

TOWN OF WELLESLEY



MASSACHUSETTS

ZONING BOARD OF APPEALS

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ZBA 2006-46

Appeal of Daniel Kasper and C. William Whitman
119 Abbott Road

Appeal of DANIEL KASPER and C. WILLIAM WHITMAN (collectively, the "Appellant") in letters dated April 4, 2006 and April 14, 2006, pursuant to the provisions of Section XVII, Section XIX and Section XXIV-C of the Zoning Bylaw, appealing the decision of the Inspector of Buildings relative to the Building Permit issued for 119 ABBOTT ROAD, in a 20,000 square foot Single Residence District.

The Board said that there are two separate appeals. The first appeal is based on the assertion that the Building Permit was not properly issued because the lot size is smaller than that required in a 20,000 square foot Single Residence District, and hence building on that lot would require a Special Permit under Article XXV of the Zoning Bylaw. The second appeal is based on the assertion that the front yard setback does not meet the requirements of Article XIX, Table 1, as noted by the asterisk referring to the special requirements on a frontage of 500 feet (the "500 Foot Rule"), and hence building on the lot would require a variance for the proposed front yard setback of 30 feet.

Mr. Whitman said that he also has an issue with the window walkout setback. The Building Inspector said that issue was raised in Mr. Whitman's letter dated April 6, 2006.

The Building Inspector said that the Kasper Appeal was limited to the 500 Foot Rule and the lot size.

C. William Whitman, 117 Abbott Road, said he has lived there for 23 years. He said that he and his wife were present at the hearing with Mr. Kasper and their attorney, William Mone.

Daniel Kasper said that he lives at 90 Abbott Road. The Board asked where 90 Abbott Road is in relation to 119 Abbott Road. Mr. Kasper said that it is seven houses away on the opposite side of the road.

Mr. Kasper reviewed his argument that the lot is undersized. He said that an original as-built survey was submitted in February, 2006 by Mr. Giunta (as defined below, the "As-Built Survey") showing a lot size of 19,974 square feet. Mr. Kasper and Mr. Mone immediately called to the Building Inspector's attention that the As-Built Survey showed the lot size was less than the minimum lot area required under the Zoning Bylaw for the district in which 119 Abbott is located.

Mr. Kasper said that he and Mr. Mone researched historical real estate records going back to 1903. He said that originally 119 Abbott Road was part of the lot at 117 Abbott Road, shown on the deed to contain 39,951 square feet (the "Original Survey"). The combined lot was divided sometime around 1950 to 1951 after the Zoning Bylaw was enacted. When the two lots were divided the survey performed for the

subdivision (the "Gleason Survey") showed an aggregate area for the two lots at 117 and 119 Abbott of 40,001 square feet. Because two conforming sized lots could not be created from a single lot of 39,951 square feet, Mr. Kasper said that the historical evidence supports the case that this lot is undersized.

Mr. Kasper said that the Appellant has raised serious objections to the Drake Survey. The Appellant does not believe the Drake Survey was an independent survey. The Appellant asserts that Mr. Drake did not re-identify the markers or the bounds, but rather appears to have simply confirmed the As-Built Survey.

Mr. Kasper said that some interior angles in the geometric figure comprising the lot at 119 Abbott were changed at the corner of Abbott and Arlington, and the length of several of the sides were increased. That could have the effect of increasing the area of the lot at 119 Abbott.

Mr. Kasper said that the Appellant believes that there is substantial evidence that the lot is smaller than the minimum size required in the district. He said that it is a nonconforming lot and in order for the proponent to build on it, he should have to come before the Board to get a Special Permit.

The Board asked if Mr. Kasper had engaged his own surveyor. Mr. Kasper said that he had not.

Mr. Mone said that he is representing Mr. Kasper. Mr. Mone said that he lives on Abbott Road. He said that the Appellant did not think it was appropriate to have its own survey done because the Town had ordered an independent as-built survey. The Appellant thought that the independent as-built survey would be done from scratch. The Appellant also did not feel comfortable about trespassing on Mr. Bevilacqua's property. The Board said that there are statutes that allow surveyors to go onto properties. Mr. Mone said that the Appellant wanted to wait until the independent as-built survey was completed and submitted.

Mr. Mone said that he sent some materials, including the Giunta Survey and the As-Built Survey to the surveyor that he uses in his real estate practice. Mr. Mone asked his surveyor to calculate the area of the lot at 119 Abbott based on the materials that Mr. Mone had submitted. Mr. Mone's surveyor said that he was unable to do that without the bearings of the lines forming the lot at 119 Abbott.

Further, Mr. Mone said that he sent the Drake Survey to his surveyor when it was submitted and became public. Mr. Mone's surveyor said that there is a mathematical problem with the lot in that it does not form a geometrically closed figure, and that the mathematical problem has something to do with an omission on the Gleason survey in 1951.

