

TOWN OF WELLESLEY



MASSACHUSETTS

## ZONING BOARD OF APPEALS

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ROBERT W. LEVY  
WALTER B. ADAMS  
DEREK B. REDGATE

Thursday, February 5, 2015, 7:30 p.m.

Juliani Meeting Room  
Town Hall

Zoning Board of Appeals Members Present: J. Randolph Becker, Acting Chairman  
David G. Sheffield  
Robert W. Levy  
Derek B. Redgate

Presenting the case at the hearing were Ken Zhao, (the Petitioner), John Lee, Architect and Brian Dalmaso, Builder.

Mr. Zhao said that it is a nonconforming lot. He said that the request is to modify a variance to demolish the existing nonconforming structure and build a new structure on the same footprint. He said that he is also requesting a special permit/finding for additions at the front and the back of the house that will conform to setback requirements. He said that the existing house is just over 1,000 square feet. He said that the proposal is to add a second story to accommodate a growing family. He said that the design of the house will fit in with the neighborhood and will not be more detrimental. He said that the existing house is an eyesore, so the proposed house will increase value in the neighborhood. He said that they tried to be as conforming as possible. He said that it is a difficult lot to develop.

Mr. Dalmaso said that there are two to three new homes that abut the property up the street that were tear downs. He said that this house will comply with the 500 Foot Rule.

Mr. Zhao said that the lot is 13,800 square feet and the proposed TLAG will be 3,462 square feet. He said that the proposal is to build on the same footprint with additions at the front and the back. He said that the side yard setbacks will not change.

Mr. Levy discussed the variance issue. He said that there were three prior decisions in 1981, 1970 and 1951. He asked which variance was intended to be modified. He questioned why this would not be a new variance. He said that, looking at the history of this lot, the builder built the house too close to the lot line. Mr. Dalmaso said that the hardship is that the lot is narrow. He said that without the bump into the side yard setback, it would be extremely difficult to build a house of similar scale.

Mr. Becker clarified Mr. Levy's question about an old variance and what happens when someone wants to change the nonconformity. He said that the question is whether it is a new nonconformity that requires a new variance.

Michael Zehner, Planning Director, said that the variance that was previously granted was based on a plan and they are now seeking to alter that plan. He said that is why it would be a modification of a variance. Mr. Levy said that does not morph it into a pre-existing nonconforming use.

Mr. Becker asked about the Mortgage Survey Plan and the issue with the roadway. Mr. Zehner said that Ethan Parsons, Assistant Planning Director had discussed that with the property owner for some time. He said that, as far as he is aware, that has not been resolved. He said that it was discussed with Town Counsel and the Engineering Department and the Building Inspector, who concluded that the homeowner needed to show proof that the area in question had been deeded to the homeowner. He said that there is a curve shown on the plan that was the former location of Cedar Street. He said that when Cedar Street was relocated it became a right of way that was retained by the town. He said that the Planning Department is not aware of any record where that area was deeded over to the property owners. He said that the property may not have frontage. He said that the zoning of that trapezoidal area is conservation that comes with special permit requirements for uses that possibly allow for a driveway.

Mr. Levy said that he did not think that it is fair for a homeowner to allow the town to move the street to make the house nonconforming. He said that should be a taking of some sort. Mr. Zehner said that does not mean that there needs to be some affirmative action by Town Meeting to transfer the property. Mr. Levy said that he has seen this in other context with a cul de sac where the town requires you to blow through to fill it in so that there is no bulb. He said that a lot of towns require that the bulb be filled in so that it is a straight road. He said that no one knows who owns those half moons.

Mr. Becker said that the site plan that was submitted was sealed by a surveyor and it refers to assessor maps and the deed book. Mr. Zehner said that the zoning noted on the survey is incorrect. He said that it is not an SRD 10. He said that the front of the property, regardless of ownership, is zoned as a Conservation District. Mr. Becker said that is different from the ownership issue. Mr. Zehner said that the Planning Department staff provided all of this information to the property representatives and they needed to provide positive documentation, which has not been done.

