

TOWN OF WELLESLEY



MASSACHUSETTS

ZONING BOARD OF APPEALS

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

Thursday, October 5, 2017, 7:30 pm

Juliani Meeting Room
Town Hall

Zoning Board of Appeals Members Present:

Richard L. Seegel, Chairman
J. Randolph Becker
David G. Sheffield, Acting Chairman
Robert W. Levy
Walter B. Adams
Derek B. Redgate

WITHDRAWN WITHOUT PREJUDICE

ZBA 2017-66 ROBERT SARAFIAN, 6 CLIFFORD STREET

Mr. Becker said that this is an Appeal of a decision of the Building Inspector that 6 Clifford Street was not subject to Large House Review. He said that the Board ended the last meeting by asking the Proponent to see if he could contact the property owner and resolve the drainage issue that was at the root of the appeal.

Presenting the case at the hearing were Hamilton Hackney, Esq. and Robert Sarafian, the Appellant, Trustee representing his mother's interests at 19 Cottonwood Road.

Mr. Hackney said that they did reach out to the Developer at 6 Clifford Street to propose a meeting and their response was that his client would need to bring a professional engineer to the meeting, which was an expense that his client felt that his mother should not have to bear just to discuss drainage. He said that they informed the Developer that retaining a professional engineer would be too expensive but they would be happy to meet with them. He said that the Developer said that they had a copy of a drainage plan. He said that his client requested a copy of that but they did not provide it. He said that they have not had an opportunity to discuss resolution of the drainage issue.

Mr. Levy said that there is a room, which the Board will call a porch for the sake of consistency, that was built on the house which the Building Inspector determined was not subject to the TLAG requirement. He said that if that was included towards TLAG it would exceed the threshold for TLAG in this district. He confirmed with the Appellant that he would agree that if it was not included towards TLAG, the action of the Building Inspector was correct. He said that the question is whether this particular room should be

in the TLAG calculation or not. He said that there are some other legal issues as to whether unheated porches should be exempt from TLAG under the bylaw.

Mr. Hackney said that the sole issue is whether to include a 9 by 12 area on the back of the house in the TLAG exclusion. He said that there are two issues there. He said that the LHR Bylaw does not discuss exclusion of unheated porches from the TLAG calculation. He said that the Planning Board issued regulations that identified unheated porches as an area that could be excluded from TLAG calculation. He said that the LHR bylaw authorizes the Planning Board to issue regulations regarding the process of LHR review of applications but it does not directly authorize the Planning Board to also create new exemptions from the TLAG calculation. He said that the bylaw does have specific terms in it regarding how TLAG should be calculated. He said that there is an authorization question. He said that the Board covered this a little bit at the previous hearing.

Mr. Hackney said that if you look at the LHR Bylaw, it talks about dwellings as being the building type that is subject to LHR. He said that it is a broadly defined term that is basically for human habitation. He said that the Planning Board's exclusion of unheated porches is inconsistent with the term dwelling, which was intended to be a broad term. He said that an issue is whether the Planning Board is authorized to create that exclusion. He said that if the Board is not prepared to deal with that directly, there is another way to address this problem.

Mr. Hackney said that the term "unheated porch," as used by the Planning Board was not defined in the regulations. He said that he believes that it is within the Board's discretion to decide how to interpret or define that term and how to apply it in this particular situation.

Mr. Hackney said that there are two issues, the first one being the question of whether this is a porch. He said that term is undefined. He said that the information that they have suggests that this is not even a room but is merely an extension off of the kitchen. He said that there is no fourth wall that separates this extension from the kitchen. Mr. Levy said that there is a sliding glass door to the house shown on the first floor plan. Mr. Hackney said that it is a sliding door, not a wall, so it is not a room. He said that it is inside the foundation of the building underneath a bedroom. He said that all of those things would indicate that it is an extension of the kitchen, not a separate room could be deemed a porch. He said that, in addition, there is a question of whether it is heated. He said that term is not defined in the ZBL or the Planning Board Regulations. He said that three sides of the room have glazing. He said that there is solar heating. He said that it adjoins the kitchen which is heated the bedroom above which is heated. He said that it is sitting inside the foundation. He said that all of those factors would indicate that the room is heated by the rest of the house. He said that ZBA could conclude that this is not an unheated porch. He said that the house was built to come up as close as possible to the 3,600 square foot limit. He said that in this case, what they are looking at is a breakfast nook that is presented as an unheated porch for the purpose of coming up with square footage under the 3,600 square foot threshold.

