TOWN OF WELLESLEY MASSACHUSETTS

ZONING BOARD OF APPEALS

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ZBA 2002-73
Appeal of Paul and Barbara Calhoun, et al
23 Abbott Road
Re: 28 Abbott Road

Pursuant to due notice the Permit Granting Authority held a Public hearing on Thursday, August 15, 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 BARBARA 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 June 27, 2002 to Zion Realty Trust for upgrading of the existing structure at 28 ABBOTT ROAD, in a Single Residence District, for the use of the premises as a Child Care Facility, a use allowed by right in a Single Residence District, pursuant to Section II A 3 A of the Zoning Bylaw.

On July 24, 2002, the petitioners filed their appeal, which required a hearing before this Authority, and thereafter, due notice of the hearing was given by mailing and publication.

Prior to presentation of the case, Richard L. Seegel, Chairman, stated that the hearing would be limited to discussion of the ways, if any, the proposed Child Care Facility does not comply with Section II A 3 A, subparagraphs a, c, d, e, f, and g. The Board shall not make any determination regarding subparagraph b, as to whether or not the structure containing such a facility and the facility itself shall meet all applicable state, local and federal requirements.

Mr. Seegel said that the neighbors had also filed a request to continue the hearing because many are away on vacation and unable to attend. The Board is very sensitive to giving the neighbors an opportunity to speak, and would like to hear from those present as to the number of neighbors missing before the Board makes a decision as to whether or not to continue the hearing.

Joyce Mandel, 16 Abbott Road, said that most of those who signed the original appeal letter were not present. There has not been enough time to gather information or appoint a spokesperson.

Jody Cale, 14 Caroline Street, said there are four Caroline Street families who are not present.

John Jeffries, 43 Abbott Road said four of his immediate neighbors are away. He asked if the Board would speak on the issue of processes outside of permitting, such as Site Plan Approval or PSI.

Mr. Seegel said that discussion regarding Site Plan Approval, or the PSI process, which requires a Special Permit from the Planning Board, is not relevant at this time. After hearing from the appellants, the Board

would raise the issues it has identified from its examination of the plans. The representative of the Child Care Facility may then respond to the issues raised. If the Board does not continue the hearing, the neighborhood will have an opportunity to speak.

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Mr. Calhoun, the appellant, said that the issues he wished to raise regarding Section XVIA are not to be considered. He had nothing more to say.

Mr. Seegel raised the following issues with the plans:

- Subsection d. of the Zoning Bylaw 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 submitted Site Plan (S-1) does not meet that requirement for two reasons. First, the plan shows a total of 3,785 square feet of play area, divided by 75 square feet, which would allow 50 children to use the play area at any one time. However, the plan does not show any of the play equipment that is planned, or the areas to be occupied by the play equipment, which must be deducted from the total area of 3,785 square feet. This would reduce the number of children using the play area at any one time. The plan is deficient in that no play equipment areas are defined, and incorrect in the number of children allowed to use the play areas at any one time.

- 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.

There is no way to determine from the submitted Site Plan whether or not this requirement has been met. The plan states there are 26 metered and nonmetered parking spaces on Seaward Road. On street parking spaces may not be counted in satisfying the parking requirement in Subsection e.

- Subsection g. states 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.

The Zoning Bylaw, Section XXI, Part D. requires that a Parking Permit be obtained to ensure that parking does comply, and in the opinion of the Board, that requirement is valid, even under Chapter 40A, Section 3. The submitted Site Plan is not acceptable because it does not comply with parking plan requirements. The plan does not include dimensions of the parking spaces, the width of the driveway, or the required stops for each parking space abutting the 5 foot setback areas. No landscaping plan showing the percentage of interior parking and the planted areas has been submitted.

- Subsection f. requires that 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.

Mrs. Hibbard stated that no "drop off" or "pick up" areas are shown on the Site Plan. She added that not only should the dimensions of the parking spaces be shown on the plan, but the spaces should be counted

and numbered to show sufficiency of off street parking related to subsection e. The dimensions of handicap spaces and the dimensions of the aisles should also be shown.

