



## ZONING BOARD OF APPEALS

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DEC 19 P 12:07  
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WELLESLEY MA 02482

ZBA 2013-86  
Appeal of Joanna Travis  
98 Livingston Road

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Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, December 5, 2013 at 7:30 p.m. in the Juliani Meeting Room, 525 Washington Street, Wellesley, on the appeal of JOANNA TRAVIS pursuant to the provisions of Section XXIV-C of the Zoning Bylaw of the Zoning interpretation of the Inspector of Buildings that a Building Permit could not be issued without further Zoning relief, at 98 LIVINGSTON ROAD, in a 40,000 square foot Single Residence District.

On November 18, 2013, 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 Himmelberger, Esq., representing Joanna Travis, (the "Appellant"). He said that the matter before the Board is an appeal from a Zoning interpretation by the Building Inspector. He said that the matter involves the proposed combining of 92 and 98 Livingston Road. He said that 92 Livingston Road will be razed and the two lots will be combined. He said that an addition will be built on the existing structure at 98 Livingston Road that will extend over what is now a common property line.

Mr. Himmelberger said that the matter was first submitted as a request for a Variance. He said that when he previously came before the Board, he argued that a request for a Variance was an inaccurate representation and that the matter should properly be reviewed as a request for a Special Permit/Finding. He said that the matter was re-marked for a later hearing date to be heard as a request for a Special Permit/Finding.

Mr. Himmelberger said that he had argued that a Special Permit was applicable and meritorious. He said that there was colloquy with the Board that perhaps another approach would be to seek a Zoning interpretation from the Building Inspector as to the contentions that were underlying the request for a Special Permit because it seemed that, according a reading of the Zoning Bylaw, this might not even require a Special Permit.

Mr. Himmelberger said that a request for a Zoning interpretation was submitted to Mr. Grant, who provided his Zoning interpretation on November 5<sup>th</sup>, rejecting the argument being made in support of the issuance of a building permit. He said that, thereafter an appeal was filed with the Town Clerk.

Mr. Himmelberger said that after receiving the Zoning interpretation, he spoke with the Building Inspector, who was of the mind that the appeal may not have been appropriately taken because there was no actual submission of a building permit application.

Mr. Himmelberger said that Zoning Bylaws (ZBL) provides for an appeal by any person aggrieved by the inability to obtain a permit. He said that there is no requirement in the bylaw for an owner to physically submit an application for a building permit and have that application rejected prior to seeking an appeal. He said that the issue here is that the only way that a building permit could be submitted would be if the existing structure at 92 Livingston Road was razed and the lots were combined. He said that the question of appeal is a question of law. He said that the courts have held that an exhaustion of administrative remedies is not a predicate to adjudication. He said that he believes that an appeal was properly taken.

Mr. Himmelberger said that the issue here is the construction of and the reading of Section XIX B – C of the ZBL. He said that they have fully indicated and acknowledged that once the structure at 92 Livingston Road is razed and the lots are combined, the new lot at 98 Livingston would be a Table 3 lot, which applies to lots recorded after 1997. He said that Section XIX C of the ZBL said that *no lot shall be altered so as to reduce the size of the then existing yard unless the resulting yard complies with the requirements of this section.* He said that section is pertinent because the house as it stands at 98 is compliant with Table 2, as it has 20 foot side yard setback on the right side. He said that side yard setback will be unaffected by the addition of 92 Livingston Road. He said that there is no reduction in the size of the then existing yard by virtue of the acquisition of and adding of 92 Livingston Road. He said that the Building Inspector erroneously misread or construed that language regarding the reduction in size of the then existing lot.

Mr. Himmelberger said that, as he stated in his memorandum, there are numerous towns that have a bylaw that states you may not alter a lot if resulting lot and/or the structure upon it is in any way non-compliant with the bylaws for setbacks. He said that Wellesley does not have that restriction. He said that Wellesley only has a bylaw that says that you cannot physically reduce the size of the side yard, either by building into it or by conveying some portion away, neither of which will result in this proposal.

Mr. Himmelberger said that Section XIX B has a provision *for every building hereafter erected or placed upon a lot at least the minimum frontage, minimum front yard width, minimum front yard depth (setback), minimum side yard width and minimum rear yard depth...* He said that they are urging that the word, "hereafter," be given its ordinary meaning, namely that buildings or structures placed after the lot is created shall be compliant with the appropriate table. He said that the addition which is hereafter being proposed will be fully compliant with the Table 3 setbacks. He said that he believes that the Building Inspector misreads that as, for every building or structure ever situated on a lot, whether before or after, shall meet minimum dimensional requirements.

Mr. Himmelberger said that Wellesley has a bylaw where it talks about heretofore or hereafter. He said that section has to do with Area Regulations. He read an excerpt from Section XVIII A that states that *no lot on which a dwelling is situated, whether heretofore or hereafter placed, shall be reduced in area...* He said that the Town knows how to speak to existing and hereafter structures. He said that because the bylaw is written as it is, he contends that the only fair reading of the bylaw is that it applies to that portion of the structure that is erected after the new lot has been created.