Mr. Hackney said that the impacts that LHR is supposed to address and mitigate are clearly present here, particularly, flooding impacts. He said that all of the factors would support the ZBA using its discretion to come to a conclusion that this is not an unheated porch and therefore should be included in TLAG calculations and subject to LHR.

Mr. Levy confirmed that under Mr. Hackney's theory, the TLAG calculation is 12 feet over the 3,600 square foot threshold.

Mr. Becker said that within the package that the Board had to review was a set of calculations for heat loss. He said that all of the spaces in the TLAG calculation are in that. He said that the sunroom/unheated porch is not. He said that the plans that were submitted also showed the location of the heat registers in the family room on the side of the wall that it shares with the sunroom porch. He said

that speaks to the laymen's concept of heating and whether it is heated or not. He said that he recognizes Mr. Hackney's solar heating argument and the French doors opening it up to the family room.

Mr. Grant said that the plans clearly state that there is no heat in the space. He said that in the process of applying ZBL he has to make judgment calls from time to time. He said that the space is not heated or cooled, it is not considered habitable space because it does not meet Code for habitable space. He said that when LHR was developed in 2008 it used assessor's methodology, which few people understand. He said that he had to develop a document so that the public could understand what assessor's methodology meant. He said that the document was reviewed and approved by the Planning Board at the time. He said that in 2010 the Planning Board changed the bylaw with respect to attics and whether or the space would count towards LHR. He said that they removed assessor's methodology. He said that the public had two years of training with assessor's methodology. He said that they changed the attic portion of the affidavit to line up with what had been approved by ATM. He said that is what has been used since then. He said that a lot of what was carried over was so that the end user could understand. He said that many times modifications of bylaws add a huge amount of confusion. He said that in the interest of consistency, they held that consistency. He said that the porch/sunroom in question has a thermal wall that complies with the energy code of MA between the family room and the sunroom. He said that the sunroom requirements are for a certain percentage of the wall area to be glass. He said that there are sliders, a bay window and two windows on the side. He said that more than 50 percent of these walls are glass, so it meets the definition of a sunroom under the Code. He said that a sunroom is an unheated space, thermally separated from the main house, which is what we have here. He said that he has to categorize it as something under the bylaw, so he categorized it as an unheated porch. He said that he feels that this house is in compliance and the standard has been consistently applied as he has to every permit that has come before him for LHR analysis from 2008 and 2010 to now.

Mr. Seegel asked what happens if they put in a piece of electrical heating such as a space heater. He said that it becomes a heated room. Mr. Grant said that would be a violation. He said that if someone files a formal written complaint, they will exercise the formal written complaint but he only has access to the house through the CO. He said that they make sure that it complies to the regulations at the time of CO and what the property owner does after they leave, they are obliged to comply with Zoning for the history of the building. He said that if they make changes to the building and do not notify the town and they are in violation, then it is a clear violation. He said that if they receive a formal written complaint, they need to act on it. Mr. Seegel asked if putting a space heater in the room a violation. Mr. Grant said that it is not. He said that the Proponent said that the room is solar heated.

Mr. Becker said that Mr. Hackney made an eloquent argument for heated versus unheated porch. He said that the real reason that the regulations have unheated porch in the column that says not applicable to TLAG is because it is consistent with the definition of TLAG. He said that TLAG says that you measure the floor area to the exterior walls of the building. He said that in looking at the plans, the exterior wall of the building is the wall between the sunroom and the family room. Mr. Levy said that one could argue that it is to the end of the sunroom. He said that from the outside it looks like it is part of the house. He said that when he thinks of a porch, he does think of a fully enclosed room. He said that he did not disagree with Mr. Grant that it may be a sunroom but does a sunroom make a porch. He asked if there is any provision in the Building Code or a definition that Mr. Grant can point to as to what a porch is. Mr. Grant said that there is nothing in the Building Code that specifies what a porch is. He said that a porch can be enclosed and partially open. He said that it falls back to the discretion of the Building Inspector to make a call to determine the exterior wall of the house. He said that it could be the thermal envelope of the house, which is the wall between the sunroom and the family room because there is no heat in there. He discussed the Energy Code. He said that there are unique ways that things are looked at as interior versus exterior. He said that he disagreed with the statement that the homeowner did this deliberately to circumvent LHR. He said that the average TLAG of homes in the 10,000 square foot district is 3,580 to

3,599 square feet. He said that almost everyone runs it to the edge. He said that this person has done what almost everyone else has done. Mr. Levy said that one has described any evil motives.

