



## ZONING BOARD OF APPEALS

TOWN HALL • 525 WASHINGTON STREET • WELLESLEY, MA 02482-5992

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 ROBERT W. LEVY

ZBA 2003-44

Petition of Ruth W. Whitehouse

56/58 Oak Street

Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, June 19, 2003 at 7:30 p.m. in the Great Hall at the Town Hall, 525 Washington Street, Wellesley, on the petition of RUTH W. WHITEHOUSE requesting a Special Permit/Finding pursuant to the provisions of MGL Chapter 40A, Section 6, and Section XXV of the Zoning Bylaw that the following construction at her nonconforming property containing one two-family dwelling and one single family dwelling, each having less than the required left side yard setback at 56/58 OAK STREET, in a 10,000 square foot Single Residence District, shall not be substantially more detrimental to the neighborhood than the existing nonconforming structures:

1. 56 Oak Street
  - a. Convert two-family house to single family house.
  - b. Construct conforming one-story 28.5 foot by 22 foot addition.
2. 58 Oak Street
  - a. Demolish existing nonconforming dwelling and existing nonconforming detached garage.
  - b. Construct new conforming 54.6 foot by 30 foot two-story dwelling with one car garage.

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On June 2, 2003, the petitioner filed a request for a hearing before this Authority, and thereafter, due notice of the hearing was given by mailing and publication.

## PUBLIC HEARING – JUNE 19, 2003

Presenting the case at the hearing were David Whitehouse, who was accompanied by his wife, Ruth, and Kevin Gordon of Design West. Mr. Whitehouse said that the property dates back to the 1920's and 1930's. It is clear that in the '30's, the house at 56 Oak Street was converted from a single family to a two family dwelling. The rear house at 58 Oak Street was maintained as a single family dwelling. At the rear, there is a nonconforming two-car detached garage.

He and his wife purchased the property in 1975. Due to the age of the buildings, the condition of the foundations, and the trashing of 58 Oak Street by a tenant, they would like to upgrade the property. The proposed plan is to demolish the existing nonconforming garage, return 56 Oak Street to single family status and add a garage at the rear of the dwelling. The dwelling at 58 Oak Street would be demolished, and a new conforming dwelling with attached garage would be built. The new dwelling would be set farther back from the garage at 56 Oak Street to afford a 30 foot space between the two structures. Both buildings would be brought up to code.

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The net effect of the proposed plan would be the reduction of three living units to two; reduction of traffic on the property; and a great improvement of the physical presence of the property. After completion of the project, the two dwellings would be sold as condominiums, so each would be owner-occupied.

The Board asked if a new foundation would be constructed beneath the front building. Mr. Gordon said that most of the foundation has deteriorated in the area in which the proposed garage would be located. The foundation in that area will be removed and replaced with concrete. The rest of the foundation can be repaired. The entire foundation under the rear building is in very poor condition.

The Board stated that the property is in a Single Residence District. Not only is the property nonconforming but the use is nonconforming, as there are currently three dwelling units on the lot. Mr. Whitehouse responded that it has been that way for about 60 years. At completion of the project, the three units would be reduced to two.

Mr. Levy stated that Chapter 40A, Section 6 deals with a use being extended or altered. The Board is concerned about allowing demolition of a nonconforming use, and then allowing that use to be reinstated by the reconstruction of the rear dwelling. Ideally, the Zoning Board attempts to make as many properties as possible conforming, which, in this case, would mean a single family dwelling on a single lot. The Board must make a finding that the proposed project shall not be substantially more detrimental to the neighborhood than the existing nonconformity. Furthermore, the Board must decide whether it has the authority to allow the nonconforming use to be maintained.

Mr. Bastille was of the opinion that the demolition of the nonconforming rear dwelling and garage and construction of a new dwelling, which conformed to the side yard setbacks, would be an improvement. Although the use is still nonconforming, as there will still be two buildings on one lot, this is not a new use.