Mr. Himmelberger urged the Board to consider the statutory rules of construction with regard to bylaws in general. He said that words are to be given their ordinary meanings. He said to effectively delete the word, "hereafter," significantly changes the meaning of the bylaw and is counter to the intent of the original enactment.

Mr. Himmelberger said that he cited the case law that stands for the proposition that when an adjudicatory body is seeking to define the intent of a bylaw, the intent of the local legislative body, here, Annual Town Meeting, is controlling. He said that he submitted materials from the bylaw change when Table 3 was put into effect. He said that it was clear that it was for new residential construction. He said that the notion was that houses to be placed on new virgin lots would be required to comply with the setbacks in Table 3.

Mr. Himmelberger said that he concluded that, under a reading of the bylaw, there is nothing that would otherwise preclude the issuance of a building permit. He said that the side yard is not being reduced, and all of the building to be hereafter erected will be fully compliant with setback requirements of Table 3. He said that the net effect of allowing this construction to occur will be that there will be more uniform spacing of the structures on Livingston Road. He said that they previously submitted the drawings that show the locus in question and other surrounding lots.

The Board said that 92 Livingston Road is sort of a pork chop lot. The Board asked if the owner has any intention of doing anything with the back piece. Mr. Himmelberger said that the back piece has no frontage on any road. He said that the entirety of the lot at 92 Livingston Road will be added to 98 Livingston Road. He said that there would be no ability to divide the combined lots via ANR due to the frontage that would then exist on Livingston Road.

Mr. Himmelberger said that, for all of the aforementioned reasons, they do believe that the bylaws do permit the Building Inspector to issue a building permit. He requested that the Board accept the appeal.

The Board said that this is a situation that does not fit into any easy definitions. The Board said that it is a situation that can only arise in the 40,000 square foot Single Residence District. The Board said that, at the previous hearing, the Board did not find that a Special Permit was the appropriate route to go.

A Board member said that he did some research and found a Supreme Judicial Court case. He said that the Court stated that any court's role in interpreting a statute is to do so in a way to come up with a logical answer rather than interpret it in such a way as to being illogical or not making any sense. He said that, based on that, he felt that Mr. Himmelberger's client has the right to put an addition on 98 Livingston Road, as proposed, as a matter of right. He said that when the house was built, it conformed in all respects to the ZBL which then only required a 20 foot side yard setback. He said that subsequent to building the house, the bylaw was amended to a 40 foot side yard setback requirement. He said that by adding a piece of land to the other side of this house and putting on an addition, his only logical interpretation is that they have the right to do it without guidance from the Zoning Board or the Building Inspector.

Mr. Himmelberger said that, if the Board accepts the Appeal, a building permit is properly issuable upon the recording of a new Perimeter Plan, the razing of 92 Livingston Road, and the successful completion of Large House Review (LHR).

Mr. Grant said that there is a sequence of events. He said that there is an existing structure. He said that first the lots have to be combined. He said that he took the approach that there is no addition on the table because the lots have to be combined. He said that the rest of the proposal is hereafter. He said that you cannot get there until the lots are combined.

Mr. Grant said that he looked at the bylaw. He said that there can be unintended consequences when bylaws are written. He said that not all bylaw language ties together. He said that if the lots were combined, he would look at the bylaw and see that a 40 foot side yard setback is now required. He said that indicates to him that a Special Permit or a Variance is needed. He said that he thought that the bylaw could be read two different ways. He said that he felt that his interpretation of the bylaw was just as correct as Mr. Himmelberger's

Mr. Grant said that there is an existing side yard that will not be physically reduced but will be reduced by statute. He said that the statute requires a 40 foot side yard setback. He said that he felt that his interpretation was sound, given the language. He said that he read the minutes from the ZBA's previous hearing. He said that he concluded that if a Special Permit is not warranted, a Variance is.

The Board said that it is of the opinion that neither a Special Permit/Finding nor a Variance is appropriate. The Board said that it is necessary for it to interpret the bylaw so that it comes up with a reasonable result. The Board said that it agreed with Mr. Grant that there are a couple of prerequisites to be satisfied before applying for a building permit, namely, combining the lots, razing the structure at 92 Livingston Road, and successful completion of LHR. The Board said that when those conditions are satisfied, the homeowner will have the right to build without coming back to the Board or seeking further interpretations from the Building Inspector.

Mr. Grant requested that the house at 92 Livingston Road be demolished before the lots are combined. He said that otherwise there would be a Zoning violation because there would be two houses on one lot.

The Board said that this is a unique situation that only happens in a 40,000 square foot Single Residence District. The Board said that until the 1990's the side yard setback requirement was 20 feet. The Board said that by adding land and building on the conforming side does not make sense for the Board to interpret the bylaw. The Board said that this is a unique set of facts and the decision applies only to that unique set of facts.

The Board discussed the future status of the combined lot. The Board said that it will become a grandfathered lot. The Board questioned whether a Special Permit will be required if there are future additions proposed on the 92 Livingston Road side. The Board said that it frequently looks at proposals for additions to dwellings that have existing nonconforming setbacks. Mr. Grant said that if a proposal is made for an addition in the future, he will send it to the Board for a Special Permit. The Board said that it will be up to the Board at the time to address it.

