

TOWN OF WELLESLEY



MASSACHUSETTS

ZONING BOARD OF APPEALS

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

RICHARD L. SEEDEL, CHAIRMAN
CYNTHIA S. HIBBARD, VICE CHAIRMAN
DAVID G. SHEFFIELD

ELLEN D. GORDON
EXECUTIVE SECRETARY
TELEPHONE
(781) 431-1019 EXT. 208

ROBERT A BASTILLE
J. RANDOLPH BECKER
ROBERT W. LEVY

ZBA 2003-24

Appeal of: Robert J. Mandel et al

Re: 28 Abbott Road

Pursuant to due notice, the Permit Granting Authority held a Public Hearing on Thursday, March 13, 2003 at 7:30 p.m. in the Great Hall at the Town Hall, 525 Washington Street, Wellesley, on the Appeal of ROBERT J. MANDEL, PAUL AND BARBARA CALHOUN ET AL, AND MARK CLAFLIN pursuant to the provisions of Section XXIV-C and Section XXIV-D of the Zoning Bylaw to the issuance of a building permit with conditions on January 14, 2003, by the Inspector of Buildings, for construction of a day care center at 28 ABBOTT ROAD, in a Single Residence District.

On February 6, 2003, the appeals of Robert J. Mandel and Paul and Barbara Calhoun, et al were filed with the Town Clerk. On February 13, 2003, the appeal of Mark Claflin was filed with the Town Clerk. The three appeals have been joined into one appeal entitled "Appeal of Robert J. Mandel, et al". Due notice of the hearing of the appeal was given by mailing and publication.

Presenting the case at the hearing was Michael Eby, counsel for the appellants. Mr. Eby said the principal issue before the Board of Appeals is that of Site Plan Approval. The application before the Board is under Section II, the residential section of the bylaw, which contains a provision for Child Care Facilities. The revised plan meets the provisions under this section.

The new building permit that was issued has two conditions: 1. The two parcels (26 and 28 Abbott Road must be merged; 2. The existing house at 26 Abbott Road must be demolished. This is raised as a preliminary matter because it is an unusual situation in that a building permit was issued for a parcel, which does not exist. The issuance of the conditional building permit is an issue to be addressed.

Site Plan Approval – Section IIB of the Zoning Bylaw specifically provides that the provisions of Section XVI-A. Site Plan Approval shall apply. Section XVI-A. B. defines the circumstances under which the requirements of Major Construction Projects apply. Mr. Kreiger, counsel for Ms. Sawhney, the property owner, claims in his Memorandum that all of the requirements have been met.

There are three applicable subsections: Grading or regrading in excess of 5,000 square feet and/or removal or disturbance of the existing vegetative cover in excess of 5,000 square feet. If one looks at the parcel on the right side of #26, where the land drops off and where there are several mature trees, that area will be filled to a gradual slope, which will run from the southern boundary of #26 to the boundary of #28. That area covers more than 5,000 square feet. The requirement, which defines a Major Construction Project, has been met.

RECEIVED
TOWN CLERK'S OFFICE
WELLESLEY, MA 02482
2003 MAR 28 11:08:22

ZBA 2003-24

Appeal of: Robert J. Mandel et al

Re: 28 Abbott Road

The second and third requirements deal with the construction of 2,500 or more square feet of gross floor area, and an increase in gross floor area by 50 percent or more, resulting in a gross floor area of 5,000 or more square feet. The building on 28 Abbott Road has been essentially gutted, and has an addition, for which a building permit was issued, but is now superseded. It has never received a Certificate of Occupancy.

The gross floor area of the original building is about 3,500 square feet. The proposed building will have a gross floor area of over 9,000 square feet, which is more than a 50% increase in floor area. Therefore, both Design Review and Site Plan Review are required for the project.

Case Law – Mr. Eby said he made reference in his Memorandum to the Rogers case, in which the issue revolved around a 2,500 square foot limitation to the footprint. The Court stated that is not a per se violation of the Zoning Bylaw. It said that one can look at the circumstances of a case to determine whether, as applied to the property under consideration, the bylaw nullifies the protection of the statute.

