

TOWN OF WELLESLEY



MASSACHUSETTS

## ZONING BOARD OF APPEALS

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ZBA 2007-14

Appeal of Healy, Bentley, Kufe  
195 Grove Street

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Appeal of HEALY, BENTLEY AND KUFU pursuant to the provisions of Chapter 40A, Sections 7 & 8 of the Massachusetts General Laws, Section XXIII E & F, Section XXIV B.1 & C.1 of the Zoning Bylaw, and Section 2.c of the Rules and Regulations of the Zoning Board of Appeals, appealing the decision of the Inspector of Buildings, in a letter dated February 14, 2007, relative to the Building Permit issued for 195 GROVE STREET, in a Single Residence District.

On March 19, 2007, the Appellant 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 David Thomas, Chairperson of Government Relations Department at the law firm of Donovan/Hatem in Boston. He said that present with him was Neal Glick, also of Donovan/Hatem.

Mr. Thomas said that he and Mr. Glick were representing the Healys who live at 194 Grove Street, the Bentleys at 3 Beebe Way, and the Kufes of 179 Grove Street (the "Appellants"). He said that all are parties in interest under Section XXVIA of the Zoning Bylaw (the "bylaw").

Mr. Thomas said that the Appeal was submitted on behalf of the Appellants based on the refusal of the Inspector of Buildings to do the following: 1) to enforce the bylaw concerning construction on a nonconforming lot, and construction of a two-family dwelling in a single-family residence district; 2) in the alternative, they allege that the Building Inspector failed to require compliance with Section XVII B.1 of the bylaw that requires approval of the Zoning Board of Appeals (the "Board") for substantial changes to nonconforming structures, and thereby asserted powers that are not granted either under statute or bylaw to the Building Inspector, thereby usurping the powers of the Board of Appeals (the "Board"). Mr. Thomas said that the Appellants asked for cessation of construction under Section XXIII B of the bylaw.

Mr. Thomas said that the Building Inspector was requested, by letter, to undertake enforcement actions pursuant to Chapter 40A, Section 7 and Section XXIII E and F of the bylaw. He said that the Building Inspector refused enforcement in a letter dated February 8, 2007.

Mr. Thomas said that, in his opinion, the letter from Mr. Grant is inconsistent with the bylaw, the statute, and the policies of the Town of Wellesley.

Mr. Glick reviewed the history of the property. He said that for 126 years the property at 195 Grove Street contained a small Victorian structure and a small detached garage. He said that the structure was originally a single family home and had retained its single-family appearance throughout its existence.

Mr. Glick displayed a photograph of the house, as it existed until recently. He said that the house had one front door.

Mr. Glick said that the small dwelling sat on a lot that is only 19,000 square feet in a 40,000 square foot Single Residence District. The lot is undersized by more than half.

Mr. Glick said that Building Department records show that, between 1938 and 1947, the property was owned by Dana Hall and was used for educational purposes under the provisions of the bylaw. The Board said that the fact that Dana Hall owned the property does not necessarily mean that it was an educational use. Mr. Glick said that, in 1947, the Selectmen confirmed that the property was used for educational purposes before the Zoning Bylaw went into effect in 1925.

Mr. Glick said that for nine years prior to 1947 the property was not a lawful commercial two-family dwelling. He said that in 1951, Dana Hall sold the property. He said that the new for-profit owner proposed to make minor additions to the house. The Building Inspector refused to grant a permit for those additions without approval of the Zoning Board. Mr. Glick said that the Board said nothing about any increase in nonconformity in its 1951 Decision but did allow a Building Permit for a small addition.

The Board said that the 1951 Board asked Judge Dewing to provide further evidence of the two-family use. By letter dated August 3, 1951, Judge Dewing wrote to the Board of Appeals setting forth all of the facts. He said that the house was being used for a number of elderly retired teachers and was probably being used as a two-family dwelling since March 1924. The Board said that it appears that the 1951 Board was satisfied with that explanation.

