TOWN OF WELLESLEY MASSACHUSETTS

ZONING BOARD OF APPEALS
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ZBA 2008-80
Petition of Linda Valentin
4 Great Plain Avenue

Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, December 11, 2008 at 7:30 p.m. at the Town Hall, 525 Washington Street, Wellesley, on the petition of LINDA VALENTIN requesting a Special Permit/Finding pursuant to the provisions of Massachusetts General Law Chapter 40A, Section 3, & Chapter 28A, Section 9, Section II A 3A (a), Section XVII and Section XXV of the Zoning Bylaw for modification of an application filed on October 20, 2008 for the use of the property at 4 GREAT PLAIN AVENUE for a child care facility, on a 19,433 square foot lot in a district in which the minimum lot size is 30,000 square feet, to allow the construction of the newly designed structure for a single family residence, shall not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

On November 20, 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 Richard Gelerman, Esq., who said that he was representing Ms. Valentin (the "Petitioner").

Mr. Gelerman said that the Petitioner is seeking a determination from the Board regarding the reasonableness of the imposition of the 30,000 square foot lot size requirement in the Zoning Bylaw. The Board said that two applications were submitted, one was to amend the Special Permit that was granted in ZBA 2007-25 for approval of a new building and the other application was for Section II A 3A (a), Section XVII and Section XXV. The Board asked which application the Petitioner would be proceeding with. Mr. Gelerman said that the Petitioner would be proceeding on the application for a determination of the use as a child care facility, and accordingly, would not be going forward on the amendment of the prior Special Permit.

The Board asked if the proposal is to build the structure that was approved under ZBA 2007-25. Mr. Gelerman said that the proposal is to build a different structure. He said that the Building Inspector made the determination that the proposed structure will meet all of the bylaw setback requirements.

Mr. Gelerman said that the Building Inspector asked in his October 30, 2008 letter to the Board to rectify the issue of the undersized lot. The Board said that there is nothing on either of the applications regarding the Building Inspector and that this is not an appeal of a finding from the Building Inspector. The Petitioner is seeking approval to use a vacant undersized lot in a Single Residential District for a Child Care Facility.

Mr. Gelerman said that present at the hearing were Jerome Dixon, Architect, Linda Valentin, and Mrs. Theo Koziol, who has worked with Ms. Valentin for a number of years. He said that he brought a Traffic Engineer to discuss issues, if necessary.

The Board asked if the Petitioner was looking to present the case under the so-called Dover Amendment, M.G.L. c. 40A, 3, as an educational use or as a child care facility. Mr. Gelerman said that the Petitioner would be proceeding as a child care facility use. The Board confirmed that the license would be for a child care facility.

Mr. Gelerman said that the property is located at 4 Great Plain Avenue, in a 30,000 square foot Single Residence District. The size of the lot is 19,433 square feet. Mr. Gelerman stated that the proposed structure will be in compliance with all other requirements under the bylaw applicable to child care facilities.

Jerome Dixon said that the Petitioner asked him to design a daycare facility capable of handling 40 students. He said that the building footprint will be 2,500 square feet for 13% lot coverage. Paved parking and driveway will be 5,558 square feet for 29% coverage. Sidewalks, steps and terrace account for 1,322 square feet or 6% coverage. The pervious areas that will remain amount to 8,112 square feet for 42% coverage. The playground area will be 2,000 square feet or 10% of the site.

Mr. Dixon said that Great Plain Avenue intersects with a traffic circle. He said that the site is relatively flat but there is a substantial stone wall along Wellesley Avenue. He said that there is a single curb cut on Great Plain Avenue. The plan is to use the existing curb cut and make some improvements to it.

Mr. Dixon said that the required parking will be 14 spaces plus 5 staff spaces, for a total of 19 spaces.

Mr. Dixon said that they will install a fence to prevent children from running out onto the street.

Mr. Dixon said that there will be 20 students per session.

Mr. Dixon said that the building is organized around a few simple ideas. He said that there will be a small tower at the front to demarcate the entrance to the building. He said that there will be a single point of entry. The main office will be located at the front to allow for control and supervision of the site. He said that the design will meet the minimum requirements for handicapped bathrooms.

Mr. Dixon said that the building design will be an enhancement to the neighborhood. He said that it will be a landmark on the traffic circle.

