

TOWN OF WELLESLEY



MASSACHUSETTS

## ZONING BOARD OF APPEALS

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ZBA 2018-74

Appeal of Paula Alvary & Jose Velez  
16 Mountview Road

Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, November 1, 2018, at 7:30 p.m. in the Juliani Meeting Room, 525 Washington Street, Wellesley, on the appeal of Paula Alvary & Jose Velez pursuant to the provisions of Section XXIV-C of the Zoning Bylaw of the determination of the Building Inspector that the Appellant's request for enforcement of the Building Code and the Town of Wellesley Zoning Bylaws was denied, and the Building Inspector's subsequent issuance of a Certificate of Occupancy at 16 Mountview Road.

On September 24, 2018, 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 were David Himmelberger, Esq., Paula Alvary and Jose Velez, the Appellants. Mr. Himmelberger said that abutters and neighbors from 29, 35, 38 and 49 Suffolk Road, and 93 Bristol Road were also present at the hearing. He said that a neighbor from 32 Suffolk Road sent an email.

Mr. Himmelberger said that this is an appeal in relation to a request for zoning enforcement, which was denied, and the subsequent issuance of a Certificate of Occupancy (CO) for a single family home that was built at 16 Mountview Road.

Mr. Himmelberger submitted photographs of the existing slope at the rear of 41 Suffolk Road leading up to 16 Mountview Road, prior to construction. He said that, based on plans that were submitted to the Building Department in the course of this construction project, it is clear that the gradually sloping hillside appears to have risen about six feet from the rear of the property line over 31 feet. He said that, as a consequence of the construction, the razing of the existing structure and construction of the new home at 16 Mountview Road, the rise was raised to 13 feet over a 12.5 to 13 foot run. He submitted materials to show the amount of fill that was required on the hillside to construct the new home.

Mr. Himmelberger said that one of the assertions by the builder and the builder's engineer is that the existing sloped rip rap wall over soil is placed on ledge. He said that there may be ledge in this ground but the rip rap and fill are placed on top of it, so the boulders do not sit on ledge but sit on a significant amount of unstabilized fill.

Mr. Himmelberger said that construction was started in 2016 and over the course of time, his clients complained about safety concerns related to the existing wall, which is a four foot high concrete wall at the base of rip rap. He said that, as a result of poor construction, the entire wall and the slope above the

wall failed on April 16, 2018, following a major rain event. He said that tons of debris came down onto his clients' property. He said that after the wall fell, the Building Inspector, Mr. Grant, issued a stop work order that required that rebuilding of the wall be done under the supervision of a site engineer. He said that the engineer who was retained by the builder, Richard Testa, went out to the site and provided a letter confirming that the slope that the original engineer had designed had been significantly changed for the worse. Mr. Himmelberger submitted wall construction designs from the original engineer that show a four foot concrete block wall over a three inch minimum recycled concrete leveling pad backed by three feet deep  $\frac{3}{4}$  inch crushed stone backfill. He said that the plan also noted the approximate ledge location. He said that the ledge location bears no relationship to what is really out there. He said that the rip rap sits on top of unstabilized fill. He said that the plan was submitted only for the design and construction of the four foot concrete block wall and the stability of the 1:1 slope had not been evaluated. He said that when Mr. Testa became involved, he took the identical plan and stamped it, again noting that it only addressed the concrete block wall and did not express any evaluation of the stability of the slope above it.

