

TOWN OF WELLESLEY



MASSACHUSETTS

ZONING BOARD OF APPEALS

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ZBA 2016-57
Appeal of Elizabeth Harrington
100 Brook Street

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Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, August 11, 2016 at 7:30 p.m. in the Juliani Meeting Room, 525 Washington Street, Wellesley, on the appeal of Elizabeth Harrington, pursuant to the provisions of Section XXIV-C of the Zoning Bylaw of and determination of the Building Inspector that the retaining wall at 100 Brook Street is compliant with Section XXIID of the Zoning Bylaw.

On July 26, 2016, the Petitioner filed a request for a hearing before this Authority, and thereafter, due notice of the hearing was given by mailing and publication.

Present at the public hearing were Elizabeth and Andrew Harrington, the Appellant, and Michael Grant, Inspector of Buildings/Zoning Enforcement Officer.

Ms. Harrington distributed a timeline to the Board members. She said that she and Mr. Harrington have a strong concern with the retaining wall that is located behind 57 Radcliffe Road. She said that they do not believe that the retaining wall is in compliance with the Zoning Bylaw (ZBL). She said that she discussed her concerns with the homeowner at 100 Brook Street early on. She said that they put in a request for enforcement to the Building Inspector on October 23, 2015 and requested a site visit. She said that on November 27, 2015 the request for enforcement was denied by Erik Tardif, Building Inspector. She said that on December 8, 2015 she requested a visit by the Building Inspector to explain how the retaining wall is in compliance because this did not fit with what she understands of the bylaw. She said that, at that time, there was another letter from Erik Tardif that denied the second request for enforcement. She said that all of these documents were provided to the Board under the Appeal, ZBA 2016-10. She said the hearing was held on March 3, 2016 and her Appeal was granted.

Ms. Harrington said that she waited for the Appeal Period to run its course and reached out to the Building Inspector to see how the wall would be brought into compliance. She said that she asked to be part of the process to understand it and asked the Building Inspector to go to the property once again with the Harrington's present.

Ms. Harrington said that on April 22, 2016 she got an email from the Building Inspector stating that the process had already started and that he found that the wall was in compliance. She said that he told them to contact the ZBA to get a copy of his report. She said that she received a copy of Mr. Grant's letter on April 25, 2016 where he explained his reason for saying that the retaining wall is in compliance.

Ms. Harrington said that she sent a letter to ZBA on May 9, 2016 and asked them to do a site visit. She said that she copied Hans Larsen, Executive Director for the Town. She said that she received no response. She said that she then inquired what she should do. She said that she received an email from the ZBA office that stated that the Chairman said that the process had been followed with the hearing closed, the Board issuing its decision and the Building Inspector going to 100 Brook Street to ensure compliance. She said that the Chairman said that there is nothing before the Board at this time.

Ms. Harrington said that nothing has changed and nothing has been moved for the entire wall. She said that she put together and is now before the Board with Appeal number two. She said that she does not believe that the retaining wall is in compliance. She said that her question for the Board is where does she go from here. She asked what changes were made to make the wall compliant. She said that she submitted pictures of measurements using instruments of measurement, a yardstick and a tape. She said that Mr. Grant's April 26, 2016 letter had a picture attached of the tool that was created by the owner with no units of measure. She said that she did not believe that was a professional way of measuring. Mr. Harrington said that they provided pictures of the wall and measurements three times. He said that the Building Inspector came back and said that the wall is compliant without providing any evidence to the fact. He said that they invited the Board to come and look at the wall and the owner would not allow the Board onto his property. He said that the Building Inspector will not meet with them. He said that they are asking the Board to come to view the site from the Harrington's property or their neighbor's property. He said that the wall is only a few feet from the property line. He asked that the Board come to measure the wall. He said that there is a reason why Mr. Holland does not want the Board to go onto his property. Ms. Harrington said that the wall is not in compliance.

The Chairman said that, in her letter of May 25, 2016. Ms. Harrington stated that, "I continue to believe that the builder/owner has not met the requirements of this bylaw." He asked which requirements Ms. Harrington was referring to. Ms. Harrington said that she was referring to the requirements for the height of the wall to be no more than four feet for the fill, as measured from the base of the wall to the grade at the back of the wall at the same section. Mr. Harrington said that they provided a diagram of the boulders at the previous hearing. He said that the uneven fill behind the wall is more than four feet as measured by the stick in several pictures and by the tape measure.