Mr. Dixon said that the parking area has been designed so that vehicles will come onto the site, park and the children will be off loaded from their car seats. He said that there will be no queuing in public ways.

There are no bus lines along that route. There is a broad expanse of grass that is Town property that separates the roadway from the property.

Mr. Dixon said that there is sufficient space in the parking lot to allow for queuing of four cars. The plan can only function well if all vehicles enter the site via a right hand turn off of Great Plain Avenue. He said that it would be difficult to get around a divider in the road. The Board said that a left hand turn there would be illegal.

Mr. Dixon said that there are many existing trees, especially along Wellesley Avenue, which they hope to maintain. There will be new plantings on the property to fully screen it.

The Board said that it received a letter from the abutter at 10 Great Plain Avenue who stated that the mature hemlock trees that run along the property line were owned by himself and the previous owner of 4 Great Plain Avenue. He said that there was an agreement that since he had paid for some of those trees, any issues would have to be addressed with the neighbor. Mr. Dixon said that he had not spoken with the neighbor. He said that the plan was to replant with new plants along that line.

Mr. Dixon said that the Petitioner is aware that there are things that she must do to be a good neighbor. He said that there are issues with drainage from neighbors' properties going onto the site that the civil engineer will have to deal with.

The Board said that it had concerns with the safety of small children in the parking lot with respect to drop off and pick up. Mr. Gelerman said that the proposed lot will meet the parking requirements in the Zoning Bylaw.

The Board said that parking and drop off and pick up for a child care facility at 4 Great Plain Avenue would be subject to Section II A 3A (e) and (f).

Section II A 3A (e):

> One off-street parking shall be provided for every paid and unpaid employee, not resident on the premises, so that there is no on-street parking by employees;

Section II A 3A (f):

> 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 said that when Town Meeting enacted the Child Care Facility bylaw, they enacted two separate sections, one concerning off-street parking and one concerning off-street drop off and pick up. That was not addressed in this proposal. The Board said that Town Meeting intended two different criteria for the parking and the drop off and pick up areas. The area shown on the plan is a parking lot. Mr. Gelerman said that the area shown on the plan will be sufficient to provide for all of the requirements.

The Board said that although the screening requirements of Section II A 3A (g) for the Abbott Day Care case were deemed by the court to be beyond the Zoning Board's authority, the issue was subsequently addressed.

Mr. Dixon said that the Petitioner's Management Plan would require staggered drop off times. He said that the children who would be attending the facility are generally of the age when they would arrive in a child car seat. He said that the vehicles will have to be parked.

Mr. Dixon said that they provided details for the screening fence around the play area. Mr. Gelerman said that the Petitioner is prepared to do either fencing or green screening there.

The Board said that it is charged with enforcing the Zoning Bylaw. The Board said that, under the bylaw, since the lot does not meet the minimum lot size requirement, the proposed day care facility use on a lot in a Single Residence District must meet the dimensional requirements for the district in which it is located. The property at 4 Great Plain Avenue is located in a 30,000 square foot Single Residence District. On this particular site for the proposed use, the 30,000 square foot requirement is reasonable because it would provide the Petitioner with a site that could accommodate both the off-street parking area and the drop off and pick up areas.

Mr. Gelerman said that the proposed use for a child care facility is protected under MGL Chapter 40A, Section 3, paragraph 3, which says that the Board may not prohibit nor require a special permit for the use. The Board may enforce reasonable requirements with respect to height, lot sizes, parking, open space and building coverage. The Board is required to balance the protected use against the municipal interest that the bylaw seeks to protect. The Board must decide if it is reasonable to enforce a 30,000 square foot lot size requirement against a protected use on a 19,433 square foot lot. He said that by enforcing the requirement, the Board will be nullifying the use. He said that is forbidden by the statute.

Mr. Gelerman said that the bylaw prohibits this use on all pre-existing nonconforming lots. There is an exemption in the bylaw for pre-existing nonconforming buildings.

Mr. Gelerman said that the 30,000 square foot requirement for this area was established in 1960 to protect large areas of remaining undeveloped land around Babson Institute. He said that there is no municipal interest protected.

Mr. Gelerman said that the generally recognized purpose of minimum lot requirements is for uniformity of neighborhoods. The area in which this lot is located is surrounded by lots of many different sizes. There is no uniformity of district in this neighborhood that is protected by the bylaw.