Mr. Himmelberger said that Mr. Testa used the original design of the wall to rebuild an identical wall and submitted periodic reports of the work that was being done. He said that when the engineer submitted a letter saying that the wall was safe, the stop work order was lifted. He said that his client presented further concerns to Mr. Grant and the engineer, noting expressly that the three inch concrete leveling base had never been placed there. He said that rather than place it there, Mr. Testa simply erased it from the plan and said that it should sit on existing grade and change the  $\frac{3}{4}$  inch gravel to gravel backed fill. Mr. Himmelberger said that it is important to note that Mr. Testa originally said in May when he began construction of this wall that the new wall needs to be supported on proper bearing material and he personally planned to inspect the base material before the base blocks were reinstalled. Mr. Testa said that any organic material not limited to organic soil, stumps and trees needed to be removed from below the retaining wall. He said that Mr. Testa set a standard and failed to meet it. He said that a you can see a tree growing underneath the wall and the wall is clearly not sitting on non-organic soil. He said that a tree that is shown growing up on the other side of the wall in one of the original photos in the appeal package was cut down to a stump beneath the slope when the wall was reconstructed. He said that there is no gravel underneath or behind the wall. He said that his clients watched intently throughout the summer as the work progressed and hoped that after complaining about the safety of the wall that a safe wall would be built. He said that it was built without a base or gravel backfill. He said that his clients submitted a letter from an engineer attesting to that fact that industry standards all call for a proper base and made reference to the segmental walls industry practice. He submitted excerpts of a Segmental Retaining-Walls Best Practices Guide.

Mr. Himmelberger said that the retaining wall was built on the property line with his client. He said that there is a two foot high rubble retaining wall 1.5 feet inside of his client's property. He said that his client's engineer's report expressed concerns that the wall was acting as retainage for the wall above. He said that there has been no evidence submitted to indicate that the wall can withstand the pressure of the concrete wall and the fill and rip rap above it. He said that the fill that cascaded onto his client's property is still there, acting as some additional support. He said that there is already erosion under the retaining wall that was built. He said that it is pivoting outward and will fail again because it was not built correctly. He submitted photographs that show the proximity of the small rubble wall on his client's property and the location of the replacement of the wall that was built on the property line, in the same location as the original wall.

Mr. Himmelberger said that his clients reached out to the Town's Department of Public Works in 2016. He said that one of the Town Engineers went to the site and expressed concerns about the wall being on top of an old fieldstone wall that was only loosely placed stones with no concrete and was not constructed to serve as any type of foundation, and an 18 inch tree behind the wall that will be buried four feet deep after the wall has been finished. Mr. Himmelberger said that the tree has since been cut down and is even with the slope. He said that the Town Engineer discussed safety concerns related to the original construction in a memo dated May 25, 2016.

Mr. Himmelberger said that the wall has been rebuilt nearly identical to the prior wall, with the exception that a five foot concrete block masonry wall on top of the slope was not replaced. He said that there was a slight concaving of the slope to make it less severe in the area directly behind the concrete block wall. He said that the concrete block wall that retains unstabilized fill and rip rap four to five feet ~~deep~~ is not imbedded, is on a slope, and will fail at some point.

Mr. Himmelberger said that there is an extensive portion of rip rap wall that continues 150 feet and is clearly in excess of a 1:1 slope. He said that he submitted photos in a supplemental package that show the efforts to place a four foot level (square) against the slope to the right of the concrete wall, and it cannot be placed because is not 1:1. He said that throughout the summer, his clients repeatedly asked Mr. Grant to meet at the site so that they could show him that it was not forty-five degrees even though Mr. Testa said that it is. He said that this is a case where the stamp of an engineer cannot override what you can see with your own eyes with a square. He said that when you look at the rip rap that is in excess of the 1:1 slope, you also see the crude attempt to put trees on the slope. He said that the burlap bagged evergreen trees that are about eight feet tall have been placed in what could be called a turret and buttressed with rock. He said that the trees sit in the burlap bags with no soil around them and are turning brown.

Mr. Himmelberger said that his clients do not believe that the wall was built in compliance with the engineer's original submittal, namely, that it would be built on a stable footing. He said that his clients do not believe that the wall was safely built and that significant portions of the rip rap wall are in excess of a 1:1 over a distance greater than four feet and within 10 feet of the property line. He said that his clients asked for enforcement of the Zoning Bylaw (ZBL) and for a wall that is greater than four feet within 10 feet of the property line. He said that they were told that Mr. Grant was relying on the submitted plan and that was the end of it, and the CO was issued, which his clients are appealing in addition to the unsafe wall. He said that boulders the size of milk crates rolled half way down into his clients' yard. He said that the wall defies comprehension without footings, with all the fill and unstabilized soil behind it, and with no drainage in the concrete wall itself, where best practices show that there should be drainage at the bottom. He said that Mr. Testa said that there is drainage at the patio above, so they do not have to worry about the slope. He said that the wall is already failing, is in excess of the permitted steepness, and a final tree plan was never submitted. He said that, based on that, the Board should uphold the appeal and suspend the CO until the wall is safely built and is in compliance with the ZBL.

