



## ZONING BOARD OF APPEALS

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ZBA 2012-68  
 Petition of Scott Hayes  
 28 Hickory Road

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 WELLESLEY MA 02482  
 2012 OCT 16 A 10:34

Record Owner of Property: Andrew & Sarah Wertkin

Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, October 4, 2012, at 7:30 p.m. in the Juliani Meeting Room, 525 Washington Street, Wellesley, on the petition of SCOTT HAYES requesting a Variance pursuant to the provisions of Section XIVE, Section XIX and Section XXIV-D of the Zoning Bylaw to correct a six inch garage encroachment in the left side yard setback due to a surveying error when the current house was constructed in 2010, at 28 HICKORY ROAD, in a 10,000 square foot Water Supply Protection District.

On July 23, 2012, the Petitioner 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 Laurence Shind, Esq., representing Scott Hayes, (the "Petitioner"). Also present were George Connors, Esq. and Susan Sullivan, Foresite Engineering

Mr. Shind said that the request is for a Variance that will allow for an existing 6 inch left side yard setback encroachment. He said that the house was constructed in 2010.

Mr. Shind reviewed the history of the property and legal grounds for approval of the application.

Mr. Shind said that the lot is conforming. He said that the current house is a center entrance colonial with a two-car garage. He said that the house contains 3,450 square feet of living area. He said that the current house was sited roughly in the middle of the lot as close as possible to the location of the prior house to fit it in with its neighboring homes. He said that the intent was to adhere to all of the setback and dimensional requirements.

Mr. Shind said that due to a survey error that was derived from an unclear and incomplete 1953 subdivision plan of this portion of the street, the shape and configuration of the house on the lot was not properly determined. He said that the left side yard setback is not in compliance with the 20 foot requirement by 6 inches. He said that noncompliance was not discovered until the neighbor next door had her own survey conducted after this house was constructed. He said that once Foresite Engineering reviewed the discrepancy and the nonconformity was discovered and confirmed, the Applicant brought the problem to the attention of the Building Department and the application for a Variance was subsequently filed with the Zoning Board of Appeals.

Mr. Shind discussed the grounds that support the application for a Variance. He said that due to the unclear and misleading 1953 subdivision plan of this portion of Hickory Road, they were unable to determine shape and layout of the lot. He said that it was not properly calculated at the time that the Building Permit and As-Built applications were filed.

Mr. Shind said that the 6 inch encroachment was inadvertent and unintentional. He said that the encroachment could be considered to be de minimis. He discussed *Capodilupo v. Vozzella*, 46 Mass.App.Ct.224. (1999), and *Steamboat Realty, LLC v. Zoning Board of Boston*, 70 Mass.App.Ct. 601. He said that the two cases support the proposition that a local Zoning Board may afford relief in a situation where the encroachment is spatially inconsequential. He said that in the *Capodilupo* case, the encroachment was roughly 5 inches.

Mr. Shind said that the cases recognized that an unintentional violation can be permitted.

Mr. Shind said that if the violation does not deprive any neighboring landowner of beneficial use of their land, it is something that can be considered. He said that the de minimis nature of this violation does not have a detrimental impact on the immediate neighbors.

Mr. Shind said that property next door to the left at 24 Hickory Road received a Variance in 1956 for a 6 foot side yard encroachment to the shared lot line with 28 Hickory Road. The Board said that Variance was granted at a different time and under a different Zoning Bylaw.

Mr. Shind said that the Courts have allowed local Zoning Boards to grant relief where the cost of removing an encroachment, in the Courts' eyes, is greatly disproportionate to the benefit to the public of asking it to be removed.

The Board said that this probably meets the requirements for equitable relief. The Board said that it was more concerned about the Engineer's error. The Board questioned if the Engineer was negligent. The Board said that Foresite Engineering has another matter on the agenda for this Public Hearing.

Susan Sullivan, Professional Land Surveyor, displayed drawings (retained by Proponent) that showed that the intention was always to put the house in the middle of the lot. She said that needing space was never an issue. Ms. Sullivan displayed the Subdivision Plan (retained by Proponent). She said that they had a CAD Operator who has worked with Foresite Engineering for years put in the plan. She said that the error shows up on the length on the inside of the road. She said that it is standard to be the entire length on a straight away. She said that, in this case, there is a tiny number written in that is in addition to the 376.26 feet. She said that the additional number of 3.34 feet was originally missed.

