



ZONING BOARD OF APPEALS

TOWN HALL • 525 WASHINGTON STREET • WELLESLEY, MA 02482-5992

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WALTER B. ADAMS
DEREK B. REDGATE

March 19, 2019
7:30 pm
Juliani Meeting Room
Town Hall

Zoning Board of Appeals Members Present: J. Randolph Becker
David G. Sheffield
Robert W. Levy
Walter B. Adams

ZBA 2019-22, WELLESLEY COLLEGE, 350 & 106 CENTRAL STREET (ATHLETIC FIELD)

Present at the public hearing was Megan Buczynski, representing Wellesley College.

The Chairman said that the Board the received materials that it asked for.

The Board discussed a proposed change to the draft conditions.

Mr. Sheffield confirmed that an Order of Conditions had been approved by the Wetlands Protection Committee.

Mr. Adams moved, Mr. Sheffield seconded the motion, and the Board voted unanimously to approve a special permit for a major construction project in a Water Supply Protection District, subject to conditions.

Mr. Sheffield moved, Mr. Adams seconded the motion, and the Board voted unanimously to grant Site Plan Approval, subject to conditions.

ZBA 2019-28, DANA HALL SCHOOL, 45 DANA ROAD (ATHLETIC FIELD)

Present at the public hearing were David Himmelberger, Esq., and Josh Atkinson, RLA, Stantec.

The Board discussed Mr. Breslin's proposed change to the two year limitation for start of the project. The Chairman confirmed that the limitation does not require that the project be completed in two years, only that the Building Permit be applied for. He said that the requested change will not be made to the conditions.

Mr. Levy confirmed that the Site Plan Approval will incorporate a special permit for signage.

Mr. Levy moved, Mr. Adams seconded the motion, and the Board voted unanimously to grant Site Plan Approval that incorporates a special permit for signage, subject to conditions.

ZBA 2019-35, CHARLES KRAUS, 8 LAWRENCE ROAD

Present at the public hearing were David Himmelberger, Esq., and Charles Kraus, the Petitioner.

Mr. Becker said that he spoke with Town Counsel after the previous hearing. He said that they discussed the *Bellalta v Brookline* case. He said that Town Counsel thought that the *Deadrick v Chatham* might be more relevant to this petition. He said that the procedure that Town Counsel recommended for the Board to follow is to decide and make a finding on whether any nonconformity was extended or intensified and, if so, a special permit is the appropriate relief and the Board has to make a determination whether it considers the proposed structure to be substantially more detrimental than the existing structure. He said that is more or less consistent with Mr. Himmelberger's argument. Mr. Levy said that it is not consistent with the Board's practice.

Mr. Himmelberger said that he appreciates that the finer lines that were recently set down by the SJC in that most recent case do reflect a slightly different practice than how this Board has handled similar situations in the past. He said that the Board had some concern about that at the last hearing. He said that he emphasized the fact that the Board always retained the ultimate authority to make a final determination as to whether or not the proposed intensification of the nonconformity was substantially more detrimental to the neighborhood than the pre-existing nonconforming structure.

Mr. Adams asked Mr. Himmelberger to identify the nonconformities being extended and explain the basis of his statement that they are not substantially more detrimental to the neighborhood. Mr. Himmelberger said that there is an existing rear garage that is within three feet of the rear and side yard setbacks. He said that a 10 foot setback is required at the rear and a 20 foot setback is required on the side. He said that under this proposal the garage will be eliminated. He said that the existing home is also nonconforming with an 18.6 foot right side yard setback where 20 feet is required. He said that with the proposed addition, the nonconformity will be extended or intensified because it will be moving closer to the side yard property line by a considerable amount to bring it four feet from the property line.

Mr. Levy asked about the setbacks on the existing garage. Mr. Himmelberger said that the side yard setback is 2.5 feet and the rear yard setback is 3 feet. He said that the proposal is to decrease the distance from the house to the side property line from 18.6 feet to 3.5 feet. He said that he and his client are urging that the Board can find that is not substantially more detrimental to the neighborhood, where they will remove a more nonconforming garage. He said that the size of the house will increase but the TLAG will be below 3,600 square feet. He said that all of the neighbors impacted by this are supportive and do not think that it will be more detrimental. He said that the house to the right, which is down grade, is separated by a two car garage and the house itself sits further forward than this addition, closer to Lawrence Road. He said that his client reduced the TLAG and the scope from the prior proposal that was withdrawn without prejudice.

Mr. Adams said that the *Bellalta v Brookline* case went to great lengths to identify the fact that the neighbors felt that it was not more detrimental, as is the case here. He said that the lot was very small but there were several other houses in the neighborhood of similar size and volume as the proposed alteration. He said that it was just a dormer that was being added.

Mr. Adams said that if the Board approves a special permit for this, a lot of people will line up to come in with similar requests. He said that the Board has reviewed cases that involve air conditioning condensers and this new SJC decision may help with some of those. Mr. Levy said that it would not apply if it was creating a new nonconformity.

