

**ZONING BOARD OF APPEALS**

TOWN HALL • 525 WASHINGTON STREET • WELLESLEY, MA 02181

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ZBA 97-70

Petition of Amy and Victor Corda  
29 Woodlawn Avenue

Pursuant to due notice, the Permit Granting Authority held a Public Hearing on Thursday, August 21, 1997 at 8 p.m. in the Selectmen's Meeting Room (Conference Room B) at the Town Hall, 525 Washington Street, Wellesley, on the petition of AMY AND VICTOR CORDA requesting a variance from the terms of Section XIX (Table 2 and Table 3) and pursuant to the provisions of Section XXIV-D of the Zoning Bylaw to allow their existing nonconforming dwelling with a minimum frontage of 75 feet and a minimum front yard width of 74.06 feet to remain at 29 WOODLAWN AVENUE, in a Single Residence District.

On August 4, 1997, the petitioners 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 John Burke, counsel for the Cordas, who were also present. Mr. Burke gave a short history of the problem. In 1995, the petitioner presented an ANR (Approval Not Required) Plan creating three lots to the Planning Board for approval. At that time, Wellesley Zoning Bylaw, Section XIX had "Table Two" which was in effect. Building permits based on the survey were granted. The original surveyor surveyed the individual lots with the houses located on the lots. Three buildings were constructed, and subsequently, three foundation certifications were also issued by the surveyor.

Mr. Burke explained that it was not until June of this year, that the surveyor for the buyer's bank discovered a zoning error and a setback problem with the original survey. The required side yard was supposed to be 20 feet. It was discovered that the actual setback was 19.1 feet. The petitioners requested McCarthy & Sullivan of Natick to resurvey the property. The ANR plan before the Board is the McCarthy & Sullivan survey. McCarthy & Sullivan showed that there were numerous errors in the plan done by the original surveyor, which were the result of a misinterpretation of a benchmark from which the surveyor sited off of Washington Street, because of several relocations which occurred in 1904. There was also a misinterpretation of a set bound at the other end of the property.

The result was that there were minor side yard and front yard infractions. The current plan is an attempt to bring the lots and the houses into the maximum compliance possible in this situation. The Planning Board has reviewed the plan and concluded that the problem cannot be resolved under the Subdivision Control Law.

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In April of this year, Town Meeting amended Section XIX of the Zoning Bylaw by creating "Table Three", which has new dimensional and setback requirements for newly created lots. The Attorney General's office struck part of the new bylaw by rejecting January 16, 1997 as the effective date. The problem with the partial rejection of the bylaw is that it threw into doubt as to the effective date of "Table Three".

Regardless of which Table is in effect, two of the properties would not conform, and the third property would not conform only if Table Three is in effect. If Table Two is in effect, #29 Woodlawn Avenue has the proper frontage, but not the required front yard width at the building line, as it is 4 inches short of the required 75 feet. The #27 Woodlawn Avenue property has the required frontage of 75 feet, but a front yard width of 74.2 feet at the building line. The property at 185 Washington Street would conform.

If Table Three applies, 90 feet of frontage is required as is 90 feet of front yard width. Neither 29 Woodlawn Avenue, nor 27 Woodlawn Avenue would have these dimensions. The property at 185 Washington Street would have a minimum rear yard setback of 10 feet, as the new rear yard setback is 18 feet.

The petitioners are requesting variances on all three properties, which would state that dimensional variances are granted, if needed and to the extent necessary depending on which Table pertains, to maintain these structures in their existing locations according to the current ANR Plan.

The petitioners are in a hardship situation because their only option is to remove the house at 27 Woodlawn Avenue. This would be a substantial financial hardship, which has not been self-created. The petitioners acted in good faith and relied on a professional registered land surveyor.

The Board asked what were the dates of the building permits. Mr. Burke said the building permits were issued in June and November of 1996, and the Zoning Certifications in June and July of 1996 and March of 1997. It wasn't until June of this year that the mistake was discovered. Under Table Two, the original ANR Plan was protected from the changes in Table Tree, but once the lot lines were changed, the lots were no longer afforded that protection. He added that the Planning Board has voted to recommend the grant of the variances.

Mary Louise Coates and Edward Coates, 2 Elm Street, expressed opposition to the granting of all three variances.

Scott Shepherd, 37 Woodlawn Avenue, supported the grant of the variance for 29 Woodlawn Avenue, but opposed the grant of variances for the other two properties.

Amy Axelrod, 189 Washington Street, expressed support for the three petitions.

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Statement of Facts

The subject property is located at 29 Woodlawn Avenue, in a Single Residence District, on 12,065 square foot lot with a frontage of 75 feet and a front yard width of 74.06 feet.