Mr. Gelerman said that traffic is a major concern to the neighborhood but that issue is not before the Board. He said that the Petitioner is prepared to talk with the neighbors regarding their concerns.

The Board said that the Petitioner could have looked for a property that met dimensional requirements. She chose an undersized vacant lot in a 30,000 square foot district. If the Petitioner wants to challenge the validity of the Zoning Districts under the bylaw, it will have to be challenged in the Land Court.

The Board said that the property is a nonconforming lot which previously had a structure on it. The owner was granted a Special Permit in 2007 to tear down the house and construct a single family dwelling. The existing structure was demolished and the lot is now vacant. The Petitioner is proposing to change the structure that had been approved in the Special Permit. The Petitioner has stated that it does not seek a new Section 6 finding or an amendment to the 2007 Special Permit.

The Board said that it is now a vacant lot. The Dover Amendment provides that the Board cannot require a Special Permit for the use of land or structures or the expansion of existing structures. The proposal is to build a structure on the vacant lot, which does not fall within the protection of the Dover Amendment. Mr. Gelerman said that the Board does have the right to impose the bulk, height and area lot requirements as long as that imposition is reasonable. He said that the building meets the bylaw except for the undersized lot. He said that the Board needs to look at the 30,000 square foot requirement under the Dover Amendment to determine if it is a reasonable imposition on what they are proposing to do.

The Board asked about future use of the property. Mr. Gelerman said that he recognized that having the right to use the property for a child care facility does not give the right to subsequently use the property for a residential use, accordingly, the only use of the structure to be built would be as a child care facility or other Dover Amendment protected use.

The Board said that the general rule of statutory construction is that a bylaw is to be considered valid. Section II A 3A (a-h) of the Zoning Bylaw is specifically geared towards child care facilities. The Town has dictated to the Board that a child care facility must meet the dimensional requirements unless the structure is a pre-existing nonconforming use. The Town intended that people would not seek out undersized vacant lots for child care facilities. Mr. Gelerman said that the Board needs to consider the bylaw and balance it. He said that it is facially unlawful because it effectively prohibits the use on all nonconforming lots. He said that he is asking the Board to look at the bylaw considerations in light of the Dover Amendment. The Board said that this particular lot, being on a major street and a rotary does not lend itself to traffic queing. Because the lot is undersized, there is no place for a drop off, pick up area on the lot. The parking lot cannot be safely used as a drop off, pick up area.

The Board said that if the existing home had not been demolished, the use could have been altered. Mr. Gelerman said that the proposed building will be conforming. The Board said that any building on an undersized lot, by definition, is a nonconforming structure.

The Board said that if the Petitioner had originally come before the Board to alter the existing structure, the Board could make a Section 6 finding that it would not be substantially more detrimental to the neighborhood to modify the building and use it. The Board did approve construction of a single family home of a specific design that it felt would not be substantially more detrimental to the neighborhood. It is now a vacant piece of property. The proposal is not to use the Special Permit that was approved. The Board has to look at the proposal from anew. The bylaw says that a vacant lot must meet the dimensional requirements, for the construction of a new building.

The Board said that in a Land Court case, *Campbell v. Wayland*, the Court ruled that a child care facility in a new structure, rather than an existing structure, a Special Permit may be required, based upon the language "or the expansion of existing structures" in the portion of c. 40A §3 pertaining to child care facilities. The Applicant reiterated that it did not seek a modification of the 2007 Special Permit.

The Board said that it has jurisdiction over four matters, (i) appeals from decisions of the Building Inspector, (ii) Variances, (iii) Special Permits, and (iv) appeals from Large House Review. There is no precedent for making findings as to reasonableness of the bylaw.Procedurally in the context of the petition and the relief the Applicant stated it seeks, the Board lacks jurisdiction to make a finding under the Dover Amendment.

The Board said that it would deny the application to give the Petitioner something to challenge in court. The only way that the law will be determined is for the applicant to file an appeal with the Land Court to overrule the Board's decision, or to tell the Board to consider the reasonableness of enforcing the lot size requirement, or that the Zoning Bylaw, as applied to this lot, is invalid.

