

TOWN OF WELLESLEY



MASSACHUSETTS

## ZONING BOARD OF APPEALS

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ZBA 2017-83

Appeal of Peter Katsikaris  
15 Manor Avenue

10/11/19  
10/11/19  
10/11/19

Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, October 5, 2017 at 7:30 p.m. in the Juliani Meeting Room, 525 Washington Street, Wellesley, on the appeal of Peter Katsikaris subject to Section XXIV-C of the Zoning Bylaw of the determination of the Inspector of Buildings that the Applicant's proposed addition is subject to Large House Review, as it was granted a modification to a variance by the Zoning Board of Appeals and not a Chapter 40A, s.6 finding. The property is located at 15 Manor Avenue, in a 10,000 square foot Single Residence District and a Water Supply Protection District.

On August 29, 2017, the Appellant filed a request for a hearing before this Authority, and thereafter, due notice of the hearing was given by mailing and publication.

Presenting the case at the hearing was David Himmelberger, Esq. and Peter Katsikaris, the Appellant.

Mr. Himmelberger said that this is an appeal from a determination of the Building Inspector that the project would be subject to Large House Review (LHR), as it was granted modification to a variance by the Zoning Board of Appeals and was not granted a finding under Chapter 40A, Section 6. He said that the matter was previously before the Board on July 13, 2017, at which time the Board issued a blanket modification of a previously issued variance rather than a modification and a special permit for a pre-existing nonconformity that was not covered by the original 1972 variance. He said that one of the issues that he raised in July was that the structure was pre-existing nonconforming by virtue of a side facing garage with less than 30 feet and would be otherwise exempt from LHR because it would be subject to a finding, in accordance with the language in the bylaw. He said that the Board stated that if the Building Inspector determined that the project would have to go through LHR, the determination could be appealed. He said that after the Board's decision was finalized and recorded, he submitted a request for a determination that, as the Applicant's proposed addition was to a pre-existing nonconforming single family dwelling, it was subject to a finding in accordance with Chapter 40A, Section 6 and Section XVII of the ZBL and was therefore specifically exempt from LHR. He said that in a letter dated August 28, 2017, Mr. Grant stated that it was his opinion that the project required LHR because it had not received a Chapter 40A, Section 6 finding. He said that he then appealed Mr. Grant's zoning interpretation. He said that the crux of the appeal is predicated upon the Building Inspector's interpretation that only changes that actually received a finding are exempt, rather than, in accordance with the ZBL, are subject to a finding. He said that, in this case, the Applicant is effectively penalized by a 45 year old variance that no longer has a basis in fact. He said that the only issue addressed by the 1972 variance was the purported inadequate frontage on a paper street. He said that Rose Street is not a street but is a side yard property line. He said that the only dimensional deficiency is the side facing garage that became nonconforming in 2002 when the bylaw was changed to require 30 feet. He said that their argument is that there is no

rational basis for the 1972 variance for insufficient front yard setbacks to be expanded to cover inadequate setbacks for a side facing garage that did not come into existence until 30 years after the original and now moot variance. He said that they believe that the enactment of the 2002 ZBL for side facing garages renders this to be a pre-existing nonconforming structure for which changes to it are expressly governed by and subject to Section 6 of Chapter 40A and Section 17 of the ZBL.

Mr. Himmelberger said that the proposed project will increase lot coverage by only 544 square feet. He said that TLAG will increase from 2,846 to 4,081 square feet, with the increased lot coverage behind the existing home. He said that the only visible increase is the raising up of a small side section of house that will remain four feet lower than the highest existing ridge line. He said that, of the various standards and criteria of LHR, the only one that would be marginally implicated is scale, which the Applicant believes would be resolved in his favor. He said that drainage has been addressed to the satisfaction of the Wetlands Protection Committee (WPC). He said that the Applicant is seeking to avoid the increased cost and time of the LHR process. He said that they believe that relief can be granted here without subverting the LHR process or the ZBL. He said that all they are seeking is the application of clear language, namely a recognition that the proposed addition is to a pre-existing nonconforming single family home with a side facing garage that is therefore subject to a Section 6 finding. He said that the Planning Board concluded that this project is subject to a finding, even though it has not received one, and is exempt from LHR. He said that the same Board that is charged under the bylaw for implementing LHR agrees that this project is exempt. He said that the Applicant believes that the Building Inspector's interpretation was incorrect and that, as it is a pre-existing nonconforming structure by virtue of the 2002 bylaw change rendering side facing garages subject to a 30 foot side yard setback, it need not receive a finding but has to be subject to a finding. He said that, based on the fact that it is subject to a finding, he believes that it is exempt from LHR and asks that the Board decide in the Appellant's favor.