Mr. Glick said that Mr. Dewing's letter preceded the 1951 Board's Decision, dated August 6, 1951. He said that the 1951 Board was not convinced by Mr. Dewing's letter.

The Board said that the 1951 Board felt that it was not entirely clear that the two-family use existed prior to adoption of the Zoning Bylaw in 1925. The 1951 Board did allow the permit.

Mr. Glick said that the Town Census records show that, between 1964 and 1965, the property was used as a single-family residence. He said that any lawful two-family use was abandoned under Section XVII A of the bylaw.

The Board said that the two-family use has been continued since 1951. The Registrar's List is not certified. It is created by a voluntary response. There is no evidence of abandonment of the use.

Mr. Glick said that the present owner of the property appeared before the Zoning Board in 2006 with a plan for a single-family house that was similar in design to the two-family house that is currently under construction. The size of the project that was presented to the Board was smaller.

Mr. Glick said that, at the June 8, 2006 Public Hearing, the Board gave Mr. Reber an advisory opinion that the proposed house was too big for the undersized lot. Mr. Reber asked what size house would be acceptable. The Chairman said that the new structure should not be twice the size of the existing structure.

Mr. Glick said that the Appellants were present at the June 8, 2006 Public Hearing. He said that, after hearing the Board's comments, the Appellants felt confident that they would receive notice if a project for a dwelling that would be twice the size of the original dwelling was brought before the Town.

Mr. Glick said that Mr. Reber subsequently applied for a Building Permit for a larger two-family structure. No notice was given to abutters and no public hearing was held.

Mr. Glick said that the Building Inspector took the position that he could make findings based on language contained in Section XVII B.1 that addresses, "changes which themselves comply with this Zoning Bylaw." Mr. Glick said that phrase cannot apply to this project because the changes do not comply with the bylaw.

Mr. Glick said that Section XVII of the bylaw prohibits the Building Inspector from issuing a Building Permit for the project at 195 Grove Street without certain findings from the Board. He said that a pre-existing nonconforming structure cannot be altered, extended or reconstructed except in conformity with all provisions of the bylaw in effect at the time of the alteration unless the Board makes findings regarding intensification of the use, nonconformity and detriment to the neighborhood.

Mr. Glick said that the nonconformities for the property at 195 Grove Street included: a two-family residence in a single-family district, a lot that has less than half the required area, and an existing garage that did not meet setback requirements.

Mr. Glick said that, under Section XVIII A of the bylaw, the Building Inspector cannot issue a permit for construction on an undersized lot without prior approval of the Zoning Board. He said that under Section II of the bylaw, a two-family use is not allowed as of right in a Single Residence District.

Mr. Glick said that in its Supreme Judicial Court Decision for Bransford versus the Town of Edgartown, 444 MA 853 2005, the Court faced a case that involved the issuance of a Building Permit to construct a new larger single-family residence on a property that would comply with all dimensional requirements of the Zoning Bylaw with the exception of the minimum lot area. The owners argued that they were entitled to the permit under Chapter 40A, Section 6 because reconstruction would not or could not increase the nonconforming nature of the structure. The owners said that it would result in construction of a conforming structure on a nonconforming lot.

The Board said that the facts in the Bransford case were a little different in that the dwelling had already been removed from the lot. Mr. Glick said that there is nothing in the Bransford Case that addresses the distinction between a nonconforming lot where the dwelling has been removed and a nonconforming lot where the dwelling has not been removed.

Mr. Glick said that the Court ruled that where an undersized lot exists, proposed reconstruction may be allowed without Special Permit only if the proposed new residence does not intensify the existing nonconformities.

Mr. Glick said that when dealing with an undersized lot, a finding of non-intensification is required, not a finding that structural changes do not comply with the current bylaw.

