



## ZONING BOARD OF APPEALS

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ZBA 2000-73  
Appeal of Kathleen C. Gallivan  
In Regard to 89 Manor Avenue

Pursuant to due notice, the Permit Granting Authority held a Public Hearing on Thursday, September 28, 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 appeal of KATHLEEN C. GALLIVAN pursuant to the provisions of Section XXIVC and Section XXIV of the Zoning Bylaw to the decision of the Inspector of Buildings and Zoning Enforcement Officer not to enforce the provisions of Section XIX of the Zoning Bylaw in regard to the violation of the structure located at 89 MANOR AVENUE, in a Single Residence District, which has a minimum rear yard setback of 14.6 feet rather than the 20 feet required for a rear yard setback on a corner lot in a 10,000 square foot district.

On August 21, 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.

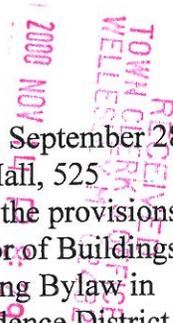
#### Public Hearing – September 28, 2000

Presenting the case at the hearing was Kathleen Gallivan, who said that Mass General Laws, Chapter 40A and municipal zoning power attempts to balance and reconcile the interests of the general public, the land owner and abutters by defining terms, setting procedural requirements, by setting time limits and providing a mechanism for appeal.

The regulations regarding area, dimensions and setbacks are precise. Section XIX of the Zoning Bylaw requires a minimum side yard setback of 20 feet, but has no definition of a "corner lot", or what is to be considered a "front yard". Recently, Section XIX was amended to read that in 10,000 and 15,000 square foot districts, on corner lots, the minimum rear yard depth shall be no less than the minimum side yard depth. In this situation, the rear yard of the property at 89 Manor Avenue, on the corner of Oakdale Avenue, abuts her side yard. The garage portion of the structure is only 14.6 feet from her property line. It is obtrusive, oversized and fails to meet the requirements of the Zoning Bylaw.

Ms. Gallivan distributed a three page list of cases on this point to the Board, and stated many of the rulings in the listed cases.

Ms. Gallivan explained that it is the date of the issuance of the Building Permit that is operative. Section 6 of the Zoning Enabling Act states that a structure that is lawfully in existence or lawfully begun or a building permit issued before the first publication of a Notice of Public Hearing on a zoning amendment



is protected from the adopted change. However, any building permit issued after the first publication of Notice is subject to the amended bylaw.

The Board asked when the building permit had been issued. Ms. Gallivan said it was issued on March 9, 2000. In June she made inquiry in the Building Department as to the compliance of the rear setback of the structure under construction. The lot is a legal lot on Manor Avenue. The house has been oriented to front on Oakdale Avenue, which is a private road. Her side yard abuts the rear yard of the Manor Avenue property. The issue is the two-car garage which is set back 14.6 feet from the lot line, which is in violation.

Tyler Chapman, counsel for Richard Eyges, property owner of 89 Manor Avenue, said the Eyges' did everything correctly. They began preparation for construction of the house in September, 1999, and immediately contacted the Building Inspector. During November and December, they met with the Building Inspector to review plans. At a meeting in December, 1999, prior to the first notice of the zoning amendment, the Building Inspector stated to the Eygeses that he would approve the plans and grant them a permit, but specified the steps needed to be taken before this could occur, which included removal of asbestos from the home to be demolished and closing down the utilities, which was completed at the end of January, 2000. They filed the application for a building permit, which was issued in March by the Building Inspector pursuant to his initial authorization.

Mr. Chapman stated that the property owners followed procedure correctly and the Building Inspector followed through on his verbal authority. Their position is that the property is conforming to the bylaws as they stood prior to the amendment and was authorized prior to the amendment, although the first written authorization was in March, 2000, after January 15, 2000, the date of first notice.

The Board asked when the plans were filed with the Building Department. Mr. Chapman said he believed they were filed as early as December. The continuing to proceed was based on the filing of the plans and the verbal authority of the Building Inspector. The site plan was also submitted in December, 1999. The Eygeses first learned there was a setback problem when Ms. Gallivan brought it to their attention in July, 2000.