The petitioners are requesting a variance from Section XIX (Table Two) to allow the existing nonconforming dwelling with less than the front yard width of 75 feet to remain and a variance from Section XIX (Table Three) of the Zoning Bylaw to allow the existing nonconforming dwelling with less than the required frontage of 90 feet and less than the required front yard width of 90 feet to remain.

A Plan of Land dated July 17, 1997, signed by Joseph R. Sullivan, Registered Professional Land Surveyor; a Mortgage Survey Plan dated 6/23/97 signed by Paul J. DeSimone; a copy of the Zoning Certification Form for Building Permit #29563, dated March 19, 1997, signed by Robert E. Devlin, Registered Land Surveyor; Addendum A, which outlines the Facts, drafted by John M. Farrington, legal counsel; and photographs were submitted.

On August 12, 1997, the Planning Board reviewed the petition and voted to recommend approval of the petition.

Decision

This Authority has made a careful study of the materials submitted and the information presented at the hearing. The subject property does not conform to either Table Two or to Table Three, Section XIX of the Zoning Bylaw as noted in the foregoing Statement of Facts.

It is the opinion of this Authority that the petitioners sustain a definite hardship which was not self-created, but created by the original land surveyor and exacerbated by a change in the Zoning Bylaw. It is not within the jurisdiction of this Authority to make a determination as to whether or not Table Three of Section XIX of the Zoning Bylaw is or is not currently in effect or what the effective date should be. It is within the jurisdiction of this Authority to grant zoning relief from hardship which has not been self-created.

It is the opinion of this Authority that a literal enforcement of the provisions of Section XIX (Tables Two and Three) of the Zoning Bylaw would involve a substantial hardship to the petitioners, and that desirable relief may be granted without substantially derogating from the intent or purpose of the Zoning Bylaw.

Therefore, the requested variance is granted, as voted unanimously by this Authority at the Public Hearing, to allow the dwelling at 29 Woodlawn Avenue, with a frontage of 75 feet

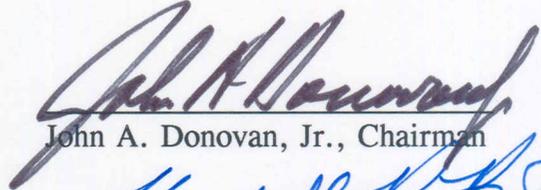
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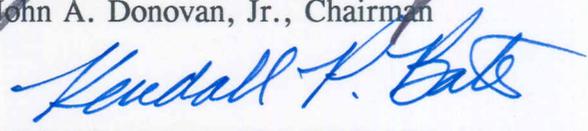
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and a front yard width of 74.6 feet to remain under both Table Two and Table Three of Section XIX of the Zoning Bylaw, as shown on the submitted ANR Plan dated July 17, 1997, signed by Joseph R. Sullivan.

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  
Inspector of Buildings  
edg

  
John A. Donovan, Jr., Chairman

  
Kendall P. Bates

  
Robert A. Bastille

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ADDENDUM A

This is an application by the owners of 27 Woodlawn Avenue, 29 Woodlawn Avenue and 187 Washington Street for a variance from the requirements of Section XIX, Yard Regulations of the Town of Wellesley Zoning Bylaw, as more specifically described below.

The basis for this request is that failure to grant the required variance will result in a hardship on the current owners of the property and subsequent owners of the property; that the hardship was not of the owner's creation and that a variance can be granted without substantial detriment to the public good and without substantially derogating from the intent or purpose of the Zoning Bylaw

Facts

Each of the properties in question is one of three lots at the corner of Washington Street and Woodlawn Avenue with street addresses of 27 and 29 Woodlawn Avenue and 187 Washington Street. These three lots were created by an Approval Not Required (ANR) plan recorded in the Norfolk Registry of Deeds and referenced as Plan No 849 of 1995 in Plan Book 435 and Plan No 178 of 1997 in Plan Book 446. Each of these recorded plans was prepared by Robert Devlin, Registered Land Surveyor.

Based on the survey lines and dimensional requirements from these recorded plans, the Town building inspector issued building permits and houses were constructed on all three lots. Foundation locations and other Zoning Bylaw, Section XIX yard regulation standards were checked by this same Registered Land Surveyor during the course of construction and relied on by the Town building inspector and the owner of this property.

One of these three properties, 29 Woodlawn Avenue, was under a contract of sale from the applicants to a buyer. On June 23, 1997 the engineer for the buyers' bank financing the 29 Woodlawn Avenue purchase stated that the side yard setback at the rear corner of the house was 19'1" and not the required 20' required by Section XIX for this zone. See Exhibit A.