The Board asked Ms. Sullivan how long she has been a Professional Surveyor. Ms. Sullivan said that she has been a Professional Land Surveyor for approximately 20 years.

Ms. Sullivan said that when looking at the road layout, the math seemed to be fine. She said that because there are missing dimensions there is no way to add up the frontages.

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The Board asked about the 376.26 dimension. The Board asked if that is supposed to be the length of Hickory Road. Ms. Sullivan said that the actual dimension is 376.26 plus 3.34. She said that the dimension runs to the end of the lots not to the circle.

The Board asked how that affected the other side of the street. Ms. Sullivan said that they held the dimension for the North side and went up and around in front of the lots on the South side. She said that the back of the Subdivision also does not have full dimensions. She said that when they did their survey, they tied into three monuments, which held very well on the left side of the error.

Ms. Sullivan said that when Everett Brooks, Professional Land Surveyor, representing the neighbor at 24 Hickory Road, came back with different dimensions, she went out to redo everything and then discovered the missing piece. She said that by moving everything over by 3.34 feet, the lot line was shifted over closer to the house.

The Board asked if Ms. Sullivan has had any conversations with the abutters. Ms. Sullivan said that she spoke with the neighbor at 24 Hickory Road who put in the fence.

The Board asked if Foresite Engineering has instituted any changes to their procedures so that something like this will not happen again. Ms. Sullivan said that she will now do everything herself from scratch. She said that, at the time that this survey was done, she had been diagnosed with breast cancer and was somewhat distracted.

The Board said that it relies heavily on professional land surveyors. The Board said that, in addition, architects and builders have to rely on the surveyors' work to ensure that everything is done correctly.

The Board said that, in this case, the intent was to site the house with more than allowed setback area.

Bonnie Chick, 32 Willow Road, said that she has lived there for 36 years. She said that she had sent a letter and a picture of a hemlock hedge to the Board. She said that she hired Everett Brooks to survey her land. She said that she was relatively sure that the hemlocks were located on her property. She said that years ago they had to install a fence around the property because of a swimming pool. She said that the back line was surveyed and it showed that the hemlocks had been planted on her property even though it was done by the owner who lived at 28 Hickory Road. She said that she had the hemlocks cut deeply to install the wire mesh fence. She said that she had contributed a fair amount of money over the years to maintain the hemlock trees.

Ms. Chick said that she called Roger Kane, the Builder, early on in the project for 28 Hickory Road and asked him not to take the hemlock trees down. She said that he told her that if the hemlock trees were on the 28 Hickory Road property, he may have to take them down to create more of a backyard.

Ms. Chick said that when the trees were taken down, the landscaper came to install rolls of grass. She said that there was a string between the stakes and she could tell that something was wrong because she had practically no backyard. She said that was when she hired Everett Brooks, a Professional Land Surveyor that she has used in the past. She said that the survey showed that there was an encroachment on her property by 3 feet. She said that the hemlock hedge had been located within those 3 feet.

Ms. Chick said that she called Mr. Fleming about the grass and the hoses that the landscaper had installed. She said that immediately workers came out to remove all of that. She said that clearly they knew that a mistake had been made. She said that they did not check for mistakes on the survey even after they knew that the rear lot line was wrong. She said that it was then discovered that the side lot line was off by 3 feet when the fence was put in.

Ms. Chick said that she had to pay \$380 to hire the surveyor. She said that she now has no privacy because she has such a small backyard. She said that she spent almost \$4,000 to hire Weston Nurseries to plant Arbor Vitaes.

Ms. Chick said that she has no problem with the Petitioner getting the Variance for the side yard encroachment.

The Board asked who would have done the staking for the property at the back lot line. Ms. Sullivan said that Foresite Engineering did not have an issue with the rear property line. She said that the issue may have involved the builder going over the lot line. The Board asked if it was possible that the rear lot line was staked out improperly. The Board said that could possibly be a civil matter between the builder and Foresite Engineering.

