



ZONING BOARD OF APPEALS
TOWN HALL WELLESLEY, MA 02181

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JOHN A. DONOVAN, JR.
ROBERT R. CUNNINGHAM

MARY ANN McDOUGALL
Executive Secretary
Telephone
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431-1019

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

85-1

Petition of Ellyn G. Carlson
23 Gilson Road

Pursuant to due notice, the Permit Granting Authority held a Public Hearing in the Phillips School on Thursday, February 21, 1985 at 8 p.m. 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 frontage less than the required sixty (60) feet.

Robert Carlson, attorney, and Ellyn Carlson presented the case for the petitioner. Attorney Barry Ravech, representing Rolf Augustin, 19 Bradford Road, spoke in opposition as did Jon Plexico, 23 Bradford Road and R. Lawrence St. Clair, 11 Gilson Road. Carl J. Madda, 20 Gilson Road, wrote a letter in opposition submitted by Mr. Augustin's attorney.

The Carlson's stated, in addition to reasons given twice before to this Board, that their lot at 23 Gilson Road was recently evaluated at \$81,000 by the Town of Wellesley and that it has been taxed as a buildable lot since 1954. Mrs. Carlson stated that she had received an offer for the subject property in 1984. The offer was apparently for \$30,000. She also said that her efforts to purchase nine feet of land from Carl Madda had not been successful.

Statement of Facts

The facts concerning this petition have been amply set forth in this Board's decisions of 1) July 24, 1978 (Case 78-15) denying petitioner's appeal from a denial of the issuance of a building permit and 2) April 16, 1981 (Case 81-7) denying petitioner's petition for a variance from the required sixty (60) foot frontage. (Copies attached). Petitioner's appeals to the Superior Court No. 125210 and 133318 were tried before Paul G. Garrity, Jr. who on October 20, 1981 affirmed the decisions of the Permit Granting Authority upholding the Building Inspector's denial of a permit (1978) and the Permit Granting Authority's denial of a variance (1981). (Copy attached). The court stated:

"...I find that the decision of the Town of Wellesley Inspector of Buildings denying to the Plaintiff a building permit was properly predicated on the fact that the lot on which she sought to have constructed a single-family dwelling and garage has insufficient frontage under the Zoning Bylaws of the Town of Wellesley....."

The court continues:

"The decision of the Board of Appeals denying the Plaintiff's request for a variance from the required frontage was and is in accordance with law. There was absolutely no evidence presented to this Court de novo which would justify the granting of a variance..."

On February 5, 1982, the Land Court, Norfolk Misc. Case No. 90804, Fenton, J., ruled that the petitioner was not entitled to reformation and the complaint was dismissed (Copy attached).

Decision

This Board once again denies Petitioner relief in that there have been presented no facts which persuade us to desert our prior decisions. 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 sixty (60) foot frontage for Lot #5.

A deficiency in frontage alone, here just over nine (9) feet, does not provide any basis for a variance. Raia v. Board of Appeals of No. Reading, 4 Mass. App. Ct. 318,322 (1976); Warren v. Board of Appeals of Amherst, 381 Mass. 1 (1981). In addition, this Board finds no hardship especially affecting petitioners property which would allow this Board to grant a variance, the above cited decisions notwithstanding.

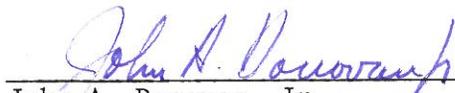
Therefore, it is the unanimous opinion of this Authority that this requested variance be denied and that this petition is hereby dismissed.

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.

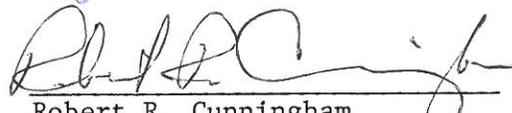
cc: Planning Board



Stephen S. Porter, Chairman



John A. Donovan, Jr.



Robert R. Cunningham

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TOWN CLERK'S OFFICE

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS

SUPERIOR COURT
Nos. 125210 and
133318 (Consolidated)

ELLYN G. CARLSON

v.

FRANCIS L. SWIFT, ET AL

and

ELLYN G. CARLSON

v.