Mr. Seegel stated that in regard to the three parking spaces shown on the first driveway on the left on the Site Plan, cars parked in those spaces must be able to turn around and exit the parking lot going forward. The parking plan must show there is sufficient turning radius to do this.

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Stanley Brooks, attorney for the property owner, Jyotsna Sawhney, said that in regard to subsection d, the fenced in play areas, the relevant language is the 75 square feet required for **every child at play**, and not for every child that occupies the facility. Mr. Seegel concurred, but stated that nothing in the plans or application indicates the number of children permitted to play outside at any one time.

Mr. Brooks said that would be dictated by the available square footage. The play areas have not been shown on the plan. However, Mrs. Sawhney has indicated to him that the number of children outside at any one time varies from 20 to 25, and that number will be dictated by and scheduled as to the available play area.

Mr. Seegel responded that the Board is limited to the record on which the Building Inspector took action.

Mr. Brooks said that in regard to the parking plan, including turning radii, the Building Inspector did review the submitted plans prior to issuing the building permit, and had there been a problem with the plans, he would not have issued the permit. Mr. Seegel reiterated his statement that the Board can only make a decision on what the plans show and the information provided by the Building Inspector.

Mr. Seegel said the Board is in agreement that it cannot accept new evidence or claims in this appeal. The issue has been raised as to whether 5,000 square feet of vegetative cover will be disturbed, which might trigger Site Plan Approval. The Board cannot make this determination at this time.

Mr. Seegel said that as the Board is leaning towards upholding the appeal, it suggests that Mrs. Sawhney submit an application for a new building permit with a Existing and Proposed Site Plan, Parking Plan and Landscaping Plan, all raised to the standard of plans required for Site Plan Approval. The Board is of the opinion that, based on the plans and information submitted, the project is not in compliance with the subsections discussed.

Mr. Seegel asked if a building permit for 26 Abbott Road had been issued. Mr. Brooks said that it had been issued within the last week. Mr. Seegel stated that there is no issue regarding more than one building on one lot, as the lots have not been joined. However, he is of the opinion that there is more parking provided on one lot than on the other, and does not know how the owner will satisfy the subsection requirements for each lot, as no information was submitted as to the number of children occupying each building. The owner has the right to file revised plans for building permits that comply with the Zoning Bylaw. If the permits are issued and the neighborhood is still unhappy, it would have the right to file an appeal of either or both building permits.

The Board discussed upholding the appeal and suggested that the applicant resubmit building applications to the Building Inspector for both 26 and 28 Abbott Road simultaneously, with plans and information in sufficient detail so that the Building Inspector, and ultimately the Board, if the new building permits are

appealed, can determine if all the elements in Section II A 3 A have been met. At the present time, the applicant has not complied with the applicable sections of the Zoning Bylaw.

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Mark Claflin, 31 Abbott Road, asked if the Board was of the opinion that the existing appeal must be upheld based on the evidence before it, then would it not be inappropriate for any continued work to go on under the existing permit, as the permit will be revoked. He asked because that morning, vegetation was removed.

Mr. Seegel said that if the Board revoked the permit on 28 Abbott Road, the applicant could take all necessary action to keep the building safe and water tight. They could not continue to work under the permit once it is revoked.

Mr. Claflin asked if he could obtain a copy of the plans, including the changes that were recently made and the proposed structure. Mr. Seegel said that anything done under the existing permit up to now is valid. The Board cannot force the owner to restore the property to what it was before. He asked Mr. Brooks if, when the owner submitted additional applications and plans, the neighborhood representative could be furnished with a complete set. The neighborhood must decide on a representative and contact Mr. Brooks. Mr. Brooks agreed.

The Board then moved and voted unanimously to uphold the appeal and order revocation of the Building Permit issued for the interior remodeling of 28 Abbott Road for use as a Child Care Facility.

Statement of Facts

The subject premises is located at 28 Abbott Road, in a Single Residence District, on a 23,794 square foot lot and contains a single family dwelling with access from Seaward Road and Abbott Road. The premises at 26 Abbott Road is located on a 3,440 square foot lot abutting 28 Abbott Road, with access from Abbott Road and from Seaward Road through the 24 foot wide driveway shared with 28 Abbott Road and contains a single family dwelling.