Mr. Grant said that the original slope and wall were signed off by a licensed engineer in 2016, before it failed. He said that the engineer signed off that the slope was 1:1 or less and the wall was constructed correctly. He said that between that point and April 16, 2018, when there was a major rain event, the developer at 16 Mountview Road made significant changes to the property and the slope by putting up a cinder block wall and extending the yard out five feet, along with a patio to increase the yard. He said that, as a result of that, it severely surcharged at the top of the slope, and because of the rain event,

collapsed, slid down and pushed the wall over that was at the bottom. He said that was the cause of the wall collapsing. He said that the developer made changes to the slope and added surcharge at the top by extending the yard out further. He said that, as a result of the collapse, he requested that the engineer come out to the site to view the aftermath of the collapse. He said that the engineer submitted a letter saying that major changes had been made to the site and that invalidated his previous opinion of what that wall was capable of handling. He said that the engineer stepped away because he said that he was not responsible due to changes that had been made to the makeup of the slope. Mr. Grant said that he met with the Town's Executive Director and Town Counsel to discuss enforcement action and subsequently issued a Stop Work Order because the changes that were made to the slope violated the Building Code and the ZBL. He said that he put the project under the control of a registered design professional and set various criteria that had to be followed and benchmarks to be met regarding submittal of documents on a timely basis. He said that he had several conversations with the engineer, who had a representative on site observing the working being done in accordance with the Stop Work Order. He said that they verified that the slope went back to a 1:1 configuration. He said that the wall itself retains less than four feet of unbalanced fill, so it is not in violation of the ZBL. A Board member said that the rip rap is part of a retention system. Mr. Grant said that the Building Code says that boulders that are only used for soil retention are not subject to the criteria. He said that the rip rap is there to prevent soil erosion and the soil erosion is not on the slope. He said that the engineer signed off on the wall under the controlled construction and also signed off that the slope is less than 1:1. A Board member said that the slope may have shifted from the time the engineer certified it. He confirmed that Mr. Grant was not present when the engineer certified the slope. He said that the Building Inspector can demand further investigation if what he sees does not jibe with what the engineer has certified. Mr. Grant said that he sent concerns to the engineer twice, and the engineer responded that the wall was built to industry standards.

The Board members discussed their opinions as to what constitutes a retaining wall. Mr. Grant said that he followed the Building Code to form his opinion. He said that the ZBL does address slope. A Board member said that, after walking the property, the wall did not appear to him to be structurally sound. Mr. Grant said that he applied regulations. He said that he got an engineer involved to verify that the wall met the Building Code with a 1:1 or less slope and that it was built correctly. He said that Town Counsel monitored the enforcement action. He said that the Town was advised of and participated in every conversation that Mr. Grant had about this and was consulted on a regular basis. He said that at no point was he told that he was out of bounds or that the Town felt that there was a Zoning violation.

The Board discussed changes from the original plan, including the masonry wall at the plaza level. Mr. Grant said that when the first wall was built, there was no upper wall. He said that it was built between the time the Building Department signed off on the original wall and when the developer made landscaping changes without seeking approval. He said that wall is not subject to regulation because it is not retaining four feet or more of unbalanced fill. He said that it is a landscaping item because it plays no structural part in holding up the slope.

A Board member asked if the geometry of the retaining wall ZBL is being appealed by saying that it is greater than four feet. Mr. Himmelberger said that the appeal is for two things, the denial of his clients' request for zoning enforcement as to retaining walls because they are in violation of the bylaw, based on geometry, and the issuance of a CO. He said that central to the stop work order, the first item cited was that the project had become a threat to public safety. He said that they are appealing the issuance of a CO because they believe that the wall, as configured today, continues to pose a public threat as it erodes and

moves outward. He said that the survey that was submitted by Mr. Testa that attests to the wall height or slope, says that it has a target on a window sill at TBM-B. He said that if you look at the configuration of the building shown on the plan, you cannot find the building and the window sill on the As-Built Plan. He said that the As-Built Plan of the structure does not line up with the design that Mr. Testa said that he targeted on the window sill.