WILLIAM F. CULLINANE, ET AL

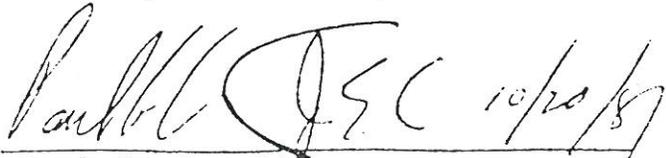
Consolidated Findings, Rulings and Order

After a trial of each of the above-referred cases, in Civil Action Numbered 125210, I affirm the decision of the Board of Appeals of the Town of Wellesley dismissing the Plaintiff's appeal from the action of the Inspector of Buildings of the Town of Wellesley denying her application for a building permit and I affirm the decision of the Board of Appeals; and in Civil Action Numbered 133318, I affirm the decision of the Board of Appeals of the Town of Wellesley denying the Plaintiff's petition requesting a variance from the terms of the applicable zoning by-law. I find that the decision of the Town of Wellesley Inspector of Buildings denying to the Plaintiff a building permit

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was properly predicated on the fact that the lot on which she sought to have constructed a single-family dwelling and garage ~~having~~ insufficient frontage under the zoning by-laws of the Town of Wellesley. The decision of the Board of Appeals denying the Plaintiff's request for a variance from that required frontage was and is in accordance with law. There was absolutely no evidence presented to this Court de novo which would justify the granting of a variance . While in fact there may be some economic hardship resulting to the Plaintiff, she either knew or should have known when she acquired the locus that its frontage was insufficient under the Wellesley zoning by-laws to permit construction of a single-family dwelling and garage thereon.

I neither grant nor deny the request for findings of fact and rulings of law submitted by the Plaintiff for the reason that the requests set-out what are, in effect, abstract propositions of fact and law and do not bear directly on either the facts or the law of these cases. The same could be said with respect to the defendant Board of Appeals motion for rulings of law except with respect to Request No. 10, which I allow.


Paul G. Garrity

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SUPERIOR COURT
CIVIL ACTION

NO. 125210

..... ELLYN G. CARLSON, Plaintiff(s)

v.

..... FRANCIS L. SWIFT ETALS, Defendant(s)

JUDGMENT

This action came on for (trial) (~~hearing~~) before the court, Garrity, J. —
J. presiding, and the issues having been duly (tried) (~~heard~~) and findings having been duly ren-
dered,

It is Ordered and Adjudged:

(that the Plaintiff recover of
the defendant the sum of \$ with interest
thereon from in the sum of \$ as provided by law, and his
costs of action.)

(that the plaintiff Ellyn G. Carlson take nothing,
that the action be dismissed on the merits, and that the defendant Francis L. Swift etals
recover of the plaintiff Ellyn G. Carlson his costs of action.)

Dated at Dedham, Massachusetts, this 20th day of

October, 1978

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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION

NO. 133318

..... Ellyn G. Carlson, Plaintiff(s)

v.

..... William F. Cullinane etals, Defendant(s)

JUDGMENT

This action came on for (trial) (~~hearing~~) before the court, Garrity, J., J. presiding, and the issues having been duly (tried) (~~heard~~) and findings having been duly rendered,

It is Ordered and Adjudged:
(that the Plaintiff

..... recover of the defendant the sum of \$, with interest thereon from in the sum of \$ as provided by law, and his costs of action.)

(that the plaintiff Ellyn G. Carlson take nothing, that the action be dismissed on the merits, and that the defendant Wm. F. Cullinane etals recover of the plaintiff Ellyn G. Carlson his costs of action.)

Dated at Dedham, Massachusetts, this 20th day of

..... October, 197^x81

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by counsel before the court and neither defendant had any apparent interest in the outcome of the case. Shortly after the complaint was filed, each defendant assented to the entry of judgment against him. Both assents were drafted by plaintiff's attorney and executed on his stationery. Upon receipt of the assents, the case proceeded as an uncontested matter and judgment for the plaintiff was entered on September 7, 1978.

Shortly thereafter, defendant-intervenor Augustin filed a motion to intervene, a motion for relief from judgment, and a motion for a new trial. Augustin's supportive memoranda set forth, inter alia, that his land abuts the locus; that judgment for the plaintiff would change the record title to the locus at a crucial time in relation to the zoning by-laws of the Town of Wellesley, thereby allowing plaintiff to build a dwelling on a presently unbuildable parcel; that such building would diminish the value of Augustin's land and that the nominal defendants have no present interest in either the locus or the outcome of the case.

Augustin further suggested that the status of this case raised "the spectre of possible collusion between the present plaintiff and the defendants to effect the plaintiff's objective."

In opposition to Augustin's motion to intervene, plaintiff argued that Augustin had shown no reason for the court to disturb its prior judgment, and that even if Augustin had appeared earlier, he would have lacked standing in a reformation case

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WELLESLEY, MASS.

because, even though he was an immediate abutter to the locus, he was a stranger to its chain of title.

While the cogent arguments by the plaintiff were given substantial consideration by this Court, it concluded that once Augustin had brought to its attention material information which was not otherwise before it, it was incumbent upon the court to protect against the possibility of fraud or collusion.

