

TOWN OF WELLESLEY



MASSACHUSETTS

ZONING BOARD OF APPEALS

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ZBA 2008-18

Appeal of James and Judith Barr
339 Linden Street

Appeal of JAMES & JUDITH BARR pursuant to the provisions of Chapter 40A, Section 7, 8 & 15 of the Massachusetts General Laws, and Section XXIV (C)(2) of the Zoning Bylaw appealing the decision of the Inspector of Buildings, in a letter dated January 30, 2008, relative to the Building Permit issued for 339 LINDEN STREET, in a 10,000 square foot Single Residence District.

On March 26, 2007 the Petitioner filed a request for a hearing before this Authority, and thereafter, due notice of the hearing was given by mailing and publication.

Presenting the case at the hearing was Michael Fee, Esquire, who said that he was representing James and Judith Barr, who are the residents at 331 Linden Street. He said that they are appealing a decision of the Building Inspector. They are challenging the Building Inspector's determination that a retaining wall constructed at 339 Linden Street is not a structure and need not comply with the side yard setback requirements.

Mr. Fee said that a brief was submitted on February 29, 2008 that included the initial enforcement request to the Building Inspector, Mr. Grant's response as well as several other supportive pieces of documentation.

Mr. Fee said that his clients' property is located directly to the west of 339 Linden Street. He said that the driveway is the area of interest.

Mr. Fee displayed photographs that were taken on April 9, 2008.

The Board confirmed that the entire wall is on the owners' property at 339 Linden Street.

Mr. Fee said that the initial request for enforcement was submitted to the Building Inspector on January 22, 2008, prior to construction of the wall. The Building Inspector's response on January 30, 2008 was also sent before construction of the wall.

Mr. Fee said that the wall is a structure that is not defined anywhere in the bylaw. He said that in Section XIX of the bylaw there is language that refers to any building or structure that needs to comply with certain setback requirements on the front, rear and sides.

Mr. Fee said that there is a specific definition of structure that includes retaining walls. He said that the Building Inspector rejected that argument.

Mr. Fee said that when there is lack of guidance within the document, you have to look at related source materials. Mr. Fee said that he looked in the dictionary for generic definitions of structure. He said that he then looked at the most applicable source, which is the Building Code.

Mr. Fee said that the wall at 339 Linden Street is a combination of materials, placed in sequence, combined in a certain way to perform a specific function. He said that the function is to change the slope to enable construction of impervious surface to allow for a side-facing garage.

Mr. Fee said that the problem could have been avoided. He said that the new house is a massive structure. He said that constructing a front-facing garage could have eliminated the need to build the wall.

Mr. Fee said that he had submitted an old case from 1967 that involved a permit issued for a swimming pool. The ZBA was asked to revoke the permit and did. The decision was appealed in court and the court upheld the ZBA decision that a swimming pool is a structure. The Supreme Judicial Court agreed that a swimming pool is a structure that should comply with setback requirements.

Ralph Briggs, said that he is President of Tree Specialists in Holliston, which he has been operating for approximately 27 years. Mr. Briggs described his credentials.

Mr. Briggs said that he has worked for the Barrs for a number of years. He said that he has followed the construction project at 339 Linden Street. He said that the trees on the Barr property are within nine inches from the stonework on 339 Linden Street.

Mr. Briggs said that he visited the property on December 28, 2007. He said that there is a 20 percent slope between 339 and 331 Linden Street. He said that has changed with the construction of the wall, which is made up of 19 stones that are approximately three feet high by four feet wide by 2 feet deep. He said those were placed on a smaller mix of stone.

Mr. Briggs said that the large stones weigh approximately four thousand pounds each, for a total of 76,000 pounds.

Mr. Briggs said that there are three Sugar Maple trees and one Tulip tree, all of which are substantial in size. He said that side of the property has been maintained as a native woodland with a perennial garden below.

Mr. Briggs said that due to lack of light, there is no opportunity to grow grass on that side of the property. He said that the additional weight from the wall and driveway will compromise the root system of the trees. He said that gas exchange will not occur properly. Water penetration will change. He said that the risk of the trees falling over is increased.

Michael Grant, Building Inspector, said that he responded in the negative to a letter of complaint calling for a cease and desist order for construction at 339 Linden Street. He said that, in his opinion, there is no Zoning in effect to regulate retaining walls in the Town of Wellesley. He said that there is no definition in the Zoning Bylaw that states what a structure is.