Mr. Becker said that in the design of the balance of the house, the basement is elevated and it sits up higher than the surrounding houses. He said that the fill that is being placed in there comes up as a four foot hill. He said that the only reason to do that is to make sure that the TLAG is less than 25 percent for the basement. He said that there is nothing in the bylaw that prohibits that.

Mr. Hackney said that there is a space on the first floor off of the family room/kitchen that is being designated as exterior. He said that there is a bedroom on top of that and there is a full foundation under it. He said that there is an exterior wall that wraps around the perimeter. He said that they heard that the wall on the first floor is different from the wall on the second floor. He said that it looks identical and it has a full foundation under it. He questioned how that could be considered to be exterior space when the bedroom above it is considered to be interior space. Mr. Becker said that it highlights the difficulty of having consistent definitions in terms of TLAG.

Mr. Levy said that there are two issues, one of which is whether this is an unheated porch. He said that the other questions is whether the Planning Board has the authority to exempt unheated porches from LHR. He said that the bylaw is clear when it talks about measurement from the exterior face of the exterior walls, which is probably the footprint of the house. He said that the bylaw says that the Planning Board can issue Rules and Regulations but it appears to limit those rules and regulations to procedural rules. He said that adding an exemption goes beyond the procedure. He said that the Rules and Regulations go on to say that calculations shall be in accordance to Rules and Regulations adopted by the Planning Board. He questioned whether there is a provision that allows the Planning Board to authorize exemptions or just to come up with the formula for the mathematical calculations.

Mr. Becker said that the second question is something that the Board need not be concerned with because it is the definition as to exterior wall which is in the bylaw that actually makes that question moot. Mr. Levy said that if the Board finds that the exterior wall is the wall between the house and the sunroom/porch, it is done. He said that the Board is done if it goes the other way unless it determines that the Planning Board had the right to exempt heated porches and the Board finds that this is a porch, which he was not confident that the Board could find.

Mr. Levy questioned the standard for review for this. He asked if it would be de novo or abuse of discretion. Mr. Hackney said that he believed that it is the latter. Mr. Levy said that it is a higher standard for the Board to find an abuse of discretion versus de novo where the Board makes the decision. Mr. Adams said that it could be much simpler. He said that it could be whether the Board agrees with the interpretation of the Building Inspector. He said that it would not be a decision as to whether the Building Inspector abused his discretion. He said that no one is suggesting that Mr. Grant was inappropriate in his actions. He said that the question is whether he correctly interpreted the Code in this regard. Mr. Levy said that it is also the legal standard whether he is entitled to deference.

Mr. Becker discussed hearing the petition de novo because he did not think that the Board is qualified to decide whether the Planning Board did the right thing in making its exemption. Mr. Levy said that the Board has to interpret the bylaw. Mr. Grant said that even though the bylaw has a second section about Rules and Regulations, he thinks that the bylaw does give the Planning Board the authority to promulgate regulations as to how they want to have a house calculated. He said that the bylaw states that calculations shall be determined in accordance with the Rules and Regulations adopted by the Planning Board. He said that the bylaw gives the Planning Board the authority under the Rules and Regulations Statute that they can. Mr. Levy said that could also be determined to be calculations and how you measure it, not what you include and do not include. He said that there is a separate section in the bylaw that talks about

exemptions. Mr. Grant said that the Planning Board can set how a house is calculated and that could extend to what is exempted and what is not exempted.

Jessica Yee, 6 Clifford Street, said that she was not present at the previous public hearing. She said that there had been a lot of discussion at that meeting about her unwillingness to meet with the Appellant. Mr. Becker said that there was no need to do that because the Board was dealing with the two questions that Mr. Levy brought forth. Mr. Levy said that one of the reasons that the Board continued the hearing was because the homeowner was not there. He said that the Board encouraged the Appellant to talk with the homeowner to try to resolve this so that the Board does not have to make a difficult decision.