The Board was of the opinion that it would like to approve the project, but before doing so, wanted to request guidance from Town Counsel as to the issue of allowing the nonconforming use to be perpetuated.

The Board voted unanimously to continue the hearing on the petition to the Public Hearing on July 10, 2003, pending an opinion from Town Counsel.

#### PUBLIC HEARING – JULY 10, 2003

Presenting the case at the hearing were David Whitehouse and Kevin Gordon of Design West.

Mrs. Hibbard, Acting Chairman, said at the last hearing, the Board found the proposed plan to be a considerable improvement compared to a prior submitted plan, which had been withdrawn without prejudice, but did not act on the petition due to its uncertainty regarding its authority to approve the reconstruction of a single dwelling unit at 58 Oak Street, which would result in perpetuating the nonconforming use of two dwellings on one lot. The Board had continued the hearing in order to seek guidance on this issue from Town Counsel.

In a letter to the Board dated July 2, 2003, Mr. Robinson expressed his opinion that as the proposed project would bring the property more into compliance with the Zoning Bylaw than the existing structures

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and uses, the Board had the authority to make a finding pursuant to MGL Chapter 40A, Section 6, which would allow the continuance of the nonconforming use.

Mr. Levy stated there are two provisions in the bylaw relative to Special Permits for nonconforming structures. One involves more favorable treatment to a single or a two-family house than to those dwellings, which do not come under that classification. He is not certain as to whether to view this petition as a three-family use, or as a nonconforming lot. The statute refers to structures rather than to "uses" of the lot.

Mr. Levy said that his other issue concerns demolition and rebuilding on a nonconforming lot. The bylaw refers to "alterations" or "additions" requiring Special Permits. The only provision for reconstruction is in a disaster situation. The Board has granted Special Permits for reconstructions on nonconforming lots in the past, but the issue continues to trouble him.

Mr. Seegel, who was present but not sitting on the petition, offered his comment that over the years, the Board has wrestled with this issue. It has been the general practice of the Board, although not specifically addressed in the Zoning Bylaw, to permit the teardown and rebuild of a nonconforming structure, provided that prior to demolition, the petitioner appears before the Board to request a Special Permit. When the Board has found that the proposed construction would not be substantially more detrimental to the neighborhood than the existing nonconforming structure, it has granted a Special Permit. In other cases, the petitioner generally withdrew the petition without prejudice, and returned later with a modified plan.

In this instance, there are three families living on the lot. The rear dwelling is nonconforming, as it has no frontage, encroaches on the left side yard setback, and constitutes a second dwelling unit on a lot in a Single Residence District. However, it is incumbent on the Board to attempt to interpret the bylaw in a way in which a reasonable conclusion may be reached. No two cases are the same, and each case is viewed on its own merits.

Mr. Bastille was of the opinion that the key in this situation was that the proposed project would not be substantially more detrimental than what is there now. Although the new house is slightly larger than the one to be demolished, it does conform to the setbacks. It has no frontage, but that is an existing condition, which cannot be rectified. The fact that the front dwelling would be converted to a single family, rather than the existing two-family demonstrates that the petitioner is attempting to improve the situation. The Board ought to be able to rely on Town Counsel's opinion regarding the Special Permit for the petition before the Board.

Mrs. Hibbard noted that at the last hearing, one of the abutters expressed support for the petition.

Ms. Gordon read into the record the recommendation of the Planning Board, which had reservations about the demolition and reconstruction of the nonconforming use on the lot. The Board was concerned about the possible precedent setting nature of approval.

Mr. Whitehouse said that the abutters on one side had reviewed the plans and supported the petition. The abutter at 60 Oak Street is an absentee owner. He has also received support from neighbors on Oak Street.

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Mr. Levy said he was of the opinion that Special Permits should be given for 56 and 58 Oak Street separately, as there are different issues involved. The two structures should be treated independently.

No other person present had any comment on the petition.