Mr. Glick said that Chapter 40A does not provide for any exceptions for existing nonconforming structures and uses without a finding from the Zoning Board. He said that practice is also consistent with the Wellesley Zoning Board's prior decisions. He said that for ZBA 2006-62, 22 Barnstable Road, the only nonconforming issue was that the lot was undersized by 147 square feet. He said that the petition for 22 Barnstable Road was required to come before the Zoning Board for findings. Mr. Glick said that the lot at 195 Grove Street is 136 times more undersized than the lot at 22 Barnstable Road.

The Board said that under the Zoning Bylaw the petitioner is required to come before the Board for conforming changes on a nonconforming lot only if it is a teardown situation, which was the case at 22 Barnstable Road. The petitioners came before the Board with a petition for a Special Permit while the existing house was still standing.

Mr. Glick said that the Building Inspector cannot make teardown determinations based on his rule that 50% of the existing nonconforming structure remains. He said that Mr. Shind, in his letter, said that the policy or rule is not required under Section XVII B.1. Mr. Glick said that the 50% Rule does not exist. He said that the 50% Rule has no relation to the required findings under Section XVII.

Mr. Glick displayed photographs of the structure before and after construction. He said that there is a new foundation, no roof, no third floor, and almost no cladding on three sides. He said that more cladding was taken down after the picture was taken.

Mr. Glick said that the existing house is no longer there. He said that the new footprint is over three times the size of the prior footprint. He said that this is larger than what was presented to the Board in June of 2006.

The Board said that there was no decision made on the petition that was presented in June of 2006. No construction plans were submitted. The applicant was permitted to withdraw his petition without prejudice.

Mr. Glick said that the Appellants hired a registered architect to do a site investigation, and make a comparison of the former house with the new construction. The Architect's Report confirmed that none of the original materials or structure of the original building is visible. The architect concluded that less than 35 percent of the original structure remains, and that 35 percent is unrecognizable. The architect estimated that 10 to 15 percent of the original structure remains. Mr. Glick said that this appears to be a teardown by encasement.

The Board said that the 50% Rule does not exist. The current Building Inspector uses that as a guideline. The Zoning Board historically has taken the position that if two walls remain, it is not considered a teardown. The Board developed its own internal criteria in the absence of guidance from the Planning Board in the form of a bylaw. The Building Inspector's criteria is more conservative than the Zoning Board's.

Mr. Glick said that the bylaw does not make any distinction between a teardown and any other alteration, construction, or extension of a pre-existing nonconforming use. He said that the word "teardown" does not appear in the bylaw. The Board said that it has always required that proposals for teardown and reconstruction on a nonconforming lot come before it for a Special Permit.

The Board said that under Section 8 of Chapter 40A there are 30 days to appeal the issuance of a Building Permit. The Board said that although the appeal is couched as an enforcement action, it is really an appeal of the issuance of the Building Permit. The time period to appeal that has expired. There was a recent case in Wellesley on that issue, Gallivan v. Town et al, Land court Misc. No. 268074, that supports that point.

The Board said that the house was sitting on an existing foundation. There was an amendment to the Building Permit that allowed the developer to put a new foundation under it. Michael Grant, Building Inspector, said that there was an original rubble foundation that would be typical for the age of the house. He said that the developer asked him if he could jack the house up and pour a new foundation due to structural issues with the old rubble foundation. This was verified on an as-built plan.

The Board confirmed with Mr. Grant that front and side walls sitting flush on the foundation in a photograph were original walls.

Mr. Grant said that existing framework and floorboards for the first and second floors are still remaining. He said that there is a two-story wall on the right side and a fair amount of wall remaining on the left side of the house. He said that there is nothing in the bylaw that says that exterior walls have to remain as exterior walls. He said that this project involved additions to an existing structure which comply with the Zoning Bylaw.

Mr. Grant said that he set the 50% criteria to show that there was a vested interest in preserving the structure. He said that he does not have jurisdiction over interior partitions or siding.