A Board member said that the issue is whether a house that is a nonconforming structure that would require a special permit under Section 6 if an addition was made to the house is sufficient to exempt it, notwithstanding whether that finding was ever sought. Mr. Himmelberger said that the Applicant did seek a special permit/finding at the previous hearing. He said that the Board said that it would issue a blanket variance and that would do away with the need for a special permit/finding. He said that the Board said that granting of a modification of a variance would render consideration of a request for a special permit moot because it would allow the construction as requested. He said that the Chairman said that if the Building Inspector tells the Applicant that they have to go for LHR, the Applicant can appeal the decision of the Building Inspector. The Board confirmed that the prior decision, ZBA 2017-63, was not appealed.

Michael Grant, Building Inspector, said that the Applicant filed for a determination as a modification or a special permit/finding. He said that he read the minutes from the July 13, 2017 public hearing. He said that the Applicant had the opportunity and argued vigorously for a special permit/finding, which the Board felt was not appropriate. He said that the Board granted a modification of the variance. He said that the Applicant had more than ample time to argue that he should have a special permit/finding and was not granted it. He said that under the ZBL, it states that the project must be subject to a special permit/finding. He said that his interpretation is that the concept of subject to extends out to also receiving the special permit/finding. He said that Mr. Himmelberger sent a letter that contained a lot of case law that requires extensive review. He said that he forwarded the letter and meeting minutes to

Town Counsel and they agreed that it is subject to LHR. He said that, due to time constraints, Town Counsel was not able to render a written response in time for this public hearing.

Mr. Himmelberger said that if a special permit had been sought and was denied, there would be no opportunity to apply for a building permit for a nonconforming structure. He said that it would be denied based on that alone and they would not be addressing the issue of whether LHR should apply or not. He said that the issue is whether this project was subject to a finding. A Board member said that the project was subject to a variance. Mr. Himmelberger said that this meets the criteria for a finding under Section 6 because it is a change being made to a pre-existing nonconforming structure. He said that the Board can choose to issue a variance, as it did, but that does not negate or undercut the fact that it is subject to a Section 6 finding because it is a pre-existing nonconforming structure.

The Board said that there are five or six exceptions under State Case Law, Bjorklund v Norwell that do not require a special permit, regardless of whether the structure is nonconforming. Mr. Himmelberger said that in this case, they require a finding. The Board said that the prior Board decided that the special permit is moot and that decision was not appealed. Mr. Himmelberger said that there was no need to appeal the determination because the relief that they were seeking to build was granted. He said that they are appealing the fact that, although the Board went beyond what the Applicant was asking for, the project was subject to a finding. He said that the Planning Board agrees with that.

A Board member said that the exemption for LHR in the Zoning Bylaw came about as a result of a public meeting with the Planning Board that he attended. He said that he posited the question of fairness to make homeowners go through both LHR and a Section 6 finding, with the idea being that, implicit in a finding of not substantially more detrimental to the neighborhood, this Board would consider a lot of the factors entailed in LHR. He said that the Board never got there in the July hearing. He said that the Board never considered whether this would be substantially more detrimental. He said that all the Board did consider was whether there were grounds for modification of a variance. He said that the idea behind the exemption, is that people would not have to go through the rigors of a Section 6 finding and LHR. Mr. Himmelberger said that they did submit for a special permit. He said that the two hours that the Board spent on this that night was a rigorous process. He said that they believe that this house would sail through LHR but at a cost of expense and time. He said that the bylaw does not talk about projects that are subject to and receive a finding under Section 6 being exempt. He said that the bylaw talks about projects that would be subject to a Section 6 finding. A Board member said that Mr. Grant said that subject to a finding encompasses whether a decision was made one way or another. He said that the Board never got to the point of making a decision that this structure was not substantially more detrimental to the neighborhood. He said that the safeguard of the exception of LHR was not operative.

A Board member said that the initial variance was to allow a nonconforming building with less than 30 feet from Rose Street. He said that a prior Board granted relief because they felt that there was no reasonable basis to treat Rose Street as a street. He said that a subsequent bylaw change is the basis for which this is now nonconforming. He said that Mr. Grant determined that it is not reasonable to apply front yard setback requirements to the side of the building that faces Rose Street. He said that the current building would be considered compliant save for the fact that it has garages that open on that side of the building. He said that it is a coincidence that the front yard setback and the requirement for a side facing garage are 30 feet. He said that it seems reasonable to him that, by granting modification of the variance, the Board was reinforcing the decision that was made in the past. He said that he thought that it is clear

that the proposed work, even with the side facing garage, will not create a hardship for the abutting property. He said that there is a significant buffer between the properties. He said that this is still a property that was subject to a variance. He said that, based on Mr. Grant's determination which is different from the Board's determination at the time they granted the variance, it is nonsensical to say that it is still a front yard because it will never be developed as a street and therefore has become a space that is available for use for the owners on either side. He said that with the addition and where it is placed, the building would not raise concerns if it did go through LHR. He said that it is not a huge house with the amount of land around it already. He said that what the homeowner is proposing to do is not unreasonable, including adding an additional garage that faces the side. He said that the variance piece was the neatest way to address the problem. He said that his thinking is that with any property that has had a variance for whatever reason, any further action will be a modification or reinforcement of the variance.