Mr. Himmelberger that this petition is to extend an existing nonconformity. He said that in the *Brookline* case the Court said that because it was an intensification, it did not need to reach the issue in the *Chatham*

case that a new nonconformity was created. He said that the language does allow for new nonconformities but the Brookline case only addresses an intensification of a nonconformity, which is the case with this petition where there is a pre-existing nonconforming right side setback at 18.6 that will be increased or intensified by bringing the structure closer to the lot line at 3.5. He stressed that they will be eliminating a garage that was more nonconforming on the side and the rear. He said that the project will improve the garage's setback but will intensify the home's setback.

Mr. Levy confirmed that the Petitioner is not relying on the garage's nonconforming as the basis for seeking a special permit but relying on the fact that there will be an intensification of the existing side yard setback of 18.6 feet on the house. Mr. Adams said that it will be a huge increase in the nonconformity. Mr. Himmelberger said that, with respect to the house, this will intensify the nonconformity of the house by extending further into the setback, and on that basis alone, they believe that the Brookline case allows the Board to make a finding under Section 6, if the Board determines that it will not be substantially more detrimental to the neighborhood. He said that in making that decision about whether or not intensifying the right side nonconformity of the house is not substantially more detrimental, the Petitioner wants the Board to take into consideration that will remove entirely the garage at the rear as well as improve the right side nonconformity of the garage.

Mr. Levy asked if there is evidence to show that this is a pre-existing nonconforming structure, meaning that it was built prior to the adoption of Zoning or the side yard setback bylaw. He said that the Board has only seen a permit is from 1927. Mr. Himmelberger said that side yard setback requirements were enacted in 1940.

Mr. Levy asked if Mr. Himmelberger's interpretation of the Brookline case is that once you have a nonconforming structure on a lot, any alteration only requires a special permit and under no circumstance would be a variance be required. He asked if the standard should just be more detrimental if the plan was to extend to 40 feet high. Mr. Himmelberger said that in accordance with his reading of Bellalta, Mr. Levy's hypothetical case would create a new nonconformity. He read Footnote 13 in Maria Bellalta & another vs Zoning Board of Appeals of Brookline & others. He said that he thinks that would still be an open question or as yet an undecided decision by the SJC. He said that there is language in their decision that could support that argument. Mr. Levy said that the F.A.R. was already in violation and there was an increase in that. He said that it did not create a new nonconformity. He said that the Trial Court opinion that was appealed in the Brookline case said that it does not address new nonconformities.

Mr. Levy said that he was concerned that the ruling creates a get out of jail free card for nonconforming lots where they can do whatever they want. Mr. Himmelberger said that the applicant will always have to come before the ZBA. Mr. Levy said that it will be for a much lesser standard.

Mr. Levy said that the existing nonconforming structure is shy of a conforming setback by 1.5 feet. He said that one little corner nicks the setback. He said that the SJC ruling now this gives the property owner the right to do whatever he wants without a variance.

Mr. Levy said that part of the Board's analysis should be to look at the fact that the setback will go from 18.6 feet to 3.5, keeping in mind that the town deemed that a 20 foot side yard setback is appropriate in this district. He said that the Board has to look at how it relates to being substantially more detrimental.

Mr. Adams said that when the second exempt clause was added to Section 6, there were a couple of wordings suggested. He said that the wording that was limiting to the ability to make a modification to a nonconforming structure was rejected. He said that it was clearly the opinion of the framers of the second exempt clause of Section 6 that there be the ability to extend a nonconforming portion of the building and that a variance would not always be required for such a condition. He said that, based on that, he thought

that, Counsel has proved his case. He said that he is troubled because this is a rather dramatic extension of the nonconformity, very much unlike the one that the Brookline case was based on. He said that, were it not for the fact that the Applicant communicated with all of the neighbors and produced documents that they did not think it would be substantially more detrimental, he would probably have a different opinion about this case. He said that the Board will have to rely heavily in the future on the fact that each case is based on its own merit.

Mr. Himmelberger said that the Board might have more difficulty in making its determination were it not for the fact that the pre-existing nonconforming garage that will be removed. He said that the Board has in the past has permitted nonconforming garages to be rebuilt.

Mr. Becker said that after speaking with Town Counsel, he thought more about the meaning behind what would be considered to be substantially more detrimental. He said that neither the bylaw or Chapter 40A define it. Mr. Levy said that the US Supreme Court said in a case defining pornography is that you know it when you see it.

Mr. Becker said that he redefined his study area but it did not materially change the analysis. He said that this will still be the largest, which by itself does not say anything because somebody has to be the largest house. He said that the Board frequently reviews petitions to go from below average to the largest house in the neighborhood.

Mr. Becker said that what matters with this project is the change in the setback. He said that he looked around other neighborhoods in Wellesley to see where are there other places with narrow setbacks. He said that is difficult to do because you cannot see where the property lines are. He said that you can see the house to house difference. He said that the other side of that coin is the point of having setbacks. Mr. Adams said that the Board has to evaluate the project based on the circumstances of a particular case.