The Board discussed applicability of Section XXIID of the ZBL to the wall. Mr. Grant said that he applied Section XXIID.B. Applicability and Exemptions, Item #1, that addresses exceptions and exemptions. He said that the Building Code says that a slope at 1:1 is not considered unbalanced fill. The Chairman said that the wall was not properly designed and installed.

Mr. Himmelberger said that the area to the right of the retaining wall is rip rap that is clearly in excess of a 1:1 slope and therefore is a retaining wall. He said that the original plans called for an entire row of trees at the base of the slope, above the retaining wall.

Kevin Smith , Esq., said that he was representing the Developer at 16 Mountview Road. He said that the Building Inspector played by the book. He said that something happened on April 16<sup>th</sup> with an extraordinary rain event and the Building Inspector shut the project down, consulted with whomever he felt was appropriate, ordered the builder to hire an independent engineer to look at plans, come up with a design, supervise construction and then certify the work that was done. He said that the Building Inspector's stringent order was complied with to the letter by the builder. He said that the plan certified by a licensed professional in the Commonwealth of Massachusetts says that it is 1:1 slope or less all of the way around. He said that he respected people's ability to go out and eyeball something but that is different from having a surveyor go out to the property with instruments, take measurements, put them on a plan and certify that the measurements are accurate. A Board member asked if the plan was stamped by a land surveyor. Mr. Smith said that it was stamped by an engineer from Framingham Survey Consultants, Inc. He said that Mr. Testa has the authority to stamp such a plan as long as he is satisfied that it was done accurately. He said that a structural engineer watched the construction and then certified that it was done in accordance with the plan.

A Board member said that he was not comfortable with the jump that the Building Inspector made from the wording in the ZBL and his interpretation that the rip rap wall is not a retaining wall if it meets or is less than a 1:1 slope. He said that there is nothing in the ZBL to lead him to determine that. Mr. Grant said that he agreed and that was why he applied the Building Code to it. He said that he used available resources and applied the regulations that he felt were appropriate to make sure that it met the ZBL and the Building Code.

#### Statement of Facts

The subject property is located at 16 Mountview Road, in a 20,000 square foot Single Residence District.

The Appellant is appealing, pursuant to the provisions of Section XXIV-C of the Zoning Bylaw, the determination of the Building Inspector that the Appellant's request for enforcement of the Building Code and the Town of Wellesley Zoning Bylaws was denied, and the Building Inspector's subsequent issuance of a Certificate of Occupancy at 16 Mountview Road.

Submittals from the Appellant

- Letter to Town Clerk, dated September 24, 2018, from David Himmelberger, Esq., re: Appeal of Building Inspector's Determination regarding 16 Mountview Road, Wellesley
- Notice to Town Clerk pursuant to Section XXIV of the Zoning Bylaws
- Memorandum in Support of Appeal of Building Inspector's Denial of Request for Zoning Enforcement at 16 Mountview Road, Wellesley, MA
- Exhibit A – Notice to Dean Behrend, dated April 27, 2018, from Michael Grant, Inspector of Buildings, re: Notice of Violations and Order to Stop Work, 16 Mountview Road, Wellesley
- Exhibit B – Retaining Wall Plan S.1, stamped by Richard Testa, P.E.
- Exhibit C – Photographs
- Exhibit D – Letter to Jose Velez, dated August 8, 2018, from Coweeset Engineering, re: Inspection Report, Rear of 41 Suffolk Road, Wellesley, MA
- Exhibit E – Email to David Himmelberger, dated August 27, 2018, from Michael Grant, re: Engineer Letter from the Abutter – 16 Mountview Road
- Letter to Zoning Board of Appeals with photographs attached, date October 17, 2018, from David Himmelberger, Esq., re: 16 Mountview Road, Wellesley
- Hand drawn Elevation Drawing of Slope
- Plan S-1, dated 2016, stamped by Jeffrey M. Benway, P.E.
- S.1 Retaining Wall Plan, dated 2018, stamped by Richard Testa, P.E.
- S.1 Retaining Wall Plan, dated 7/30/18, stamped by Richard Testa, P.E.
- Pre-construction photograph of slope, taken from 41 Suffolk Road
- Segmental Retaining Walls Best Practices Guide
- Email to Skyeyecorp, dated May 25, 2016, from David Hickey, Town Engineer, Town of Wellesley, re: Draft Email to Building Department
- Exhibit Plan Stone Wall Locations, dated July 11, 2018, stamped by Richard Testa, P.E.
- As-Built Plot Plan, dated 3/1/17, stamped by Glenn D. Odone, Jr., Professional Land Surveyor