While it is true that Augustin is a stranger to the title to the locus and that, as such, he has no direct interest in the reformation of the deeds in question, it is clear that plaintiff presently has record title to the locus, and that the sole reason for the maintenance of this suit is to revise the back title to the locus at a specific point in time so that the Town zoning laws do not preclude the plaintiff's ability to build on her property.

In this context, and in order to attempt to accomplish substantial justice, the Court granted Augustin's motions and allowed him to intervene, judgment was vacated, and the case was scheduled for trial.^{1/}

1/ Land Court Case No. 91756, Augustin v. Building Inspector of the Town of Wellesley, brought by the defendant-intervenor herein pursuant to G. L. c. 185, j 1/2 and c. 240, §14A was disposed of by summary judgment in favor of plaintiff Carlson, a defendant to that action. Carlson correctly argued in that action that the decision of McDonald's Corporation v. Town of Seekonk, 1981 Mass. App. Ct. Adv. Sh. 1508, barred Augustin's action inasmuch as he had not pursued the administrative remedies prescribed in G. L. c. 40A, §7.

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During the subsequent twenty-four months, a plethora of papers was filed by the plaintiff including four motions for summary judgment brought at three to six month intervals, which were disposed of seriatim by each of the judges of this court. Each motion was denied for the reason that the documentation before the court left unresolved the crucial factual questions as to the intentions of the parties to the deeds which plaintiff sought to reform.

The trial date was additionally delayed by requests for continuances and the plaintiff's difficulty in obtaining depositions from the named defendants, one of whom resides in a foreign jurisdiction.

The case came on to be heard on June 3, 1981 and a stenographer was sworn to record the testimony. The plaintiff called no witnesses. Thirteen documents were entered in evidence, by agreement of the parties, some of which were subject to certain reservations by the defendant-intervenor, who also rested without calling witnesses. The named defendants did not appear. All the evidence is incorporated herein for the purpose of any appeal.

There is no dispute as to the record title to the locus. On all the evidence, I find the following facts:

1. Plaintiff is the record owner of Lots 4 and 5 (locus) as shown on a plan entitled "Subdivision of Land in Wellesley, Massachusetts, June 15, 1954, William J. Ford, Jr., Civil Engineer", Land Court No. 3850E (the Plan). See Appendix:

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2. Plaintiff acquired title to locus from Laurance E. Boyden, Jr. by deed dated March 21, 1978 and recorded on March 30, 1978 at Norfolk Registry of Deeds, Book 5447, Page 215.^{2/}

3. As of March 7, 1958, Walter C. Withers, Jr. and Shirley K. Withers, husband and wife, as tenants by the entirety, were the record owners of Lots 3, 4, 5 and 6 as shown on the plan. Record title to Lot 5 remained in the Witherses until April 28, 1967.

4. By deed dated February 29, 1964, Walter C. Withers, Jr. and Shirley K. Withers, husband and wife, conveyed all their right, title and interest in Lot 4 to Richard L. Wilder. Transfer Certificate of Title No. 74796 in the name of Richard L. Wilder was issued on March 2, 1964.

5. By deed dated June 13, 1966, registered as Document No. 274690, Richard L. Wilder conveyed all his right, title and interest in Lot 4 to Walter C. Withers, Jr. for consideration less than \$100.00. (See Transfer Certificate of Title No. 80342).

6. Withers retained record title to Lot 4 until April 28, 1967.

7. By deed dated April 28, 1967, and recorded on May 17, 1967 at Book 4428, Page 15, Walter C. Withers, Jr., former husband of the late Shirley K. Withers,^{3/} conveyed all his right,

2/ All instruments referred to herein as being recorded are recorded in said Registry and all references to registered instruments are to instruments registered at the Land Court division of said Registry.

3/ Shirley K. Withers died on April 1, 1967. (Norfolk Probate No. 162897).

title and interest in registered Lot 4 and unregistered Lot 5 to Russell F. Gooley and Billie E. Gooley, husband and wife as tenants by the entirety. (See Transfer Certificate of Title No. 82271 for Lot 4).

8. By deed dated June 18, 1968 and recorded on June 19, 1968, Russell F. Gooley and Billie E. Gooley, husband and wife, as tenants by the entirety, conveyed all their right, title and interest in Lots 4 and 5 to Laurance E. Boyden, Jr.

9. Plaintiff Carlson took title to both parcels on March 30, 1978 (see Paragraph 2 above).

10. Subsequent to the commencement of this action and after the plaintiff's first motion for summary judgment was denied, two confirmatory deeds with recitals were recorded. Each deed was executed by a named defendant on the stationery of the plaintiff's then counsel of record. The recitals attached to each deed contain long narratives which, in essence, attempted to support the plaintiff's case for reformation.