Mr. Mone said that he called Mr. Drake who told him that in order to make the lot mathematically close he had to make assumptions around the Abbott/Arlington intersection. He did use the bounds that were found by Mr. Giunta and which were used in both the Giunta Survey and the As-Built Survey. Mr. Drake changed the radius at the corner of Abbott and Arlington because that was the only way he could get the lot to mathematically close. Because of the change in radius of the corner at Abbott and Arlington, Mr. Drake recalculated the setbacks to the affected lot lines. For the lot at 119 Abbott the distance from the closest point of the foundation to Abbott Road is two feet less than on the Giunta Survey and on the As-Built Survey.

Mr. Kasper said that he believes that the As-Built survey and the Drake Survey are inconsistent with the bounds on the deed.

Mr. Mone said that the Drake Survey was submitted with a lot area of 20,001 square feet plus or minus, which he understands is an allowable lot size for the district in which 119 Abbott is located, though he objects to the notation plus or minus, which he implies indicates a problem with the survey. He said that the Giunta Survey and the As-Built Survey certified the corner of the foundation as the closest point to Abbott Road at 32.9 feet. Mr. Mone said that between the time the As-Built was completed and the time the Drake Survey was completed, the house was substantially framed and built. Mr. Mone asserts that a portion of the house above grade extends closer to the Abbott Road lot line than even the 30 foot setback of Section XIX of the Zoning Bylaw. The Drake Survey used the same corner point of the foundation as the As-Built Survey to find the actual setback from Abbott Road. The Drake Survey figure for the setback was 30.8 feet, or a loss of two feet.

Mr. Mone said that the closest point of the house must conform to the setbacks. The Board said that, while it agrees that the Zoning Bylaw requires that the closest point of the house cannot impinge on the setback, ALTA/ACSM requirements for land survey specify that the measurements be taken at grade.

Mr. Mone said that when the as-built survey was submitted showing that the lot area was less than that required for the district in which 119 Abbott was located, the Building Department should have sent the builder to the Board for a Special Permit.

The Board said that it has to look at what is before it. Mr. Drake was not present at the hearing and has not substituted anything that would make the Board believe that the Drake Survey is incorrect. The Board is dealing with a stamped plan from Mr. Drake showing 20,001 square feet, plus or minus, and the notation "plus or minus" is the norm for such surveys submitted, and does not indicate a defect in the survey. There is no other evidence before the Board that indicates that the lot is not 20,001 square feet.

Mr. Kasper said that he had provided attachments in his initial letter of appeal that included deed records and Town Plans that show the combined lot. The Board said that it had reviewed those records. The original plan in 1903 describes 39,951 square feet but has neither interior angles nor the bearings of the lot lines listed. Surveying techniques and requirements have changed significantly since 1903. Instrumentation is much better. The Board said that it cannot have confidence in the plan in the absence of any interior angles or the bearings of the lot lines.

Further, the Board said that, in comparing the lengths of the lot lines between the Giunta Survey and the As-Built Survey, the exterior dimensions are exactly the same on the two surveys. As reported by Mr. Giunta, the reason that the lot area differs between the Giunta Survey and the As-Built Survey is that there was a calculation error made by the draftsman on the As-Built survey.

The Board said that the lot has been assessed based on a lot area of 20,000 square feet. The Assessor's map shows it at 20,002 square feet. The 1935 Town Atlas shows the combined corner lot having 39,920 square feet. Neither the Town Atlas or the Assessor's map is a survey. The Board concludes that the most reliable survey before the Board is the Drake Survey because it is the first survey that has the bearing of the lot lines recorded.

The Board said that it has to rely on the stamp of a professional land surveyor. If there was a competing survey that showed something different, the Board could look at that. The burden of proof is upon the Appellant to give the Board evidence otherwise. The Board did not feel that the burden had been met on this issue.

Mr. Kasper said that the Board does have evidence before it. The Board said that it was not competent and credible evidence.

Based on the series of surveys from 1903 through 2006, the Board said that it believes the progression of the change in lot size is a function of the surveyors grappling with the problem of the mathematical non-closure of the geometric figure that is the lot at 119 Abbott, not a conspiracy to circumvent the Zoning Bylaw requirements for lot size. The ALTA survey specifications provide requirements for what to do when the geometric figure that is the lot boundary does not close. The Board believes that is what Mr. Drake did in the Drake Survey.

Richard Baum, 84 Abbott Road, asked if the neighbors could have an independent survey done. The Board responded that the Appellant could have had a survey completed, but that on the date of the public hearing for the case it is too late. The Board said that it is typical in land use that the builder or the owner hire a surveyor for permitting purposes. The Town can rely on the fact that the survey is properly prepared because the surveyors are licensed, as evidenced by the stamp and signature on the plan. The signing and sealing of the plot plan is regulated by the laws of the Commonwealth.