Edgar Phaneuf, Building Inspector and Zoning Enforcement Officer, said there is nothing in writing that goes back to December, 1999 on this project. He had an informal meeting with the applicants as to whether they could tear down and rebuild. At that time, he reviewed the plans and made a determination that they could construct a building provided they adhered to the setback requirements, lot coverage and height requirements of the Zoning Bylaw at that time.

The Board asked if the Eygeses had presented a plan at that time. Mr. Phaneuf said they were in the process of buying a modular home, so they had to have plan approval before they could order the house, which is why the Eygeses began the process so early. They had to have the foundation ready to receive the modular sections. In his opinion, he did enough work to afford protection under the old bylaw.

Mr. Phaneuf explained the building permit was delayed until affidavits were received from the gas company and the asbestos company that the work was completed, which did not occur until the end of January. Once the affidavits were received, the house was demolished. The 10 day appeal period after publication of the notice of new construction had to expire before a building permit could be issued.

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The Board asked when the modular home was actually ordered from the manufacturer. Mr. Chapman said it was ordered on December 16, 1999.

The Board asked if, under the state Building Code, a foundation permit can be issued before demolition takes place. Mr. Phaneuf said that in Wellesley, it has always been the practice to wait until demolition has been completed before a building permit is issued. This eliminates the possibility of having two dwellings on the lot at one time.

The Board asked what would be involved in removing 5.5 feet from the garage. Mr. Chapman said the contractor had stated that, because of the modular nature of the home, the structure would have to be demolished in order to make the adjustments necessary to conform to the current bylaw requirement.

Stefan Braun, 94 Manor Avenue, objected to the construction, which he felt was massive and did not fit into the neighborhood.

Ms. Gallivan there are two issues: the timing of when the plans were submitted and when construction began. Case law states that Building Inspectors cannot predate permits to give a new applicant protection from the first notice of public hearing. The law supports the issuance of a permit, not an early start. Case law states that even when there has been a substantial financial investment, that is not estoppel to the defense for the enforcement of zoning bylaws. She submitted a recent Land Court case involving this point that had been heard by Judge Kilborn.

Mr. Chapman said that although he has not had an opportunity to review the cases cited by Ms. Gallivan, he would disagree with the propositions which she cites support. The Building Inspector is required to be fair, judicial and reasonable, which the Eygeses feel he has been in this case.

The Board stated that the Notice of Public Hearing was issued on January 15, 2000. The Eyges home was contracted to be built in December, 1999. The contract was for a house that would be conforming on the lot. The Eygeses could not have asked for a permit before the house was completed at the factory. It would be a substantial hardship to require a portion of the house to be removed.

Mr. Chapman said that in Section 6 of the Zoning Enabling Act cited by Ms. Gallivan, the two issues are that the permit has to be granted or the construction begun prior to the first notice of the hearing. It is their position that construction had begun prior to the first notice. The contract for the construction of the modular home and the other steps needed to ready the site for demolition, which were all done prior to the first notice of the hearing, constitute the beginning of construction prior to the first notice of the hearing.

Robert Devlin, Assistant Building Inspector, supported the position of the Building Inspector.

The Board voted unanimously to continue the hearing to the Public Hearing on October 26, 2000, in order to do further research on the issues.

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**Public Hearing – October 26, 2000**

Presenting the case at the hearing was Kathleen Gallivan, who said she had presented her appeal and cases in support of her position at the last hearing. She presented the argument that the property at 89 Manor Avenue is a lot laid out on Manor Avenue and not on Oakdale Avenue, whereby the portion of the lot on Manor Avenue is the front; the rear is defined as the boundary opposite the front. Everything else is the side yard.

Ms. Gallivan stated that an argument had been made at the previous hearing that a significant amount of work had been done with the Building Inspector prior to the change in the amendment. Although that might be true, the fact remains that the building permit was not issued until March 9<sup>th</sup>, when the zoning bylaw had been changed.