Mr. Himmelberger said that he pressed the fact that a special permit was warranted because there was no way that the 1972 variance could cover a nonconformity that only came into existence in 2002. He said that the Board said that it would issue a variance and the special permit would be moot. He said that he raised the issue about LHR. Mr. Himmelberger said that his client applied for a modification of a variance for the portion of the house above the existing first floor left side. He said that he applied for a special permit to extend the garage.

Mr. Himmelberger said that LHR is time consuming. He said that the Planning Board will be bound by the Building Inspector's interpretation if this Board upholds it. He said that the Planning Board has no provisions within its Rules & Regulations to grant a waiver for the entire process. He said that it is a three to four month process that costs between \$5,000 and \$10,000, at a minimum. He said that the clear language of the statute of the bylaw says subject to, not receiving. He said that the Board can grant this without doing any harm to the bylaw, its application or the ethic of LHR. He said that this is about as benign as it could be for LHR, if it qualified for one. He said that it is not fair to insert words into the bylaw. He said that the bylaw says subject to, not subject to and receiving. He asked the Board to exercise its discretion and uphold the appeal.

The Board asked Mr. Grant to discuss a situation where there is a nonconforming structure or lot and someone is seeking to do a renovation or addition that would not require a special permit but would trigger LHR. Mr. Grant said an example would be someone wanting to enclose a porch. He said that if they wanted to enclose it and make it a habitable part of the house, they would have to calculate TLAG. He said that they would not be required to obtain a Section 6 finding. He said that if the house sits on a nonconforming lot but dimensionally meets all of the setbacks, and they do not change the footprint or create any new nonconformities, they would not be required to get a Section 6 finding. Mr. Himmelberger said that Bjorklund says, as a matter of law, enclosure of a porch does not require a Section 6 finding because it does not increase the nonconformity of the house. He said that the Board is concerned about others going through a perceived loophole but he is arguing that there is no loophole because everyone who is subject to it has to get relief, whether it is a special permit or a variance. He said that there is no basis for someone to say that they are subject to it but do not require relief. He said that it does not exist under the laws and bylaws.

Mr. Himmelberger said that they needed relief for the additional volume of the house that will bring it to over 3,600 square feet because of the side facing garage. He said that the side facing garage is what

creates the nonconformity. A Board member said that the whole purpose of the exemption was that if this Board would make a finding that it was not substantially more detrimental to the neighborhood, that was sufficient to exempt it from LHR. He said that this Board never got to that finding because it determined that granting modification of a variance was the simplest way to grant relief.

The Board asked Catherine Johnson, Planning Board member, if there is a quick and far less costly way to go through LHR. Ms. Johnson said that there are lots of waivers that can be put in place. She said that there has to be a formal request to the Planning Board. She said that everything that is waived is a reduction in the costs.

A Board member said that the house exceeds TLAG. He said that some type of determination has to be made that it is an appropriate house for the town, either through LHR or by the Board making a finding that it is not substantially more detrimental to the neighborhood, and neither of those occurred. He said that the Applicant could have asked for a variance from LHR. Mr. Himmelberger said that they sought a variance for that which they thought was appropriate.

A Board member said that his concern is that the safeguards that Town Meeting put in place to cover houses that exceed TLAG have not been met in this case. Mr. Himmelberger said that when the Board has granted modifications of variances, it has repeatedly stated that it applies a special permit test. The Board said that it applies a variance test. Mr. Himmelberger said that the Board did consider whether this addition was detrimental because, otherwise it would not have modified the variance.

Mr. Himmelberger said that a previous Board determined that Rose Street was not a ~~paper~~ street. He said that Mr. Grant supports the previous Board's interpretation that it is not a street because it is not capable of being traveled on.

A Board member said that he was concerned about setting a precedent. Mr. Himmelberger said that this will not set a precedent because people will have to come before the Board to seek a special permit. He said that only in those instances where there is a pre-existing variance on the property that pertains to some of the changes which they are seeking, can the Board choose to extend the variance to cover all of the changes.