The Chairman said that the Board has a drawing from a registered land surveyor that shows that the wall complies with the Building Code. Mr. Harrington asked if the survey showed the height of the rock. The Chairman said that the height of the rock should not be confused with the height of the retaining wall. He said that the definition in the ZBL says that the height of the wall is measured at the front face from the grade to the unbalanced fill, not to the wall. Mr. Harrington said that there is no question that the wall is more than four feet, if you measure from the base of the stone to the uneven fill behind.

The Chairman asked if the Harrington's think that the Board should give more weight to the Harrington's measuring stick or tape measure than a survey from a registered professional land surveyor. Ms. Harrington asked who had that report. The Chairman said that the Building Inspector had it. Mr. Harrington said that the Building Inspector has a vested interest in the case. He confirmed that the survey is the same one that was submitted at the previous hearing. He said that the Board ruled in favor of Ms. Harrington when the property owner would not let the Board go onto his property. He asked what had changed since that time. The Board said that the survey was not part of the ZBA record. The Board said

that it was submitted at the previous public hearing and the Board would have liked to have had more time to look at it as well.

Ms. Harrington asked how the Building Inspector measured the wall. Mr. Harrington said that the survey is not consistent with what the Building Inspector said. The Board asked if the argument is about the quality of the report or about the amount of unbalanced fill. Mr. Harrington said that he did not understand why the Board cannot measure the wall. The Board said that is not its job. Mr. Harrington said that they are not getting justice from the people whose job it is. The Board said that, in the Building Inspector's view, the Harrington's have gotten justice. The Board said that the Building Inspector submitted a report that says that. Mr. Harrington said that the Building Inspector submitted no pictures with any measurements.

The Chairman said that the Harrington's also seem to have issues about meeting at the wall and witnessing its measurement. He said that there is nothing in the process that includes that as a requirement. He asked where the Board would get the authority to do that. Mr. Harrington said that the Board brought it up at the previous hearing. The Chairman said that the Board did that to try to find common ground to bring the two parties together who were clearly at odds. The Harrington's said that they still like that idea. The Chairman said that the Board deals with documents and the documents that the Board has seen and the testimony that the Board has heard, seems to come down on the side of the wall complying. Mr. Harrington said that they submitted a picture of the stick next to the rock and the rock is bigger. The Chairman said that it is not the rock that is measured, it is the unbalanced fill. Mr. Harrington said that the fill is greater than four feet. The Board said that according to the definition of the bylaw, you can build a wall that is ten feet high with three feet of unbalanced fill behind it.

Mr. Harrington said that they would accept a picture of any measurement tool that was used. He said that the wall was not measured correctly. He said that the fill behind the rock is bigger than the rock. The Chairman said that the part that slopes upward is outside of the definition because it is not at the back face of the wall. He said that the definition in the ZBL is predicated on the description of a typical retaining wall with a concrete footing with a stem, a toe and a heel. He said when you get to other forms of retaining walls, such as a railroad tie retaining wall where you dig a slot in the earth to put the first one in, stack a bunch on top and put a rod through to keep it, it does not fit the definition nicely because the stuff at the front of the wall, in the definition, was intended to take the standard and prevent you from piling up dirt to reduce that difference. He said that in the case of the tie, it does not fit because the tie has to be imbedded in the soil. He said that the definitions do not necessarily get applied in the way that the Harrington's are asserting. He said that what is included in the bylaw is that the height measured by the unbalanced fill on the back to the front is exempt if it is less than four feet. Mr. Harrington said that there is no question that it is over four feet. The Chairman said that the Board has a stamped drawing from a registered land surveyor that says what the Harrington's are telling the Board is not true. Mr. Harrington said that the Board had the survey at the previous hearing and it offered to come see the property. The Board asked what purpose that would serve. Ms. Harrington said that the Board can see the wall.

Mr. Harrington asked how else they can get justice. He said that the Building Inspector will not meet with them. The Chairman said that the issue is not about justice but about compliance with the ZBL. He said that if the Harrington's are seeking justice, that is what the courts are for.

Ms. Harrington said that the Board granted her appeal and the Building Inspector went back to the property but there have been no changes. She said that he wrote a letter. Mr. Harrington said that the Board offered to come to the property and then decided to put it on the Building Inspector, who simply said the same thing that he said the first time.