Keith Higgins, 105 Abbott Road, said that there was an as-built survey for the lot which listed the area of the lot at 119 Abbott as 19,974 square feet, a size less than the minimum lot size in the zoning district in which the lot is located. A Building Permit was issued based on that erroneous survey. The Board corrected Mr. Higgins and said that the Building Permit was issued based on the Giunta Survey that showed a lot area of 20,002 square feet. When the foundation is complete, the Building Department requires that a second survey be submitted, showing the as-built location and dimensions for the foundation. As reported by Mr. Giunta, the reason that the lot area differs between the Giunta Survey and the As-Built Survey is that there was a calculation error made by the draftsman on the As-Built Survey.

Mr. Michael Grant, the Building Inspector, said that the Building Department originally issued a Building Permit based on the Giunta Survey showing a 20,002 square foot lot. He said that upon submittal of the As-Built Survey, he checked to see that the foundation in-place was the same as the foundation that shown on the As-Built Survey. In addition, he looked to see that the setbacks conformed to the requirements of the Zoning Bylaw. He signed off on the As-Built Survey as a result of those checks. He said that the discrepancy in lot size slipped by the contractor, the land surveyor, and himself. He said that when the discrepancy in lot size between the Giunta Survey and the As-Built Survey was brought to his attention he dealt with the problem expeditiously as is shown in the documents listed below.

Eileen Stokes, 44 Arlington Road, said that the neighbors did not realize that all that they needed to do was to trespass to do a survey. The Board said that under appropriate circumstances a surveyor has the right to go onto property of others to do a survey under Massachusetts law. The Board said that the Appellants were represented by counsel who could have told them what the legal requirements were.

The Board said that it is a quasi-judicial board that has to make findings of fact and rulings based on the requirements of the Zoning Bylaw and case law as the Board understands it. The Board is not at liberty to bend the law or rules. The law says that it is incumbent on the neighbors to learn what they must do in a timely fashion.

Mr. Mone said that the Appellant was told by Town Counsel after the discovery that the As-Built Survey showed a lot size smaller than that shown on the Giunta Survey that there would be a third independent survey. The Appellant was not told the identity of the surveyor. The Appellant did not want to have a separate surveyor go to the property when it took the Town's word that this third survey would be an independent survey. The Board said that it was an independent survey. Mr. Mone said that the Appellant thought that the third independent survey would be done from scratch.

Mr. Mone said that the independent surveyor should have been given the address of the property and the deed references. Mr. Mone asserted that the independent surveyor should not use any prior surveyor's own markings. He said that Mr. Shind's correspondence referred to Mr. Drake's survey as being confirmatory, alluding to that reference as evidence that the Drake Survey was not independent.

The Board said that the ALTA/ACSM specification for land surveys does not require that a survey be started from the point that Mr. Mone described. Mr. Mone said that this case was different because there was a specific question to address.

The Board said that any surveyor who is willing to put his stamp and his signature on a survey is considered independent. The Board confirmed that Mr. Mone was aware that the Appellant could have had its own survey done.

Kevin Donnelly, 123 Abbott Road, said that it is not unusual for a zoning board to reconvene so that additional evidence can be brought.

Mr. Whitman submitted pictures of the previous house at 119 Abbott Road to the Board.

Mr. Whitman reviewed Mr. Shind's chronology of events related to the commencement of the work at 119 Abbott Road (the "Shind Chronology"). He said that there were a couple of things that he wanted to add to the Shind Chronology. He said that on November 11, 2005 the house at 119 Abbott Road was demolished. That was Veterans' Day, which was a Town holiday. He said that neither he nor any neighbor was notified that the house at 119 Abbott was going to be torn down. The foundation was demolished the following day, Saturday, November 12, 2005.

Mr. Whitman said that he has indicated on the chronology the stage where he realized that he had a problem. He said that they spoke with the Building Inspector a few times. He and his wife sent letters in to the Building Inspector. Mr. Whitman learned about Mr. Kasper's concern through Mr. Mone.

Mr. Whitman submitted a package of photographs (the "Whitman Photos") to the Board. He said that the first picture shows a "No Trespassing" sign on the property at 119 Abbott. He said that the bay window bump-out is a full room extension, not a bay window. He said that it is 18 feet from the lot line, which is extremely close. The Board said that under the Zoning Bylaw bay windows are allowed to project two feet into the setback, provided that the bay window does not have a foundation.

Mr. Whitman said that picture #6 shows a typical bay window. He said that the typical bay window is not a walk-out. He said that what he is confronted with is a room extension. He said that to the right of that room extension there are three sliding glass doors that will have stairs (not yet constructed in the photo displayed) that extend towards his house.

Mr. Whitman said that this is a massive house. He said that the new house at 119 Abbott Road blocks everything from the view from his property at 117 Abbott Road. He said that they used to have air circulation and light. They could see Abbott Road. He said that the new house is bigger than what was originally at 119 Abbott Road.

Mr. Whitman said that the new home is not in partnership with the neighborhood. He said that there has been a lack of communication from the builder.

