

**ZONING BOARD OF APPEALS**

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ZBA 2008-65
Petition of Judith DeLoughrey
16 Grant Avenue

Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, September 11, 2008 at 7:30 p.m. at the Town Hall, 525 Washington Street, Wellesley, on the petition of JUDITH DeLOUGHREY requesting a Special Permit/Finding pursuant to the provisions of Section XVII and Section XXV of the Zoning Bylaw that construction of a 12 foot by 22 foot one story addition that will increase existing nonconforming lot coverage from 22.3 percent to 22.8 percent, in a General Residence District, at 16 GRANT AVENUE, shall not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

On August 25, 2008 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 David Tobin, Esquire, who said that he was representing Judith DeLoughrey, (the "Petitioner"). He said that also present at the hearing was Joe Grignaffini, who owns several of the units in the complex and was also the developer.

Mr. Tobin said that the Petitioner would like to construct a 12 foot by 20 foot sunroom at the back of her unit. He said that is a pre-existing nonconforming structure that was built in 1978 prior to enactment of a bylaw regulating intensity or ground coverage. The current bylaw allows for 20% lot coverage. The existing ground coverage is 22.3%. The addition of 264 square feet will result in an increase of ½ of 1%.

Mr. Tobin said that Ms. DeLoughrey withdrew a prior petition for the sunroom without prejudice. The Board had said at the prior hearing that it did not want to establish precedent. Mr. Tobin said that he included in his brief a file from the Appeals Court where the Judge determined that precedent should not be the basis for turning down a request for a finding under Chapter 40A, Section 6 and that each case should stand on its own merit.

Mr. Tobin discussed the photographs of the back of the building that were submitted to the Board. He said that at the back of the unit there is a plain stucco wall with a patio. He said that an attractive sunroom is being proposed. He said that no views will be blocked, and that there will be no increase in traffic or density. He said that the Petitioner and the neighbors believe that there will be no detriment to the neighborhood. Mr. Tobin said that letters of support from the neighbors had also been submitted.

The Board asked if the Applicant should be the Condominium Association since the affected area is common area. Mr. Tobin said that the Petitioner has an interest in the property and is a member of the Association. He said that the Petitioner could get the other members of the Association to co-sign the application if that is necessary. He said that attached to the brief that was submitted is a petition signed by the owners of the units in the condominium complex supporting a change to the bylaws to allow for construction of the proposed addition.

Mr. Tobin said that the existing concrete slab will be removed. He said that the proposed addition will be more than 25 feet from the lot line, except for the landing and steps, which are not counted as structure in the rear yard.

Mr. Tobin said that the houses behind 16 Grant Avenue are located in a General Residence District. He said that the frontage for 16 Grant Avenue is nonconforming and some of the structures are closer than are allowed by the current bylaw. He said that the structures were built before there were any side yard requirements under the bylaw.

The Board asked how many other units in the complex would be able to construct a similar addition without impinging on the setback. Mr. Tobin said that possibly two other units could do something similar.

The Board said that one issue that was not discussed in Mr. Tobin's brief was open space. Lot coverage is one measure to control open space. The case law that Mr. Tobin referred to involved views of the ocean and how close buildings were in that particular setting. Loss of open space is central to this petition.

The Board said that the Town considered the issue of open space as being important when it put into effect the bylaw for 25% lot coverage. The Town later decided that 25% coverage was too much and decreased the amount to 20%.

Mr. Tobin said that the patio is existing and should not be considered open space. He said that it occupies 140 square feet of space and is raised to 1.5 feet off of the ground. The proposed sunroom would increase that amount to 264 square feet, for an addition of approximately 120 square feet, or ¼%.

Mr. Tobin said that this property is also located in a General Residence District. He said that the neighbors do not have any objections to the proposal. He said that this proposal does not involve a Variance where detriment to the bylaw is a consideration. He said that a finding involves determination of substantial detriment to the neighborhood. Mr. Tobin said that this would not be substantially more detrimental to the neighborhood. He said that the proposal represents a small increase in lot coverage, there will be no views, light or breeze blocked. He said that there will be no effect on traffic or public safety. He said that rather than looking at the back of a stucco wall with an old patio, the neighbors will be looking at an architecturally designed room that will better contain noise. He said that would be an enhancement to the neighborhood.