Statement of Facts

The subject property is located at 56/58 Oak Street, in a 10,000 square foot Single Residence District, on a 15,044 lot. The lot contains a two-family dwelling, built in 1930, with a minimum left side yard clearance of 8.7 feet (56 Oak Street) at the front of the lot. The rear portion of the lot is occupied by a nonconforming single family structure with a minimum left side yard clearance of 9.6 feet (58 Oak Street), built in the 1920's, and a nonconforming detached garage with a minimum right side yard clearance of 4.9 feet. Not only are the structures on the lot nonconforming as to the relevant setbacks, but the structure at 58 Oak Street does not have frontage on a public way, and the total number of living units exceeds the one unit per lot allowed in a Single Residence District.

The petitioner is requesting a Special Permit/Finding that the following construction at her nonconforming property shall not be substantially more detrimental to the neighborhood than the existing nonconforming structures and use:

1. 56 Oak Street – conversion from a two family to a single family dwelling and construction of a one story 28.5 foot by 22 foot addition which will conform to the left side yard setback.
2. 58 Oak Street – demolition of existing nonconforming dwelling and garage; and construction of a 54.6 foot by 30 foot dwelling which will conform to the left side yard setback.

The following plans were submitted:

1. Existing Plot Plan dated 9/12/02, drawn by Robert A. Gemma, Professional Land Surveyor
2. Proposed Plot Plan dated 5/22/03, revised 5/29/03, drawn by Robert A. Gemma, Professional Land Surveyor
3. Existing and Proposed Floor Plans for 56 Oak Street
4. Existing and Proposed Elevations for 56 Oak Street
5. Existing and Proposed Floor Plans for 58 Oak Street
6. Existing and Proposed Elevation for 58 Oak Street

All the architectural plans were dated 1/21/03 and drawn by Design West. Photographs of all these structures on the lot were also submitted.

On June 10, 2003, the Planning Board reviewed the petition and expressed reservations about the demolition and reconstruction of the nonconforming use on this lot. There is concern about the possible precedent-setting nature of approval of the application.

In response to a request from the Board for guidance from Town Counsel in regard to its authority to grant a Section 6 finding which would permit the reconstruction of the house at 58 Oak Street, Mr. Robinson, in his letter of July 2, 2003 wrote:

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“...Notwithstanding that the proposal will not avoid the continuance of two structures on one lot, the proposal will bring the site more into conformance with zoning, and thus I am of the opinion that the answer to your question is “yes”. The making of a favorable finding under G.L.c.40A, Section 6, inherently presumes the continuance of a nonconforming situation, so, from that perspective at least, the continuance of a nonconforming status, should a finding be made favorably in the instant case, is not going to be a surprise nor an abuse of the zoning power, as I see it.”

Decision

This Authority has made a careful study of the materials submitted and the information presented at the Public Hearings. The subject property does not conform to the current Zoning Bylaw as noted in the foregoing Statement of Facts.

In regard to both 58 and 56 Oak Street, this Authority finds that the petitioner’s proposed sale of both units as condominiums upon completion of the project, rather than the existing leasing of each unit, will be a substantial betterment both to the property and the neighborhood, as each unit shall be owner occupied rather than leased by an absentee owner.

In regard to 58 Oak Street, the rear property containing a nonconforming single family dwelling and a nonconforming garage, this Authority makes the following findings:

- The existing structure at 58 Oak Street is nonconforming as it has less than the required left side yard setback and does not have frontage on a public way.
- The use of the structure at 58 Oak Street is nonconforming as it is a third dwelling unit on one lot in a Single Residence District.
- The demolition of the existing nonconforming dwelling and garage and reconstruction of the single family dwelling, in accordance with the submitted plot plan and construction drawings, shall not be substantially more detrimental to the neighborhood than the existing nonconforming structure and use, as the nonconforming garage will be eliminated and the new structure will be in conformance with the side yard setbacks. The nonconformance shall not be intensified, nor shall new nonconformity be created in regard to both structure and use.