Sally Whitman, 117 Abbott Road, said that there is a front yard setback issue with 119 Abbott Road. All of the houses on Abbott Road from Livermore Road to Forest Street are set back 60 feet. The new house at 119 Abbott Road is set back 32 feet. She said that she did not believe that the intent of the Zoning Bylaw and the application of the 500 Foot Rule would allow for demolition of the prior house at 119 Abbott and then new construction built 28 feet forward from where the last house existed. She said that if the new house at 119 Abbott was set back at 60 feet it would not be blocking the view from their residence at 117 Abbott Road and all of the houses on Abbott from Arlington Road to Livermore Road would be aligned at the same distance from Abbott Road.

Ms. Whitman said that she did not think that it was the intent of the Zoning Bylaw, particularly the 500 Foot Rule, that an existing house could be torn down and have the lot treated as raw land. She said that the Zoning Bylaw was created to protect the neighborhood.

The Board said that under the 500 Foot Rule, treatment of the post-demolition lot as raw land might or might not have been the intent when the 500 Foot Rule was written in 1939 but the Board has to enforce the Zoning Bylaw as it is written. In a prior case (the "Woodlawn Avenue Case") the Board received an opinion from Town Counsel on the application of the 500 Foot Rule that is reasonably consistent with the treatment of 119 Abbott Road. Ms. Whitman said that the 500 Foot Rule could be interpreted in different ways.

Mr. Kasper said that the Appellant can demonstrate that this project violates the 500 Foot Rule and the Zoning Bylaw. He said that the Appellant heard at a Planning Board Meeting that area of Abbott Road is historically significant. It was suggested that the layout of the area was done by Olmstead. The landscaping at the train station was done by Olmstead. He said that this area is the gateway to the Abbott Road area. It is called Abbott Road/Belvedere, which means clear view. He said that an important part of clear view is consistency of setbacks.

Mr. Kasper presented a handout to the Board (the "Kasper Handout") and referred to the pictures in the handout. He said that in the Google Earth satellite photograph the setbacks are consistent on each side of Abbott Road. Every house built on Abbott Road since the 500 Foot Rule was adopted in 1939 has maintained the previous setbacks, including 119 Abbott Road which was built in 1951. He said that there were people present at the hearing who would testify that the Planning Director told a potential purchaser for 119 Abbott Road that the potential purchaser would have to build back at 60 foot setback if they tore the house down.

Mr. Kasper said that there was a Town map in the handout that shows the layout along Abbott Road from Livermore Road to Forest Street. He said that the setbacks are at a minimum of 60 feet.

Mr. Kasper said that there was another Google Earth photograph that shows a darkened shaded area drawn in front of a structure at 119 Abbott Road that shows how far the new structure moves the setback line toward Abbott Road. He said that it is a huge difference on a street that has had a long and consistent record of front yard setbacks at 60 feet.

Concerning the demolition of the previously existing dwelling at 119 Abbott, Mr. Kasper asked if a builder can avoid the 500 Foot Rule simply by tearing a house down. He said that he thought that it is contrary to intent of the Zoning Bylaw. He said that prior to 1939 Wellesley had no setback bylaw. He said that Town Meeting was obviously concerned about maintaining the character of the Town, so they imposed minimum setback requirements. Town Meeting also recognized that in some areas setbacks in excess of the minimum existed. He said that the 500 Foot Rule was enacted to protect the character in pre-existing areas with greater than minimum front yard setbacks.

Mr. Kasper said that it would be contradictory to accept the Building Inspector's interpretation of the three house rule under the 500 Foot Rule. He said that if the owner of 119 Abbott Road, prior to teardown, had come in to the Board and asked for a Special Permit to put an addition into the setback from 60 feet to 30 feet, it is highly unlikely that the Board would have granted the Special Permit.

The Board said that there did not appear to be any circumstance in which a Special Permit would be required for the previously existing dwelling. If the prior owner had proposed to alter the dwelling to extend into the setback, that would require a variance, which would not have been granted because no such proposal meets the Zoning Bylaw requirements for a variance. Special Permits only come into play when there is a nonconforming lot or a pre-existing nonconforming setback.

Mr. Kasper said that he thought it would be highly unlikely that a Building Permit would be issued in either case.

Mr. Kasper said that the consequences of accepting the Building Inspector's interpretation are substantial. He said that if Mr. Grant's interpretation of the 500 Foot Rule based on the demolition of the prior dwelling being excluded from the count of structures, and his corresponding issuance of a Building Permit is upheld, then 117 and 115 Abbott will immediately be free from the 60 foot setback requirement. These two houses could be torn down and built out to 30 foot front yard setbacks. He said that by not counting the structure to be torn down, it will become fair game for developers to tear down and build to a 30 foot setback. He said that would substantially change the character of the Town.