On July 24, 2002, Paul and Barbara Calhoun filed a request with the Inspector of Buildings for an open hearing in regard to the issuance of a Building Permit on June 27, 2002 to Zion Realty Trust for upgrading of the existing structure at 28 Abbott Road, in a Single Residence District, for use of the premises as a Child Care Facility, a use allowed by right in a Single Residence District, pursuant to Section II A 3 A of the Zoning Bylaw.

On the same date, the following property owners filed individual appeals to the issuance of said Building Permit on the grounds that the project was not in compliance with Section II A 3 A:

1. Wayne Office Park, LLC – G. Arnold Haynes, Manager	34 Washington Street
2. Joyce and Robert Mandel	16 Abbott Road
3. Eileen Cahn	54 Abbott Road
4. David Center	3 Caroline Street
5. Lee W. Jeffries	43 Abbott Road
6. W.A. Haering Engels	9 Clovelly Road

7. Charlotte Levy and Laurence Krenis	32 Seaward Road
8. Veronica and Giovanni Castellucci	29 Abbott Road
9. Richard and Rebecca Killigrew	34 Seaward Road
10. Mark and Nancy Claflin	31 Abbott Road
11. Haukur Thorgilsson and Ingunn Sturlaugsdottir	30 Abbott Road
12. Douglas Hodes and Susan Loveland	39 Abbott Road
13. Stephen and Catherine Thomas	48 Abbott Road
14. Robert Froh and Barbara Baker	11 Caroline Street
15. Phillips Park Residents (10)	324 Washington Street

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On July 24, 2002, the Executive Secretary of the Board of Appeals requested copies of all documents and papers constituting the record of the case in which the appeal was taken from the Inspector of Buildings, pursuant to Section XXIV-C of the Zoning Bylaw.

On August 2, 2002, Edgar A. Phaenuf, Jr., Inspector of Buildings responded to the request. In a letter of the same date, Mr. Phaneuf stated:

> "It is the opinion of this office that the applicant, Zion Realty trust, demonstrated that the submitted plans meet the requirements of Section 2, subsection #A of the Town of Wellesley Zoning Bylaws."

Accompanying the letter was a memo entitled Site Data, dated July 22, 2002, a 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 a letter from Brian Judge, AIA, to Mr. Phaneuf regarding the Building Permit for 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, prepared by Brian Judge, dated 5/15/02, revised 7/19/02, revised 7/22/02, and a copy of the Building Permit dated June 27, 2002, issued to Zion Realty Trust to "upgrade exist structure to meet Day Care Facility Requirements – 7 Class Rooms/10 Toilet Rms.

The following plans were received from Zion Realty Trust:

Sheet 1	Front & Left Elevations
Sheet 2	Rear & Right Elevations
Sheet 3	First Floor Plan
Sheet 4	Second Floor Plan
Sheet 5	Basement and Foundation Plan
Sheet 6	Stair/Elevation Details
Sheet 9	Schedules, Notes, Mouldings & Details
Sheet 10	Plan Details and Interior Elevations
Sheet 11	Interior Details
M1	Basement & Foundation HVAC Plan
M2	First Floor HVAC Plan
M3	Second Floor HVAC Plan
P1	Basement & Foundation Plumbing Plan
P2	First Floor Plumbing Plan
P3	Second Floor Plumbing Plan

E1	Basement & Foundation Electrical Plan
E2	First Floor Electrical Plan
E3	Second Floor Electrical Plan
FA1	Basement & Foundation Fire Alarm Plan
FA2	First Floor Fire Alarm Plan
FA3	Second Floor Fire Alarm Plan

All plans were stamped by Brian Judge, Registered Architect.

S-1	Site Data & Site Plan prepared by Brian Judge, Registered Architect
SP-1	Sprinkler System, stamped by James N. McHugh, Registered Fire Protection Engineer

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To date, the Board of Appeals has received no copy of any letter from Mr. Phaneuf responding to the request for a meeting with Paul and Barbara Calhoun and neighbors to discuss enforcement of alleged zoning violations in regard to the plans submitted for the building permit issued for upgrading 28 Abbott Road.

