



ZONING BOARD OF APPEALS

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ZBA 2019-38
Appeal of Brightside Investments, LLC
7 & 11 Longmeadow Road

Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, May 2, 2019, at 7:30 pm in the Juliani Meeting Room, 525 Washington Street, Wellesley, on the Appeal of Brightside Investments, LLC pursuant to the provisions of Section XVIII (A), Section XIX (B), Section XXIII (A) and Section XXIV-D of the Zoning Bylaw of the Building Inspector's Determination, responsive to a request for a zoning bylaw interpretation regarding a building permit for a newly constructed single family home at 7 Longmeadow Road while occupying the existing home at 11 Longmeadow Road.

On February 6 and February 7, 2019, the Petitioner filed requests for a hearing before this Authority, and thereafter, due notice of the hearing was given by mailing and publication.

Present on behalf of the Town were Thomas Harrington, Esq., Town Counsel, and Michael Grant, Inspector of Buildings and Zoning Enforcement Officer.

Present at the public hearing were David Himmelberger, Esq., representing Brightside Investments LLC, and Sam Soderholm, Soderholm Custom Builders, Inc. Mr. Himmelberger said that Dana and Joanna Thorpe, who live at 11 Longmeadow Road with their two children, were also present at the hearing.

Mr. Himmelberger said that the Appellants are seeking an appeal of a denial of a request for Zoning interpretation. He said that there are two appeals that were taken serially.

Mr. Himmelberger said that 11 Longmeadow Road (11 Longmeadow) is a pre-existing nonconforming 20,000 square foot lot in a Single Residence District in which the minimum lot size is 40,000 square feet. He said that his clients would like to build a larger home at 7 Longmeadow Road (7 Longmeadow) with a portion of it built into what will now be the setback with 11 Longmeadow. He said that when the plan to take 11 Longmeadow down after 7 Longmeadow was built was not approved by the Building Inspector, his clients submitted a formal request for Zoning interpretation to consider their proposal to submit a building permit application for a new home at 7 Longmeadow, with the understanding and commitment that prior to receiving a Certificate of Occupancy (CO) for 7 Longmeadow, 11 Longmeadow would have to be razed. He said that on January 7, 2019, the Building Inspector denied the request, citing as the basis for his denial, Section 23A, which precludes the issuance of a building permit if the constructed building would be in violation of the Zoning Bylaws. He said that it was the Building Inspector's opinion that would occur if he issued a building permit for the construction at 7 Longmeadow, as in his opinion this would result in two dwellings existing on the single merged lots, where the two lots merged for Zoning purposes when the kitchen was taken out during construction of 7 Longmeadow. He said that his clients

appealed the determination predicated on the fact that, as the Building Inspector is the sole individual responsible for the issuance of CO's, no CO could be issued for 7 Longmeadow until 11 Longmeadow had been taken down. He said that while there would be two physical structures on the lot for a brief time, there would never, as defined in the bylaws, be more than one one-family dwelling at a time.

Mr. Himmelberger said that, mindful of the Building Inspector's rationale in his determination on their initial request, his clients submitted a second request for a Zoning interpretation to construct 7 Longmeadow in phased construction. He said that during the first phase, his clients would submit a building permit application for construction of a building with no kitchen facilities, as the existence of a kitchen is what controls whether or not a building is a dwelling. He said that at the completion of Phase 1, his clients would have a large accessory structure that in no way qualifies as a dwelling and could never be converted. He said that once Phase 1 was completed, 11 Longmeadow Road would come down and his clients would apply for a building permit for Phase 2 to include a kitchen. He said that the kitchenless structure built during Phase 1 can be considered to be a garage or an accessory structure, which is an accessory use allowed under the bylaw. He said that an accessory use is defined as customary in connection with a one-family dwelling, incidental thereto including a private garage or private stable. He said that there is nothing within the definition that speaks to the size of the structure. He said that only one single family dwelling is permitted per lot in the Single Residence District. He said that the Zoning Bylaw defines a one family dwelling as a detached dwelling containing not more than one dwelling unit, that is a unit with facilities for food storage and preparation. He said that the building without a kitchen at 7 Longmeadow would merely be an oversized accessory structure containing a collection of rooms and garage bays.

Mr. Himmelberger discussed a 2014 Land Court decision regarding a renovated 165 foot tall, 10 story watch tower that was constructed in 1943 as part of the war effort and whether it could be considered an accessory structure to a single family structure. He said that the Land Court found that the uses of the renovated tower as guest quarters, storage of household items, home office, and household entertainment were accessory and customarily incidental to the permitted use of the existing dwelling, subject to the galley in the tower not thereafter being converted to a full kitchen. He said that the determinant was no kitchen. He submitted an article, photographs and the Land Court Decision.

Mr. Himmelberger said that following the construction of this large accessory structure, his clients will seek a subsequent Phase 2 building permit, following the razing of 11 Longmeadow. He said that the only issue to be decided is whether the requested building permit for Phase 1 would result in a Zoning violation as two dwellings on a lot. He said that his opinion is that it will not. He said that there is no basis in fact for the Building Inspector's assertion that to grant a Phase 1 building permit will result in a violation of the rule against two single family dwellings on a single lot.