Ms. Gallivan continued that not only is the structure in violation of the new bylaw, but is also in violation of the old bylaw because the boundary which abuts her property is the side yard of 89 Manor Avenue, which would not meet the 20 foot setback requirement under the old setback requirements. The fact that the house has been reoriented so that the front is on Oakdale Avenue, as permitted by the Building Code, does not change the zoning bylaw that says this is a legal lot on Manor Avenue. The boundary line on Manor Avenue is the front; the opposite side is the rear, and the side, which required a 20 foot setback, abuts her property.

The Board stated that Section 6 of Chapter 40A has an either/or criteria: either the building permit has been issued, or construction shall have commenced. The Board understands that because this is a modular home, the testimony at the last hearing was that a deposit had been made to the factory, and the factory had actually commenced building this modular home in November or December of 1999, prior to the first notice. This is a situation in which the Board believes that if the building was under manufacture prior to the time of the first publication, the "except" clause of Section 6 has been satisfied. This is a modular home that was custom pre-built, rather than "off-the-shelf". The statute does not state that construction must be commenced on the site; it simply says construction must have commenced.

The Board voted unanimously to deny the appeal of Kathleen Gallivan.

Statement of Facts

The subject property of the appeal is located at 89 Manor Avenue, in a Single Residence District, on a 10,000 square foot lot in a Single Residence District, and is owned by Richard Eyges. The lot is a corner lot fronting Oakdale Avenue and Manor Avenue. Although the address is 89 Manor Avenue, the house fronts on Oakdale Avenue.

In November and December, 1999, the Eygeses met with the Building Inspector to discuss the plans for a modular home and its location on the site.

On November 19, 1999, Mr. Eyges issued a check in the amount of four hundred (\$400.00) dollars to Chelsea Modular Homes in Marlboro, NY, as a deposit, which was followed by a second check dated December 16, 1999, in the amount of sixteen thousand, three hundred (\$16,300.00) dollars.

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According to a letter received by Mr. Chapman dated November 7, 2000, signed by John T. Edwards, Sales Manager of Chelsea Modular Homes, Mr. Eyges' signed order for the house in question was received on December 16, 1999 along with a check for \$16,300. Ordering of materials and scheduling the delivery began immediately after the house was ordered.

On January 13, 2000, the Planning Board published a notice of Public Hearing in the Wellesley Townsman on the proposed amendments to the Zoning Bylaw and the Zoning Map proposal to be considered by the March 20, 2000 Annual Town Meeting. Article G read as follows:

“To see if the Town will vote to amend the Zoning Bylaw, Section XIX, Yard Regulations, by clarifying the yard designations for corner lots by adding a new paragraph within sub part B. REQUIREMENTS, to immediately precede the last paragraphs of the sub part to read substantially as follows:

Regularly shaped corner lots shall have two front yard, two side yards, and no rear yard. Whenever uncertainty exists as to which yard requirement applies in a particular case, the determination shall be made by the Inspector of Buildings. Or take any other action relative thereto.”

On February 3, 2000, the Inspector of Buildings issued a demolition permit to take down the existing dwelling at 89 Manor Avenue and on March 9, 2000, issued a building permit for construction. On March 14, 2000, an “As Built Certification Form”, stamped by George Giunta, Registered Land Surveyor, was submitted to the Building Department. The As Built showed the dwelling to be located 30.5 feet from Oakdale Avenue, 30.4 feet from Manor Avenue, 23.6 feet from one side and 14.6 feet from the side abutting 85 Manor Avenue.

On July 17, 2000, in a letter to Mr. Phaneuf, Town of Wellesley Building Inspector, Kathleen Gallivan stated that the garage portion of the structure at 89 Manor Avenue was in violation of Section XIXB of the Zoning Bylaw and requested enforcement of the provisions of said section.

On July 28, 2000, in a letter to Ms. Gallivan, Mr. Phaneuf stated that he declined to act, as, in his opinion, he verbally authorized the demolition and new construction in late December, subject only to confirmation from the utilities that they had been disconnected.

On July 28, 2000, in a letter to Ms. Gallivan, Mr. Phaneuf stated that although he verbally authorized the demolition and new construction in late December, 1999, her letter reflects the formal record. He stated that he had notified the property owners on that date that their building stands noncompliant with zoning.