The Board said that the lot becomes nonconforming by virtue of a change to the ZBL that made a previously conforming structure nonconforming.

The Board said that the Petitioner would not have to come back before the Board for minor changes such as changes to windows because that type of minor change will not affect the fundamental decision. The

Board said that this addition will be built by right and will not require Board review for changes. Mr. Grant said that future alterations may trigger the need for a Special Permit.

The Board said that a problem is that when laws are written, very often the people who are enacting these laws do not look at all of the potential results. The Board said that it was of the opinion that it could interpret the bylaw in this instance to permit this addition to go forward with the addition of the lot without creating a situation that can be relied upon by other petitioners who come before the Board.

#### Statement of Facts

The subject property is located at 98 Livingston Road, in a 40,000 square foot Single Residence District.

The Petitioner is appealing the Zoning interpretation of the Inspector of Buildings that a Building Permit could not be issued without further Zoning relief.

#### Submittals from the Inspector of Buildings

- Email to Zoning Board of Appeals, dated 12/5/13, re: 98 Livingston Road, ZBA 2013-86

#### Submittals from the Appellant

- Letter to Zoning Board of Appeals, dated 11/6/13, re: 98 Livingston Road, from David J. Himmelberger
- Notice to Town Clerk Pursuant to Section XXIV of the Zoning Bylaws, dated 11/12/13, signed by David J. Himmelberger
- Letter to David J. Himmelberger, dated 11/5/13, re: Zoning Interpretation, 98 Livingston Road, Wellesley, from Michael T. Grant, Inspector of Building/Zoning Enforcement Officer
- Memorandum in Support of Appeal of Building Inspector's Zoning Interpretation Regarding Appellant's Proposed Construction at 92-98 Livingston Street, Wellesley, MA
- Exhibit A
  - Email to David Himmelberger, dated 9/10/13, re: 98 Livingston Road, from Michael Grant
  - Letter to Zoning Board of Appeals, dated 9/9/13, re: Petition for Special Permit; 98 Livingston Road, Wellesley, from David J. Himmelberger
- Exhibit B
  - Letter to Michael Grant, dated 10/7/13, re: 98 Livingston Road, Wellesley, from David Himmelberger
  - Excerpt from September 12, 2013 Public Hearing, ZBA 2013-51, Joanna Travis, 98 Livingston Road
  - Letter to Michael Grant, dated 10/4/13, re: Request for Zoning Interpretation, 98 Livingston Road, Wellesley, from David J. Himmelberger
  - Existing Lots Detail, dated 8/15/13, prepared by Cheney Engineering Co., Inc.
  - Proposed Lots Detail, dated 8/15/13, prepared by Cheney Engineering Co., Inc.
  - Locus Plan, Lots Detail, dated 8/15/13, prepared by Cheney Engineering Co., Inc.
  - Certified Plot Plan, dated 6/17/13, revised 9/11/13, stamped by Elliott J. Paturzo, Professional Land Surveyor

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- Exhibit C
  - Letter to David Himmelberger, dated 11/5/13, re: Zoning Interpretation, 98 Livingston Road, Wellesley, from Michael T. Grant
  - Exhibit D
  - Excerpts from Advisory Book to Annual Town Meeting, citing Article 29, pages 74, 75 & 76, and pages 121, 122 & 123
  - Excerpt from Advisory Book to Annual Town Meeting, citing Article 26, pages 80, 81 & 82, and pages 110, 111, 112, 113 & 114.

Decision

This Authority has made a careful study of the materials submitted and the information presented at the hearing.

On the Appeal of the Zoning interpretation of the Inspector of Buildings that a Building Permit could not be issued without further Zoning relief, the Board voted unanimously to grant the appeal of the Petitioner and overrule the Building Inspector's interpretation of the ZBL, and find that, with the conditions to be enumerated, the applicant may by-right add this addition to their property, but nothing in this decision shall be deemed a precedent because it is based on a unique set of facts that is applicable only in a 40,000 square foot Single Residence District. The following conditions must be met prior to issuance of a building permit:

1. The structure at 92 Livingston Road shall be razed prior to combination of the lots at 92 and 98 Livingston Road
2. A new Plan of Land combining the two lots at 92 and 98 Livingston Road shall be recorded at the Norfolk County Registry of Deeds
3. Review and approval of Large House Review

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TOWN'S OFFICE  
WELLESLEY MA 02482

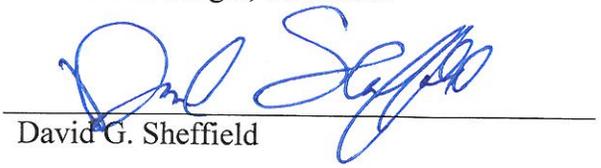
ZBA 2013-86  
Petition of Joanna Travis  
98 Livingston Road

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MIDDLEBURY MA 02482

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

  
Derek B. Redgate

cc: Planning Board  
Inspector of Buildings  
lrm