The Chairman said that the building permit application will be for a second structure on a residential lot. Mr. Himmelberger said that without a kitchen, it will not be a second dwelling, which is the prohibited situation. He said that the request is that the Board grant the first appeal which allows the issuance of the full building permit, including the kitchen, because his clients cannot get a CO until 11 Longmeadow comes down. He said that if the Board grants that appeal, the second appeal would be moot. He said that if the Board is not inclined to grant the first appeal, his clients request that the appeal be granted to allow the Building Inspector to issue a building permit for phased construction of 7 Longmeadow, with the first

phase being a kitchenless accessory structure and after that building permit is closed out and after 11 Longmeadow is razed, a second building permit will be submitted to build a kitchen.

Mr. Himmelberger said that all of the neighbors on Longmeadow Road have signed and submitted a letter of support. He said that there is no harm or insult to the Zoning Bylaws that result from granting this appeal. He said that there will be no permanent impact for the relief being sought. He said that at the end of construction, at the end of Phase 1 and thereafter the razing of 11 Longmeadow, and Phase 2 being the construction of the kitchen at 7 Longmeadow Road, there will be one single family dwelling on one lot and they will have eliminated the pre-existing nonconforming lot at 11 Longmeadow.

The Chairman said that there is a remedy that is available, which is to rent another house, tear down 11 Longmeadow and proceed with construction at 7 Longmeadow.

Mr. Harrington said that Mr. Grant had consulted with him along the way with the various arguments presented by Mr. Himmelberger. He said that the property started out as two lots that have now merged into one lot. He said that the Appellants are looking to have two houses on a single lot. He said that just because you take a kitchen out of a house, that does not make it an accessory structure. He said that if this is allowed, it could become the norm in Wellesley, which is not what the Zoning Bylaw intended. He said that he did not think that it was a proper interpretation of the bylaw. He said his concern is about two dwellings on a single lot, perhaps with one without a kitchen. He said that at some point there could be tough decisions to make and he did not think that the town would want to put itself in that situation.

The Chairman expressed concerns about the precedent that this would set. Mr. Himmelberger said that in other situations where a lot was sufficiently large to permit a new structure to be built that is fully Zoning compliant, you could request the same relief but the vast majority of lots in town do not allow for a new home to be built on an existing lot in a conforming fashion while the existing home remains. He said that the bylaw has definitions for a reason. He said that a dwelling is specifically defined as a facility with the ability for food storage and preparation. He said that they do not have that here.

The Chairman said that the request is for a second building permit on the same lot. Mr. Himmelberger said that the Town approves them all of the time for barns, pool houses and cabanas. He said that there is no downside to the neighborhood or to the Town. He said that his client is willing to have a condition that 11 Longmeadow must come down and is willing to put up a bond to ensure that. He said that his client is willing to do whatever it takes to satisfy the Board that the Applicant would not change his mind at the end of the day and decide to keep both houses. He said that if there were two houses on the lot with kitchens, a \$300 a day fine would be imposed.

Mr. Himmelberger said that there is nothing in the bylaw that precludes the issuance of the building permit for something that is not a dwelling and can never be made a dwelling until 11 Longmeadow comes down. He said that clients will get the benefit of remaining on site overseeing construction with their children, which is far less disruptive to them, will not be disruptive to the town, and the neighborhood is squarely in favor of it. He said that no second dwelling can exist under the scenarios that they have set forth. He said that his client is happy to accept any conditions that the Board wishes to place on the issuance of a permit for razing 11 Longmeadow once 7 Longmeadow has been completed in Phase 1.

Mr. Harrington said that an accessory structure, by definition, needs to be accessory to the main use. He asked how a house without a kitchen would be accessory to a house. Mr. Himmelberger said that it is a garage or a collection of rooms without a kitchen. He said that there is nothing in the bylaw that precludes it. He said that Mr. Harrington is twisting the bylaw to say that it is still a dwelling even though it does not have a kitchen. He said that the ability to set precedence is so small, given the fact that there are so few lots that could accommodate something like this. He asked where the downside is to the limited precedence where there is no violation to the bylaw. He said that the proposal is for temporary quarters while a house is being built. He said that this is an existing structure in which his clients live and they want to continue to live there while they build 7 Longmeadow Road. He said that by doing it in phased construction, they will be very careful to observe the requirements within the bylaw.

The Chairman discussed inserting a condition for a substantial bond of \$300,000 to \$400,000 so that it would be painful to not take the house down. Mr. Harrington said that creates difficult enforcement actions. He said that constructing a second house with no kitchen puts the burden on the Town to enforce. He said that is not how the Zoning Bylaw was written. He said that an accessory structure should be accessory to the main use, which is a dwelling unit. He said that the Appellant bought two lots and could have lived on one and constructed on the other, but he merged them.