Mr. Becker confirmed that there are two issues; one is ownership and the other is zoning.

Mr. Levy asked if there was a 20 foot by 158 foot parcel conveyed by the town on the 1951 plan that is Lot A. Mr. Becker said that there are two references to the deed book. Mr. Dalmaso asked if the surveyor's license is on the line.

Mr. Levy asked if there is an appetite for the Town to sell some land. Mr. Zehner said that people are open to discussion. He said that the issues are who owns it and is it conservation land. Mr. Becker asked who has been paying taxes on it since 1951, if anyone. Mr. Zehner said that the Town presumes that it owns it. He said that it is part of the tax parcel recognized by the Town. He said that the Zoning Map is based on the Tax Map. He said that he would be happy to work with the Applicant and various Town departments to resolve this. He said that they met with the Applicant quite a while ago and he left the meeting thinking that the Applicant needs to do some work to resolve it.

Mr. Becker said that it would be interesting to know what the second page deed book reference is.

Mr. Zhao said that the deed for the last 50 years has referred to Cedar Street as it is know.

Mr. Dalmaso asked about eminent domain. Mr. Levy said that you cannot get adverse possession over a municipality.

Mr. Zhao said that the original owner of the house did a land trade with the Town.

Mr. Levy said that if Mr. Zhao was able to gain 10 more feet, the house would be conforming. Mr. Dalmaso said that the surveyor followed the deeds and references which prove that there was a land swap. Mr. Levy said that was not for the frontage in question.

Mr. Dalmaso said that the homeowner would like to expand his family. He said that the existing house is in poor condition.

Mr. Becker said that there are three issues; the right side variance and modification, the ownership of the trapezoidal piece and the zoning. He said that the Proponent and Mr. Grant said that is taken care of but the Planning Board said it is not taken care of.

Mr. Zhao said that this project has been going on for over a year. He said that he worked with Mr. Parsons on it. He said that they made some discoveries when they brought the Planning Director and Town Engineer into the discussions.

Mr. Levy said that he thought that the Board does not know enough. Mr. Becker said that the plan that is attached to the Building Permit from 1985 lists the lot size at 11,600 square feet and it is truncated at the front. He said that something had to have happened.

Mr. Zhao said that the deed says that the property is extended to present day Cedar Street. He said that it has not changed in the past 52 years. He said that he has been tracing the history of the property on the Norfolk County website. He said that the deed says that it is to present day Cedar Street but somehow that got lost. He said that 50 years ago there was clearly a land swap with the town. He said that the town took a piece at the back that is swampland and a stream. He said that three quarters of the property is not usable because there is a steep cliff drop. He said that they traded the swampy area for the wedge at the front. He said that it did not make sense for the homeowner to not have a driveway.

Mr. Levy questioned whether the setback established by the variance would be grandfathered. He said that the structure will be gone.

Mr. Levy said that the town is willing to work with the homeowner to solve the issues. He said that it would be good if they were able to negotiate for 10 more feet on the side. He said that would greatly increase the value of the property.

Mr. Becker read the Planning Department Staff recommendation.

Mr. Becker asked about the construction sequence. Mr. Zhao said that the plan is to demolish the first floor and the foundation, shown on the plans, D-1 and D-1.1. He said that the footprint of the old foundation is highlighted in red on Plan A-1. He said that the plan is to rebuild on that footprint. He said that they will push the front and the back out to setbacks that will conform.

Mr. Sheffield confirmed that the dashed line on the basement shown on Plan A-1 indicates the deck above. He said that the plan is missing a column.

Mr. Dalmaso said that when they worked with the Building Department on the plans, they said that they way to make it conform would be to put an addition off of the front and at the back. Mr. Sheffield said that helps to achieve the 30 foot setback from the garage to the side lot line. Mr. Zhao said that the

existing garage is 30 feet to the side lot line. He said that they had originally planned to push it out. He said that it is not a deep garage. Mr. Becker confirmed that the foundation on the right side will be in the same position as the existing foundation. Mr. Dalmaso said that Mr. Grant's understanding was that because the house was built with a variance, it could be rebuilt on the same footprint. Mr. Becker questioned who owns the variance.