The Court further stated what a municipality could do in light of the Dover Amendment. Where there are legitimate municipal concerns, and the application bears a rational relationship to the perceived concerns, it is permissible for the Zoning Board to enter restrictions, as long as it did not nullify the provisions of the Child Care Bylaw.

The issuance of the building permit for 28 Abbott Road was premature. Considering that the day care center is a commercial enterprise, which will have a decided impact on the residential neighborhood, Design Review and Site Plan Approval are necessary to ensure that the child care facility does not have a negative impact on the neighborhood. As the Building Inspector has issued the building permit prior to Site Plan review, the permit should be revoked until this process has been completed.

In the KinderCare cases, the Court made a decision to remand the case back to the Zoning Board for Site Plan Approval. The Court had no compunctions in upholding the conditions imposed through the Design Review process.

There are legitimate issues which should be addressed regarding traffic, congestion and parking, open space, and drainage. Based on the Zoning Bylaw and the requirements of the bylaw regarding Site Plan Approval, the issuance of the building permit was premature. The applicants should go through the Site Plan Approval process as the project is a Major Construction Project.

Neighborhood Comments

Ingunn Sturlaugsdottir, 30 Abbott Road, said the distance of the proposed day care center road from Abbott Street to Seaward Road was 20 feet from her house. There will be a great deal of noise as well as odors from the parking lot. The project is too large for the area in which it is located. There will be a one-story drop from the west side of the property to her lot line, which will intensify existing drainage problems as the water currently flows into her yard.

Christine Lannigan, 19 Abbott Road, also expressed concern about drainage. The water flows down from both Washington Street and Abbott Road, meeting at a low point in front of 26 Abbott Road. The traffic is already hazardous, and she is concerned about the safety of the children. She added that the commercial enterprise was inappropriate in a Single Residence area.

ZBA 2003-24

Appeal of: Robert J. Mandel et al

Re: 28 Abbott Road

Joyce Mandel, 16 Abbott Road, said this would be a commercial use in a residential area. The best use of the property would be a residential use. In a prior hearing, a neighbor had indicated there might be an underground oil or gas tank on the property.

Jody Cale, 14 Caroline Street, said she would like to address the issue of a commercial use in a residential district.

Mr. Seegel, Chairman, said that no Town authority, including the Board, can prohibit day care centers from being built in single family residential districts. The State has determined that, as a matter of right, a day care center may operate in any single family residential district. There is simply no argument on this issue.

Mrs. Cale said the building and use are too large for the neighborhood. Traffic would be increased and there would be parking problems.

Mark Claflin, 31 Abbott Road, said that in the Rogers case, the day care facility was restricted to 2,500 square feet. The restriction is to **a lot or a structure**. The language in the Zoning Bylaw refers to a **child care facility**. Therefore, the Board could restrict the day care center to **one** existing lot with **one** existing structure.

Presentation for Jyotsna Sawhney

Arthur Kreiger – counsel for Jyotsna Sawhney, who was present, introduced co-counsel Stanley Brooks and project architect, Brian Judge. Mr. Kreiger said Ms. Sawhney initially applied for building permits for 26 and 28 Abbott Road, for a single business operation of a child care center, using the existing structures on both lots. Building permits were issued, appealed by the neighbors, and ordered by the Board to be revoked. Appeals to the Board's decisions have been filed in Land Court.

Ms. Sawhney returned to the Building Inspector with a revised plan that addressed the concerns and questions the Board raised in its initial decisions in July and August. This application was founded on the position taken by Town Counsel and the Building Inspector regarding conditional permitting in order not to render the existing law suits moot.

There are currently two separate conforming lots. If they are merged, they cannot be separated. In order for the revised plan to be submitted, Ms. Sawhney has agreed conditionally that 26 Abbott Road be demolished, and the two lots merged into one.

The position taken by the Building Inspector has to do with the three numerical criteria for Site Plan Approval, which will be discussed following Mr. Judge's presentation.