Mr. Grant said that the last sentence in the decision of the Board states that, "The Building Inspector shall return to the site to verify compliance of the retaining wall with the Zoning Bylaw." He said that he went out to the site and got permission from the owner to enter the site. He said that he used a wooden tool that was originally used and provided by the owner. He said that he used a tape measure to verify that the tool was four feet in height. He said that he measured the wall along its entire length and then rendered his report to the Board. He said that he used the surveyor's report to determine the height of the highest boulders at 3'9". He said that the Harrington's submitted a picture at the previous hearing showing boulders over four feet. He said that the boulders have been counter sunk into the ground to keep them from moving. He said that there has not been fill added to circumvent the bylaw. He said that he submitted pictures in his report pointing out that the grade is the same along both sides of the fence to show that there was no fill added. He said that he took the tool to verify what the land surveyor said and came up with roughly the same height of the boulders. He said that he then measured down from the stick to the top of the fill that abuts the back of the rock and it was six inches lower, at 3'6". He said that it is less than four feet from the grade on the face to the grade at the back of the wall and meets the definition of a retaining wall that is not subject to the ZBL.

Mr. Grant said that it is his understanding that the Harrington's and the Holland's have met with the Executive Director. He said that the Executive Director asked Mr. Grant to accompany him to the property to look at the wall. He said that they used the same tool and verified its height at four feet. He said that the Executive Director watched Mr. Grant show how the wall was measured. He said that he does not have anything in writing from the Executive Director but he has not heard anything from him stating that he is in arrear of the ZBL. He said that three individuals have measured the wall and none have disagreed that the wall is compliant.

The Board asked if any of the exposed faces of the boulders are more than four feet as measured by the stick. Mr. Harrington said that they are. He said that the Building Inspector's Report stated that there was one rock that was close to four feet. He said that the fill behind it is significantly higher than that. He said that the grade is steeper at their neighbor's property at 61 Radcliffe Road. He said that you could not get the tool that was used at 100 Brook Street in there to get a measurement.

Mr. Grant said that he stated in his report that this is a boulder type wall that has surcharge that is not retained by the wall. He said that the surcharge can move. The Board asked if the revealed grade at the base of the boulder measured to the top of the back fill at the back of the wall is what was measured. Mr. Grant said that is what was measured at 3'6".

A Board member questioned whether there is a permissible issue before the Board. He said that the bylaw permits a party to appeal the denial of an enforcement action. He said that the appeal is of Mr. Grant's determination in response to the last action, not an enforcement action. He said that has already been dealt with, the matter was concluded and the appeal period has expired. He questioned what is actually before the Board and if the Board has any authority to rule on this. He said that there is no

enforcement action before the Board. He said that Mr. Grant's report was in response to the last proceeding when the Board directed him to measure the wall.

Mr. Grant said that he followed the direction given by the Board in ZBA 2016-10 to verify compliance of the wall. He said that he feels that he followed the direction that the Board gave him at the time. The Board said that the appeal is of Mr. Grant's report.

A Board member said that the Retaining Wall Bylaw is relatively new and it would not be the first bylaw that has been taken advantage of by builders based on the language that is in there. He said that for ZBA to enforce bad taste is not its job. He said that the ZBL may not have contemplated this type of wall. He said that he had no reason to not believe in the integrity of the Building Inspector that he is able to read the ZBL for retaining walls and determine the actual height as it is written in the ZBL.

The Chairman discussed what he thought has changed from the last time. He said that he has had time to reflect on the surveyor's drawing. He said that he went back a few times and looked at the definition in the bylaw. He said that he thought through different ways to retain earth and how the bylaw definition might apply in those cases, including a stone wall. He said that he concluded that there are several different ways that do not fit the bylaw well regarding fill at the front side of the wall. He said that there are a couple of methods of constructing retaining walls that require digging into the earth to keep the wall from sliding. He said that it is an important consideration. He said that when he looked at the different methods that both sides have used to measure the wall, he gave the greatest weight to the surveyor's drawing, gave the second amount of weight to Mr. Grant and Mr. Tardif because he understood their methods, and the lesser amount of weight to the pictures submitted by Ms. Harrington because he could not understand the uncertainty in the measurements. He said that he could not understand if the pole was vertical and what it was measured from and to. He said that when he ranked things in that order, he came to the conclusion that he agrees with Mr. Grant that the wall complies with the bylaw. He said that is the reason for the change from last time.

Ms. Harrington said that last time a Board member did come out to see the stone and the wall and said that he could tell that it was not four feet. The Board said that the Board member did not have access to the property and was viewing the wall from a distance. The Board said that it was not sure if the Board member had the ability to measure or comprehend the height of the unbalanced fill. The Board said that the Board member was just looking at the boulder. The Chairman said that he visited the wall on two different occasions and had a different conclusion. He said that he viewed the wall from the street and driveways.

The Board said that Mr. Grant is an unbiased witness who has no stake other than to enforce the bylaw.