11. The first deed, recorded on September 24, 1979 at Book 5655, Page 283, is a deed from Walter C. Withers, Jr., in his own right and as surviving tenant by the entirety of Shirley K. Withers, purporting to convey all his right, title and interest in Lots 4 and 5 to Richard L. Wilder.

12. Withers' recitals set forth, inter alia, that the February 29, 1964 deed of Lot 4 from himself and Shirley K. Withers was intended to "completely convey to Richard L. Wilder all the right, title and interest which I and my then

spouse, Shirley K. Withers, held in Lots 4 and 5 and described...
[on the plan]..." He further recites that:

"the purpose of said conveyance [was to] separate from common ownership on that date the locus composed of lots 4 and 5...from the locus composed of lots 3 and 6...all of said lots having then been owned by me and my then spouse...and intending to make such conveyance for the purpose of preserving the independent use of lots 4 and 5 herein, together, as constituting a separate locus for future use as a single family residential building lot henceforth; but through mistake or accident lot 5 was omitted from said deed;..."

13. The second confirmatory deed, recorded on September 28, 1979 at Book 5657, Page 544, is a deed from Richard L. Wilder, purporting to convey all his right, title and interest in Lots 4 and 5 to Walter C. Withers, Jr.

14. Wilder's recitations set forth, inter alia, that the February 29, 1964 deed of Lot 4 from Walter C. Withers, Jr. and Shirley K. Withers was intended to completely convey to him all their right, title and interest in Lots 4 and 5 for reasons identical to those set forth in Wither's confirmatory deed. (See paragraph 12 above); and that the June 13, 1966 deed of Lot 4 from Wilder to Withers was intended to completely convey to the latter:

"all the right, title and interest which I held in land described in the [February 29, 1964] deed to me from said Walter C. Withers, Jr. and as further described in Recital 2, herein, and by the Confirmatory Deed from Walter C. Withers, Jr., to me dated June 22, 1979."

In addition to documentation of record title, two sets of Requests for Admissions served on each of the nominal defendants are in evidence. All the sets attempt to elicit

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admissions regarding the intent of the named defendants at the time they executed the deeds in question.^{4/} A deposition of defendant Wilder taken by the plaintiff on November 25, 1980 is also in evidence. (Exhibit 11)

Additionally, the Town of Wellesley Zoning By-law (as amended through April, 1980) is in evidence. The plaintiff directed the court's attention to page 44 which reads as follows:

"FRONTAGE. There shall be provided for each lot upon which a building or structure is hereafter erected or placed a frontage of not less than sixty (60) feet. This requirement shall not apply to any lot having a frontage of less than forty (40) feet if such lot on June 21, 1951 did not adjoin other land of the same owner available for use in connection with said lot, nor to any lot having a frontage of forty (40) feet or more and less than sixty (60) feet, if such lot on March 23, 1964 did not adjoin other land of the same owner available for use in connection with said lot, nor shall it apply to lots in Business District, Business Districts A, Industrial Districts or Industrial Districts A." ^{5/}

Inasmuch as no testimony was produced at trial, the documentation before the Court is essentially the same as it was when plaintiff brought her fourth motion for summary judgment.

The second set of Requests for Admissions propounded to Richard L. Wilder is accompanied by Wilder's responses. None of the other three sets of Requests was answered by Wilder or Withers. A motion to have these Requests deemed admitted by virtue of defendant's failure to respond was denied by the Court on May 2, 1980.

^{5/} The thrust of plaintiff's argument is that the Witherses, in anticipation of the March, 1964 amendment to the zoning by-law, intended to convey Lots 4 and 5 to a third party (Wilder) to remove Lots 4 and 5 from the same ownership as Lots 3 and 6, thus avoiding the requirement for 60 foot frontage as proposed in the Zoning by-law change. As of that date, Lot 5 had 50.28 feet of frontage on Gilson Road, a col-de-sac, according to the Plan. (See Appendix).

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The issue thus remains whether the plaintiff has established the mutual mistake of the parties, thereby entitling the plaintiff to reformation of the deeds in question.

The grounds for reformation of instruments are well settled in this Commonwealth. There can be no reformation of a written instrument without fraud, accident or mutual mistake. Century Plastic Corp. v. Tupper Corp., 333 Mass. 531, 533 (1956) and cases cited. Where mistake is alleged, reformation is available to parties where there has been a "mutual mistake which is material to the instrument and where no rights of third persons are affected." Beach Associates, Inc. v. Fauser, ___ Mass. App. Ct. ___ (1980) ^{6/}. The mistake of one party is not ground for relief. Century Plastic Corp., supra, at 534.