Brian Judge – At present there are two structures on two separate lots, which were under construction at the time of purchase. Under the revised plan, 26 Abbott Road will be removed; play yards A and B for separate age groups constructed; sufficient parking, landscaping and two new catch basins to improve site drainage will be provided.

RECEIVED
TOWN CLERK'S OFFICE
WELLESLEY MA 02188
MAR 28 10 08 AM '03

ZBA 2003-24

Appeal of: Robert J. Mandel et al

Re: 28 Abbott Road

The square footage of the two lots totals 34,000 square feet. The existing building at 28 Abbott Road originally contained 3,483 square feet, which included 900 square feet for a two-car garage. This garage is being utilized as an indoor/outdoor gym.

They are proposing an addition to encase the exterior egress stairs that were originally proposed for 28 Abbott Road, relocate the elevator and provide a front elevation facing on Abbott Road. Relocation of the elevator will provide a drop-off/pick-up area on grade with exit to Seaward Road.

There will be two play areas: one for toddlers and one for the older children. The smaller play area will hold 10 children; the larger one will hold 21 children. There is a maximum of 9 children per class in the toddler group. The play yards will be used from 8:45 a.m. to 4:15 p.m. The facility operates Monday through Friday, opening around 7 a.m. when staff begins to arrive. The last child is picked up around 6 p.m. The staff leaves no later than 7 p.m. Gates will be installed on Seaward and Abbott Roads to prevent cars from using the driveway as a cut-through. There will be three catch basins draining into the Town system.

Several discussions have been held with the Building Inspector as to what constitutes "disturbed" vegetation. Much of the site had been disturbed due to construction begun by the prior owner. The revised site plan shows the 4,900 square foot area that is currently undisturbed, but that will be disturbed by this project.

Mr. Kreiger noted that Mr. Judge has assumed conservatively that the entire area marked on the plan as 4,900 square feet is currently undisturbed, which is not actually the case. It is wooded, but not completely undisturbed. To say that 4,900 square feet would be disturbed is an overstatement.

Legal Issues

1. Mr. Clafin's point regarding "one lot or structure" is not relevant because they are proposing only one structure on one lot.
2. Site Plan Approval
 - A. The triggers for Site Plan Approval in the Zoning Bylaw have not been met.
 - B. Section III A of Section II was added to harmonize with State law. Subsections a. through g. were added to govern child care facilities, and if complied with, as they are in the revised plan, there is no basis to apply Site Plan Approval regulations.
 - C. State law – The Site Plan Approval issue has been settled by the Appellate Courts. Site Plan Approval cannot be applied to a child care facility. The Petrucci case and the Rogers case state that one cannot require a Special Permit or any other local rule. In the KinderCare case, the applicant had stipulated that the Town could require Site Plan Approval, but the discussion in that case is that the Town cannot require it for any existing property.

RECEIVED
TOWN CLERK'S OFFICE
WILMINGTON, MA 01890
2003 MAR 28 11:48:22

In the very worst case, if Site Plan Approval were to be allowed, it cannot under any circumstances address the size of the building or traffic, which are the two principal concerns raised by the neighbors.

- D. No one has identified a legitimate municipal interest within the purview of the Board that would be served by Site Plan Approval. In fact, the Planning Board stated there does not appear to be a point to requiring Site Plan review because everything has been described. If there is no municipal purpose to be served by local regulations, they cannot be applied.

Mr. Eby stated that under Rogers and other case law, one can apply a reasonable zoning regulation. He makes the inference that as the regulation in the Rogers case was not unreasonable on its face, the regulation regarding Site Plan Approval is also not unreasonable and can be applied. State law says that land or structures can be subject to reasonable regulations regarding bulk, height, yard size, lot area, setbacks, open space, parking and building coverage. The case law is clear that any additional local approval process cannot be required if all reasonable regulations have been met.

3. Special Permit/Finding – Ms. Sawhney has not applied for a finding because counsel does not feel it is applicable. The project will not increase the nonconformity as the nonconforming portion of the building is not being changed in regard to the setbacks, nor will any new nonconformity be created. However, if the Board was inclined to make such a finding, it might avoid the remote possibility of a remand for a finding.