This caused the owners to hire MacCarthy and Sullivan, Engineering Inc. to check the survey work of the original surveyor and to see if the mortgage surveyor's conclusions were correct. Joseph R. Sullivan, Registered Land Surveyor resurveyed all three lots and discovered that the original engineer had made a fundamental mistake when locating the survey bounds on Washington Street (likely because of a taking and widening of Washington Street years ago). This causes a number of engineering calculations to be incorrect.

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The resurveyed MacCarthy and Sullivan plan is submitted with this Application. Based on the resurveyed plan, all three lots, and the structures on each of the three lots meet the sectional dimensional requirements that were in effect when the plan was recorded in 1995 with two minor exceptions noted below. In order to address the side yard set back issue raised in connection with right rear corner of 29 Woodlawn Avenue, the interior lot lines between 29 and 27 Woodlawn Avenue and between 27 Woodlawn Avenue and 187 Washington Street have been adjusted.

The 1997 Wellesley Town Meeting adopted a new table of yard regulations with Warrant Article 29 at the April 8, 1997 session. The effective date for new Table 3 was voted by Town Meeting as January 16, 1997 and this effective date is the first sentence in new Table 3. The office of the Attorney General in its review of the 1997 Annual Town Meeting zoning articles struck the first sentence of new Table 3, which is the effective date language, thus leaving Table 3 without a Town Meeting voted effective date. Table 2 was also modified at the 1997 Annual Town Meeting to make it effective prior to January 16, 1997.

The Attorney General's office has stated verbally that its their view all of Article 29 and Table 3 needs to be revoked at a subsequent town meeting.

The applicants believe that under MGL ch 40A sec 6, minor engineering corrections to already existing plans are allowed under the requirements in effect at the time the plan being corrected was recorded at the Registry of Deeds. In this case, the Section XIX, Table 2 yard regulations would apply. Each of these requirements is met for all three properties as shown on the July 17, 1997 corrective plan with the following exceptions:

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- 1) Table 2, minimum front yard width. The total front yard width requirement for 29 Woodlawn Avenue is less than required because the right front lot line has been angled slightly. It is short of the required 75' requirement by about 0.4 feet.
- 2) Table 2 minimum front yard width. The total front yard width requirement for 27 Woodlawn Avenue is less than required because the right front lot line has been angled slightly. It is short of the required 75' requirement by about 0.8 feet.

If the new Table 3 requirements were to be applied to the corrective plan there are three requirements that would not be met. These are:

- 1) The rear yard set back for 187 Washington Street is 10'05" inches at the closest point and not 18'.
- 2) The frontage and front yard width calculations for 27 and 29 Woodlawn Avenue are based on the Table 2 75' frontage requirement and not the

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Table 3 90' frontage requirement. All three of these properties are owned by the applicants and together have 330' feet of frontage, but to reallocate the aggregate frontage at a minimum of 90' to each lot would result in a complex series of driveway and walkway easements.

Thus the following findings and variances are requested in the alternative (Note although the applicants have used a single narrative because all three of these lots result from a 1995 Approval Not Required Plan, a variance request is filed separately for each Lot.)

- 1) A finding is requested that that plan titled Plan of Land in Wellesley, Mass dated July 17, 1997 by MacCarthy and Sullivan Engineering Inc represents a correction to those plans filed at the Norfolk Registry of Deeds and recorded as Plan No 849 of 1995 in Plan Book 435 and Plan No 178 of 1997 in Plan Book 446. Further, if applicable and to the extent applicable a variance is granted from Section XIX, yard regulations, Table 3 and a finding made that Table 2 is applicable.

A variance from the Table 2, front yard width requirements is requested for that property known and number as 27 Woodlawn Avenue.

A variance from the Table 2, front yard width requirements is requested for that property known and numbered as 29 Woodlawn Avenue.

It is submitted that a lesser showing of hardship is appropriate for dimensional variances because they usually do not change the character of the zoning district or endanger nearby properties with an inconsistent land use. DiGiovanni v. Board of Appeals of Rockport, 19 Mass.App.Ct. 339, 474 N.E.2d 198 (1984); 6 P. Rohan, Zoning and Land Use Controls 43.02 [3] (1983).

- 2) In the alternative, the following variances are requested from Section XIX, Yard Regulations, Table 3, to the extent such Table is in effect and applicable.
  - a A variance from the 18' rear yard set back to 10' is requested for 187 Washington Street.
  - b A variance from the 90' frontage and Table 3 front yard width requirements is requested for 27 Woodlawn Avenue.
  - d A variance from the 90' frontage and Table 3 front yard width requirements is requested for 29 Woodlawn Avenue.

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