In the present case, where mutual mistake is alleged, the plaintiff's burden of proof is more stringent than a preponderance of the evidence and the deeds will be reformed only upon clear and convincing proof of mutual mistake. Covich v. Chambers, ___ Mass. App. Ct. ___ (1979) ^{7/}. See also Kidder v. Greenman, 283 Mass. 601, 614 (1933) (discussing, without deciding the meaning of "full, clear and decisive" proof necessary to reform or cancel an instrument on the ground of mutual mistake).

^{6/} 1980 Mass. App. Ct. Adv. Sh. 525, 533.

^{7/} 1979 Mass. App. Ct. Adv. Sh. 2345, 2351 - 2352.

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On all the evidence, and for the reasons stated below, I find and rule that plaintiff has not sustained her burden of proof that Lot 5 was excluded from the deeds conveying and reconveying Lot 4 due to the mutual mistake of the parties thereto.

In order to establish the mutual mistake of the named defendants, plaintiff relies primarily on confirmatory deeds executed by Wilder and Withers and recorded during the pendency of this litigation, and on unanswered Requests For Admissions propounded by plaintiff to each named defendant.

The confirmatory deeds (Exhibits 3 and 4), while part of the record title to locus, are of little evidentiary value. This is particularly true of the confirmatory deed and recitations of defendant Wilder who contradicted his recitations during his deposition, taken subsequent to the recording of his confirmatory deed. A fair reading of Wilder's deposition (Exhibit 6) indicates that he executed the confirmatory deed as an accomodation to plaintiff's counsel and relied on the latter's representations as to the truth of the recitations therein, having no independent recollection of his intention either as grantee when he received the deed to Lot 4 from the Witherses or as grantor when he later deeded Lot 4 back to Withers. (pp. 27-35).

Additionally, both confirmatory deeds were drafted by plaintiff's counsel and executed on his stationery. In light of the totality of the circumstances surrounding the preparator

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and submission of the confirmatory deeds, and particularly in view of Wilder's subsequent statements which are inconsistent with his recitations, sufficient suspicions are accordingly raised which permit me to give slight, if any, evidentiary effect to his confirmatory deeds and recitations.

To prove Withers' intentions at all materials times, both as grantor and grantee of Lot 4, the plaintiff relies exclusively on the statements contained in the confirmatory deeds and recitations, none of which were subject to cross examination either at trial or during a deposition, and on unanswered Requests for Admissions.

Plaintiff argues that pursuant to Mass. R. Civ. P. 36(a), all matters contained in the unanswered sets of Requests must be deemed admitted by virtue of defendant's failure to respond. The Court agrees and did, therefore, admit the sets into evidence.

The Court, however, cannot agree, as plaintiff urges, that pursuant to Rule 36(b) the statements contained in the Requests for Admissions are conclusively established.

The Court is cognizant of the mandatory language of Rule 36(a) and (b), but I am unpersuaded that technicalities of Rule 36(b) can be properly applied to the unusual facts and posture of this case.

A literal reading of Rule 36(a) and (b) indicates that properly framed Requests For Admissions are not only conclusively binding upon the party who fails to answer, but can also form the basis for summary judgment if no genuine issues of material fact

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remain as a result. Mass. R. Civ. P. 56(c). Contra, Pickens v. Equitable Life Assurance Society, 413 F. 2d 1390 (5th Cir. 1969), Silvax v. Baker Tractor Corp., 1979 Mass. App. Div. Adv. Sh. 97.

Notwithstanding the above, I choose not to apply literally Rule 36(b) in this case for two reasons. First, Messrs. Withers and Wilder are nominal defendants, neither of whom are embroiled in a controversy with the plaintiff. In fact, both named defendant were reticent to become involved in this litigation in any way, having no present interest in the locus. Rule 36 presupposes the existence of controversy between parties and, like its federal counterpart, is a vehicle through which facts and issues in controversy can be narrowed prior to trial. It is not meant to be used as a vehicle for circumventing one's burden of proof of essential facts.

In this case, if I were to rule that all facts contained in the three unanswered sets of Requests For Admissions were conclusively established, the case would be disposed of on the strength of Rule 36. I do not believe that the Rule is meant to be interpreted in such a way as to allow a plaintiff to name nominal disinterested defendants and then build a case devoid of adversity by drafting Requests perhaps knowing they will not be answered. A strict application of Rule 36 in this case would, in my view, be a perversion of the Rules of Civil Procedure and would substantially undermine this court's search for truth.

In addition, even if the statements contained in the unanswered Requests for Admissions are conclusively binding upon

Withers and Wilder and operate to estop them from introducing contradictory evidence, Rule 36 does not prevent Augustin, the defendant-intervenor, from introducing evidence by deposition or otherwise that rebuts evidence introduced by operation of the rule.