Board Discussion

Mr. Seegel read into the record the recommendations of the Planning Board, which concluded that the appeal should be denied.

Mr. Seegel then explained the procedural make-up of the prior case and this case. Neither case was before the Board for Site Plan Approval, but on appeals from the issuance of building permits by the Building Inspector. In the course of the first appeal hearing, the Board expressed its concerns about its inability to determine whether the Site Plan Approval process might have been triggered because the plans were not complete enough for the Board to make a determination.

More importantly, the Board indicated that the plans were not complete enough for the Board to be able to determine whether Section II, subsection III A had been complied with in respect to requirements a. through g. At that time, the Board urged the owner to pay attention to the general criteria for plans, required by the Board for Site Plan Approval, in the development of any revised plans submitted, and that said plans address the requirements of subsection III A in that manner. In his opinion, the new plans submitted have addressed the Board's concerns.

The Board has not said at any time that Site Plan Approval had been triggered, nor has the Board expressed the opinion that the project was subject to Site Plan Approval. After reviewing the Zoning Bylaw and the various cases, he does not believe the full Site Plan Approval process is permissible.

RECEIVED
TOWN CLERK'S OFFICE
WILLESLY MA 01482
MAR 28 10:00 AM '03

ZBA 2003-24

Appeal of: Robert J. Mandel et al

Re: 28 Abbott Road

Mrs. Hibbard agreed that the submitted revised plans were much better than the prior plans. She questioned why the applicant does not waive any rights to consider the use of the lots as separate and unmerged

Mr. Brooks responded that the building permit issued by the Building Inspector is conditioned on two items: the lots must be combined, and the structure on #26 be razed. It is their intention, as indicated by the note on the plans, that once the permit is issued and the appeal period expires without appeal, or if an appeal, it is taken by judgment and construction can commence, that the lots will be joined. Until such time as the lots are merged, they are not giving up the right to use the property in its existing configuration.

Mr. Seegel added that because there is existing litigation, and since an appeal has been taken on the conditional building permit, there is nothing wrong with the note on the plan. Ms. Sawhney cannot utilize the building permit that has been issued until and unless the house is demolished and the lots merged; but the building permit that has been issued is not usable until all the appeals processes have ended with a final judgment.

Mrs. Hibbard expressed her opinion that it is likely that the grading and regrading threshold of 5,000 square feet has been exceeded because, not only does the applicant show an area of 4,900 square feet that will be disturbed, but there will other regrading, which must also be counted, in order to come to final grade on the site.

The Site Plan Approval process would be beneficial because of the drainage issues. Although two new catch basins will be installed, without Site Plan Approval the Board does not have calculations to determine if they will be properly sized, that they are not going to flood, and would provide protection from oil runoff into Caroline Brook.

Mr. Sheffield said he was also concerned with the amount of runoff and the difficulties with the amount of disturbed vegetative cover. He is also concerned about the drop-off area, and questions why the one-way traffic will result in the passenger side not being on the building side. Children would be passing behind the cars to reach the entrance. Children exiting the handicap space have to cross the driveway to reach the building. The spaces should be relocated to avoid the problem.

Mr. Eby concluded that, as the Board has heard, questions were asked. This project should have gone through the Site Plan Approval process. This is not a discretionary issue based on whether the Board thinks the process would or would not be helpful. If the project is a Major Construction Project, the applicant must go through the process. The size of the project triggers Site Plan Approval as a Major Construction Project. Site Plan Approval is a general application, which is not discriminatory in that it applies to all facilities, not just to child care facilities. He suggests this is an appropriate course of action.

Mr. Seegel closed the Public Hearing. He stated the Board's purpose is to interpret the Zoning Bylaws from a legal standpoint, as well as all other standpoints. Section XXV B.3. in the Zoning Bylaw states, in part:

ZBA 2003-24

Appeal of: Robert J. Mandel et al

Re: 28 Abbott Road

“the approval of plans by the Special Permit Granting Authority in accordance with Section XVI-A. Site Plan Approval, shall constitute the granting of a Special Permit.”

