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ZONING BOARD OF APPEALS  
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82-50

Petition of Dorothy C. Peschier and John J. Reynolds

Pursuant to due notice, the Permit Granting Authority held a Public Hearing in the second floor hearing room of the Town Hall at 8 p.m. on Thursday, November 18, 1982, on the petition of DOROTHY C. PESCHIER AND JOHN J. REYNOLDS, who are appealing the action of the Building Inspector who has refused to issue a building permit allowing a dwelling to be erected on a parcel of land known as LOTS 257 and 258 on MANOR AVENUE at the corner of MARIGOLD AVENUE. Said request is pursuant to Section XXIV-C-1 of the Zoning Bylaw.

On October 29, 1982, the petitioner filed a request for a hearing before this Board and thereafter due notice of the hearing was given by mailing and publication.

Presenting the case was John C. Hession, attorney with Butterworth and Hession, Belmont, Ma., representing Dorothy Peschier of Watertown, owner of the parcel, and John J. Reynolds of Belmont, potential purchaser of the property. Mr. Hession stated that the parcel in question contains 5,000 square feet of area and has been owned by the same family since 1917. A building such as proposed could have been constructed on the lot in 1917. The petitioners rely on Massachusetts General Laws, Chapter 40A, Section 6, Paragraph 4 to "grandfather" in the lot in question.

John Reynolds and Joseph A. Gautreau, a partner in the purchase of the property, spoke in favor of the petition and described the proposed 24' by 28' dwelling which would have a front yard setback from Manor Avenue of 31', a setback from Marigold Avenue of 10', and side yards of 12' and 45'.

No one was present at the hearing in opposition to the request.

Statement of Facts

The property in question is a parcel of land known as lots 257 and 258 on Manor Avenue on the corner of Marigold Avenue, which contains 5,000 square feet of area. It has a frontage of 50 feet on Manor Avenue and 100 feet on Marigold. Dorothy Peschier of 90 Lowell Avenue, Watertown, Ma., is the record owner of the parcel, being the daughter of the late Robert Warner, to whom the parcel had been deeded in 1917 by a deed recorded in Norfolk Registry of Deeds in Book 1379, Page 490.

The petition states the following:

1. Dorothy C. Peschier of 90 Lowell Avenue, Watertown, Ma. is the record owner of a parcel comprised of two lots of land on Manor Avenue, Wellesley, which two lots are described as follows:

That certain piece of land situated in Wellesley, County of Norfolk,

Commonwealth of Mass. and being lots numbered 257 and 258 on a plan of land in Wellesley, Mass. Wellesley Manor John D. Crossman Civil Engineer Dated November 1913 and filed with Norfolk Registry Deeds Book of Plans 69 Plan No. 3324 said land bounded and described as follows, Northerly on Manor Ave. on said plan 50 feet Easterly on lot 259 on said plan 100 feet Southerly on lot 256 on said plan 50 feet, Westerly on Marigold Avenue on said plan 100 feet containing 5000 square feet more or less.

2. The said Dorothy C. Peschier is a daughter of the late Robert Warner, who deceased in 1942, and to whom this parcel had been deeded in 1917, by a deed recorded in Norfolk Registry of Deeds in Book 1379 at Page 490. A photo copy of such deed, and a photo copy of the Petition for Probate of the estate of Robert Warner, Middlesex Probate Court Docket No. 250821, is appended hereto. Also appended is a copy of the Inventory in Probate Docket No. 250821, showing that the parcel of two lots in question was all of the land owned by the late Robert Warner on Manor Avenue in Wellesley.

The interest in this land acquired by other heirs of Robert Warner was deeded to Dorothy Peschier in 1979, by a deed recorded with Norfolk Registry of Deeds in Book 5643 at Page 646, a photo copy of which is also appended hereto.

Lots 257 and 258 were both part of land deeded to Machael R. Connolly in July, 1913, which subsequently was described in a plan of land in Wellesley, Ma., Wellesley Manor, John D. Crossman, Civil Engineer dated November 1913 and filed with Norfolk Registry of Deeds Book of Plans 69, Plan No. 3324.

John J. Reynolds, a Belmont builder and developer, has entered into a contract to purchase the parcel of land from Dorothy Peschier, on which he proposes to construct a 24 foot by 28 foot dwelling. The sale is contingent on a building permit being issued for the premises.

Arthur LaConte, Building Inspector, has refused to issue a building permit to construct a single family dwelling on said parcel to Mr. Reynolds and his partner, Joseph A. Gautreau. In a letter dated November 18, 1982, Mr. LaConte stated that the proposed dwelling would not meet the requirements currently in force in Section XIX of the Zoning Bylaw dealing with Yard Regulations and Section XVII dealing with Non-Conforming Uses and Structures.

The petitioners claim that a building could have been constructed on the lot conforming to the "Building Laws" of the Town of Wellesley which were in effect in 1917 when the parcel was purchased by Robert Warner. The Building Laws in 1917 required a building to be ten feet from all party lines. The Yard Regulations, Section XIX, in effect at the present time, requires a minimum frontage of 60 feet, minimum front yard setback of 30 feet, and minimum sideyard width of 20 feet.

A Plot Plan was submitted, drawn by Eugene Mulligan, Registered Land Surveyor, dated 10/22/82. The proposed dwelling is 28' by 24', would have a front-yard setback of 31' from Manor Avenue, 10' setback from Marigold, and 12' sideyard from 76 Manor Avenue. Lots 257 and 258 are each 25' by 100'. The petitioner claims that his right to build on said lot is preserved by Massachusetts General Laws, Chapter 40A, Section 6, Paragraph 4.