Linda Valentin said that she and her husband met with the Building Inspector in March. She said that they explained to him the purpose of purchasing the lot. She said that he told them that they were protected under the Dover Amendment but that they needed to meet the bylaw requirements. She said that Mr. Grant determined that the proposed structure would meet dimensional requirements.

Ms. Valentin said that the bylaw requires that there be ample parking for parents to drop off and pick up the children. She said that the bylaw requires one parking space for every three children. The proposed parking area will meet the requirements. The age of the children will range between two years nine months to six years old. The parents will have to park their cars and walk the children into the school.

Ms. Valentin said that it was her understanding that the only relief that she needed from the Board was for the 30,000 square foot requirement. She said that a child care facility use is protected under the Dover Amendment. She said that MGL states that a child care facility is exempt. The Board said that MGL says that it is exempt but not from reasonable dimensional requirements. Town Meeting set what reasonable dimensional requirements would be. The Zoning Board does not have the authority to overrule Town Meeting. The Board is bound to enforce the Zoning Bylaw as it is written.

The Board said that the property is located in a single family residential district where a child care facility is a permitted use. The Board is not objecting to the use. Ms. Valentin said that the Board is not telling them whether it is reasonable or not to build a child care facility, which is an exempt use, on a lot that is undersized. She said that the lot will remain nonconforming no matter what is put on it.

Statement of Facts

The subject property is located at 4 Great Plain Avenue, on a 19,433 square foot lot, in a District in which the minimum lot size is 30,000 square feet.

The petitioner is requesting a Special Permit/Finding pursuant to the provisions of Massachusetts General Law Chapter 40A, Section 3, & Chapter 28A, Section 9, Section II A 3A (a)., Section XVII and Section XXV of the Zoning Bylaw for modification of an application filed on October 20, 2008 for the use of the property at 4 GREAT PLAIN AVENUE for a child care facility, on a 19,433 square foot lot in a district in which the minimum lot size is 30,000 square feet. The Applicant withdrew its request for modification of the existing Special Permit, ZBA 2007-25.

On November 3, 2008 the Planning Board voted unanimously to:

> question whether this application can be considered favorably since the lot is undersized for the zoning district. The Planning Board believes that such a proposal would need to be meet all of the criteria of Section II., 3A applicable to "Child Care Facilities." Beyond this the Board is concerned that the site may not be able to provide safe and convenient access for patrons and may pose a danger to traffic using the Great Plain Rotary. No information or recommendations were submitted by the applicant by a qualified traffic engineer relative to traffic flow to and from the site or within the site nor concerning sight lines at the driveway opening, possible directional or traffic safety signage, or pedestrian safety improvements.

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.

The application for ZBA 2008-80 to amend the Special Permit, ZBA 2007-25, to substitute a new proposed building as a child daycare facility on a vacant lot containing 19,433 square feet is denied for the reason that the Applicant stated that she did not want to proceed on that petition. The single family home that was on this property was demolished pursuant to the Special Permit, ZBA 2007-25, which authorized the construction of a single family residence in accordance with a set of plans that was furnished to the Board. Section II A. 3A. (a) of the Zoning Bylaw states, in part, that the lot containing a child care facility shall meet the dimensional zoning requirements for the district in which the structure is located unless it is a legally pre-existing nonconforming building or structure, the lot in question is vacant and does not have a building or structure on it. The building or structure previously on the lot has been voluntarily demolished. In the current procedural context the Board lacks jurisdiction solely to make a determination of reasonableness of the dimensional requirements under the Dover Amendment as such determination is not one of the enumerated powers of the Board as set forth in Section XXIV B of the bylaw. Since the Applicant has stated that she does not seek an amendment of the 2007 Special Permit, the Board has not considered same. In any event the proposed development does not comply with the bylaw requirements applicable to child care facilities, including being vacant on a substantially undersized lot and not providing adequate drop off and pick up areas.The Board has not made a determination on the issue of reasonableness of enforcing sections of the bylaw.