Mr. Kasper said that it is unreasonable to assume that Town Meeting, in 1939, was so short-sighted. He said that Mr. Shind offered some speculation in his submittal that Town Meeting intended the 500 Foot Rule to apply to virgin lots. Mr. Kasper said that there is no evidence to support that speculation.

Mr. Kasper said that Town Counsel offered an opinion in a letter to the Building Inspector, based on the Woodlawn Avenue Case. The Building Inspector had made his decision in the matter of 119 Abbott Road while unaware of the Board decision that Town Counsel referred to in the Woodlawn Avenue Case. Town Counsel stated in his letter that, after discussion of bylaw language with the Planning Director, it was a safe assumption that the 500 Foot Rule only referred to vacant (virgin) lots. Mr. Kasper said that Town Counsel provided no evidence to support that.

Mr. Kasper said that the previous structure at 119 Abbott Road should be counted in the three house count under the 500 Foot Rule. He said that, consistent with the Woodlawn Avenue Case, it would be sensible to start measuring for the 500 foot rule from the corner of the lot. By doing that you would end up with the three requisite houses.

Mr. Kasper discussed the setback issue in the Edmunds Road Case. He said that a new house was permitted to be built at the setback of the previous structure. The Board said that matter was not before it. Mr. Kasper said that he was suggesting that the Building Department's own practice was fully consistent with counting the lot at 119 Abbott Road with the previous dwelling when considering the 500 Foot Rule.

Mr. Kasper said that the Appellant is asking that the teardown be included in the count, that the Board find that the lot is nonconforming, and require that the existing 60 foot setback requirements be respected.

Mr. Kasper said that the builder made the situation more difficult at Abbott Road by continuing to build quickly after the issues had been raised.

Mr. Kasper said that he would like to reserve the right to request formally of the Board that it extend the hearing so that the Appellant can get a survey done.

The Board said that the Town established a 30 foot setback for this district. Most of the houses on Abbott Road have a greater setback than that. There are many houses on Abbott Road that could be knocked down and built closer to the street.

Mr. Kasper said that setbacks are protected to honor the voluntary agreements that have been struck between homeowners. The Board asked why a 60 foot setback was not established for the area. Mr. Kasper said that the houses on the other side of the street have a different setback. He said that the setbacks are consistent within areas.

The Board Chairman said that it was his understanding that the intent of the 500 Foot Rule was to address issues with in-fill lots that had not been built on.

Mr. Kasper said that there are no minutes of the 1939 Town Meeting. He said that the Chairman's understanding of the intent of the bylaw is based on hearsay. The Board said that there is credence to the argument that the 500 Foot Rule was written to address in-fill lots because it talks about all existing buildings. Mr. Kasper said that this was not an in-fill lot.

The Board said that when the Building Permit was granted, there were only two existing buildings within 500 feet. Mr. Kasper said that the building was torn down and then the Building Permit was applied for. He did not believe that it was the intent of the Zoning Bylaw to allow for that.

A Board member said that his interpretation of the 500 Foot Rule was that between two streets such as Livermore Road and Arlington Road, whether it is more or less than 500 feet, if there are three houses and someone wants to build a fourth house, it should be set back at whatever the minimum is for the three houses. Four lots would be included in the calculation. The three existing houses would be used to determine the front yard setback of the fourth house.

The Board said that there are only three houses between Arlington and Livermore. There is no fourth house for the calculation. The minimum front yard setback requirement has been 30 feet since 1939. That people built the houses at a 60 foot front yard setback is a benefit to the neighborhood, but is in no way required under the Zoning Bylaw or under the 500 Foot Rule.

Mr. Kasper said that he would assume that the bylaw exempted any place where there were only three houses at two intersecting streets.

Mr. Kasper said that this was a self-created hardship.

The Board said that there is nothing in the bylaw that talks about teardowns.

Mr. Mone said that the bylaw talks about three existing buildings. He said that looking at that literally, there is the Whitman's house, their free-standing garage, the Mehta's house and their free-standing garage. The setback would apply to all buildings.

The Board said that a building is a combination of materials forming a shelter for persons, animals or property.

Mr. Mone said that the garage has to abide by the setback. He said that there are four buildings between the two properties and they abide by the increased 60 foot front yard setbacks. He said that otherwise the garage could be set forward at 30 feet.

Mr. Kasper said that in this case, excluding the torn down structure, there are three structures between Livermore Road and Arlington Road. He said that they are all set back 60 feet or more.

Caren Parker, 134 Abbott Road, said that the neighbors should not have to police the Zoning Bylaws. She said that she looked through 10 years of Town Meeting records and found nothing in them regarding setbacks. She said that they expect the Town officials to act consistently. She said that this does not seem to be consistent in keeping setbacks.

The Board said that a land survey is done at grade level. The Board said that it relies on setback calculations provided by professional land surveyors. The Building Department also relies on the professional surveys.