Ms. Yee said that at the beginning of this year when she started this project, she went over to the property to introduce herself. She said that a lady came out and said that she did not want to talk with her. Mr. Becker said that information is in the record via an email that was submitted. Mr. Levy said that the Board's decision will not be based on whether the homeowner spoke with the Appellant. He said that the Board encourages neighbors to talk but it will not make its decision based on personal relationships between neighbors.

Ms. Yee said that she has lived in Wellesley for 14 years. She said that she purchased this property three years ago. She said that her son attends the high school. She said that she intends to occupy this property. She said that, prior to buying this property, she was not aware of the big pool of water behind the house. She said that they elevated house to deal after her builder said that she could not have a deep basement there or she would have water and sump pump issues all of the time. She said that it is a custom designed home. She said that she met with the Building Inspector numerous times to make sure that the design would be in compliance. She said that it is a modular home, which was built in a factory. She said that there cannot be any room for mistakes when the modules are shipped. She said that they made sure that the exterior walls between the family room and the sunroom is an exterior wall with a door, fully insulated. She said that the room is not off of the kitchen. Mr. Levy said that the Board can see on the plans that it is off of the family room. Ms. Yee said that it is not a dining or breakfast nook, as presented by the Appellant. She said that the kitchen has a hood facing the back wall. She said that there is no room for her to put a window there. She said that a neighbor had talked about the view. She said that she did not understand why the issue of the unheated sunroom is coming up now. She said that she feels like she is being singled out for this. She said that things were said during the hearing that assumed that she would be doing something illegal by putting heat in the sunroom. She said that she is not going to. Mr. Becker said that the suggestion that someone could put an electric heater in was not that they were going to do that but was to test a hypothetical to test an argument to see how that argument and result could change under those circumstances. He said that the Board does that all of the time. Ms. Yee said that she followed all of the bylaws when she designed the home. She said that there is an exterior wall with an exterior door that leads to the sunroom.

Mr. Becker said that the issue before the Board is not whether Ms. Yee has done anything illegal but whether the Building Inspector made the correct choice in saying that Ms. Yee's house and application were exempt from the TLAG calculation. Ms. Yee said that it is written on the TLAG form that any unheated porch is exempt. Mr. Levy said that what the Board is struggling with is whether this a porch. He said that the reason for the appeal has to do with the drainage. He said that the Appellant is looking to get some understanding as to how that could affect them. He said that if this went through LHR proceedings as the Appellant maintain it should, that issue would have to be addressed before the Planning Board.

Ms. Yee said that she met with the Town's Engineering Department a few times and filed plans. She said that the drainage was completed on April 3rd. She said that she has not seen flooding at the property after that. Mr. Levy said that sharing drainage and engineering plans with the neighbors might have helped. He said that he believes that this is an issue should be able to be resolved between neighbors. He said that

if the Board makes a decision tonight, someone is going to be unhappy. He said that the best time to resolve a dispute is when both parties have some risk.

Mr. Levy confirmed that a drainage system was put in. Mr. Grant said that a drainage system is shown on the plot plan. He said that was not required under the bylaw but was provided. He said that it is shown at the rear edge of the property. Mr. Levy asked Mr. Hackney if his client was aware that a drainage system had been installed. Mr. Hackney said that they were informed about the drainage plan about a week ago. Mr. Levy when the drainage system was installed. Ms. Yee said that it was installed in June. Mr. Levy asked Mr. Sarafian if he has seen any improvement in the drainage. Mr. Sarafian said that it is his mother's home and he does not live there. He said that had not witnessed any flooding there. He said that his sense is that it would probably be a late winter/early spring type of phenomena when the water table is high and snow is melting. He said that they tried to avoid this meeting tonight. He said that they very much wanted to resolve this outside of the Board and not take up its time. He said that they have reached out and have been unable to engage in a friendly conversation and to see the plans and see what is going on. He said that his hope and his sense is that it will be resolved in this fashion. Mr. Levy said that it is the not the Board job to resolve disputes. He said that he firmly believed that this could be resolved without the Board's intervention. He recommended that the parties talk to see if they can get to a meeting of the minds. He said that the Board is here if people want them to.

