

TOWN OF WELLESLEY



MASSACHUSETTS

ZONING BOARD OF APPEALS

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

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April 8, 2010

J. Gavin Cockfield, Esquire  
Davis Malm & D'Agostine, P.C.  
One Boston Place  
Boston, MA 02108

Re: ZBA 2009-85  
Rahim Sohani  
100 Pilgrim Road

RECEIVED  
TOWN CLERK'S OFFICE  
WELLESLEY MA 02482  
2010 APR 15 P 2:40

Dear Mr. Cockfield:

Please be advised that the Board voted unanimously at the Public Hearing on April 1, 2010 to allow the petition to be withdrawn without prejudice.

If you have any questions, or need further assistance, please do not hesitate to call me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lenore R. Mahoney".

Lenore R. Mahoney  
Executive Secretary, Zoning Board of Appeals

Town Clerk  
Planning Board  
Inspector of Buildings

EXCERPT FROM MINUTES OF 12-10-09 PUBLIC HEARING

ZBA 2009-85, RAHIM SOHANI, 100 PILGRIM ROAD

Presenting the case at the hearing were Gavin Cockfield, Esq. and Rahim Sohani. Mr. Cockfield said that it was an appeal of denial of LHR. He said that Mr. Sohani had proposed to reconstruct the house that he owns on Pilgrim Road with a larger house that was over the threshold for LHR. He said that they went to the Planning Board and to the DRB. He said that the DRB voted that the proposed house should be approved. He said that after two meetings with the Planning Board there were a number of concerns that were raised by the Board by members of the public. Mr. Sohani requested to have an opportunity to amend his proposal to address the specific concerns that had been raised regarding the height of the roof, the setbacks pushing the house further back from the street and bringing the total living area down by approximately 300 square feet to bring the number just over the threshold. He said that the final proposed total living area was 4,786 square feet and the threshold is 4,300 square feet in a 15,000 square foot district.

Mr. Cockfield said that he had two presentations that he could make. He said that one presentation is on the merits. He said that he believes that there is a procedural issue that should be addressed concerning the standard that needs to be applied by the Planning Board when it reviews LHR. He said that when the bylaw was approved by the town, the standard procedure that is required under the Zoning Enabling Act is that the Attorney General has to review the bylaw. The Attorney General submitted an approval letter based on an opinion that the bylaw was akin to Site Plan Review. He said that has some significance. He submitted a copy of the Attorney General's letter of approval to the Board.

Mr. Cockfield said that there is a lot of case law that deals with Site Plan Reviews. He said that normally a project cannot be denied except under very unusual circumstances where there is no set of reasonable conditions that could be imposed on the project to alleviate concerns raised by the particular Site Plan Review bylaw. He said that, in this case, the underlying use is allowed by right under the Zoning Bylaw. He said that case law has said that because the use is allowed by right, you can only deny under very unique circumstances.

Mr. Cockfield said that, in looking at the Planning Board Decision in this case, the standard is not explicitly set forth in the Zoning Bylaw. He said that the Planning Board denied the application on the face of the bylaw itself, that it did not meet the standards rather than try to come up with conditions that would ameliorate the concerns that they had. He said that is inconsistent with the Site Plan Review threshold that the bylaw is subject to, which the Attorney General also felt was subject to.

Mr. Cockfield said that, if the Board agrees that the standard does apply, the most expedient way to deal with the situation is for the Zoning Board to remand the petition back to the Planning Board with an explanation of how it interprets the bylaw as to whether or not the standard applies, and allow the Planning Board to apply the standards. He said that he assumed that the Planning Board would try to come up with conditions that would address their concerns since they had denied the petition in the first place.

Mr. Levy said read a portion of the bylaw that states, "If the Planning Board finds that the Standards and Criteria for Review have not been satisfied, it shall disapprove the project, and shall state in writing the basis for its decision." He said that the bylaw appears to provide that the Planning Board can deny the application. Mr. Cockfield said that it could, on the face of it.

Mr. Levy said that the right of appeal is for conditions. He asked whether the Zoning Board has the authority to hear an appeal of denial.

Mr. Levy said that different towns treat Site Plan Reviews differently. He said that it is sometimes treated as a Special Permit, which allows for appeals under the Special Permit criteria. He said that other municipalities treat Site Plan Review as its own creature, which is not a statutory creature. He said that the rights of appeal for Site Plan is questionable unless it is under Special Permit criteria.

Mr. Levy said that the Board received a communication from Town Counsel advising that there is a Land Court proceeding that is pending. He said that there was some expectation that the Zoning Board would remand the matter to the Planning Board. Ms. Hibbard read a portion of Town Counsel's letter to the Planning Director dated November 6, 2009.

Mr. Levy said that he was not averse to remanding the matter to the Planning Board but was concerned about what instructions the Zoning Board should give to them. He said that he was not sure if the Zoning Board is in the position to instruct the Planning Board that the Zoning Board interprets this as a Site Plan.