Mr. Levy said that part of the Board's charge for Zoning is to try to make structures as conforming as possible and not to go in the other direction. Mr. Adams said that the Court said in its decision that the Boards should not be strictly guided by that. Mr. Levy said that the Town set Zoning and parameters for a reason. He said that it is not the sole determinant but it is a factor. Mr. Adams said that the court case says that the Board has to decide if it is more detrimental or not.

Mr. Himmelberger said that his client would not come before the Board if he was not starting from the position where he has the pre-existing nonconforming garage. He said that intuitively the Board has allowed rebuilding of nonconforming structures in place. He said that this project will bring a nonconforming garage piece forward and attach it to the house, which will make the house more nonconforming but not as nonconforming as the garage was. He said that they will remove the rear nonconformity of three feet and the structure will now be fully conforming to the rear yard setback of 10 feet. He said that it would be a significantly higher burden if there had been no garage with the nonconformities.

Mr. Levy said that there will be greater mass with the proposed addition. He said that the existing garage is one story.

Mr. Adams said that part of the SJC ruling was that the nonconformity was not intensified and it was the opinion of the neighbors that it was not being intensified. He said that clearly there is a benefit to sharing plans and working with neighbors to address their concerns.

Mr. Becker said that if the setback ended up at 9 feet instead of 3.5 feet, making a finding that the proposed structure would not be substantially more detrimental would be easier. Mr. Levy said that the analysis is if the modification of a proposed addition will be substantially more detrimental than the existing structure. He said that going from 18.6 feet to 3.5 is huge percentage increase and the question is if it is more detrimental.

Mr. Becker said that if the rest of the houses in the neighborhood were 3 to 6 feet it would not be more detrimental. Mr. Adams said that this is a specific situation that has a pre-existing nonconforming garage on the neighboring property that is probably closer than 3.5 to the property line. Mr. Levy said that it is a one story garage that is lower. Mr. Adams said that because of the driveway, there is a setback that is not likely to be encroached upon. He said that condition could change if the house was torn down and rebuilt.

Mr. Himmelberger said that if this was just a case where they were seeking to increase a nonconformity setback from 18.6 to 3.5 feet, it would be a much harder case to plead. He said that the case has to be viewed in totality that includes the nonconforming garage and eradication of its nonconforming rear yard setback. Mr. Levy said that it would be easier if the addition was kept to one story. He said that the mass and bulk will be substantially more onerous on the lot than the present garage. Mr. Becker said that it is an intensification of the use that shows up in the TLAG. Mr. Levy said that it will look a lot different from the street and for the neighbors because it will go up two stories. Mr. Adams said that the Board has not always viewed a vertical increase that does not exacerbate the setback as an intensification. Mr. Himmelberger said that this should be viewed as a 1.5 story versus a 2 story because it will have a shed dormer on a half story. He said that part of the height is driven by the desire to keep the pitch of the proposed structure consistent with the pitch of the existing structure.

Mr. Becker said that he looked at properties on Weston Road and saw some that are very close to the lot line. He said that there are several properties on River Ridge that are close to the property line. He said that the difference between 18.6 feet and 3.5 feet is a lot.

Mr. Himmelberger said that his client would like to avoid a negative vote from the Board.

Mr. Becker asked if there was anyone present at the public hearing who wished to speak to the petition.

Mr. Adams said that his opinion has changed, based on a detailed reading of the Brookline case. He said that he could make a finding that the proposed structure shall not be substantially more detrimental to the neighborhood than the existing nonconforming structure, subject to a condition that the garage is removed, because the design was carefully worked through and vetted with the impacted neighbors, who provided statements of support. He said that this will be looming over one neighbor on the side. He said that he appreciated that Mr. Kraus made the effort to speak with all of his neighbors which gave them an opportunity to express disagreement with the design and gave them an opportunity to organize others who might feel the same way but that did not happen.

Mr. Becker said that although he was concerned about the 3.5 foot setback, on the basis of what has been said, he would be willing to support a finding that the proposed structure would not be substantially more detrimental to the neighborhood, principally because of the distance between the houses. He said that when viewed from the street you cannot tell where the lot line is. He said that combined with the neighbors' support would lead to that conclusion.

Mr. Levy asked to see the letter of support from the neighbor at 19 Willow Road. He confirmed that the letter dated February 25, 2019 referenced the new plans.

Mr. Adams said that the existing house makes a statement as it is and that will be continued with this design.

The Board confirmed that TLAG will be 3,526 square feet.

Mr. Adams said that the Board should be mindful that a 6,000 square foot lot is very small. Mr. Levy said that a 3,500 square foot house is a large house.

Mr. Himmelberger said that there are unique facts in this case.

Mr. Levy moved, Mr. Adams seconded the motion and the Board voted unanimously to make a finding that the proposed alteration will intensify an existing nonconforming and make a finding that the proposed renovations will not be substantially more detrimental to the neighborhood than the existing nonconforming structure, and approve a special permit, subject to a condition that the garage be removed.

Mr. Becker said that although it is not a Zoning issue, something should be done with the retaining wall.

As there was no further business to come before the Board, the hearing was adjourned at 8:30 pm.

Respectfully submitted,

Lenore R. Mahoney
Executive Secretary

DRAFT