Therefore, a Special Permit is granted, as voted unanimously by this Authority at the July 10, 2003 Public Hearing, subject to demolition and construction in accordance with the submitted plot plan and construction drawings.

The Inspector of Buildings is hereby authorized to issue a permit for construction upon receipt and approval of a building application and detailed construction plans. No building permit shall be issued prior to the demolition of the existing dwelling and the garage.

In regard to 56 Oak Street, the front property containing a nonconforming two family dwelling, this Authority makes the following findings:

- The existing structure at 56 Oak Street is nonconforming as it has less than the required left side yard setback and is currently a two family dwelling located in a Single Residence District.

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56/58 Oak Street

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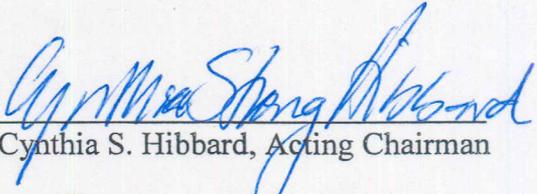
- The conversion of the existing structure from use as a two family dwelling to use as a single family dwelling shall not be substantially more detrimental to the neighborhood than the existing nonconforming structure as the use of the structure will be less intense than the use of the existing nonconforming structure.
- The construction of the 28.5 foot by 22 foot addition at the rear of the structure shall not be substantially more detrimental to the neighborhood than the existing nonconforming structure as it will neither intensify the nonconformance, nor create new nonconformity as it will be in conformance with the side yard setbacks.

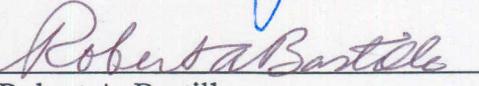
Therefore, a Special Permit is granted, as voted unanimously by this Authority at the July 10, 2003 Public Hearing, to construct the 28.5 foot by 22 foot addition in accordance with the submitted plot plan and construction drawings subject to the condition that the structure shall never be returned to use as a two family dwelling.

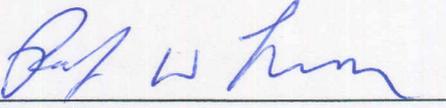
The Inspector of Buildings is hereby authorized to issue a permit for construction upon receipt and approval of a building application and detailed construction plans.

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.