The Chairman said that his conclusions were not based on what he saw but on the surveyor's drawing and measurements he had seen in the documents. Ms. Harrington asked about the surveyor's report. She asked if there is a way of measuring the grade. The Chairman said that was what was shown on the surveyor's plan. The Board said that it relies on stamped plans by surveyors on a regular basis. The Board said that the surveyors have a State license and a stamp that they put on the plans. The Board said that it accepts the stamped plans as true unless someone can prove them to be otherwise.

The Board asked about the as built approval. Mr. Grant said that the as-built was provided by the owner as a defense mechanism to the complaint. He said that they originally looked at the wall and thought that it complied. He said that when they got the complaint, Mr. Tardif went out to get a more thorough take on the wall. He said that during the previous hearing, the owner produced the survey that was not entered into the record. He said that he retained a copy and he used it as a mechanism to pinpoint the areas that were in question at the previous hearing. The Board confirmed that it was not required as part of the building permit to finalize Zoning compliance. Mr. Grant submitted Boulder Landscape Wall Detail Plan Showing Top and Bottom Elevations, 100 Brook Street, Wellesley, Mass., dated February 11, 2016, stamped by Bradley J. Simonelli, Professional Land Surveyor, and it was entered into the record.

Mr. Harrington said that the bylaw is new and there is a question of interpretation. He said that there is a question of measurement. He said that he does not understand why the Board cannot go over and measure the wall. He said that Mr. Grant is not representing them as the aggrieved party of an unsightly property behind them. He said that he did not think that it was unfair to ask and it is also what the Board had offered to do.

Mr. Grant said that he stands behind his report. He said that three independent individuals have looked at the wall or were present when the wall was measured. He said that his opinion is that the wall complies with the ZBL.

Ms. Harrington said that Mr. Grant's letter does not mention three people or the Executive Director. Mr. Harrington asked why they were not allowed to be there. The Board said that the Harrington's are welcome to speak with Mr. Grant at some other time about what is not in the record but that is not what is before the Board.

A Board member reiterated his concern about whether there is an appeal of an enforcement action before the Board. He said that the Board's jurisdiction is limited to hearing appeals of enforcement actions by the Building Inspector. He said that Mr. Grant wrote a letter in response to the last decision and that is what was appealed.

The Chairman said that the Board could take the view that this is not appeal of an enforcement action by the Building Inspector and dismiss the appeal, or the Board could rule on it, notwithstanding whether it is an enforcement action or not. A Board member said that the Board is officially getting information from the survey tonight. He said that the plan verifies Mr. Grant's opinion. He questioned whether the hearing should be continued for verification of the land surveyor's plan. He questioned whether the Harrington's should hire their own professional to review the plan and comment on it. A Board member said that there is no party to this case that is the land owner. He said that nobody can go onto the property without the owner's permission. He said that a surveyor that is hired by the Harrington's to measure the wall would need to have the owner's permission to go onto his property. He said that allowing access to the property to measure the wall might satisfy the Harrington's as to its true height. He said that the town would like to have some finality to this so that everyone feels that they have had a fair shake and that it gets to a just, fair, truthful result instead of having people unhappy because they do not feel that they had the opportunity to properly address or vent the issues. He asked if the Harrington's would be willing to hire a surveyor. Ms. Harrington said that they would.

Peter Holland, 100 Brook Street, said that he submitted a copy of the survey to the Board members at the previous hearing.

The Board asked if Mr. Holland would permit a registered land surveyor who was hired by the Harrington's to go onto his property. Mr. Holland said that he would not. He said that the wall has been measured six times with the same result. He said that the Harrington's were concerned that there be someone that they trust present when the wall was measured. He said that the Harrington's went to the Executive Director to discuss their issues. He said that the Executive Director went to the property with Mr. Grant and came to the same conclusion.

A Board member said that at the previous hearing the Board asked if it could go onto the property to take a view and Mr. Holland said no. Mr. Holland said that the Board acknowledged that would be unprecedented. He said that it would be unfair to him. The Chairman said that the reason that the Board asked to do that was because it was trying to find common ground between the parties. He said that clearly it did not find that.

The Board discussed moving forward with its action. A Board member questioned whether it is an appeal of an enforcement action. The Chairman said that he would prefer to vote for a definitive answer that can be argued. He said that a problem that he could see with a continuation is that there will be another set of documents. He said that it will either come out as complying or not complying. He said that then it will become a numbers game with three to one, etc. He said that he did not see anything that would leap off of the page as a defect in the surveyor's plan.

A Board member said that he was thinking that the Harrington's would get raw data and an opinion versus the ZBL and come to the same conclusion as the Building Inspector. He said that they would need access to the property. He said that he was not anticipating that it will conflict.

