in the first instance. The fact that there will be no enlargement of the foundational footprint is but one factor to be considered in making the necessary determination or findings.”

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- *Holmes v. Doelger and the Zoning Board of Appeals of Chatham*, 3 LCR 158 (1995) – In this case, the plaintiff wished to demolish a 868 square foot guest house and construct a 3,652 square foot main house and convert the existing 3-bedroom main house into a two-bedroom guest house, resulting in an increase of the usable living area of the buildings by 100% on a 58,474 square foot lot in a 60,000 square foot district.

In her decision, Judge Scheier stated:

“In its decision, the Board identified the specific way in which the Property does not conform to the By-law: Plaintiff’s house and guest house use are situated on a lot with less than 60,000 square feet. Plaintiff, in contrast, urges the Court to define the nonconformity in terms of lot area only. Under Plaintiff’s theory, the Property is nonconforming because the lot size is less than 60,000 square feet. Inasmuch as Plaintiff’s proposal does not alter the size of the Property, the argument goes, it does not alter or expand the nonconformity. I cannot agree.”

“Presently, the structures situated on the Property contain approximately 2,600 square feet of living space. Plaintiff proposes to increase the size of the structures such that the total living area is more than doubled. In that Plaintiff’s lot already contains insufficient square footage to support the existing structures, Plaintiff seeks to increase the nonconformity by making the guest house on the Property bigger. I conclude, therefore, as the Board did, that Plaintiff’s proposal would result in an intensification of the present nonconformity. In addition, the Board’s conclusion that the doubling of the square footage of living space on the Property would be substantially more detrimental to the neighborhood than the present nonconformity, is a reasonable one.”

- *Dugas v. Burman* 7 LCR 39 (1999) – In this case, the Falmouth Building Commissioner erred when issuing building permits for the reconstruction of a dimensionally conforming house following the destruction of the original structure where such a project would require a finding from the zoning board that the dwelling was not more detrimental to the neighborhood and did not intensify the nonconformity.

In his decision, Judge Green stated:

“Defendants claim that the commissioner properly issued the building permit because the dwelling meets all applicable setback requirements and, accordingly, is not nonconforming. According to defendants, it is the lot, rather than the structure, that is nonconforming...”

“Accordingly, an otherwise conforming structure on a nonconforming lot is treated as a nonconforming structure.”

“Accordingly, the proposed reconstruction may be allowed only if the board finds that (i) the proposed new dwelling does not intensify the nonconformity, or (ii) (if it does intensify the nonconformity) the proposed new dwelling would not be substantially more detrimental to the neighborhood than the former dwelling.”

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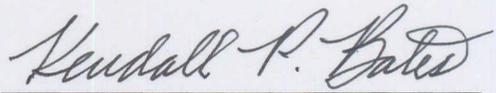
Predicated on the precedents established by the foregoing court cases, the Special Permit Granting Authority makes the following findings:

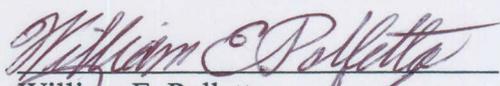
1. The subject lot does not conform to the current Zoning Bylaw as it has less than the required square footage in the district in which it is located.
2. Any structure built on said nonconforming lot is also nonconforming.
3. Construction of the proposed dwelling requires a Special Permit issued by the Special Permit Granting Authority, which must determine that there will be no intensification or addition to the nonconformity or that said intensification or addition to the nonconformity will not be substantially more detrimental to the neighborhood than the prior nonconforming structure.
4. The footprint of the proposed house is more than double the size of the prior house, as is the living space: Therefore, not only is the nonconformity intensified, but new nonconformity will be added. The bulk of the new structure will create a "wall" from the abutting properties.
5. The "neighborhood" is comprised of properties descending Hundreds Road in an easterly direction, all of which are undersized lots with dwellings containing living space of less than 2,500 square feet. The living space of the proposed dwelling will be in excess of 5,000 square feet, which is not in keeping with that of the "neighborhood."
6. The "neighborhood" also extends southerly on Woodlawn Avenue, and, although the lot size is considerably larger, the living space in these dwellings does not exceed 2,700 square feet. The proposed dwelling is not in keeping with this "neighborhood" either.
7. The regrading of the subject lot could have serious adverse drainage consequences to the properties east of the locus.
8. For all the aforesaid reasons, the Board finds that the proposed nonconforming construction at 54 Hundreds Road will be substantially more detrimental to the neighborhood than the prior nonconforming structure.

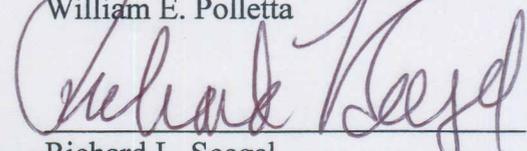
The request for a Special Permit is therefore denied, as voted unanimously by this Authority at the Public Hearing, and this petition is dismissed.

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  
edg Inspector of Buildings

  
Kendall P. Bates, Chairman

  
William E. Polletta

  
Richard L. Seegel