Mr. Grant said that Article 40 that was proposed at 2007 Annual Town Meeting was voted down. He said that article proposed language to define structure as well as regulation of retaining walls. He said that Town Meeting took the position that retaining walls did not need to be regulated.

Mr. Grant said that the 1967 decision that upheld that a swimming pool is a structure was decided when the Zoning Enabling Law was in effect. Under the current Zoning Act swimming pools are subject to setback requirements. He said that under the Zoning Act, the Zoning Bylaws cannot regulate the Building Code. He said that the Building Code states that the codes are for Building Code purposes only.

Mr. Grant said that he is not convinced that it is a retaining wall. He said that retaining walls are designed to withstand pressure. He said that this wall has not been designed to withstand pressure. He said that it is a series of boulders placed on the ground. He said that the boulders are relying on their mass to hold back the imposed load on top. He said that it is more of a soil retention device than a retaining wall. Mr. Grant said that heaving of soil could move the boulders. He said that it is common practice to use large boulders when there is a 2:1 slope to prevent soil erosion.

Mr. Grant said that Mr. Briggs stated that the boulders are three feet high. The Building Code is triggered when there is more than four feet of fill retained.

Mr. Grant said that it is not a structure, the bylaw does not apply in this case, and a cease and desist is not warranted in this situation.

Mr. Grant said that the original complaint asked for revocation of the building permit. He said that he responded to Mr. Fee that the permit was for the house only. He said that the appeal letter came in requesting a cease and desist for the retaining wall. He said that it appears that the Barrs are asking for a second enforcement order through the Board.

Mr. Fee said that the original building permit shows a driveway. He said that the plans show a side-facing garage. He said that the Building Inspector approved a plan that called for a side-facing garage. He said that the Barrs learned, during construction, that because of the steep slope the driveway would have to be supported by the retaining wall. He said that there was nothing in the Building Permit that would alert the Barrs that a retaining wall was contemplated.

Mr. Fee said that his initial request for enforcement stated that construction of the retaining wall to support the driveway was improper and could not be done in compliance with Zoning requirements.

Mr. Fee said that his request was dual. He said that a cease and desist order was requested with respect to the Building Permit because it included the tangential elements that the Barrs are complaining of.

Mr. Grant said that driveways and pavement are not regulated in the bylaw. He said that the proposed house met all Zoning requirements. He said that the 30 foot side setback requirement for side-facing garages is for turning access to the garage.

Mr. Fee said that the request is not only for cease and desist but for enforcement of the Zoning Bylaw as well.

The Board said that there are many properties in Wellesley with retaining walls in the setback area.

Mr. Fee said that Mr. Grant made the argument that if something is not specifically defined in the Zoning Bylaw, it does not exist for Zoning purposes and is not subject to regulation. Mr. Fee said that if the Zoning Bylaw uses the word structure but fails to define it, it is up to the Zoning Board to determine what it means in that context. He said that the Scott case shows that, in 1969 when swimming pools were not defined, the general proposition was how a Zoning Board determines what a structure is. He said that the point of Scott is to look first at the context and then use common sense to determine whether or not all of the elements, when put together, constitute something that would be considered a structure in normal human experience. He said that the dictionary definitions and Building Code are all that there is to work with here.

The Board said that the Zoning Bylaw prohibits hvac systems in the setback area. Town Meeting purposely included that specific language in the Zoning Bylaw.

Mr. Fee said that Zoning is designed to enhance public safety and provide for harmonious relationships between neighbors. He said that all Zoning Bylaws are not necessarily complete. He said that they are living documents that evolve over time. He said that although something is not in the Zoning Bylaw does not mean that it does not exist.

Mr. Grant said that the Building Permit for 339 Linden Street was issued prior to adoption of Large House Review.

Mr. Fee said that the primary objection to the wall is that there is a visual obstruction and the drainage will be drastically changed in a fragile area. He said that hydrostatic changes will have an impact on the drainage situation.

The Board asked how the drainage pattern has changed. Mr. Fee said that the driveway goes halfway up the lot line. He said that, as a result of all of the compaction, water will now sheet over the wall instead of soaking into the soil. Mr. Fee said that the asphalt goes right to the wall, according to the building permit. He said that there are no drainage structures shown.

The Board said that reducing the width of the asphalt and planting a buffer might help to prevent sheeting water from going over the wall.