Ms. Yee said that she responded the Mr. Hackney's email stating that she is willing to meet. She said that because her drainage plan is already done, she feels that the meeting would be efficient if there is someone who is knowledgeable about the drainage system present to review it with them. Mr. Hackney said that they are happy to meet and review the drainage plan with the Town Engineer.

Mr. Sheffield asked if there was a letter stating that the Town Engineer had reviewed the Drainage Plans. Ms. Yee said that she can provide that.

Mr. Levy asked if the drainage issue is resolved will the Appellant withdraw the appeal. Mr. Hackney said that he will.

Joanna Winkleman, said that she is the abutter whose property goes alongside this property. She said that at this point she just wants the property to be completed. She said that it has been quite disruptive to those who live nearby. She said that her professional background is in design review. She said that one thing that has been left out of the discussion is the nature of the porch. She said that there is no definition of what a porch is in Wellesley. She said that it is quite common to define a porch as having a different flooring from the rest of the home, a different kind of wall and single pane windows that are different from the rest of the home. She said that is a bona fide enclosed porch. She said that if that space has a modern window, the same finishes and flooring as the rest of the house, it changes the matter. She said that it would not necessarily be a porch. She said that there is no definition for that. She said that it is not a matter of heat but of finishes. She said that she has a heated porch that is not included in her square footage because it has different flooring, wall and windows from the living space. She said that it is sad that the Town does not have a definition of porches. She said that there need to be guidelines for all properties going forward. Mr. Becker said that is why the Board wants the neighbors to resolve their drainage issue. He said that this would be much easier to deal with if there were definitions in the bylaw.

David Himmelberger, Linden Street, said that he found the Attorney's arguments compelling, particularly the extent to which the Planning Board may have inadvertently exceeded its boundaries in crafting an exemption in its Rules and Regulations because the Rules and Regulations that they are permitted to make are procedural. He said that Rules and Regulations is capitalized. He said that in the reference previous to that, it is still limited by the fact that those Rules and Regulations must be procedural in nature. He said that he found it interesting that attics that are not heated are included in TLAG. He said that the simple, ordinary language of the bylaw, which is the controlling document, talks about the exterior wall.

He said that you think about exterior as opposed to interior. He said that there is no question that between the wall that is being claimed to be an exterior wall, it is interior to the outermost wall. He said that the outermost wall is exterior. He said that he googled definitions of porches and they all refer to appendages to buildings, frequently covered entrances to buildings. He said that he is now convinced by the Attorney's argument that the Planning Board overstepped when they created the exemption for unheated porches, his guess is that they were contemplating unheated exterior appendages to the main structure of the house because that is how we typically view a house. He said that this is probably the first time that someone has tried to make a space that is interior to all of the exterior walls fit the definition of a porch simply by being unheated space. He said that it is a case of first impression for this Board. He said that depending on which way the Board rules, there may be a lot of homes designed with interior unheated porches.

Mr. Adams said the Counselor's comments made him think about this a little further in that there is something in the exterior wall that is more than just insulated. He said that the exterior wall is also a moisture barrier and a method of keeping the outside out, aside from the temperature, and the inside in. He said that the Board should think carefully about what the term exterior wall means and how it will influence its decision.

Mr. Hackney said that if the homeowner is willing to provide a copy of their drainage plan for the Appellant to review, they would be willing to continue the hearing to give them time to review, hopefully have a follow up discussion and resolve the issue without a Board decision. Ms. Yee agreed to supply a copy of the drainage plan. She said that the Engineering Department already has a copy on record.

Mr. Levy said that the Board strongly suggests that the neighbors try to resolve this. He move that the hearing be continued to December 7, 2017. He said that according to Mr. Grant it will not hold up the CO or any other part of the project. He said that it is at the homeowner's risk that if the Board goes forward and find against Mr. Grant, the project will be stopped and will have to undergo LHR. Mr. Grant said that he would have to issue a violation notice, revoke the CO, and issue a violation notice the homeowner had gone through LHR and complied with the decision. Mr. Redgate seconded the motion. The Board voted unanimously to continue the hearing to December 7, 2017.

Mr. Levy said that if the issue is resolved outside of the hearing, the Board would need to get an email or a letter to request that the petition be allowed to be withdrawn without prejudice. He said that no attendance would be required at that hearing.

December 7, 2017

Mr. Becker moved and Mr. Sheffield 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.