The Board is prohibited from requiring a Special Permit for a day care facility. In his opinion, the Board is therefore prohibited from conducting a formal Site Plan Approval of a day care facility.

Statement of Facts

The subject joined appeal is taken on the decision of the Inspector of Buildings to issue a building permit dated January 14, 2003 for new construction and interior renovation of the property at 28 Abbott Road, in a Single Residence District, for use as a Child Care Facility.

On June 27, 2002, the Building Inspector, after revoking the existing permits, issued a building permit to Zion Realty Trust for upgrading of the existing structure at 28 Abbott Road for use 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 August 15, 2002, the Board of Appeals heard the Appeal of Paul and Barbara Calhoun et al, filed on July 24, 2002, to the issuance of said building permit on the grounds that the project was not in compliance with Section II A 3 A of the Zoning Bylaw. The Board found noncompliance, or insufficient information to determine compliance, upheld the appeal, and ordered the Inspector of Buildings to reverse his decision, and revoke the building permit (ZBA 2002-73).

The same process was undertaken with respect to the issuance of a building permit on August 6, 2002 for conversion of the building at 26 Abbott Road to meet Day Care Facility requirements. An appeal was filed on August 28, 2002, and on September 19, 2002, the Board upheld the appeal for the same reasons as recorded in the prior decision (ZBA 2002-94).

The appeal in this instance is taken not on the grounds of noncompliance with subsections a. through g. of Section II A 3 A of the Zoning Bylaw, but on the grounds that the Inspector of Buildings issued the permit for construction of a project deemed by the appellants to be a Major Construction Project pursuant to Section XVI-A of the Zoning Bylaw, thus requiring Site Plan Approval by the Special Permit Granting Authority, prior to said Site Plan Approval process.

The following plans and information were submitted by the Inspector of Buildings pursuant to Section XXIV-C. 3. of the Zoning Bylaw:

1. Copy of the Building Permit issued on January 14, 2002 for renovation and construction at 28 Abbott Road.
2. Site Data & Site Plan (S-1) – Renovation for the Abbott Center, 28 Abbott Road, dated 12/16/02, stamped by Brian Judge, Registered Architect.

The following information was submitted by Michael Eby, counsel for the appellants:

1. Memorandum of Law Concerning Requirement of Site Plan Approval, dated March 6, 2003.
2. Traffic Analysis dated March 12, 2003, prepared by Conley Associates
3. Land Court Decisions on KinderCare cases dated July 29, 2002 and November 29, 2001.

ZBA 2003-24

Appeal of: Robert J. Mandel et al

Re: 28 Abbott Road

The following plans and information were submitted by Arthur Kreiger and Stanley Brooks, co-counsel for Jyotsna Sawhney, owner of 28 Abbott Road:

1. Letter from Brian Judge to Edgar Phaneuf dated February 21, 2003, regarding compliance of the project in respect to site plan approval criteria under Section XVI-A B. of the Zoning Bylaw.
2. Packet from Stanley Brooks to Ellen Gordon including Mr. Brooks' letter to Edgar Phaneuf dated December 18, 2003, letter from Arthur Kreiger to Edgar Phaneuf regarding issue of Site Plan Approval with Land Court Decisions, Site Plan (S-1) dated 12/16/02 prepared by Brian Judge.
3. Memorandum from Arthur Kreiger to the Board of Appeals dated March 13, 2003, responding to the appeal and the Memorandum of Law dated March 6, 2003 by Michael Eby.
4. Existing Conditions Plan dated December 16, 2002, stamped by George N. Guinta, Professional Land Surveyor; Planting & Lighting Plan (L-1) stamped by Nelson R. Hammer, Registered Landscape Architect; Site Plan of Land dated December 16, 2002, stamped by George N. Guinta, Professional Land Surveyor.

On March 11, 2003, the Planning Board reviewed the petition, and stated that it was apparent that the applicant has taken traffic flow and safety into consideration in the revised plans, and made recommendations regarding interior traffic flow, lighting of drop-off area, monitoring drop-off area, staggered drop-off/pick-ups, provision of information to parents and neighborhood residents.