Mr. Levy said that he did not think that the Board is prepared to vote in the affirmative on this petition tonight. He discussed the options to continue the matter or offer the Petitioner the option to withdraw his petition without prejudice.

Mr. Dalmaso said that their position is that the documentation has been submitted. He said that the property is referenced in the deed from the 1950's. He said that it is possible that the Town Map is wrong. He said that the surveyor stamped the plot plan. Mr. Levy said that there is a surveyor stamp on a plot plan from 1985 that does not agree with the current one. Mr. Dalmaso said that the deed makes references to the property.

Mr. Becker said that the purpose of continuing the hearing is to allow time to resolve all of the issues. Mr. Zehner said that the issues will have to be resolved with the Assessors, DPW and the NRC. He said that they will have to meet several times to figure this out. He said that they could have been doing this already. Mr. Becker asked why all of those people have to be involved. He said that the question seems to be who owns the trapezoidal piece and what is the zoning. He said that not take a lot of meeting with a lot of people. He said that there should be documentation in the deed for that and other documents that resolve that question. Mr. Zehner said that there are multiple interests in the way that the town functions and no one person can make a decision that will resolve this.

Mr. Levy asked if it is only the trapezoidal piece that is zoned Conservation. Mr. Zehner said that is his understanding. He said that the survey that was submitted should show that zoning line.

Mr. Dalmaso said that he thought that the surveyor is the end all, be all. Mr. Zehner said that the surveyor does not determine what the zoning is.

Mr. Levy asked about the conservation land. Mr. Zehner that there are two issues, one is the conservation zoning and the other is whether it is owned by the NRC. Mr. Becker said that should be in the chain of title. Mr. Zehner said that what has been discussed is a transfer that no one from the town is aware of. He said that if there is documentation, they need to produce it. He said that would direct Bill Millett at DPW to contact Brian DuPont and the Assessors to correct the title, ownership and tax parcel.

Mr. Dalmaso asked about continuing the petition to March 5, 2015 because the Petitioner feels that the evidence can be produced quickly.

Mr. Levy said that ownership is one of the issues.

Mr. Becker said that the Board was amenable to continuing the petition to March 5<sup>th</sup>. He said that would give the petitioner time to resolve the ownership issues and give the Board time to resolve the issue of the variance, based on Zoning Bylaws and State Case Law.

Mr. Zhao asked about a special permit for the setback. He said that the only thing that the proposed structure will not meet is the front yard setback. Mr. Becker said that they are still left with the issue about whether the variance goes away for the side yard setback if the wall is torn down. He said that is independent of who owns the wedge. He said that if the town owns the wedge, it does change the setback and that would create a nonconformity. Mr. Zhao said that there are already two curb cuts there. He said

that the proposal was to pave in between to connect them. Mr. Becker said that may be using the town's land. He said that the records for Town Meeting could be checked for authorization of a land swap.

Mr. Levy said that the best idea may be to get a good title examiner.

Mr. Sheffield moved and Mr. Becker seconded the motion to continue the petition to the March 5, 2015 Public Hearing. The Board voted unanimously to continue the petition.

**Thursday, March 5, 2015, 7:30 p.m.**

Juliani Meeting Room  
Town Hall

Zoning Board of Appeals Members Present:      Richard L. Seegel, Acting Chairman  
                                                                                 J. Randolph Becker  
                                                                                 Walter B. Adams

ZBA 2-15-16, KEN ZHAO, 100 CEDAR STREET

Mr. Seegel said that the Petitioner requested that the petition be allowed to be withdrawn without prejudice. Mr. Becker moved and Mr. Adams seconded the motion to allow the petition to be withdrawn without prejudice. The Board voted unanimously to allow the petition to be withdrawn without prejudice.