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Submittals from Michael T. Grant, Inspector of Buildings/Zoning Enforcement Officer

- Letter to Michael T. Grant, Building Inspector, dated July 18, 2018, from David Himmelberger, Esq., re: 16 Mountview Road, Wellesley, Notice of Violations and Order to Stop Work
- Letter with photographs attached, to Michael T. Grant, Building Inspector, dated July 6, 2018, from David Himmelberger, Esq., re: 16 Mountview Road, Wellesley, Notice of Violations and Order to Stop Work
- Letter to Michael T. Grant, Building Inspector, dated May 22, 2018, from David Himmelberger, Esq., re: 16 Mountview Road, Wellesley, Notice of Violations and Order to Stop Work
- Exhibit A – Notice to Dean Behrend, dated April 27, 2018, from Michael Grant, Inspector of Buildings, re: Notice of Violations and Order to Stop Work, 16 Mountview Road, Wellesley
- Exhibit B – Letter to Dean Behrend, dated November 28, 2016, from Michael Grant, re: 16 Mountview Road – Building Code & Zoning Violations
- Exhibit C - Letter to Michael Grant, dated April 19, 2017, from Jeffrey Benway, P.E., re: Retaining Wall & Slope Evaluation 16 Mountview Road, Wellesley

- Exhibit D – Letter to Michael Grant, dated May 16, 2018, from Richard Testa, Jr., P.E., re: Project: 16 Mountview Road, Wellesley, MA
- Letter to Michael Grant, dated May 17, 2018, from Richard Testa, Jr., P.E., re: Project: 16 Mountview Road, Wellesley, MA
- Exhibit E – S.1 Retaining Wall Plan, stamped by Richard Testa, Jr., P.E.
- Exhibit F – Photographs
- Notice to Dean Behrend, dated April 27, 2018, from Michael Grant, Inspector of Buildings, re: Notice of Violations and Order to Stop Work, 16 Mountview Road, Wellesley
- Letter to Michael Grant, dated May 9, 2018, from Dean Behrend, re: 16 Mountview Road
- Initial Construction Control Document, dated May 16, 2018, stamped by Richard Testa, Jr., P.E.
- Letter to Michael Grant, dated May 10, 2018, from Dean Behrend, re: 16 Mountview Road
- Letter to Michael Grant, dated May 14, 2018, from Dean Behrend, re: 16 Mountview Road
- Letter to Michael Grant, dated May 16, 2018, from Richard Testa, Jr., P.E., re: Project: 16 Mountview Road
- Letter to Michael Grant, dated May 17, 2018, from Richard Testa, Jr., P.E., re: Project: 16 Mountview Road
- Letter to Dean Behrend, dated May 21, 2018, from Michael Grant, re: Authorization to Commence with work: 16 Mountview Road, Wellesley, MA
- Letter to Michael Grant, dated May 29, 2018, from Richard Testa, Jr., P.E., re: Project: 16 Mountview Road – Weekly Report – May 21<sup>st</sup> thru May 25<sup>th</sup>
- Letter to Michael Grant, dated May 29, 2018, from Richard Testa, Jr., P.E., re: Project: 16 Mountview Road – Weekly Report – May 29<sup>th</sup> thru June 1<sup>st</sup>
- Letter to Michael Grant, dated June 11, 2018, from Richard Testa, Jr., P.E., re: Project: 16 Mountview Road – Weekly Report – June 4<sup>th</sup> thru June 8<sup>th</sup>
- Letter to Michael Grant, dated June 20, 2018, from Richard Testa, Jr., P.E., re: Project: 16 Mountview Road – Weekly Report – June 11<sup>th</sup> thru June 15<sup>th</sup>
- Letter to Michael Grant, dated June 26, 2018, from Richard Testa, Jr., P.E., re: Project: 16 Mountview Road – Weekly Report – June 18<sup>th</sup> thru June 22<sup>nd</sup>
- Final Construction Control Document, dated June 28, 2018, stamped by Richard Testa, Jr., P.E.
- Photographs of Left Side Slope, Mid Slope, Left Side Slope and Picture from Top
- Letter to Michael Grant, dated August 2, 2018, from Richard Testa, Jr., P.E., re: Project: 16 Mountview Road
- Letter to Michael Grant, dated August 20, 2018, from Richard Testa, Jr., P.E., re: Project: 16 Mountview Road
- Email to Michael Grant & Bean Behrend, dated August 21, 2018, from Richard Testa, re: Engineer Letter from the Abutter – 16 Mountview Road
- Letter to Mike, from Jose Velez
- Letter to Jose Velez, dated August 8, 2018, from Arthur S. Cabral, P.E., Coweeset Engineering, re: Inspection Report, rear of 41 Suffolk Road, Wellesley, MA
- Photographs
- Engineering Pictures
- Letter to Michael Grant, dated April 19, 2017, from Jeffrey Benway, P.E., re: Retaining Wall & Slope Evaluation 16 Mountview Road, Wellesley