The Chairman said that he saw two paths to get closure. He said that one is that the parties agree on a set of facts, which they have not done yet. He said that the other is that one, the other, or both parties are aggrieved by the Board's decision and move on to other measures that are not the ZBA. He said that the Board has done what the bylaw requires to the best of its ability. The Board said that if it denies the enforcement action, there could be an appeal, which could drag this out for another year or so. The Board said that it could possibly be resolved by allowing a licensed surveyor on the site, which the Harrington's could get through a court action. The Chairman said that the Board has asked for that twice and had the same answer both times.

The Chairman said that, from a procedural sense, a ruling saying that there is no enforcement and therefore null and void may get to the same point but is not satisfying to either party. The Board said that it will just precipitate a request for an enforcement action and the Board will come back to hear it again. The Board said that it is hard for it to come to finality when the two parties do not allow the Board to approach it in the common sense way that was suggested. Mr. Harrington said that they would have had a survey done if they knew that they could do that. The Board said that they cannot go onto Mr. Holland's property without his permission. He asked about trespass rights for surveyors. Mr. Grant said that they can survey lot lines. He said that he did not believe that the statute allows them to cross over lot lines onto private property.

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A Board member said that to the extent that this is an enforcement action, he would uphold the Building Inspector's determination and deny the Appeal. The Chairman said that the Board has drawn out a reasonable next step. He said that if the Harrington's choose to carry this further, the venue will be in court system, not town government.

Statement of Facts

The subject property is located at 100 Brook Street, in a 20,000 square foot Single Residence District.

The Appellant is appealing a determination of the Building Inspector that the retaining wall at 100 Brook Street is compliant with Section XXIID of the Zoning Bylaw.

Submittals from the Appellant

- Explanation of Request
- List of documents submitted to Town Clerk on May 26, 2016
- Letter to Zoning Board of Appeals, dated 5/25/16, from Elizabeth Grover Harrington
- Letter to Richard Seegel, Chairman, Zoning Board of Appeals, dated 4/26/16, from Michael T. Grant, Inspector of Buildings/Zoning Enforcement Officer, re: 100 Brook Street – ZBA 2016-10 (photographs attached)
- Email to Liz Harrington, dated 4/21/16, from Michael Grant, re: Enforcement 100 Brook Street
- Email to Liz Harrington, dated 4/22/16, from Michael Grant, re: Enforcement 100 Brook Street
- ZBA 2016-10, Appeal of Elizabeth Harrington, 100 Brook Street
- Letter to Zoning Board of Appeals, dated 10/22/15, from Elizabeth Grover Harrington, (photographs attached)
- Letter to Mrs. Elizabeth G. Harrington, dated 12/10/15, from Erik Tardif, Local Building Inspector, regarding Response to letter received December 8, 2015
- Letter to Michael, dated 12/8/15, from Liz Grover Harrington
- Letter to Mrs. Elizabeth G. Harrington, dated 11/27/15, from Erik Tardif, Local Building Inspector
- Email to Michael Grant, dated 11/20/15, from Liz Grover Harrington

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

- Letter to Richard Seegel, Chairman, Zoning Board of Appeals, dated 4/26/16, from Michael T. Grant, Inspector of Buildings/Zoning Enforcement Officer, re: 100 Brook Street – ZBA 2016-10 (photographs attached)

Decision

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

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To the extent that this is an enforcement action, the appeal of the determination of the Building Inspector that the retaining wall at 100 Brook Street is compliant with Section XXIID of the Zoning Bylaw is upheld and the appeal is denied.

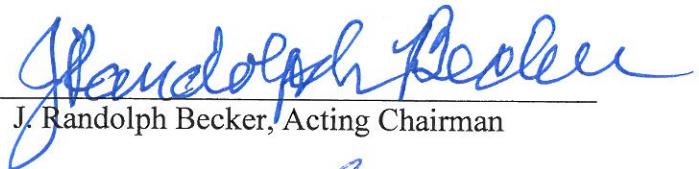
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APPEALS FROM THIS DECISION,
IF ANY, SHALL BE MADE PURSUANT
TO GENERAL LAWS, CHAPTER 40A,
SECTION 17, AND SHALL BE FILED
WITHIN 20 DAYS AFTER THE DATE
OF FILING OF THIS DECISION IN THE
OFFICE OF THE TOWN CLERK.


J. Randolph Becker, Acting Chairman


Robert W. Levy


Derek B. Redgate

cc: Planning Board
Inspector of Buildings
lrm