JAN 12 3 23 PM '83

Lots 257 and 258 were deeded to Frank Batcheller who owned no adjacent property before deeding them to Robert Warner on August 22, 1917. Neither Warner nor Peschier ever owned lots immediately adjacent to Lots 257 and 258.

### Decision

The parcel of land in question contains 5,000 square feet of land. The petitioners have requested a review of the action of the Building Inspector who refused to issue a building permit for the parcel of land because it did not meet the requirements of Section XIX (Yard Regulations) and Section XVII (Non-Conforming Uses and Structures). The petitioners are appealing on the basis that their right to build upon the lot is preserved by Massachusetts General Laws, Chapter 40A, Section 6, Paragraph 4.

Article XVII of the Wellesley Zoning Bylaw, which parallels Massachusetts General Laws, Chapter 40A, Section 6, states:

" .....Any increase in area, frontage, width, yard, or depth requirements of this Zoning Bylaw shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirements but at least five thousand square feet of area and fifty feet of frontage. The provisions of this paragraph shall not be construed to prohibit a lot being built upon, if at the time of the building, building upon such lot is not prohibited by the Zoning Bylaw in effect. Any increase in area, frontage, width, yard or depth requirement of a zoning ordinance or bylaw shall not apply for a period of five years from its effective date or for five years after January first, nineteen hundred and seventy-six, whichever is later, to a lot for single and two-family residential use, provided the plan for such lot was recorded or endorsed and such lot was held in common ownership with any adjoining land and conformed to the existing zoning requirements as of January first, nineteen hundred and seventy-six, and had less area, frontage, width, yard or depth requirements than the newly effective zoning requirements but contained at least seven thousand five hundred square feet of area and seventy-five feet of frontage, and provided that said five year period does not commence prior to January first, nineteen hundred and seventy-six, and provided further that the provisions of this sentence shall not apply to more than three of such adjoining lots held in common ownership:..."

Article XIX deals with Yard Regulations. The lot in question being a corner lot, and its width and length make it impossible to conform with the present yard requirements.

There is a division of opinion on this case. The majority of the Board of Appeals, Stephen S. Porter and William E. Polletta, agree with the Building Inspector that the Town of Wellesley Zoning Bylaw as written does not allow a building permit to be issued on said parcel of land. John A. Donovan, Jr. disagrees with the Building Inspector on this issue.

#### #1 MAJORITY OPINION:

It is the opinion of the majority, Mr. Porter and Mr. Polletta, that the specific language in Article XVII of the Wellesley Zoning Bylaw grants rights of

non-conformance with the Bylaw to those lots that were owned separately and not in common at the time of endorsement or recording. While the present owner has owned this lot since 1917, the lot was owned in common ownership as described above when recorded in 1913. The Bylaw specifically restricts rights of use of these non-conforming lots if they are held in common ownership. There is no mention in Article XVII of grandfathering for lots held in common at the time of endorsement or recording.

While the majority of the Board agree that this lot was indeed a building lot when purchased in 1917, the fact that it was not used makes it non-conforming, not only with the Bylaw but with most of the houses in the general area. Also, it should be noted that in an appraisal of real estate on file with the Probate Court of Middlesex County in 1945, the value of the property in question was appraised at \$100.

There appears to be validity for an appeal for a variance under Section XIX dealing with Yard Regulations. The petitioners were made aware of the option of applying for a variance. They chose not to pursue this option and instead filed an appeal to the Building Inspector's denial to issue a building permit. It is the belief of Mr. Porter and Mr. Polletta that the variance process would give this Authority the right to put restrictions on the size of the structure and the placement on the particular lot, to see that it conforms with what presently exists in the neighborhood and more closely conforms with the sideyard restrictions of the Bylaw.

#2 MINORITY OPINION:

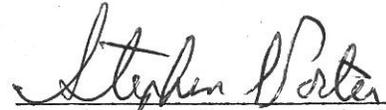
While Massachusetts General Laws, Chapter 40A., Section 6 and Section XVII of the Wellesley Zoning Bylaw are very unclear, I believe the petitioner should be allowed a building permit since at the time of the "recording" of the deed first describing the "lot", the "lot" was buildable in accordance with the petitioners present plans.

To require the premises to have been deeded out from other adjacent property before the plan or subdivision is "recorded or endorsed" is wholly impractical. To give meaning to the words "proposed requirements" one would have to interpret the statute and bylaw as grandfathering only those transactions occurring while a town or city was adopting a more restrictive zoning law which became effective before the building was completed. It does not appear that this very restrictive exception was intended. If the same protection prior to the 1975 amendments was intended, such was not clearly stated in the legislation or bylaw.

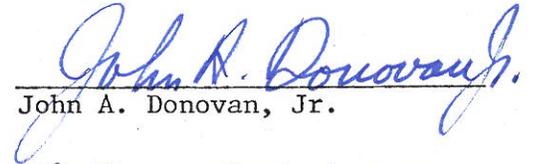
According to Section XXIV-C-3 of the Zoning Bylaw of Wellesley, the concurring vote of all members of the Board of Appeals shall be necessary to reverse any order or decision of any administrative official under this Zoning Bylaw, or the Zoning Act (Chapter 40A, MGL as amended).

This Authority supports the action of the Building Inspector in refusing to issue a building permit for lots 257 and 258 on Manor Avenue, and the appeal is hereby denied.

This Authority unanimously agrees that the petitioner would have reason to apply for a variance, and this Authority would be willing to hear evidence at a hearing if the petitioner so desires to submit a variance application.



Stephen S. Porter, Chairman



John A. Donovan, Jr.



William E. Polletta

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