Ms. Hibbard clarified that the Zoning Board agreed with the Planning Board that they could deny the application but that they should revisit whether it is possible to impose conditions that will be acceptable. Mr. Levy said that the Zoning Board would remand the matter to the Planning Board to consider imposing conditions. He said that he was not comfortable instructing the Planning Board as to how to interpret the bylaw.

Mr. Cockfield said that the bylaw states that if the standards are not complied with, the Board can deny the application. He said that virtually every Site Plan Review bylaw is written that way. He said that the Court has tried to determine if those are discretionary permits. He said that if it is a discretionary permit, whether you meet the standards or not, the Board can exercise its discretion to deny. He said that where the bylaw in one section allows the use by right (in this case by right and by use, since it is dimensionally conforming), the bylaw cannot allow in one place a structure and a use and then make it subject to discretionary permits in another section of the bylaw. He said that the Court has said that it is not to be construed as a discretionary permit but a permit that can only be denied if you can't come up with a set of conditions that address the concerns of the bylaw. He said that the Court wants to keep the level of review within the town but protect the property owners' rights that the bylaw cannot allow the use on one hand and then take it away on the other.

Mr. Cockfield said that he filed two appeals, one to the Zoning Board and one to the Court, under Chapter 40A § 17. He said that he sent a letter to Town Counsel explaining why he was filing two appeals.

Mr. Cockfield said that there may be an error in how the bylaw was framed. He said that the bylaw contemplates that, in general, the Planning Board is not going to deny the applications but will approve with conditions. He said that is why it does not talk about denials in the appeals. He said that he filed the Appeal in the Land Court in the event that the Zoning Board agreed with the Planning Board. He said that he thought the Town Boards should deal with this first before going to Court.

Mr. Cockfield said that if this is akin to Site Plan Review, the way to appeal Site Plan Review is to go to whichever Board conducts Site Plan Review and get turned down, then apply for the Building Permit, and then appeal under Section 8, in this case, to the Zoning Board for Site Plan Review denial. He said that Michael Grant told him that would be a moot exercise because he won't accept the application until the LHR issue is resolved. He said that effectively the Building Inspector has denied it.

Mr. Cockfield said that there is an appeal to the Zoning Board and it will be called upon to make an interpretation of the bylaw. He said that ZBA does not need to direct the Planning Board as to how to interpret the bylaw but must indicate how it interprets it.

Mr. Levy said that ZBA is not a policy making board but a judicial board.

Stephanie Wasser said that she was present on behalf of the Planning Board. Mr. Levy asked if the Planning Board would be receptive to having the matter remanded and in lieu of an outright denial, impose conditions. Ms. Wasser said that the Planning Board has discussed that. She said that the Planning Board has concerns about the project as it is designed. She said that the Planning Board is willing to talk to the builder to discuss what conditions might be imposed to mitigate the impact.

Ms. Hibbard asked if there was anyone present at the Public Hearing who wished to speak to the petition.

Mr. Levy moved and Mr. Sheffield seconded the motion to remand the matter to the Planning Board to reconsider its denial and, if it deems appropriate, issue conditions.

Mr. Cockfield asked if the Board could retain jurisdiction over the matter after the Planning Board has had an opportunity to reconsider its decision. He said that they would come back before the ZBA unless the appeal was dismissed. Mr. Levy said that the Board would have to continue the matter. Mr. Cockfield said that it could be continued for 60 days. Ms. Wasser said that she was not sure about the Planning Board's schedule. Mr. Sheffield said that if the time frame does not work out, the appellant can come back before the Board to request an extension. The Board said that it would grant an extension to February 4, 2010. The Board voted unanimously to remand the matter to the Planning Board and to extend the matter to February 4, 2010.

EXCERPT FROM FEBRUARY 4, 2010 PUBLIC HEARING

ZBA 2009-85, RAHIM SOHANI, 100 PILGRIM ROAD

Ms. Hibbard read a letter dated February 4, 2010, from J. Gavin Cockfield, requesting a 30 day continuance of the Public Hearing.

Mr. Levy moved and Mr. Sheffield seconded the motion to grant the request. The Board voted unanimously to grant the continuance to March 4, 2010.

EXCERPT FROM MARCH 4, 2010 PUBLIC HEARING

Mr. Seegel said that there were items on tonight's agenda that will be continued. He said that the first item was 100 Pilgrim Road, which was a holdover from the prior meeting. He said that at the request of the applicant who has reached agreement with the Planning Board for Large House Review (LHR), the Board is continuing the matter that was before ZBA to April 1, 2010. Ms. Hibbard moved and Mr. Grissino seconded the motion to continue the appeal to April 1, 2010. The Board voted unanimously to continue the appeal.

EXCERPT FROM APRIL 1, 2010 ZBA PUBLIC HEARING

ZBA 2009-85, RAHIM SOHANI, 100 PILGRIM ROAD

Mr. Levy moved and Mr. Sheffield seconded the motion to allow the petition to be withdrawn without prejudice. The Board voted unanimously to allow the petition to be withdrawn without prejudice.