Mr. Grant said that there is information in the 1951 Decision that should be looked at in relation to the current Zoning Bylaw, Section XVII A and Section XXV. He said that this building was in existence when the bylaw took effect. The bylaw required that the Zoning Board make a finding that the original building can no longer be used or adapted at a reasonable expense with fair financial return for the use regularly permitted in the district. He said that the Zoning Board stated clearly in the 1951 Decision that Section 7 B 2 of the bylaw that no nonconforming building may be altered without permission from the Board of Appeals. The Building Inspector had no discretion as to whether to send the petition before the Board, at that time.

Mr. Grant read an excerpt from the 1951 Decision concerning the location of the house and the difficulty in adapting it for single-family use. The Board stated that it would be an unnecessary financial hardship for the petitioner to require the single-family use. He said that the 1951 Board permitted alteration of a nonconforming structure and use in that decision.

Mr. Grant said that Section 7 B 2 of the Zoning Bylaw changed in 1993. He said that the description submitted to Town Meeting stated that the Planning Board felt that it was unreasonably burdensome to require the owners of all of the nonconforming homes in Wellesley to be required to go through the hearing process for additions that fully comply with yard setbacks, height limits and do not intensify the use of the lot. He said that this article would restore the appropriate authority to the Building Inspector to facilitate timely processing of applications for extensions and alterations that fully comply with the bylaw.

Mr. Glick said that this project should come before the Zoning Board so that it can making findings of detriment to the neighborhood.

The Board said that the change did not create any new nonconformities as it was a continued two-family use on an undersized lot. The Board said that the 1951 Decision stated that

While it is not entirely clear that the house in question was occupied by two families prior to the adoption of the Zoning By-law in 1925, it is clear that is has been so occupied for a great many years. Continuance of such use will not change a situation that has long existed.

Mr. Glick said that a nonconformity was intensified. The Board said that intensification does not mean a larger building. Mr. Grant said that his interpretation of an increase in the use of the property would be if the house was changed from a two-family to a three-family.

Mr. Glick said that virtually every other town in the Commonwealth considers enlarging a nonconforming two-family house an intensification issue. The Board said that it rules in accordance with the Zoning Bylaws of Wellesley.

Mr. Grant said that, in his opinion, the structure at 195 Grove Street fully complies with the Zoning Bylaws.

Mr. Grant said that he reviewed the Assessor's records back to 1984. He said that it was referred to as a two-family in the records. He said that it was bought and sold and permitted as a two-family. He said that the Special Permit was granted in 1951 and it goes with the property.

Mr. Glick said that he looked at the Assessor's records. He said that the records show that the inspector was never able to get inside the house. He said that the property was listed as a single-family residence when Mr. Reber bought it. He said that the listing sheet shows only one kitchen.

Mr. Grant said that, Section XXIII C of the bylaw states that,

At least ten (10) days before issuing any permit, except a permit for work on an existing building or structure or for a new structure of less than 300 square feet of floor area, the Inspector of Buildings shall at the expense of the applicant send notice by mail, postage prepaid, to the abutters and abutters to the abutters within 300 feet of the property line of the applicant, including owners of land directly opposite on any public or private street or way, as they appear on the most recent applicable tax list. Owners of land directly opposite the applicant on any public or private street or way, shall be considered abutters under this Section.

Mr. Grant said that this was an existing structure with large additions. He said that he was not required to send notice of the application for a Building Permit.

Mr. Glick said that the Building Permit was not properly posted. He said that it was posted back on the garage where it could not be seen unless you were to trespass on the property. He said that the Appellants had no idea of what was going to be built until the enormity of the project was upon them.

Craig Bentley said that he is an abutter to the property. He said that he was present at the Zoning Board Hearing last June. He said that Mr. Reber was told that the proposed 3,700 square foot structure was too large for this lot. The neighbors had all been notified of the Public Hearing and were satisfied with how the Board had handled the situation.

Mr. Bentley said that they were not notified about that the Building Permit had been issued, or notified of plan size or dimensions. He said that the neighbors are confused as to why the petition had to be brought before the Board last June and not again this time.