In the instant case, neither Withers nor Wilder appeared at trial so there was no attempt on their part to circumvent the operation of Rule 36. Augustin, however, has introduced contradictory evidence in the form of 1) statements made by Wilder during the course of deposition by Augustin's counsel and 2) recitations in a deed of Lot 6 from Walter C. Withers to Laurance E. Boyden, Jr. and Phyllis K. Boyden (Exhibit 5) describing Lot 6 as bounded "NORTHEASTERLY again by land of Walter C. Withers, Jr.". This deed is dated May 15, 1965 and is at least some evidence, though not conclusive evidence, that as of that date (after he conveyed Lot 4 to Wilder and before Wilder reconveyed Lot 4 to him) Withers had knowledge of his continuing ownership of Lot 5.

Even assuming arguendo that by operation of Rule 36 plaintiff has succeeded in conclusively establishing the mistaken omission of Lot 5 from the February 29, 1964 conveyance of Lot 4 from the Witherses to Wilder, I find that plaintiff has failed to establish either defendants' intent in the reconveyance of Lot 5 by deed dated June 13, 1966. No Requests For Admission sought to elicit the intent of either Withers or Wilder as to the 1966 conveyance. Therefore, notwithstanding Augustin's

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introduction of Wilder's deposition and Withers' deed of Lot 5, I find and rule that plaintiff has not clearly and convincingly established the mutual mistake of the named defendants as to the reconveyance deed executed on June 13, 1966.

Additionally, no evidence was introduced at trial as to the intent of Shirley K. Withers, now deceased, who was a tenant by the entirety with her husband, Walter C. Withers, Jr., and was a co-grantor in the February 29, 1964 deed to Wilder.

In any event, even if plaintiff had established her case, the objective of Withers and Wilder at the time of the initial conveyance of Lot 4 would have been to manipulate lot ownership in such a way as to circumvent an imminent zoning amendment to the town of Wellesley by-laws. The Courts of this Commonwealth have not favored manipulations which "attempt to preserve non-standard lots for building purposes." Giovannucci v. Board of Appeals of Plainville, 4 Mass. App. Ct. 239, 243 (1976), dir. app. rev. den. 370 Mass. 867 (1976), citing Screnti v. Board of Appeals of Wellesley, 345 Mass. 343, 352 (1963).

For all the foregoing reasons, I rule that the plaintiff, Ellyn G. Carlson, has failed to prove by clear convincing evidence that Lot 5 was omitted from the deeds in question by the mutual mistake of Withers and Wilder. The plaintiff is not, therefore, entitled to reformation.

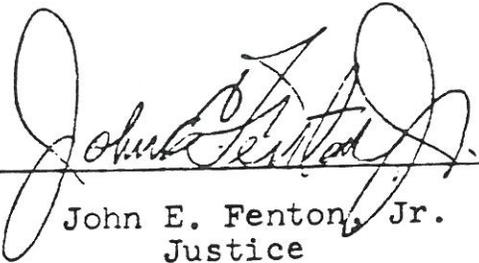
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Both the plaintiff and defendant-intervenor have submitted requests for findings of facts and rulings of law and I find and rule as follows:

Plaintiff's Requests No. 1, 12, 13, 15 and 16 are granted and Nos. 2, 4, 5, 14 and 17 are denied. While requests 3, 7, 8, 9, 10 and 11 appear to be superficially correct, each is inapplicable to the facts found and I so rule. Plaintiff's request No. 6 is granted, but the court makes note of the inherent, independent obligation of the court to do substantial justice in the absence of adverseness.

Defendants' requests Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, 17 and 18 are granted. Requests Nos. 13, 15, and 25 are denied. Construing defendants' requests No. 19, 20, 21, 23 and 24 containing the language "insufficient evidence" to mean insufficient to carry the plaintiff's burden of clear and convincing proof which is required in a reformation case, I grant said requests.

Judgment to enter accordingly.



John E. Fenton, Jr.
Justice

February 5, 1982

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DEPARTMENT OF THE TRIAL COURT

Norfolk, ss.

Miscellaneous
Case No. 90804

ELLYN G. CARLSON,
Plaintiff

vs.

WALTER C. WITHERS, JR.
and RICHARD L. WILDER,
Defendants
and ROLF AUGUSTIN,
Defendant Intervenor

J U D G M E N T

This case came on to be heard and was argued by counsel and, thereupon, the court having ruled that the plaintiff is not entitled to reformation, it is hereby

ADJUDGED and ORDERED that the plaintiffs complaint be, and hereby is, dismissed.

By the Court. (Fenton, J.)

Attest:

Jeanne M. Maloney
Deputy Recorder

A TRUE COPY
ATTEST:

Jeanne M. Maloney

DEPUTY RECORDER

February 5, 1982

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ZONING BOARD OF APPEALS

FRANCIS L. SWIFT, Chairman
HENRY H. THAYER
WILLIAM O. HEWETT
WILLIAM E. POLLETTA
WILLIAM F. CULLINANE
FRANKLIN P. PARKER

KATHARINE E. TOY
Administrative Secretary
Telephone
235-1664

John A. Donovan, Jr.