The Board said that it is very rare that a Board gets an Equitable Variance situation. The Board said that the current owner is innocent. The Board said that it does have the authority as a quasi-judicial Board to grant an Equitable Variance under these circumstances.

The Board said that this is an exception to the State Statute and the Town's Zoning Bylaw that the Courts have recognized. The Board said that it is appropriate under these circumstances.

Statement of Facts

The subject property is located at 28 Hickory Road, in a 10,000 square foot Water Supply Protection District, with a minimum left side yard setback of 19.5 feet.

The Petitioner is requesting a Variance to correct a six inch garage encroachment in the left side yard setback due to a surveying error when the current house was constructed in 2010.

A Plot Plan dated 3/7/12 and T-LAG Calculation Plan, dated 9/2/10, stamped by Susan E. Sullivan, Professional Land Surveyor, Existing Floor Plans and Elevation Drawings, dated 7/21/10, prepared by R.C. Searles Associates, photographs, Letter dated 8/2/12, from Laurence D. Shind, Esq., with two enclosures: (1) Legal Memorandum, dated 8/2/12, from George F. Connors, Counselor at Law; and (2) Explanation of Variance Request with Exhibits were submitted.

On August 7, 2012, the Planning Board reviewed the petition and recommended that the Variance be denied.

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Decision

This Authority has made a careful study of the materials submitted and the information presented at the hearing. The subject structure does not conform to the current Zoning Bylaw, as noted in the foregoing Statement of Facts.

It is the opinion of this Authority that the lot on which the hardship was created by a six inch garage encroachment into the left side yard due to a surveyor's error does not qualify for the strict requirements of a statutory variance set forth in Chapter 40A and our Bylaw, the hardship is one that is not self-created by the owner petitioner. The encroachment itself is de-minimus, and a literal enforcement of the provisions of Section XIX of the Zoning Bylaw would involve substantial hardship to the Petitioners. Additionally, the grant of an equitable variance would not adversely affect the Zoning District in which it is located nor nullify or derogate from the intent or purpose of the Zoning Bylaw. Accordingly, as this Board does have certain equitable powers, it is the opinion of this Board that Equitable Relief may be granted by use of an Equitable Variance because the hardship created by the six inch garage encroachment in the left side yard setback was due to a surveying error when the house on the property was constructed in 2010 and it is spatially inconsequential and de-mimimus, and the cost to cure would unreasonably high.

Therefore, the requested variance from the terms of Section XIX and pursuant to the provisions of Section XXIV-D of the Zoning Bylaw is granted to allow for a six inch garage encroachment in the left side yard setback due to a surveying error when the current house was constructed in 2010.

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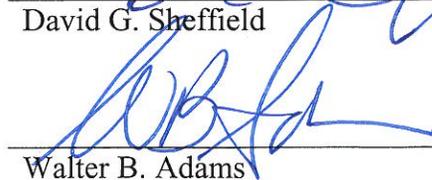
APPEALS FROM THIS DECISION,  
IF ANY, SHALL BE MADE PURSUANT  
TO GENERAL LAWS, CHAPTER 40A,  
SECTION 17, AND SHALL BE FILED  
WITHIN 20 DAYS AFTER THE DATE  
OF FILING OF THIS DECISION IN THE  
OFFICE OF THE TOWN CLERK.



