

TOWN OF WELLESLEY



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68-43

BOARD OF APPEAL

RICHARD O. ALDRICH
DANA T. LOWELL
F. LESTER FRASER

1968 MAR 31 PM 1:57
KATHARINE E. TOY, CLERK
TELEPHONE
235-1664

Appeal of J. Marshall Hamill and A. Seymour Parker (Aggrieved parties)
(Edward D. and Jane F. Dana)

The Board of Appeal held a public hearing in the hearing room on the second floor of the Town Hall at 8:10 p.m. on September 26, 1968, on the appeal of J. Marshall Hamill and A. Seymour Parker, claiming to be aggrieved from the issuance of a permit to construct a swimming pool on premises at 97 Arnold Road, owned by Edward D. and Jane F. Dana. Said appeal was taken under the provisions of Sections II, XVI, and XVIII-B of the Zoning By-law, Chapter II of the Building Code, Massachusetts General Laws, Chapter 143, Section 1, and Amendments thereto and Chapter 40A, Section 13 and Section 16.

The Inspector of Buildings, upon application of Edward D. and Jane F. Dana, issued said permit on July 31, 1968, there being no apparent violation of the Zoning By-law or of the Building Code. On August 6, 1968, the appellants filed their appeal with this Board based on Sections II, XVI, XVIII-B of the Zoning By-law, Chapter II of the Building Code, General Laws Chapter 143, Section 1 and Chapter 40A, Section 13 and 16. Thereafter due notice of the hearing was given by mailing and publication.

Francis L. Swift, attorney, represented the appellants at the hearing.

The following persons spoke in opposition to the issuance of the permit. J. Marshall Hamill, 94 Edmonds Road, Lillian Lovejoy, 67 Lowell Road, Gloria G. Bernard, 61 Lowell Road, Seymour A. Jr. and Margaret L. Parker, 91 Arnold Road, Arthur and Gertrude Schoepfer, 86 Arnold Road, and Madeline E. Wickham, 72 Old Colony Road. All felt that the proposed swimming pool would prove detrimental to the neighborhood, would result in depreciation of properties and create a hazardous traffic condition because of additional cars being parked on the street.

Letters opposing the issuance of the permit were received from Howard E. Grimes, 81 Arnold Road and Arthur E. Schoepfer, 86 Arnold Road.

Joseph E. Scammon, Inspector of Buildings, stated that the application for the pool was not in violation of the Zoning By-law or Building Code and therefore issued the permit and, in his opinion, there were no violations of the Deed restrictions.

Statement of Facts

The lot involved, containing 22,745 square feet, is located within a Single-residence District requiring a minimum lot area of 20,000 square feet. There is a dwelling on the lot and the Inspector of Buildings has issued a permit for the construction of a swimming pool 20' x 40', approximately 20' from the rear of the dwelling, approximately 22' from the adjacent lot on Arnold Road, approximately 25' from the adjacent lot on Lowell Road and 90' from Lowell Road.

It was stated at the hearing that said lot is part of a tract of land which was laid out into lots and streets in 1935 with certain restrictions imposed. Sewer and drainage pipes were installed and the then existing brook was piped, thus creating easements over the property. These easements are shown on a plan which was filed in 1935 by the original developer, Abbott Estates, Inc.

It was alleged that the excavation of the pool could disturb the natural flow of the subsurface water, interfere with the drainage easements, and change the water level so as to result in additional water being shed onto abutting properties.

Another restriction provided that only one single-family dwelling could be placed on the lots. Chapter 143, Section 1, of the General Laws defines a building as a "structure," therefore, it is felt that the pool is a building and could constitute a violation of a Deed restriction.

It was further pointed out that the pool is also a violation of the Zoning By-law as the appellants feel that it will be harmful to surrounding properties. Substantial decreases in property values will result because more cars will be parked at the corner of Lowell Road and Arnold Road and this will increase an existing hazardous condition at that corner, the proximity of the pool to the street and the noise emanating from the pool area due to its location and closeness to adjoining properties.

Decision

Appellants advance several arguments in support of their contention that the Building Inspector erred in granting a permit to construct the pool.

First they cite a 1935 agreement between the developer and the Town giving to the Town certain easements for streets, sewers and a pipe which encloses a brook flowing across the Dana property. However, counsel for appellants concedes that the pool does not directly infringe upon these easements, urging instead that it may somehow disturb the natural subsurface water flow contemplated by one of the easements. The rights created by the easements in respect of drainage would appear to be cognizable by this Board only if the alleged interference therewith is sufficiently clear and imminent as to bring the situation within the purview of Section XVI of the Zoning By-law. In the opinion of the Board no such relationship has been established here. The Board regards any such argument and conclusion as speculative and remote at best and, therefore, not a proper ground for the relief sought.

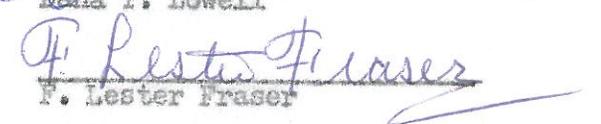
Appellants also invoke certain restrictions created in a deed to Abbott Estates, Inc. which, inter alia, prohibit the erection of any "building or part thereof" within thirty feet of any street, contending that "building" as used in said deed imports the meaning given to the term in Chapter 143, Section 1, of the General Laws and in the Wellesley Building Code and would include a structure such as the pool in question. The Board finds it unnecessary to resolve this question since it is of the view that under these circumstances the Board is not an appropriate tribunal for enforcement of the private rights and restrictions said to have been created by the deed in question.

The Board is not persuaded by appellants' further argument that the pool offends Section XVI because of the increased noise, activity and traffic that may be caused by the pool. Section XVI of the Zoning By-law

is intended to prohibit the construction, use, etc. of structures and land which are inherently obnoxious, offensive, dangerous or injurious to the public health, morals, safety or welfare or harmful to property therein. It is not intended to restrict the erection of buildings or structures or uses of land which are by their nature neither harmful to the community or property therein even though they may conceivably be used improperly or abused in an improper and unlawful manner. In the absence of special circumstances which are not present here, a swimming pool is not a structure or use within the purview of Section XVI of the Zoning By-law.

Accordingly, the appeal is dismissed on its merits.


Richard O. Aldrich

Dana T. Lowell

F. Lester Fraser

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