Subsequent to the filing of the Appeals, but prior to the Public Hearing, the properties at 26 and 28 Abbott Road were purchased by SAI Realty Trust, Jyotsna Sawhney, Trustee.

On August 6, 2002, the Inspector of Building issued a Building Permit to SAI Realty Trust to convert the premises at 26 Abbott Road to a Child Care Facility. To date, no appeal has been filed in regard to this permit.

Decision

This Authority has made a careful study of the materials submitted and the information presented at the hearing. It is the opinion that the letter from Paul and Barbara Calhoun constitutes a request for enforcement of Section II A 3 A of the Zoning Bylaw by the Inspector of Buildings and an appeal to his decision that the use of the property at 28 Abbott Road, in a Single Residence District, was in compliance with said Section, as evidenced by his issuance of a Building Permit for upgrading the premises for use as a Child Care Facility.

This Authority makes the following findings:

1. The 23,794 square foot lot numbered 28 Abbott Road and the 3,440 square foot lot numbered 26 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. The memorandum entitled Site Data submitted by the Inspector of Buildings was a copy of the Site Data provided on the submitted Site Plan and did not involve any computations by the Building Inspector as to compliance with Section II A 3 A subsections e. through g.

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 plan 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 abutting land of 26 Abbott Road, but cover portions of both properties.
- 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 occupied by play equipment is not delineated on the plan, and 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.
- 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. Although the Building Permit issued for 26 Abbott Road is not subject to the Appeal, this Authority notes that the 675 square foot Plan area C located on the 26 Abbott Road lot cannot be used for 9 children, as noted on the Site Plan, for the same reason.

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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.
   - Furthermore, the Site Plan shows a total of 39 spaces. Portions of 8 spaces on the 24 foot drive encroach onto the Abbott Road lot, as does one handicap space fronting Abbott Road. This would reduce the number of spaces to 30, which is less than the 34 spaces stated as "required" on the plan.
   - The Site Plan notes 26 metered & non-metered spaces on Seaward Road. As all employee parking must be on-site, these spaces cannot be included to satisfy the parking requirement although the plan states that additional off street parking is available on Seaward "Street".
   - 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 remaining 30 spaces 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 location of a drop off/pick up area to be provided on a street abutting the lot.
   - No drop off/pick up area is shown on the Site Plan for either 26 or 28 Abbott Road.
   - The Site Plan notes that the required parking on 26 and 28 Abbott Road is 1 space per 3 children plus 1 space per employee. Occupancy is stated as 115 children divided by 3 totaling 38 spaces. This number is then reduced to 17 children per 15 minute period with an additional 17 spaces required for employees totaling a maximum of 34 spaces, which are not available. (See #3)

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- The Site Plan shows no breakdown of the number of children occupying each of the properties. There is no way to determine from the submitted Site Plan whether or not each lot has sufficient drop off/pick up space for the children and staff occupying the separate buildings.

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:

   - The submitted Site Plan does not show the width of the strip of landscaped open space. This strip must have a minimum width of 5 feet.
   - The submitted Site Plan states that a "5 foot high arbor viate hedge" shall be planted for a length of 178.70 feet along the property line perpendicular to Abbott Road, but does not show the proposed planting materials to be used or the height of said planting materials along the 86.97 foot area labeled "Ex. Paved 86.97 Pathway".
   - No artificial lighting is shown on the Site Plan. There has been no information submitted as to whether or not any artificial lighting will be used.

This Authority finds noncompliance, or insufficient information to determine compliance, in regard to Subsections d. through g. 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 for the interior remodeling of 28 Abbott Road for use as a Child Care Facility, and to revoke said permit.

The Board strongly recommends, but does not order, that the Inspector of Buildings reverse his decision to issue a Building Permit for the interior remodeling of 26 Abbott Road for use as a Child Care Facility, and to revoke said permit.

Should SAI Realty Trust submit new building applications for either 26 or 28 Abbott Road, the Board orders that the Inspector of Buildings waive any additional fees involved in both applications.

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.

Richard L. Seegel, Chairman

Cynthia S. Hibbard

David G. Sheffield

Cc: Planning Board
Inspector of Buildings
Board of Selectmen
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