A Board member said that the bylaw talks about nonconforming single family dwellings which are subject to a finding. He said that Mr. Grant said that means that a finding was heard and granted. He said that the purpose of the exception was to not require people to go through LHR and ZBA review, which is a loophole in the bylaw. Mr. Himmelberger said that an applicant has to come before the Board in any instance when they are subject to a Section 6 finding. The Board member said that this is a house that exceeds TLAG that has not gone through a special permit/finding proceeding or a LHR proceeding. Mr. Himmelberger said that there was a lengthy discussion about a special permit. The Board member said that no finding was made. He said that Section 6 requires two findings. Mr. Himmelberger said that if you are not otherwise subject to a variance. He said that they received a variance, which rendered it moot. He said that they were subject to and went through the process and that is all that is required under the bylaw. A Board member said that subject to means that there is a finding and you have to live with it.

Mr. Himmelberger said that they have an approved variance. He said that they could go back before the Board to seek a special permit to increase or alter the size. Mr. Grant said that if the Board makes a finding that it is not more detrimental, they will be exempt from LHR.

The Board said that the size of the house could be reduced. Mr. Himmelberger said that it is the size that the homeowner desires for his needs.

The Board asked about the TLAG. Mr. Himmelberger said that it will be 4,081 square feet. The Board said that it is located in a 10,000 square foot Single Residence District. A Board member said that it will exceed the TLAG threshold by approximately 600 square feet but will not be more detrimental to the neighborhood. The Board said that the property abuts Weston.

Mr. Himmelberger said that the application was submitted in June when the garage was not included in TLAG. He said that the garage would now be included. He said that it would be appropriate to exclude the garage.

There was no one present at the public hearing who wished to speak to the petition.

#### Statement of Facts

The subject property is located at 15 Manor Avenue, in a 10,000 square foot Single Residence District.

The Appellant is appealing a determination of the Inspector of Buildings that the Applicant's proposed addition is subject to Large House Review, as it was granted a modification to a variance by the Zoning Board of Appeals and not a Chapter 40A, s.6 finding.

#### Submittals from the Appellant

- Notice to Town Clerk, dated 8/28/17, from David J. Himmelberger, Esq.
- Memorandum in Support of Appeal of Building Inspector's Zoning Interpretation Regarding Appellant's Proposed Construction at 15 Manor Avenue, Wellesley, MA
- Exhibit A – ZBA 72-27, Appeal of Guyton J. Nicolai, Jr.
- Exhibit B – ZBA 2017-63, Petition of Peter Katsikaris
- Exhibit C – Letter to Michael Grant, Chief Zoning Enforcement Officer, Town of Wellesley, dated 8/19/17, from David J. Himmelberger, Esq.
- Exhibit D – Letter to David Himmelberger, dated 8/28/17, from Michael Grant, Inspector of Buildings/Zoning Enforcement Officer

#### Decision

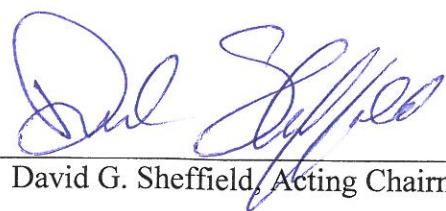
This Authority has made a careful study of the materials submitted and the information presented at the hearing.

The appeal to overrule the Building Inspector's determination that the Applicant's proposed addition is subject to Large House Review, as it was granted a modification to a variance by the Zoning Board of Appeals and not a Chapter 40A, s.6 finding is upheld and the Building Inspector's determination is denied.

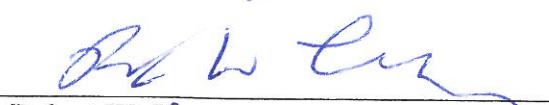
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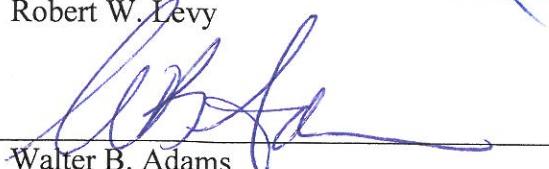
APPEALS FROM THIS DECISION,  
IF ANY, SHALL BE MADE PURSUANT  
TO GENERAL LAWS, CHAPTER 40A,  
SECTION 17, AND SHALL BE FILED  
WITHIN 20 DAYS AFTER THE DATE  
OF FILING OF THIS DECISION IN THE  
OFFICE OF THE TOWN CLERK.



David G. Sheffield, Acting Chairman



Robert W. Levy



Walter B. Adams

cc: Planning Board  
Inspector of Buildings  
lrm