

TOWN OF WELLESLEY



MASSACHUSETTS

## ZONING BOARD OF APPEALS

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ZBA 2021-46

Petition of John & Loraine O'Hanlon  
44 Cypress Road

Pursuant to due notice, the Special Permit Granting Authority held a Remote Public Hearing on Thursday, June 3, 2021 at 7:30 pm, on the petition of John & Loraine O'Hanlon requesting a Variance pursuant to the provisions of Section 19 and Section 24 of the Zoning Bylaw for a Build Factor of 24.69 for a reconfigured lot at 44 Cypress Road, in a 20,000 square foot Single Residence District. The existing Build Factor is 20.80, which exceeds the maximum allowed by right.

On April 6, 2021, the Petitioner filed a request for a hearing before this Authority, and thereafter, due notice of the hearing was given by mailing and publication.

### WITHDRAWN WITHOUT PREJUDICE

June 3, 2021

2021 JUN 19 P:101

Present on behalf of the Petitioner and record owner of 38 and 44 Cypress Road, was David Himmelberger, Esq., who said that the request is to reconfigure a property line between the two properties. He said that the petition was previously before the Board as a request for a special permit to modify a pre-existing nonconforming lot, in that 44 Cypress Road has a pre-existing nonconforming build factor of 20.80 where 20 is allowed. He said that the Board concluded that it did not have the authority under the bylaw as there was no change being sought to a nonconforming structure. He said that the petition was withdrawn without prejudice.

Mr. Himmelberger said that the petition was re-submitted as a request for a variance from the provision that would require that any post 1986 lot have a build factor not greater than 20. He said that the build factor is a metric that is designed to limit oddly shaped lots. He said that being in excess of a build factor of 20, it is an unusually shaped lot.

Mr. Himmelberger said that the proposal is for a logical reconfiguration that grants more frontage to what currently appears to belong to 44 Cypress Road. He said that currently the driveway to 44 Cypress Road is owned by 38 Cypress Road. He said that it will bring 192 feet of rear lot over to 38 Cypress Road, which makes sense in terms of lot configuration and how the structures sit on the lots. He requested the Board's approval of a variance due to the shape of the lot.

The Chairman said that Mr. Himmelberger's argument about the shape of the lot is appropriate but the last clause of Section 24D of the Zoning Bylaw says that the hardship shall not have been self-created. He said that by changing the lot lines the Petitioner is creating the problem that they are asking relief for. Mr.

Himmelberger said that the shape of the lot that is before the Board is something that was not created by the Petitioner but under an ANR that was approved in the 1950's.

The Chairman questioned why, with the two lots side by side, they could not come up with a division into two lots with a build factor of 20 or less. Mr. Himmelberger said that there was no way to do that without making the setbacks for the currently compliant houses noncompliant. He said that they do not believe that there is a way to bring the driveway over and get the build factor under 20. He questioned the harm to the Zoning Bylaw by increasing the build factor for 44 Cypress Road to make it a more rational lot with a driveway on it.

The Chairman said that the Board usually acts on a plan. He said that what is before the Board is not a lot yet. Mr. Himmelberger said that the Applicant cannot go for ANR until they get zoning relief. He said that the variance cannot be recorded until the Planning Board approves an ANR.

A Board member asked if Lot B2 will remain under ownership with 38 Cypress Road. Mr. Himmelberger said that will go to 44 but 38 will retain the right to drive on it and park service vehicles at the end of it, off the driveway. He said that Lot B2 is owned by 38 Cypress Road and 44 currently has an easement over it to access its garage. He said that lawn care service vehicles for 38 Cypress Road park in the area at the end. He said that in order to continue to do that, the proposal is that the easement, instead of being in favor of 44 will now be in favor of 38 Cypress Road. He said that the driveway will become part of 44 Cypress Road, where it looks like it should belong. He said that in the 1920's to 1930's, the driveway used to service the existing house at 38 for which 44 Cypress was the carriage house. He said that when 38 was built, it took a new driveway. He said that the idea is to move the driveway to 44 and move the rear of 44, Lot A2, over to 38.