According to the Inspector of Buildings, he had received two draft letters from Town Counsel, Albert Robinson, either of which could be used, depending on whether Mr. Phaneuf considered the structure to comply with the Zoning Bylaw or was in noncompliance. Through a clerical error, both letters were sent to Ms. Gallivan, although the letter in which Mr. Phaneuf declined to act is the operative one.

On August 2, 2000, Ms. Gallivan requested clarification regarding the receipt of both letters which appeared to be contradictory.

On August 21, 2000, Ms. Gallivan filed an appeal to the decision of the Building Inspector/Zoning Enforcement Officer not to enforce Section XIXB of the Zoning Bylaw as it relates to the structure on 89 Manor Avenue.

Copies of all the aforesaid correspondence were submitted by Ms. Gallivan. Mr. Phaneuf also submitted copies of these documents in response to a request dated August 22, 2000, by the Executive Secretary of the Board of Appeals, to transmit copies of all documents and papers constituting the record of the case in which the appeal is taken, pursuant to Section XXIV-C.2. of the Zoning Bylaw.

Decision

This Authority has made a careful study of the materials submitted and the information presented at the two Public Hearings.

Chapter 40A, Section 6 of the Zoning Enabling Act states as follows:

“Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun (underlining added), or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing....”

It is the opinion of this Authority that the signing of the contract with Chelsea Modular Homes prior to the first publication of notice for a custom pre-built structure, accompanied by two checks from the property owner totaling sixteen thousand, seven hundred (\$16,700) dollars, are sufficient for the Board to find that construction was “lawfully begun” prior to January 15, 2000.

Furthermore, it is the opinion of this Authority that Chapter 40A, Section 6 makes no reference as to whether the structure must have been “lawfully begun” on site or off site. Therefore, this Authority finds that the construction of the custom pre-built modular home, “lawfully begun” in the factory of Chelsea Modular Homes in Marlborough, NY, prior to the first publication of notice, satisfies the requirement of Section 6.

In regard to Ms. Gallivan’s claim that the structure would not have been in compliance with the prior setback requirements of Section XIX of the Zoning Bylaw, as Manor Avenue constitutes the front of the property, the rear of the property being opposite to the front, leaving the area abutting her property as a side yard requiring a 20 foot setback, this Authority is of the opinion that enforcement of compliance with the prior setback requirements of Section XIX of the Zoning Bylaw is not requested in the petitioner’s appeal and therefore is not relevant.

At the Public Hearing on October 26, 2000, the Board of Appeals voted unanimously to deny the appeal of Kathleen C. Gallivan and to dismiss this petition.

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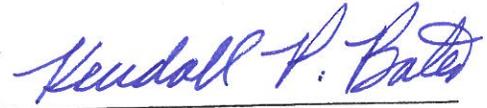
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APPEALS FROM THIS DECISION,  
IF ANY, SHALL BE MADE PURSUANT  
TO GENERAL LAWS, CHAPTER 40A,  
SECTION 17, AND SHALL BE FILED  
WITHIN 20 DAYS AFTER THE DATE  
OF FILING OF THIS DECISION IN  
THE OFFICE OF THE TOWN CLERK.

Cc: Planning Board  
Inspector of Buildings  
Richard Eyges

edg



Kendall P. Bates, Chairman



William E. Polletta



Richard L. Seegel

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TOWN OF WELLESLEY



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September 11, 2008

40 GROVE STREET  
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Lenore Mahoney, Executive Secretary  
Zoning Board of Appeals  
Town Hall  
Wellesley, MA 02482

Michael Grant, Building Inspector and  
Zoning Enforcement Officer  
Town Hall  
Wellesley, MA 02482

RE: Gallivan v. Wellesley ZBA and Zoning Enforcement Officer

Dear Lenore and Michael:

The Supreme Judicial Court has denied Ms. Gallivan's Request for Further Appellate Review. This brings this case to a close unless something unforeseen happens to prolong it. I am closing the file.

Very truly yours,

A handwritten signature in black ink, appearing to read "Albert S. Robinson".

Albert S. Robinson

ASR:mp

File: WBA-134

Asr\town\bdappls\gallivan\mahoneygrantltr9-11-08

c: Hans Larsen, Executive Director