Mr. Bentley said that virtually every bit of the existing house has been removed. He said that there are no remaining exterior walls except for the stone panel at the front.

Mr. Bentley said that the neighbors did not expect that a larger home than what was proposed at the June Public Hearing could be built without any notification to the neighbors. He said that the nonconforming variance was not granted in perpetuity.

The Board said that when there is a petition before them that they know they will be unable to rule on, they may, if asked by the petitioner, voice opinions as to what would or would not be acceptable, should the petition come before them again. That may have been misleading to the neighbors who were present at the June 6, 2006 Public Hearing.

The Board said that Mr. Reber did not have to come back before the Board because his new proposal was not for a teardown. The developer did everything to preserve the 50% that would make the project not a teardown. The Board said that although it is a very large house for that site, it is not a large house for the neighborhood.

Elaine Putnam said that she has lived in the area since 1979. She said that the house has never been considered a two-family house. She said that there now are two curb cuts where there had been one before. She said that it was listed as a one-family house. She said that there have never been two families living there. She said that people living there were two brothers and a divorce situation where the husband and wife lived in the same house.

Ms. Putnam said that she is concerned with the change in size of the structure. She said that it has gone from a one-car garage to a four-car garage.

Ms. Putnam said that she has had trouble with her gas lines and water in her basement since new construction was built in the neighborhood. She is concerned that her gas flow will be diminished with the construction at 195 Grove Street.

Laurence Shind said that he is representing the property owner, Mr. Reber. He said that he sent a written memo to the Board in response to the Appellants' application.

Mr. Shind said that the Appellants' chief argument was that there was not a valid nonconforming use on the property. He said that he believes that the 1951 Decision controls that issue. Permission was granted to make alterations to the prior nonconforming two-family that existed on the property. He said that it had been used as a two-family for many years without objection. The property has continued to be used as a two-family since 1951.

Mr. Shind said that the Registrar's records for the mid-1960's only show that the owner may not have been able to get a tenant during that period.

Mr. Shind said that the 1993 amendment to the Zoning Bylaw gives the Building Inspector the ability to make decisions as to whether petitions must come before the Zoning Board. He said that the changes made at 195 Grove Street do comply with all dimensional requirements.

Mr. Shind said that there is no bylaw guidance with respect to determination of teardown status. The Building Inspector is given the discretion to make decisions under the bylaw. He said that the Building Inspector properly used his judgment in his decision for 195 Grove Street.

Mr. Shind said that much of the existing structure does remain intact. Some prior exterior walls are now interior walls. There are many interior structural members that are still intact in the old portion of the structure.

Mr. Shind said that the Building Permit was displayed in a visible location. The Building Inspector requested that the Building Permit be moved to a more visible location.

Mr. Shind said that it was not required that the Building Permit application be published since this was a permit for renovation, not reconstruction.

Mr. Shind said that the June 6, 2006 Public Hearing was not relevant to this Public Hearing since that was an informal meeting with a theoretical proposal of a brand new construction. He said that the current project is a renovation, not a teardown.

Mr. Thomas said that the meeting in June 2006 was a Public Hearing that was posted and noticed. Mr. Reber was allowed to withdraw his petition without prejudice by vote of the Board. The Board said the June 2006 proposal was to tear the house down and start from scratch, which is something that the Board had authority over.

The Board voted unanimously to uphold the decision of the Inspector of Buildings that the building permit was properly issued and the construction be allowed to be continued.

The Board voted unanimously to deny the Appeal of Healy, Bentley, Kufe.

#### Statement of Facts

The subject property is located at 195 Grove Street, in a 40,000 square foot Single Residence District.

Building Permit #37896 was granted on September 21, 2006 and Building Permit #38044 was granted on November 8, 2006.

On April 5, 2007, the Board of Appeals heard the Appeal of Dr. Gerald and Anne Healy, Craig and Kathy McGraw Bentley, and Dr. Donald Kufe and Hillary Mankin-Kufe, filed on March 19, 2007, of the decision of the Inspector of Buildings, in a letter dated February 14, 2007, not to revoke the building permits granted on 9/21/06 and 11/8/06, and to allow for continued construction at 195 Grove Street.