Mr. Fee said that his understanding of the driveway regulations is that there is a specific requirement for spacing. The Board said that there is a 30 foot setback requirement from the garage door to the lot line.

Mr. Briggs said that equipment was on the property during the winter when there was a very high level of soil moisture. He said that damage was done to the soil porosity. He said that all of the soil would have to be removed and the carefully rebuilt in order to restore the area.

The Board said that a portion of the tree roots at 331 Linden Street extend under the property at 339 Linden Street. Construction vehicles moving on the site will compact the soil over the roots. Mr. Briggs said that is why so many trees are lost on property lines. The Board said that there is nothing in the Zoning Bylaw to regulate that.

Mr. Fee said that the argument is not that this situation does not have disproportionate impact by the construction.

Judith and James Barr said that they have lived at 331 Linden Street since 1972. Mrs. Barr said that an important part of their property is the trees. She said that the trees along the eastern border provide protection from northeasters. She said that there used to be a set of evergreens on the other side of the property line at 339 Linden Street. She said that seven trees were cut down to accommodate the driveway.

Ms. Barr said that their primary concern is the trees. She said that they do not believe that the damage that has been done is irreversible. She said that if the homeowners could be encouraged to create the required soil porosity and to move the boulders to make the slope more gentle, the roots could then be closer to the surface. She said that without the structure the trees would be able to survive.

James Barr said that a large house was built at 327 Linden Street. He said that there is not much gradient difference between that property and 323 Linden Street. He said that after the large house was built at 327 Linden Street there was a major increase of water flow onto the property at 323 Linden Street. He said that the matter had to be taken to court. He said that they fear that the same thing will happen to them because the gradient is higher.

The Board said that the Town does not consider retaining walls as being structures. The Zoning Enforcement Officer determined that it was not a structure.

The Board voted unanimously to uphold the decision of the Building Inspector relative to the Building Permit issued for 339 LINDEN STREET.

The Board voted unanimously to deny the Appeal of James and Judith Barr.

The Board suggested to the applicants that the abutters and contractor discuss possible means of mitigating potential water runoff from the new driveway and side yard on to 331 Linden Street.

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Statement of Facts

The subject property is located at 339 Linden Street, in a 10,000 square foot Single Residence District.

Building Permit #39202 was granted on December 19, 2007.

On April 10, 2008, the Board of Appeals heard the Appeal of James and Judith Barr, filed on March 26, 2008, of the decision of the Inspector of Buildings, in a letter dated January 30, 2008, not to revoke the building permit, granted 12/19/08, for construction of a new dwelling at 339 Linden Street.

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

- Letter dated 1/22/08 to Michael Grant re: 339 Linden Street/Request for Zoning Enforcement, signed by Michael C. Fee, on behalf of James and Judith Barr, owners of property located at 331 Linden Street
- Letter dated 1/30/08 to Michael C. Fee re: Your January 22, 2008 letter requesting zoning enforcement at 339 Linden Street, signed by Michael T. Grant, Inspector of Buildings/Zoning Enforcement Officer
- Building Permit #39202, permit date: 12/19/07
- As-Built Certification Form, dated 1/22/08

Submittals from Appellant

- Letter to the Zoning Board of Appeals, dated 2/29/08, re: Relief sought: Section XXIV (C) (2) Administrative Appeal of Enforcement Action regarding Linden Street, signed by Michael C. Fee
- Letter to Michael T. Grant, dated 1/22/08, re: 339 Linden Street/Request for Zoning Enforcement, signed by Michael C. Fee
- Letter dated 1/30/08 to Michael C. Fee re: Your January 22, 2008 letter requesting zoning enforcement at 339 Linden Street, signed by Michael T. Grant, Inspector of Buildings/Zoning Enforcement Officer
- Massachusetts State Building Code (6th Ed.) 780 C.M.R. 5202 – Definitions - Structure
- Dana W. Scott & another v. Board of Appeal of Wellesley & others
- Photographs: property line between 331 and 339 Linden Street
- Tree Preservation Measures for New Construction Sites
- Tree Specialists, Inc., Consulting and Proposal Form, dated 12/28/07

On April 7, 2008, the Planning Board reviewed the petition and voted to support the position of the Inspector of Buildings and recommended that the appeal be dismissed.

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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.

David G. Sheffield, Acting Chairman

Robert W. Levy

David L. Grissino

cc: Planning Board
Inspector of Buildings
lrm