Joe Grignaffini said that he is a trustee and an owner of six of the units. He said that the land directly behind all of the units is granted exclusive rights to the owners. That land cannot be used in common with other unit owners. The Board said that condominium documents should be amended to reflect that the addition would be allowed at the back. The master deed should be amended with the consent of the mortgagees as well as the unit owners. Mr. Tobin said that the unit owners will have to agree to the change.

The Board said that the presence of privacy fencing between the units at the rear implies exclusive common area. Mr. Tobin said that the certified plan shows that each unit has exclusive area from the wall line to the rear property line. He said that Mr. Grignaffini had a certified plan with him. That plan had not been submitted to the Board. Mr. Tobin displayed on the certified plan where the exclusive area is located.

The Board said that the area between 16 Grant Avenue and the properties on Washington Street is open and green with trees. The petition is before the Board because the bylaw changed. Open space has value and there is open space all around this property. The issue of detriment must be considered. Mr. Tobin said that the issue is if the proposed addition would be substantially more detrimental to the neighborhood.

The Board asked if the patio had been included in the calculation for lot coverage. Mr. Tobin said it had not. He said that it was his understanding that under the bylaw the raised patio is not counted as open space and does not count as part of the building. He said that the issue is if the proposed addition will be substantially more detrimental to the neighborhood. He said that the plan is to come out a few feet in each direction of the existing patio footprint. The only people who will see the sunroom are the people who live behind, and possibly the people who live next door, although there is a privacy fence. That neighbor has seen the plans and approves of them.

Mr. Tobin said that the Petitioner has a right to exclusive use of the space at the rear of her unit. He said that open space implies common use of the space, which is not the case. There will be no trees cut down and the addition will not block light.

Mr. Grignaffini said that the bylaw allowed for 25% lot coverage at the time that the units were built. The units were built with less than 25% lot coverage.

The Board said that there are multi-family homes along Washington Street in the General Residence District. Mr. Tobin said that many of those houses are up and down units rather than townhouse. Mr. Tobin read the Zoning Bylaw, Section IV A. 3. He said that his interpretation was that the table applied only to the townhouse units. He said that his interpretation of the bylaw is that the limitations for townhouses do not apply to Section IV. A. 4 & 5.

The Board said that it is generally the practice of the Board not to allow expansion of a nonconformance. The Board has made findings that expansions may be considered to be diminimis. The Board said that the proposed increase in lot coverage could be considered diminimis.

There was no one present at the Public Hearing who wished to speak to the petition.

Statement of Facts

The subject property is located at 16 Grant Avenue, in a General Residence District.

The Petitioner is requesting a Special Permit/Finding that construction of a 12 foot by 22 foot one story addition that will increase existing nonconforming lot coverage from 22.3 percent to 22.8 percent, shall not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

A Plot Plan dated 4/24/08, stamped by Bruce Bradford, Professional Land Surveyor, Existing & Proposed Floor Plans, dated 4/24/08, Floor & Roof Plan, dated 11/10/07, Proposed Elevation Drawings Plans & Section, dated 11/10/07, drawn by Lynn Osborn, and photographs were submitted.

September 8, 2008, the Planning Board reviewed the petition and was opposed to granting the request.

Decision

This Authority has made a careful study of the materials submitted and the information presented at the hearing. The subject structure does not conform to the current Zoning Bylaw, as noted in the foregoing Statement of Facts.

It is the finding of this Authority that although construction of a 12 foot by 22 foot one story addition will be increasing a nonconformity, such increase shall not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

Therefore, a Special Permit is granted, as voted unanimously by this Authority at the Public Hearing, for construction of a 12 foot by 22 foot one story addition, in accordance with the submitted plot plan and construction drawings, subject to the following condition:

1. Prior to obtaining a building permit, appropriate amendments shall be made to the Condominium Master Deed, in conformity with MGL Chapter 183A, to reflect the inclusion of the proposed structure at the subject unit.

The Inspector of Buildings is hereby authorized to issue a permit for construction upon receipt and approval of a building application and detailed construction plans.

If construction has not commenced, except for good cause, this Special Permit shall expire two years after the date time stamped on this decision.

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.

J. Randolph Becker, Acting Chairman

David G. Sheffield

Robert W. Levy

cc: Planning Board
Inspector of Buildings
lrm