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

- Letter to Michael T. Grant, Inspector of Buildings/Zoning Enforcement Officer, dated 1/26/07, from Neal B. Glick
- Letter to Neal B. Glick, Donovan/Hatem LLP, dated 2/8/07, from Michael Grant, Inspector of Buildings/Zoning Enforcement Officer
- Application for a permit from the Board of Selectmen, dated 8/27/47, from Dana Hall Schools by its Attorney, Edmund R. Dewing
- Letter to Edmund R. Dewing, Esq., dated 10/14/47, from Selectmen of Wellesley
- Letter to William H. Hewett, Building Inspector, dated 8/1/51, from Board of Appeal
- Letter to Board of Appeal, dated 7/25/51, from Elizabeth F. Dewing, by her attorney, Edmund R. Dewing
- Decision of the Board of Appeal, Petition of Elizabeth F. Dewing, dated 8/6/51
- Letter to Board of Appeal, dated 8/3/51, from Edmund R. Dewing
- Notice of Public Hearing, Board of Appeal, dated 7/25/51
- Excerpt of 1951 Decision of the Board of Appeal, Petition of Elizabeth F. Dewing, dated 8/6/51
- Registrars' List of Residents, January 1, 1964

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- Registrars' List of Residents, January 1, 1965
- Building Permit #10983, dated 9/26/51, 195 Grove Street
- Building Permit #8381, dated 9/21/43, 195 Grove Street
- Article 21, Motion, dated 3/19/93, 1993 Annual town Meeting
- Article 21 Recommendation, Report of the Planning Board, 1993 Reports to the Annual Town Meeting by the Advisory Committee
- Banker & Tradesman Sale Listing, 195 Grove Street
- Real Estate Listing, MLS # 70350458, 195 Grove Street
- 2007 Wellesley Property Record Card Current
- 2005 Wellesley Property Record Card Current
- 2004 Wellesley Property Record Card Current
- 2003 Wellesley Property Record Card Current
- 2001 Wellesley Property Record Card Current
- 1999 Wellesley Property Record Card Current
- Inspector's Report, dated 5/14/84
- Property Assessment Record, dated 1981
- Assessor's Sales Questionnaire, dated 8/31/06
- Application for Building Permit, dated 11/2/06, 195 Grove Street
- Application for Building Permit, dated 9/20/06, 195 Grove Street
- Letter to Lenore R. Mahoney, dated 2/14/07, from Neal B. Glick
- Letter to Neal B. Glick, dated 2/8/07, from Michael T. Grant

Submittals from Appellant

- Letter to Lenore R. Mahoney, dated 2/14/07, from Neal B. Glick
- Exhibit A, Letter to Michael T. Grant, dated 2/26/07, from Neal B. Glick
- Exhibit B, Letter to Neal B. Glick, dated 2/8/07, from Michael T. Grant
- Exhibit C, Registrars' List of Residents, January 1, 1964  
Registrars' List of Residents, January 1, 1965
- Memorandum to Zoning Board of Appeals, dated 4/1/07, from Dr. Gerald and Anne Healy, Craig and Kathy McGraw Bentley, Bill and Penny Darcey, Mark and Paula Ness Speers, Dr. Donald and Hillary R. Mankin-Kufe, Elaine Putnam, Bill and Chloe Mantel Taylor

Submittals from Laurence Shind, Counsel to 195 Grove Street LLC (the "Owner")

- Letter to Zoning Board of Appeals, dated 3/30/07, signed by Laurence D. Shind

On March 27, 2007, the Planning Board reviewed the petition and recommended that the Appeal be sustained.

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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 appeal is denied.

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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.

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Richard L. Seegel, Chairman

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Cynthia S. Hibbard

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David G. Sheffield

cc: Planning Board  
Inspector of Buildings  
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