

TOWN OF WELLESLEY



MASSACHUSETTS

81-7

ZONING BOARD OF APPEALS
TOWN HALL WELLESLEY, MA 02181

RECEIVED
CLERK'S OFFICE
WELLESLEY, MASS.
APR 16 12 29 PM '81

WILLIAM F. CULLINANE, CHAIRMAN
STEPHEN S. PORTER
JOHN A. DONOVAN, JR.

STEPHANIE J. GOSSELIN
Executive Secretary
Telephone
235-1664

WILLIAM E. POLLETTA
FRANKLIN P. PARKER
SUMNER H. BABCOCK

Petition of Ellyn G. Carlson

Pursuant to due notice, the Permit Granting Authority held a Public Hearing in the second floor hearing room of the Town Hall on Tuesday, February 24, 1981 at 8:00 PM on the Petition of Ellyn G. Carlson, requesting a variance from the terms of Section XIX of the Zoning Bylaw which would allow the construction of a single family dwelling and garage at 23 Gilson Road, with a front yard and frontage less than the required sixty (60) feet.

At the Hearing, the Petitioner Ellyn G. Carlson, was represented by her husband and attorney, Robert Carlson. Two neighbors objecting to the granting of a variance, Rolf M. Augustin, Jr. and John L. Plexico, were represented by attorney Mark D. Shuman. Several other neighbors appeared in person and spoke in opposition to the granting of the variance. Letters of opposition were received from immediate neighbors and letters in favor were received from persons in the general area of 23 Gilson Road. Both attorneys filed briefs at the hearing and letters with supplementary materials subsequent to the meeting. At least one member of the Permit Granting Authority has viewed the premises.

History

This matter is not new to this Authority. On July 24, 1978, this Authority, in a lengthy decision, dismissed the petitioner's appeal from the denial by the Inspector of Buildings of a permit to build a single family residence at 23 Gilson Road. The petitioner filed an appeal to the Superior Court (Docket No. 125210) of the dismissal of the appeal from the Inspector of Buildings' denial of a permit which has not been tried as yet. In 1979, she filed and then withdrew, after Public Hearing, a petition for a variance. On June 23, 1978, she filed an action in the Land Court (Docket No. 90804) to obtain a reformed deed to Lot #5 which would allow the petitioner to come within the exception to the 60' frontage requirement.

Rolf Augustin filed an action in the Land Court (Docket No. 91756) against the Inspector of Buildings and Ellyn G. Carlson seeking an injunction against the issuance of a building permit and obtained an order setting aside the Judgement of September 7, 1978 in case No. 90804 granting a reformed deed which had been



TOWN RECEIVED
CLERK'S OFFICE
WELLESLEY MASS.
APR 16 12 29 PM '81

Petition of Ellyn G. Carlson, continued

Page 2.

allowed with the consent of Withers, Wilder and the petitioner. Said deed had described a conveyance by the Withers to Wilder of not only Lot #4 but of Lot #5 on March 2, 1964.

Statement of Facts

The property involved is located within a Single Residence District requiring a minimum lot area of 20,000 square feet. This parcel involved is made up of two lots, namely, Lot #4 and Lot #5, which together contain 21,000 square feet. Lot #5, which abuts Gilson Road, a cul-de-sac, has a frontage of 50.28 feet rather than the 60 feet as required by the Zoning Bylaw.

The petitioner has produced a diagram prepared by Registered Land Surveyor, John J. Michaelson, which describes the metes and bounds of Lots #4 and #5 and the proposed location of the single family residence. The setback on the west side is given as 20.5 feet; that on the east side, nearest Lot #5, is given as 28 feet. The front yard setback, from what appears to be the nearest point on the cul-de-sac to the north side of the house facing Gilson Road, is 42 feet.

Petitioner's problems started after she purchased Lots #4 and #5 on April 30, 1978 and when she discovered that the Norfolk Registry of Deeds records show that as of March 23, 1964, the front parcel of the Petitioner's land which contains 50.28 feet of frontage on Gilson Road, was actually owned by the Withers who also owned the adjacent parcel, Lots #6 and #3, all shown on the subdivision plan of William J. Ford, Jr., a Civil Engineer. Lot #6 has frontage on Gilson Road measuring 71.48 feet. The Town Assessor's records apparently had shown that as of said date both Lot's #4 and #5 to be owned by Richard Wilder who had received a deed from the Withers to Lot #4 on March 2, 1964, twenty-one (21) days before the Zoning Bylaw from which the Petitioner seeks a variance became effective, requiring a 60' frontage instead of 40' which had been required prior thereto. A detailed history of the pertinent prior conveyances may be found in this Authority's decision of July 24, 1978.