Appeal of Ellyn G. Carlson

Pursuant to due notice the Permit Granting Authority held a public hearing in the hearing room on the second floor of the Town Hall at 8:45 p.m. on June 8, 1978, on the appeal of Ellyn G. Carlson, from the refusal of the Inspector of Buildings to issue a permit for the construction of a dwelling on Lot 4 and Lot 5, numbered 23 Gilson Road. The reason for such refusal was that said parcel of land contained less than the required sixty-foot frontage as specified in Section XIX of the Zoning By-law.

On May 22, 1978, the Inspector of Buildings notified the appellant in writing that a permit could not be issued for the construction of a dwelling on the lots involved as said parcel of land contained less than the required sixty-foot frontage as required in Section XIX of the Zoning By-law.

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On May 22, 1978, the appellant took an appeal from such refusal and thereafter due notice of the hearing was given by mailing and publication.

Nicholas Soutter, attorney for the appellant, explained in detail the reasons for the appeal.

Mark D. Shuman, attorney representing Mr. and Mrs. Rolf M. Augustin, Jr., 19 Bradford Road and Mr. and Mrs. Jon L. Plexico, 15 Gilson Road, stated that an examination of the Norfolk Registry of Deeds revealed that as of the critical date, March 23, 1964, the front parcel of the petitioner's land which contains 50.28 feet of frontage on Gilson Road, was owned by a person who also owned an adjacent parcel which could have been used together with the under-sized lot to make a lot conforming with the 60 foot frontage requirement of the by-laws. Therefore, the condition set forth in the Zoning By-law providing a basis on which an exception could be founded not having been met, the lot cannot be built upon. He felt that the same information was available to the appellant whose responsibility it was to conduct a similarly thorough examination of the Registry records and not rely on the records of the Town. He further stated that Mr. and Mrs. Augustin and Mr. and Mrs. Plexico both purchased their abutting properties and further developed them with the knowledge from recorded documentation at the Registry of Deeds, that the non-developed land abutting theirs and which is the subject of the appeal could not be built upon because it was a non-conforming lot. He also submitted a brief to become part of the record, which covered completely his opposition to the granting of the variance.

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Letters opposing the granting of the variance were received from the following: Mary A. Taylor and Margaret H. Magnuson, 15 Bradford Road, Peter B. Sholley, 31 Bradford Road, Amelia S. Archibald and R. Gordon

Archibald, 1 Gilson Road and Joycelyn C. Austen, 34 Bradford Road.

Statement of Facts

The property involved is located within a Single Residence District requiring a minimum lot area of 20,000 square feet. The 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 culdesac, has a frontage of 50.28' rather than sixty feet as required by the Zoning By-law.

The appellant seeks a variance which will allow the construction of a dwelling on the parcel involved with a frontage less than the required sixty feet. Section XIX of the Zoning By-law provides that:

"There shall be provided for each lot upon which a building or structure is hereafter erected or placed a frontage of not less than sixty (60) feet. This requirement shall not apply to any lot having a frontage of less than forty (40) feet if such lot on June 21, 1951 did not adjoin other land of the same owner available for use in connection with said lot, nor to any lot having a frontage of forty (40) feet or more and less than sixty (60) feet, if such lot on March 23, 1964 did not adjoin other land of the same owner available for use in connection with said lot, nor shall it apply to lots in Business Districts, Business Districts A, Industrial Districts or Industrial Districts A."

It was explained by the appellant's attorney that an investigation had been made through the Town records to determine whether the subject parcel was a buildable lot for a single family dwelling. Those records showed that the parcel involved was held under a separate ownership from adjacent properties on the critical date, March 23, 1964, and, therefore, met the criteria necessary for an exception to the by-law. Based on this information, the appellant purchased the property and now owns title to said lots. An application was filed for a building permit and it was at that time that it was discovered that the Town records were incorrect. The records in the Dedham Registry of Deeds revealed only one deed recorded to the former owner of the property and that covered Lot 4 only. Lot 5 was un-registered land in the Land Court and was owned in common ownership with the adjacent house lot.

The attorney urged the Board to grant the variance as he felt that a dwelling on the parcel involved would not prove detrimental to the public good and could be granted without nullifying or substantially derogating from the intent or purpose of the Zoning By-law. In his opinion, a literal enforcement of the by-law would result in undue hardship to the appellant who has incurred expense in excess of \$22,000.00 for a lot which will be virtually worthless.

It was also stated that the appellant endeavored to purchase a small piece of land from the adjoining neighbor which would provide a sixty-foot frontage as required, but was unable to do so.