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

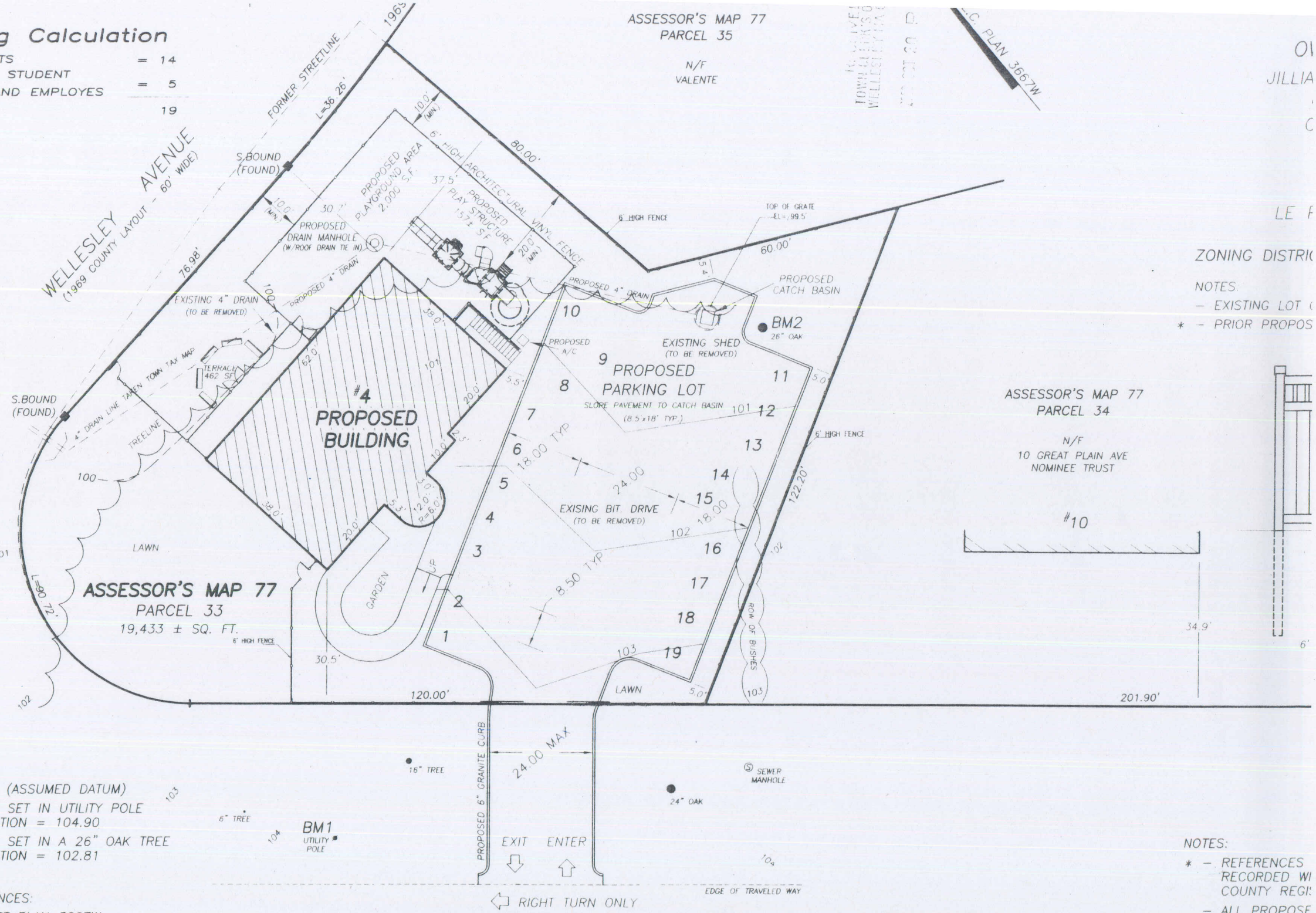
David G. Sheffield

Robert W. Levy

cc: Planning Board
Inspector of Buildings
arm

Parking Calculation

40 STUDENTS	= 14
3 SPACES/ STUDENT	= 5
DIRECTOR AND EMPLOYES	
	19



BENCHMARKS: (ASSUMED DATUM)

BM1 – SPIKE SET IN UTILITY POLE
ELEVATION = 104.90

BM2 – SPIKE SET IN A 26" OAK TREE
ELEVATION = 102.81

PLAN REFERENCES:

- LAND COURT PLAN 3667W
- 1969 COUNTY LAYOUT OF WELLESLEY STREET

NOTES:

* – REFERENCES RECORDED WI COUNTY REGI
- ALL PROPOSE ARCHITECTS S ARCHITECTS S