The Board considered whether site plan approval was required. The Board felt that there was a plausible case to require site plan approval, however, from a practical standpoint, nothing more would be achieved by forcing this project through the site plan review process than has already been accomplished. The Board believed this use could be integrated into the neighborhood.

The Board voted unanimously to recommend that the appeal be denied.

Decision

This Authority has made a careful study of all the materials submitted and the information provided by all parties at the public hearing. The proposed child care center is an allowed use in a Single Residence District pursuant to the provisions of Section II A 3 A, subject to compliance with subsections a. through g.

The appeals filed by Robert Mandel, Paul and Barbara Calhoun, and Mark Claflin do not contest compliance of the project with subsections a. through g. of Section II A 3 A. The appeals are taken on the grounds that the Inspector of Buildings issued a building permit for an addition to, and renovation of 28 Abbott Road for use as a child care center, prior to any review of the project by the Board of Appeals pursuant to Section XVI-A of the Zoning Bylaw. The appellants are of the opinion that the project constitutes a Major Construction Project requiring Site Plan Approval. As this process has not occurred, the appellants have requested the Board of Appeals to order revocation of the building permit.

This Authority makes the following findings:

1. MGL Chapter 40A. Section 3. Exemptions from Zoning Regulations reads as follows:

RECEIVED
TOWN CLERK'S OFFICE
WILLETT MA 02482
MAR 28 A 8:22

Appeal of: Robert J. Mandel et al

Re: 28 Abbott Road

“No zoning ordinance or bylaw in any city or town shall prohibit, or **require a special permit for** (emphasis added) the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of the structures, and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.”

- 2. Regulations concerning traffic, drainage, number of children and Site Plan Approval are not included among the cited regulations to which such land or structures may be subject.
- 3. Section II. Single Residence Districts. 3A in the Wellesley Zoning Bylaw contains the conditions a. through g. with which a Child Care Facility in a Single Residence District must comply. Site Plan Approval is not included as a condition.
- 4. Section XXV. Special Permit Granting Authority. Section B. Specific Powers. 3. Site Plan Approval of the Wellesley Zoning Bylaw reads as follows:

“...The approval of plans by the Special Permit Granting Authority in accordance with Section XVIA. Site Plan Approval **shall constitute the granting of a Special Permit.**” (emphasis added)

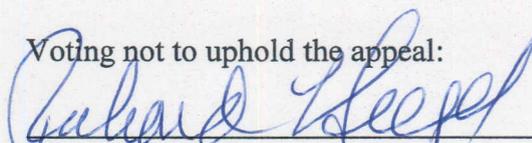
- 5. As MGL Chapter 40A, Section 3, as stated, prohibits the requirement of a Special Permit for a Child Care facility, and as Section XXV B.3. of the Wellesley Zoning Bylaw defines Site Plan Approval as a Special Permit, Site Plan Approval cannot be required for a Child Care Facility.

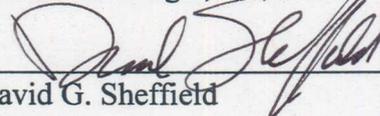
After the close of the Public Hearing, a vote to uphold the appeal failed. Cynthia Hibbard voted to uphold the appeal. Richard L. Seegel and David G. Sheffield voted not to uphold the appeal.

Therefore, the appeal is denied, 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.

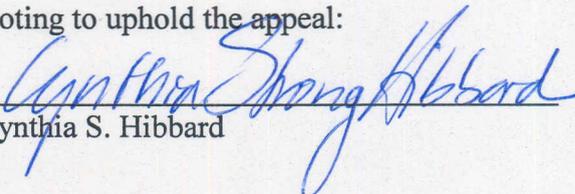
Voting not to uphold the appeal:


Richard L. Seegel, Chairman


David G. Sheffield

Cc: Planning Board
Inspector of Buildings
edg

Voting to uphold the appeal:


Cynthia S. Hibbard

RECEIVED
TOWN CLERK'S OFFICE
WELLESLEY MA 02482
2003 MAR 28 | A 8:22