Richard L. Seegel, Chairman



David G. Sheffield



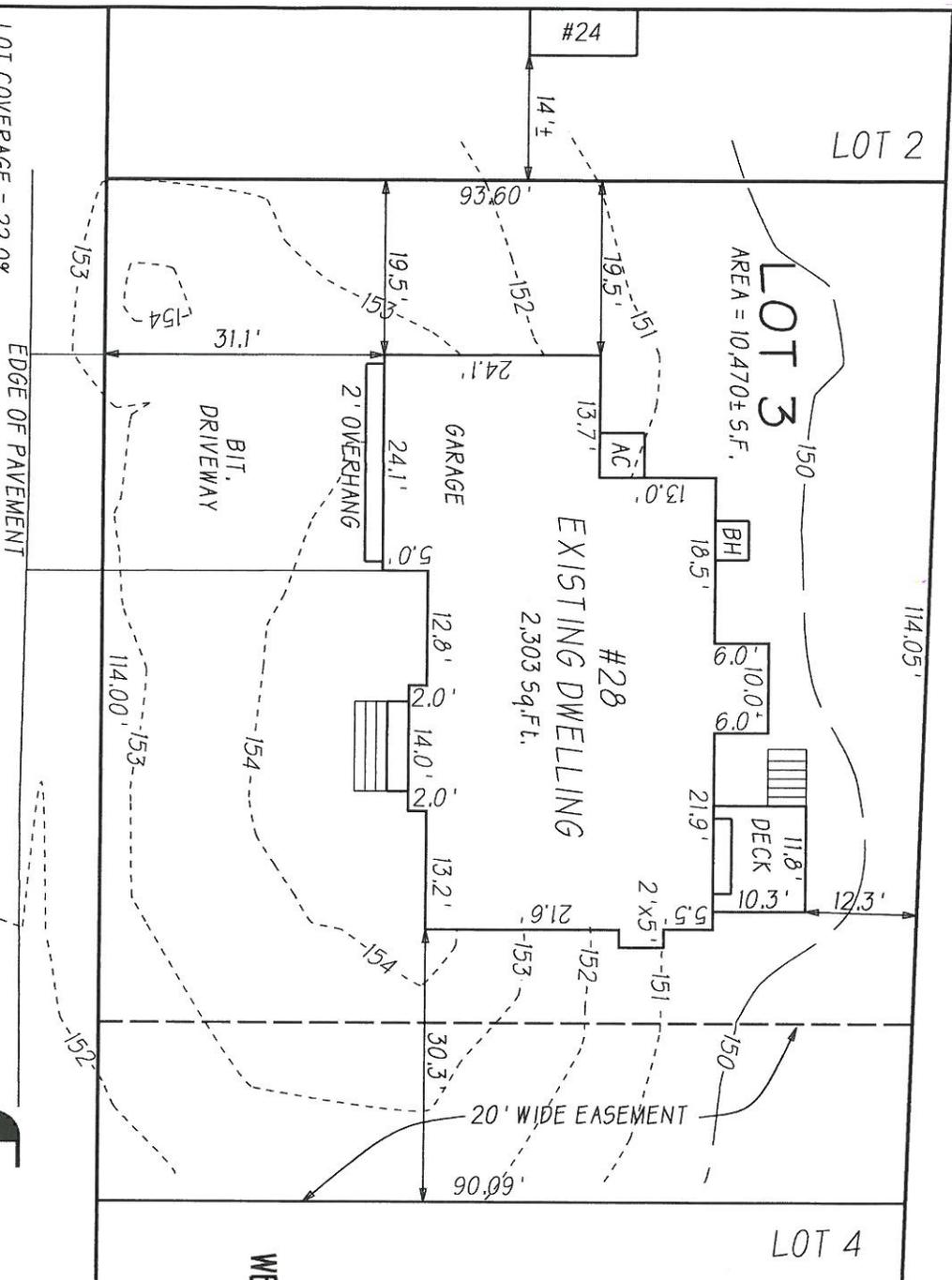
Walter B. Adams

cc: Planning Board  
Inspector of Buildings  
lrm

LOT 2

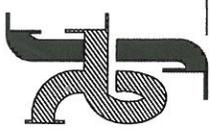
LOT 3  
AREA = 10,470 ± S.F.

LOT 4



LOT COVERAGE = 22.0%  
(LESS THAN 2,500 Sq.Ft.)  
ZONE: SINGLE RESIDENCE 10  
ASSESSORS MAP 159-57  
DEED REF: BOOK 28917 PAGE 580  
PLAN REF: BOOK 189 PLAN 1140

HICKORY ROAD



**FORESITE**  
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16 Gleasondale Road Suite 1-1  
Stow, Massachusetts 01775  
Phone: (978) 461-2350  
FAX: (978) 841-4102

EXISTING PLOT PLAN  
#28 HICKORY ROAD  
WELLESLEY, MASSACHUSETTS

RECORD OWNER:  
ANDREW & SARAH WERTKIN  
28 HICKORY ROAD  
WELLESLEY, MA 02482

DATE: MARCH 7, 2012  
SCALE: 1"=20'  
PREPARED BY:  
www.foresitel.com



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