- Letter to Michael Grant, dated April 23, 2017, from Jeffrey Benway, P.E., re: Retaining Wall & Slope Evaluation 16 Mountview Road, Wellesley
- Plan S-1, dated August 18, 2016, stamped by Jeffrey M. Benway, P.E.
- Plan S.1, Retaining Wall, dated July 30, 2018, stamped by Richard Testa, Jr., P.E.
- As-Built Plot Plan, dated March 1, 2017, stamped by Glenn D. Odone, Jr., Professional Land Surveyor
- S.1, Retaining Wall Plan, stamped by Richard Testa, Jr., P.E.
- Exhibit Plan Stone Wall Locations 16 Mountview Road Wellesley, Massachusetts, dated July 11, 2018, prepared by Framingham Survey Consultants, Inc.
- Exhibit Plan Stone Wall Locations 16 Mountview Road Wellesley, Massachusetts, dated June 25, 2018, prepared by Framingham Survey Consultants, Inc.

Decision

This Authority has made a careful study of the materials submitted and the information presented at the hearing.

The Appeal of the determination of the Building Inspector to deny the Appellant's request for enforcement of the Building Code and the Town of Wellesley Zoning Bylaws is denied.

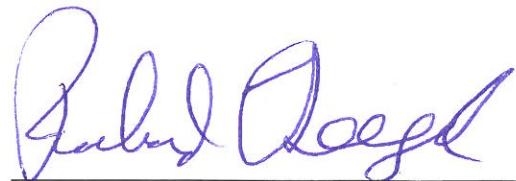
The Appeal of the Building Inspector's issuance of a Certificate of Occupancy at 16 Mountview Road is upheld.

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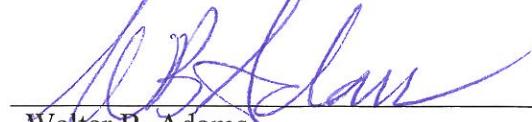
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16 Mountview Road

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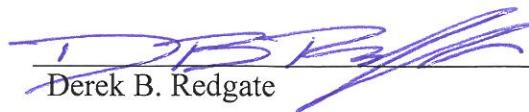
APPEALS FROM THIS DECISION,  
IF ANY, SHALL BE MADE PURSUANT  
TO GENERAL LAWS, CHAPTER 40A,  
SECTION 17, AND SHALL BE FILED  
WITHIN 20 DAYS AFTER THE DATE  
OF FILING OF THIS DECISION IN THE  
OFFICE OF THE TOWN CLERK.



Richard L. Seegel, Chairman



Walter B. Adams



Derek B. Redgate

cc: Planning Board  
Inspector of Buildings  
lrm