The present petition is based largely upon the same arguments presented on the appeal from the denial of the building permit in 1978 with the additional argument that the Petitioner's parcel being on a cul-de-sac, would be unable to comply with the front yard requirement of Section XIX that requires "a front yard at least thirty (30) feet in depth and a least sixty (60) feet in width for the entire depth of the front yard" and therefore a variance should be allowed. Petitioner argues that because lots abut a cul-de-sac, the Zoning Bylaw cannot be complied with since a sixty foot straight line cannot be drawn across the front edge of the property. Petitioner argues that the proposed dwelling would not be

RECEIVED
TOWN CLERK'S OFFICE
WELLFLEET, MASS.
APR 16 12 29 PM '81

detrimental to the public good, would not nullify or substantially derogate from the intent and purpose of the Zoning Bylaw, and literal enforcement of the Bylaw has created a hardship in cost and expenses substantially in excess of the \$20,000 purchase price.

The opponents of a variance argue that Petitioner is not entitled to a variance based solely on the lack of the required frontage and front yard dimensions. They argue that any problems with the parcel should have been known to the Petitioner since an examination at the Registry of Deeds would have disclosed that Lot #5 was still owned by Withers on March 23, 1964 and that the exception to the required 60' would not be available to her. Furthermore, they argue that Petitioner's reliance on Town Hall records and verbal assurances that Lots #4 and #5 were buildable was misplaced.

Petitioner has tried to purchase portions of adjacent property to get the required frontage but has not been successful. Petitioner offered in writing to sell the parcel for \$26,000 in December, 1978. Certain offers to purchase some or all of the parcel from the Petitioner have been made but no agreement has been reached.

Decision

Based upon a careful consideration of the evidence submitted at the Public Hearing, the briefs and exhibits submitted by the Petitioner and interested parties, and reading of the Zoning Bylaw and pertinent case law, we deny the request for a variance since we do not find evidence sufficient to warrant the findings required before a variance may be granted under Section XXIV-D 1.a. and b.

The various legal actions pending in the courts do not affect this Authority's power to decide the issue before us on the merits.

On March 23, 1964, Lot #5, one of the two lots now owned by the Petitioner, stood in the name of the Withers who owned adjoining land, Lot #6, which was available to provide the required frontage for Lot #5. Thus, as found in our July 24, 1978 decision, Petitioner would not qualify for an exemption under Section XIX from the 60' requirement. If Petitioner obtains a reformed deed for Lot #6 which would show the Withers deeding out Lot #6 before March 23, 1964, the Petitioner might

RECEIVED
TOWN CLERK'S OFFICE
WELLESLEY MASS.
APR 16 12 29 PM '81

qualify for a building permit as a matter of right.

A deficiency in frontage alone does not provide any basis for a variance. In Raia v. Board of Appeals of N. Reading, 4 Mass. App. Ct. 318, 322 (1976), the Appeals Court stated:

" (t)he division of that property into two nonconforming lots did not create a substantial hardship especially affecting the vacant lot, even though the latter could not be built upon, as it could have remained part of a nonconforming lot."

In this case, part of Lot #6 could have been available to make Lot #5 conform to the more stringent 60' requirement since both lots were owned by the same parties as of the effective date of the Bylaw on March 23, 1964. In Warren v. Board of Appeals of Amherst, 522 Mass. Ad. Sh. 1981, the Supreme Judicial Court, citing Raia V. Board of Appeals of N. Reading with favor, held that insufficiency of frontage is not a condition especially affecting the subject parcel, but not affecting generally the zoning district in which it is located. The Court stated:

"If the Legislature intended the mere fact of a deficiency in the required frontage of a lot to be sufficient without more, to satisfy this particular prerequisite for a Variance, it is difficult to believe that they would not have done so in this statute. They did not do so, and we believe that they did not intend that result."

Id. at 532-533.

In no sense do Petitioner's arguments describe a circumstance especially affecting her lot. There are approximately 65-70 cul-de-sacs in residential zoning districts in the Town of Wellesley.

Petitioner's proposed residence would, but for insufficient frontage, meet the front yard requirement by measuring the thirty foot setback continuously from every

RECEIVED
TOWN CLERK'S OFFICE
WELLESLEY MASS.
APR 16 12 29 PM '81

Petition of Ellyn G. Carlson, continued

Page 5.

point along the property line at the cul-de-sac. This would result in a setback in the identical shape of the cul-de-sac. There is nothing in the Zoning Bylaw which requires the drawing of a straight line across the frontage as Petitioner suggests. Even if a straight line were drawn at a tangent across the point in the cul-de-sac nearest the side of the building facing the street, the proposed building would have the required front yard, but for the lack of frontage.

Therefore, it is the unanimous opinion of this Authority that this requested variance be denied and this this petition is dismissed.

William F. Cullinane

William F. Cullinane, Chairman

John A. Donovan, Jr.

John A. Donovan, Jr.

Stephen S. Porter

Stephen S. Porter