Mr. Harrington said that Mr. Grant told him that there is no provision in the Zoning Bylaw for bonding a project such as this. He said that if there was an appeal, he was not sure that the Board could defend a bonding provision that does not exist. He said that if the process does not go well, the Town will pay to enforce the bond. Mr. Himmelberger said that this house will be going through Large House Review (LHR) and it can be a condition of any decision that this Board approves that approval of LHR is subject to a condition that bonding be obtained to guarantee the removal of the house. He said that his client is willing to execute any binding contracts.

Kent Soderholm, Soderholm Custom Builders, Inc., said that he and his son Sam are local builders who have worked in Wellesley for a long time. He said that they have gone through LHR with a couple of houses, were finished with the construction in January but were not able to finish all of the landscaping because it was winter. He said that the Planning Board approved their posting a bond to guarantee that the planting would be finished in the spring. He said that it is a similar situation with the Thorpes to allow them to move in in January and not have to wait until June and continue to rent a place for five or six months just because they are waiting for a final. The Chairman said that is the type of problem that the Town does not want to take on. He said that the Appellant made the decision to merge the two lots. Mr. Himmelberger said that bonds are to protect against unlikely scenarios. He said that his clients continuing to live at 11 Longmeadow in an existing home while 7 Longmeadow is built is something that will be over and done within a couple of years.

Statement of Facts

The subject property is located at 7 & 11 Longmeadow Road, in a 40,000 square foot Single Residence District.

The Appellant is appealing, pursuant to the provisions of Section XVIII (A), Section XIX (B), Section XXIII (A) and Section XXIV-D of the Zoning Bylaw, of the Building Inspector's Determination, responsive to a request for a zoning bylaw interpretation regarding a building permit for a newly

constructed single family home at 7 Longmeadow Road while occupying the existing home at 11 Longmeadow Road.

Submittals from the Appellant

- Memorandum in Support of Appeal of Building Inspector's Zoning Interpretation Regarding Appellant's Proposed Construction at 7 Longmeadow Road, Wellesley, from David J. Himmelberger, Esq.
- Letter to Michael Grant, Chief Zoning Enforcement Officer, dated December 28, 2018, from David J. Himmelberger, Esq., re: Request for Zoning Interpretation, 7 and 11 Longmeadow Road, Wellesley
- Letter to David Himmelberger, dated January 7, 2019, from Michael Grant, Inspector of Buildings/Zoning Enforcement Office, re: Request for Zoning Interpretation, 7 and 11 Longmeadow Road, Wellesley
- Letter to Michael Grant, dated January 14, 2019, from David J. Himmelberger, Esq., re: Request for Zoning Interpretation, 7 and 11 Longmeadow Road, Wellesley
- Letter to K. C. Kato, Wellesley Town Clerk, dated February 6, 2019, from David J. Himmelberger, Esq., re: Appeal of Building Inspector's Determination regarding 7 and 11 Longmeadow Road, Wellesley
- Notice to Town Clerk Pursuant to Section XXIV of the Zoning Bylaws, dated February 6, 2019
- Letter to David Himmelberger, dated February 7, 2019, from Michael Grant, Inspector of Buildings/Zoning Enforcement Officer, re: Request for Zoning Interpretation, 7 and 11 Longmeadow Road, Wellesley – Violation of the 9th Edition Massachusetts State Building Code
- Letter to Executive Secretary, ZBA, dated February 7, 2019, from David J. Himmelberger, Esq., re: Appeals of Building Inspector's Determination regarding 7 and 11 Longmeadow Road, Wellesley
- Letter to K.C. Kato, dated February 7, 2019, from David J. Himmelberger, Esq., re: Appeal of Building Inspector's Determination regarding 7 and 11 Longmeadow Road, Wellesley
- Notice to Town Clerk Pursuant to Section XXIV of the Zoning Bylaws, dated February 7, 2019
- Turning a World War II watchtower into a guesthouse with attached photograph
- Essex County Land Court decision, 15 MISC 000555 (MDV) / 17 MISC 000144 (MDV), Lazarek v Manchester-By-The Sea Board of Appeals

Decision

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

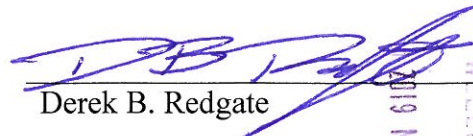
The Appeal of the Building Inspector's Determination, responsive to a request for a zoning bylaw interpretation regarding Option 1 to allow the owner to remain in 11 Longmeadow Road during construction of 7 Longmeadow Road with conditions that would guarantee the sequence of events, as described at the public hearing, will happen, is denied, as the vote of the Board was not unanimous.

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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, Acting Chairman


David G. Sheffield


Derek B. Redgate

ZBA 2019-38
Applicant Brightside Investments, LLC
Address 7 & 11 Longmeadow Road

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NOT VALID FOR RECORDING UNTIL CERTIFIED BY TOWN CLERK

In accordance with Section 11 of Chapter 40A of the Massachusetts General Laws, I hereby certify that twenty (20) days have elapsed after the within decision was filed in the office of the Town Clerk for the Town of Wellesley, and that no appeal has been filed, or that if such appeal has been filed, that it has been dismissed or denied.

Date:

Attest:

Cathryn Jane Kato
Town Clerk

cc: Planning Board
Inspector of Buildings
lrm