The Chairman questioned the hardship, if the plan simply involves flipping the easement from 38 to 44. Mr. Himmelberger said that they cannot flip it unless the land is deeded over to 44 Cypress Road. The Chairman said that there is an existing driveway easement. Mr. Himmelberger said that the hardship is to remove 44 from being an easement to get it into its property and remove Lot A-2, which is not very functional for 44 to 38, where it can be used. He said that 38 can then enjoy a larger rear yard and the driveway that looks like it should, will belong to 44. He said that the proposal is unusual but questioned the offense to the Zoning Bylaws. He said that the fully conforming lots will be in excess of the requirements for the Zoning district and will make 44 a more rational appearing and functional lot. The Chairman said that the increase in build factor would be due to the proposed changes to the lot lines. Mr. Himmelberger said that because of the unusual shape, they need a variance. He said that they are seeking to modify a nonconformity, slightly increasing it in a way that is negligible in appearance.

The Chairman said that things that the Board typically deals with arise out of Chapter 40A and this arises out of the Subdivision Control Law. Mr. Himmelberger said that build factor is within Section 19 of the Zoning Bylaw. He said that the purpose of build factor is to avoid creating unusually shaped lots that look odd as you drive down the street. He said that this will the increase build factor but not the odd factor. He said that there is an existing condition where the build factor is greater than permitted but not as result of something that the Applicant did but by a subdivision that was done in the 1950's. He said that they are proposing to change the lot lines to something that makes more sense from a land use perspective and will continue to be in excess of 20. He questioned the harm in granting the relief. He said that it makes a more rational use of the land without derogating from the Zoning Bylaw.

A Board member said that the proposed subdivision will make the build factor less conforming. He questioned how that makes it better as the build factor is in place to prevent odd shaped lots. Mr. Himmelberger said that the vast majority of variances cause a greater deviance from the Zoning Bylaw. He said that the tables in the Zoning Bylaw were designed to address new building lots. He said that these are not new but fully built upon lots. The Chairman questioned the hardship since the buildings are already on the lots.

Mr. Himmelberger said that the petition satisfies the criteria for a variance based on the shape of lot. A Board member questioned whether the hardship is based on the fact that the lawn care people cannot park their vehicles properly. Mr. Himmelberger said that the lawn care was only an explanation as to why that area was marked on the plans. He said that the goal is to get the driveway over to 44 and the rear lot to 38.

A Board member questioned why the lot line of 89.49 feet was chosen at that angle. He asked if any other lot lines could be changed to lessen the build factor. Mr. Himmelberger said that he did not believe so. He said that the Petitioner spent considerable time trying to find a way to give the driveway to 44 Cypress Road and land to 38 Cypress Road, while lessening the build factor on 44.

The Chairman said that the Board had not seen the alternative subdivision plans. Mr. Himmelberger asked for a continuance so that he could show his work.

The Board said that the Applicant should think about a hardship that is more compelling.

The Board voted unanimously to continue the petition to August 5, 2021.

August 5, 2021

Mr. Himmelberger said that this was the second of two efforts to realign a common lot line between 38 and 44 Cypress Road, both of which are owned by John and Loraine O'Hanlon. He said that the Board was concerned that if it were to grant relief, the build factor would still be in excess of 20. He said that the Petitioner has exhaustively reviewed any other options and could not find any alternative that would result in a build factor of less than 20. He requested that the petition be allowed to be withdrawn without prejudice.

The Board voted unanimously to allow the petition to be withdrawn without prejudice.

2021 Aug 19 P 1:01  
ZONING BOARD OF APPEAL  
CITY OF HANOVER, MA 02343

Planning Board Approval Under  
Subdivision Control Law Not Required