Nick McShane, 86 Abbott Road, said that there had been some confusion as to whether or not the neighbors should get their own survey of the property. He said that there were "No Trespassing" signs all over the new structure at 119 Abbott Road. He asked that the Board grant an extension to allow the neighbors to get a privately funded survey of the property.

The Board said that the neighbors had a chance to do that before the Public Hearing. "No Trespassing" signs are posted at construction sites because of safety hazards, not to prevent surveyors from entering the property to perform their duties.

Mr. McShane said that it is the Board's responsibility to look out for the residents of the Town. The Board said that its responsibility is to interpret and enforce the Zoning Bylaw as it understands it.

Virginia Murray, 114 Forest Street, said that she grew up on Abbott Road and has been a real estate broker in Town for almost 20 years. She said that if the vacant lot was not to be counted, other builders would have discovered this loophole in the Zoning Bylaw. She said that it seems that the interpretation of the 500 Foot Rule was consistent in the past. She said that surveys can be wrong, even when stamped and signed. She said that it would make sense to allow for another survey.

Kevin Donnelly, 123 Abbott Road, said he lives on the corner of Arlington and Abbott. He said that his porch looks directly on the house at 119 Abbott Road. He said that this is not a Special Permit situation so the Board does not have to make a determination if this would be more detrimental to the neighborhood. He said that it is not a variance so the Board does not have to find a hardship. He said that a hardship to the builder due to any decision that the Board makes should be of no consequence and should not be factored into the decision.

Mr. Donnelly said that if Mr. Bevilacqua had decided to make an extension off of the old home at a 30 foot setback, he could not have done that. If he had applied for a Building Permit to tear down the old house and build 30 feet closer to the street in one application, it would not have been granted. He said that the rules do not change one minute after the house is torn down.

Mr. Donnelly said that a literal interpretation of the 500 Foot Rule would include all buildings. He said that where there are different interpretations of the bylaw, the Board, as a quasi-judicial board, has the obligation to understand the purpose and intent of the bylaw. He said that all one has to do is to walk up Abbott Road to see that this is clearly in violation of the intent of the Zoning Bylaw.

Sally Whitman, 117 Abbott Road, said that the economic impact on them will be lowered property values. She said that should be taken into consideration.

Larry Shind, said that he is an attorney at Kertzman & Weil, and he is representing Mr. Bevilacqua, the property owner at 119 Abbott Road.

Mr. Shind said that Mr. Kasper did not have standing to bring the case. The Board said that there are two names on the application, Mr. Whitman and Mr. Kasper.

The Board read Section XV of Massachusetts General Laws, Chapter 40 A.

Mr. Shind said that the Building Inspector determined and Town Counsel affirmed that the 500 Foot Rule does not apply to 119 Abbott Road. He said that there are two components to the 500 Foot Rule. The first is frontage that can be less than 500 feet if there are two intersecting streets. He said that the issue is whether the property that came before the Building Inspector without a house on it is covered by the 500 Foot Rule. The 500 Foot Rule talks about all existing buildings if not less than three in number. The case before the Board is 119 Abbott Road and the two neighboring properties. The 500 Foot Rule cannot be applied.

Mr. Shind said that the 500 Foot Rule says not simply "all existing buildings", but that it says "all existings...that have front yards...". He said that structures such as a garage do not have a front yard.

Mr. Shind said that there is no language in the Zoning Bylaw regarding counting any house previously existing on the lot to be affected.

Mr. Shind said that the Appellant also cited the Woodlawn Avenue Case that came before the Board in 2003. He said that there was an existing house in that instance. He said that the Woodlawn Avenue Case does not set a precedent for 119 Abbott Road.

Mr. Shind said that the average front yard setback on the entire length of western Abbott Road from Forest Street to Washington Street is 36 feet, not 60 feet.

Mr. Shind said that teardowns were exceedingly rare in 1939. He said that there were 3,676 single family building lots in town in 1939. He said that there were a little over 7,200 in 2005. He said that his conclusion is that Town Meeting members had vacant lots in mind when the 500 Foot Rule was enacted.

Mr. Shind said that it makes sense to count three neighboring houses. He said that the average frontage in this area is approximately 100 to 125 feet. He said that four times that average would bring you to approximately 500 feet. That would give you three other houses to count. He said that the situation at 119 Abbott Road is different from the Woodlawn Avenue Case because of the intersecting streets.

Mr. Kasper said that the setbacks on Abbott Road are consistent over long stretches. He said that all of the front yard setbacks are at least 60 feet on Abbott Road, from Livermore Road to Forest Street. He said that they are at least 60 feet going down to Livermore at the other end.

Mr. Kasper said that the Zoning Bylaw discusses buildings, not dwellings. He said that Mr. Shind was incorrect that a garage does not have a front yard setback. He read Section XIX B of the Zoning Bylaw.

Mr. Kasper said that Mr. Shind had offered speculation as to the frontage of houses. Mr. Kasper said that the minimum frontage for lots was 60 feet at the time the 500 Foot Rule was enacted.