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Decision

On June 15, 1954, a parcel of land lying on the west side of Cliff Road, with a frontage on said public road measuring 306.63 feet and a frontage on Gilson Road, a private culdesac, measuring 121.76 feet, was subdivided as shown on a plan drawn by William J. Ford, Jr., a civil engineer. This subdivision consisted of six lots, two of which lots are on Cliff Road, two of which have no frontage on any roadway, and the remaining two lots divide the frontage on Gilson Road.

Lots 4 and 5, the subject matter of this appeal, are the ones located on the western end of the subdivision, lot four lying to the south of lot five, having no frontage on any way, lot five being contiguous to and lying to the north of lot four, having a frontage on Gilson Road, measuring 50.28 feet.

In 1958, one Withers and his wife, became the owners of lots four and five. Lot four is a registered lot of land, and lot five is unregistered. The status of title to both lots remained in the name of Withers and his wife until 1964. On February 29, 1964, Walter C. Withers and his wife Shirley executed a deed, for consideration, with quitclaim covenants to one Wilder, conveying to Wilder lot number 4 as shown on the Ford plan dated June 15, 1954. This deed was registered at Norfolk Registry of Deeds Land Court Division on March 2, 1964, as Document No. 251938, certificate No. 74796 in Book 374 at page 196.

Evidence of title to Lot 4 for the period of time between the conveyance to Wilder and April 1967 was not offered, but the Norfolk Deed Records indicate Wilder reconveyed said lot to Withers in 1966.

Prior to 1964 and on March 23, 1964, Withers was the record title holder of Lots 6 and 3, shown on the Ford Plan. Lot 6 has frontage on Gilson Road measuring 71.43 feet and adjoins Lot 5, also fronting on Gilson Road.

On April 28, 1967, Withers, whose wife Shirley had deceased and whose next wife Celia joined in the deed of conveyance of said date, conveyed Lots 4 and 5 to one Gooley and wife. In 1968, the Gooleys conveyed the same Lots 4 and 5 to one Boyden and wife.

The petitioners became the legal title holders of Lots 4 and 5 in 1973 and applied for a permit to erect a structure on said lots. On May 22, 1978, the Inspector of Buildings refused to issue the permit on the grounds that the Lots did not conform to the requirements of the Zoning By-law relative to the sixty-foot frontage, and it is from this refusal that this appeal is taken.

The appellants make this appeal under the provisions of Section XXIV C of the Zoning By-law which provides for an appeal to be taken by any person aggrieved by reason of his inability to obtain a permit or enforcement action from any administrative office under this Zoning By-law and the Zoning Act. The appeal was timely taken and within the thirty days from the decision of the Inspector of Buildings.

The appellants, in presenting their grievance, suggest that they are also seeking a variance from the terms of Section XIX of the Zoning By-law. Although there appears nothing in the appeal, as filed, concerning a petition for a variance under Section XXIV D, the public notice contains

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no reference to such a request, and those opposed to the grant of relief base their opposition on the terms of Section XXIV D, the Permit Granting Authority makes its decision relative to both an appeal and a petition for a variance.

As to variances: in order to grant a variance from the terms of this Zoning By-law, the Permit Granting Authority must specifically find that literal enforcement of the provisions of the Zoning By-law would involve substantial hardship financial or otherwise, to the petitioner or appellant owing to circumstances relating to: i) soil conditions, ii) shape, or iii) topography of such land or structures, especially affecting such land or structures but not generally affecting the zoning district in which it is located; and the hardship shall not have been self-created; and desirable relief may be granted without substantial detriment to the public good, and without nullifying or substantially derogating from the intent or purpose of this Zoning By-law.

The Permit Granting Authority is unable to make this required finding because there is a void of evidence to support such a finding.

As to the refusal of the Inspector of Buildings to issue a permit: The Inspector is charged with the enforcement of the Zoning By-law. On the state of the recorded title to the land on which they sought a permit to build, the Inspector acted in accordance with the terms of Section XIX of the By-law. On the evidence presented at the public hearing, and on our own investigation, the criteria necessary to make an exception to the terms of the By-law is not met. On the date, March 23, 1964, Lot 5, one of the two lots now owned by the appellant, stood in the name of the persons who owned adjoining land available for use in connection with Lot 5.

Therefore, it is the unanimous decision of this Board, that it cannot grant a variance, and the appeal from the action of the Inspector of Buildings is dismissed.

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Francis L. Swift
William O. Hewett
Franklin P. Parker

Filed with Town Clerk 7/24/78

A true copy
Attest:

Alice L. Mann
Town Clerk

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

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



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Petition of Ellyn G. Carlson, continued

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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

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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

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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

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Petition of Ellyn G. Carlson, continued

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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

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