Sherry Kasper, 90 Abbott Road, said that they are not asking for anything that has not been applied to other properties before. Ms. Kasper said that there should be consistency. The Board said that previous matters were not under consideration at this hearing.

Mr. Mone said that he spoke with Town Counsel when the Appellant was about to file its appeal. He was told by Town Counsel that the issue of standing may come up. Mr. Mone said that he assumed that Mr. Whitman was joined in the appeal when he saw that it was signed by both Mr. Kasper and Mr. Whitman.

Andrea Higgins, 105 Abbott Road, said that it is an unrealistic interpretation of the 500 Foot Rule to say that it is okay to tear a house down and immediately build a new one with new setbacks. She said that the old house should be counted. The Board said that there is no line drawn for the break between the teardown and the rebuild. The builder has been able to use this to his advantage.

Caren Parker, 134 Abbott Road, said that there was a teardown in preparation for new construction. She said that this should be looked at as existing before the project was started.

The Board discussed the issues of the size of the lot and whether the existing home should have been included in the 500 Foot Rule.

The Board Chairman said that he did not believe accessory structures such as garages or sheds should be included. A Board member concurred with the Chairman's interpretation that the 500 Foot Rule was not meant to apply to ancillary buildings. If ancillary buildings were included and a property had a dwelling, detached garaged and shed, it would have the anomalous result of having one property dictate the setback for abutting properties. The reason the bylaw did not use the word dwelling is that the 500 Foot Rule also pertains to nonresidential property.

The Board said that this is an appeal of the decision of the Building Inspector and that the burden of proof is on the Appellant.

Regarding the issue of the lot size, the Board said that it was satisfied that it could rely on the survey figure of 20,001 plus or minus square feet.

A Board member said that he looked at the development of the survey from the 1903 description to the Drake Survey. There was an evolution of the lot size during the process that reflected defects in the original property description. There was nothing in 1903 that determined either the interior angles of the lot or the bearings of the lot lines. Without the lot corner there was no way to establish what was there. There was a natural progression in the Gleason Survey and Giunta Survey to close the geometric figure that is the lot at 119 Abbott Road. He said that the Drake Survey does provide closure. The plus or minus, not an inaccuracy in the survey, but a difference in the number of significant figures in the calculation of the lot area as compared to the length of the lot lines and the bearings of the lot lines.

The Board voted unanimously to uphold the Building Inspector's determination that the minimum lot size has been satisfied.

The Board discussed the issue of standing. The Board said that at the court level, if one party has standing, they all have standing.

The Board said that it grants that the 500 Foot Rule is a poorly worded bylaw. One of the weaknesses of both the 500 Foot Rule and the Zoning Bylaw is that it does not address how the Zoning Bylaw in general and the 500 Foot Rule in particular apply to teardowns.

The Board said that the language in the 500 Foot Rule that talks about existing buildings does not apply to pre-existing buildings. There is no arbitrary rule that states how long you must keep the lot vacant before rebuilding.

The Board said that since 1939 the setback requirement between Arlington Road and Livermore Road, including the front yard setback at 119 Abbott Road has been 30 feet. That people built at a greater depth of 60 feet is to the benefit of the Town, but is not required by the Zoning Bylaw.

The Board voted unanimously to uphold the decision of the Building Inspector that the 500 Foot Rule does not apply to the 119 Abbott Road project.

The Board voted unanimously to deny the Appeal of C. William Whitman and Daniel Kasper.

Statement of Facts

The subject property is located at 119 Abbott Road, in a 20,000 square foot Single Residence District.

Building Permit #37111 was granted on November 20, 2005 and Building Permit #37233 was granted on January 23, 2006 to Paul Bevilacqua for the property located at 119 Abbott Road.

On June 8, 2006, the Board of Appeals heard the Appeal of C. William Whitman and Daniel Kasper, filed on May 22, 2006, of the decision of the Inspector of Buildings, in letters dated April 4, 2006 and April 14, 2006, not to revoke the building permit, granted 1/23/06, for construction of a new dwelling at 119 Abbott Road.

The following information was submitted by the Inspector of Buildings pursuant to Section XXIV-C.3 of the Zoning Bylaw:

- Application for Demolition Permit for existing structure at 119 Abbott Road, approved 11/8/05
- Application for Building Permit for new construction at 119 Abbott Road, approved 1/23/06 (the "Giunta Survey")
- As Built Certification Form, dated 2/13/06, stamped by George Giunta, Registered Land Surveyor (the "As-Built Survey")
- Letter to Michael Grant, dated 3/22/06, signed by Daniel M. Kasper, 90 Abbott Road
- Letter to Michael Grant, dated 3/28/06, stamped by George Giunta, Registered Land Surveyor
- Letter to Paul Bevilacqua, dated 4/4/06, signed by Michael Grant, Inspector of Buildings, delivered via Certified Mail on 4/7/06
- Letter to Daniel Kasper, dated 4/4/06, signed by Michael Grant, Inspector of Buildings
- Letter to Michael Grant, Zoning Enforcement Officer, dated 4/6/06, signed by Daniel Kasper
- Letter to Michael Grant, Building Inspector, dated 4/6/06, signed by C. William Whitman, 117 Abbott Road
- Letter to Daniel Kasper, dated 4/14/06, signed by Michael Grant, Inspector of Buildings/Zoning Enforcement Officer

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- Letter to C. William Whitman, dated 4/14/06, signed by Michael Grant, Inspector of Buildings/Zoning Enforcement Officer
- Letter to Paul Bevilacqua and Stop Work Order, dated 4/28/06, signed by Michael Grant, Inspector of Buildings/Zoning Enforcement Officer
- As Built Certification Form, dated 5/8/06, stamped by Robert Drake, Professional Land Surveyor
- Letter to Michael Grant, Inspector of building, dated 5/10/06, signed by Paul Bevilacqua
- Letter to Paul Bevilacqua, dated 5/10/06, signed by Michael Grant, Inspector of Buildings/Zoning Enforcement Officer
- Foundation Modification, dated 5/16/06, stamped by David Seaman, Professional Engineer
- Fax/email to Michael Grant, Wellesley Zoning Enforcement Officer, dated 5/17/06, signed by Daniel Kasper
- Letter to Paul Bevilacqua, dated 5/22/06, signed by Michael Grant, Inspector of Buildings/Zoning Enforcement Officer
- Letter to Daniel Kasper, dated 5/23/06, signed by Michael Grant, Inspector of Buildings/Zoning Enforcement Officer
- As Built Certification Form, dated 5/23/06, stamped by Robert Drake, Professional Land Surveyor
- Letter to Paul Bevilacqua, dated 5/24/06, signed by Michael Grant, Inspector of Buildings/Zoning Enforcement Officer
- Copy of Memo from William D. Mone, Esq. regarding 119 Abbott Road including attachments:
 - Deed, dated 7/2/1903
 - Plan of Land Owned by the Abbot Real Estate Trust, 6/20/1903
 - Town Plan, 119 Abbott Road locus
 - Plan of Land Owned by J. R. Swain, dated 5/1919
 - Property Assessment Record, 119 Abbott Road
 - Quitclaim Deed, dated 9/8/05
 - 1935 Town Atlas, Gleason Engineering
 - Plan of Land, 9/10/51, Gleason Engineering Company
 - As Built Certification Form, dated 2/13/06, stamped by George Giunta, Registered Land Surveyor
 - Proposed Construction Certified Plot Plan, dated 12/31/05, George Giunta, Professional Land Surveyor
 - Letter to Zoning board of Appeals, dated 6/7/06, signed by Daniel M. Kasper and C. William Whitman

Submittals from Appellant

(the "Kasper Handout"):

- Google Earth Photographs: 117 Abbott Road
- Section of Town of Wellesley Town Plan – 119 Abbott Road

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(the "Whitman Handout")

- Photograph: 119 Abbott Road – Former House Demolished
- Photographs: New Construction
- Photograph: View from Abutter's Lot

Submittals from Laurence Shind, Counsel to Paul Bevilacqua, owner of 119 Abbott Road

- Letter to Zoning Board of Appeals, dated 6/2/06, signed by Laurence D. Shind
- 119 Abbott Road Chronology (9/19/05 – 4/04/06) (the "Shind Chronology")
- Proposed Construction Certified Plot Plan, dated 12/31/05, George Giunta, Professional Land Surveyor
- As Built Certification Form, dated 2/13/06, stamped by George Giunta, Registered Land Surveyor
- Letter to Michael Grant, dated 3/28/06, stamped by George Giunta, Registered Land Surveyor
- As Built Certification Form, dated 5/8/06, stamped by Robert Drake, Professional Land Surveyor
- Letter to Michael Grant, Inspector of Buildings and Zoning Enforcement Officer, dated 4/4/06, signed by Albert S. Robinson, Town Counsel
- Plan of Land, 9/10/51, Gleason Engineering Company

On June 6, 2006, the Planning Board reviewed the petition and stated:

The Planning Board believes the intent of the 500 Foot Rule is to maintain a uniform setback consistent with neighboring properties. In this particular instance, however, it seems that the demolition of the house allows this rule, as it is written in the Zoning Bylaws, to be circumvented. For the new house, a street setback that is less than the neighboring properties was therefore asserted, but again this is inconsistent with the Planning Board's believed intent of the rule. The Planning Board recognizes the importance of consistency in interpretation and the implications of setting a precedent.

Decision

This Authority has made a careful study of all the materials submitted and the information provided by all parties at the public hearing.

The appeal 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.

Richard L. Seegel, Chairman

J. Randolph Becker

Robert W. Levy

cc: Planning Board
Inspector of Buildings
lrm