Cc: Planning Board  
Inspector of Buildings  
edg

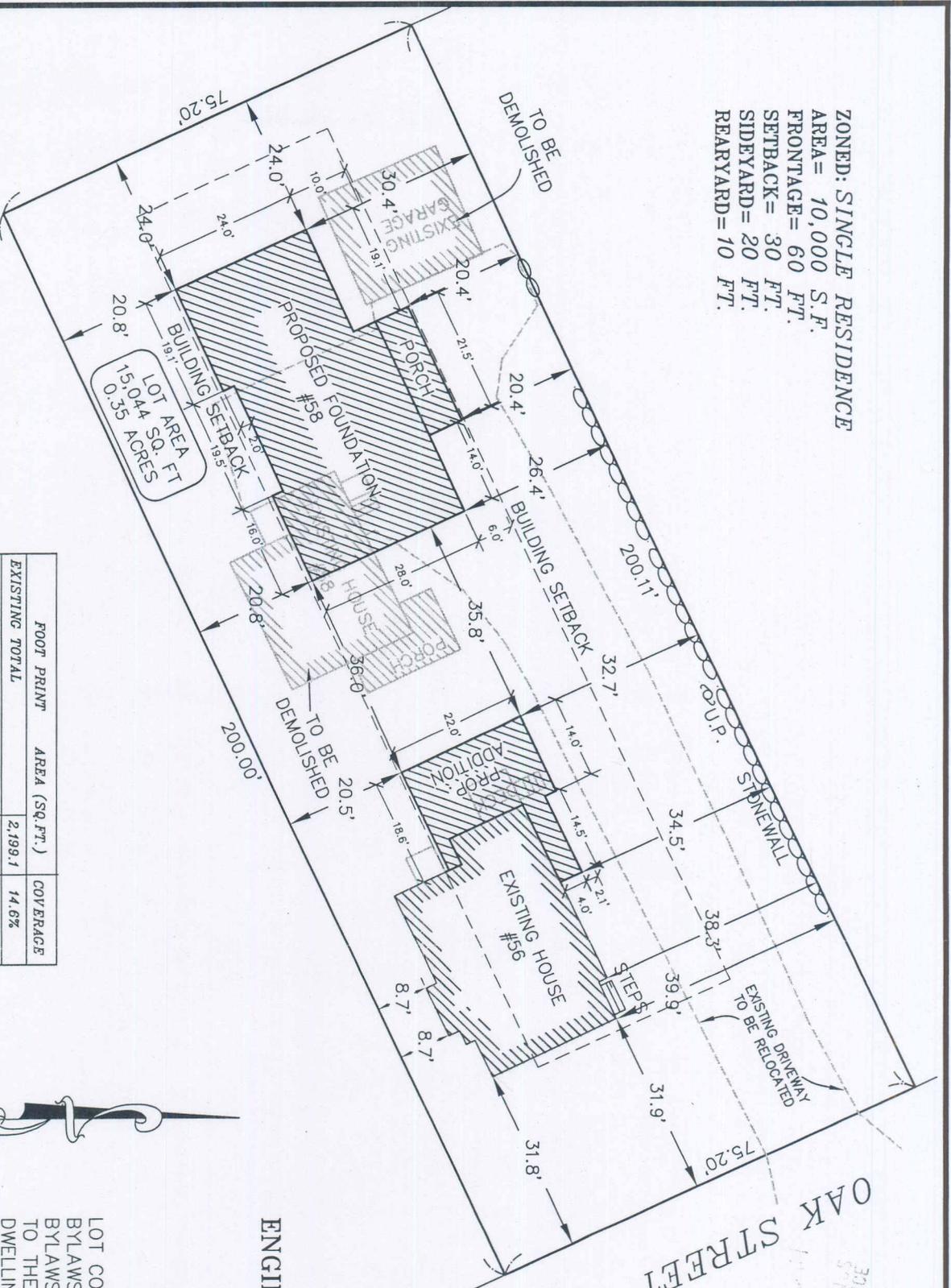
  
Cynthia S. Hibbard, Acting Chairman

  
Robert A. Bastille

  
Robert W. Levy

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ZONED: SINGLE RESIDENCE  
 AREA = 10,000 S.F.  
 FRONTAGE = 60 FT.  
 SETBACK = 30 FT.  
 SIDEYARD = 20 FT.  
 REARYARD = 10 FT.



| FOOT PRINT                                   | AREA (SQ.FT.) | COVERAGE |
|--|---------------|----------|
| EXISTING TOTAL                               | 2,199.1       | 14.6%    |
| LOT AREA                                     | 15,044        |          |
| PROPOSED ADDITION =                          | 1,918.0       |          |
| LESS OVERLAP AND PORTIONS TO BE DEMOLISHED = | 1,223.8       |          |
| PROPOSED CHANGE IN COVERAGE                  | 694.2         | 4.6%     |
| PROPOSED COVERAGE GROSS                      | 2,893.3       | 19.2%    |



*Handwritten signature and date: 05/25/03*

OAK STREET

# PROPOSED ZBA PLOT PLAN IN WELLESLEY, MASS.

SCALE: 1" = 20' DATE: MAY 22, 2003  
 LOCATION: #56 & #58 OAK STREET

PREPARED FOR: DESIGN WEST

ENGINEERS & SURVEYORS:



METROWEST ENGINEERING, INC.  
 75 FRANKLIN STREET  
 FRAMINGHAM, MA 01702  
 ROBERT A. GEMMA, PLS 37046

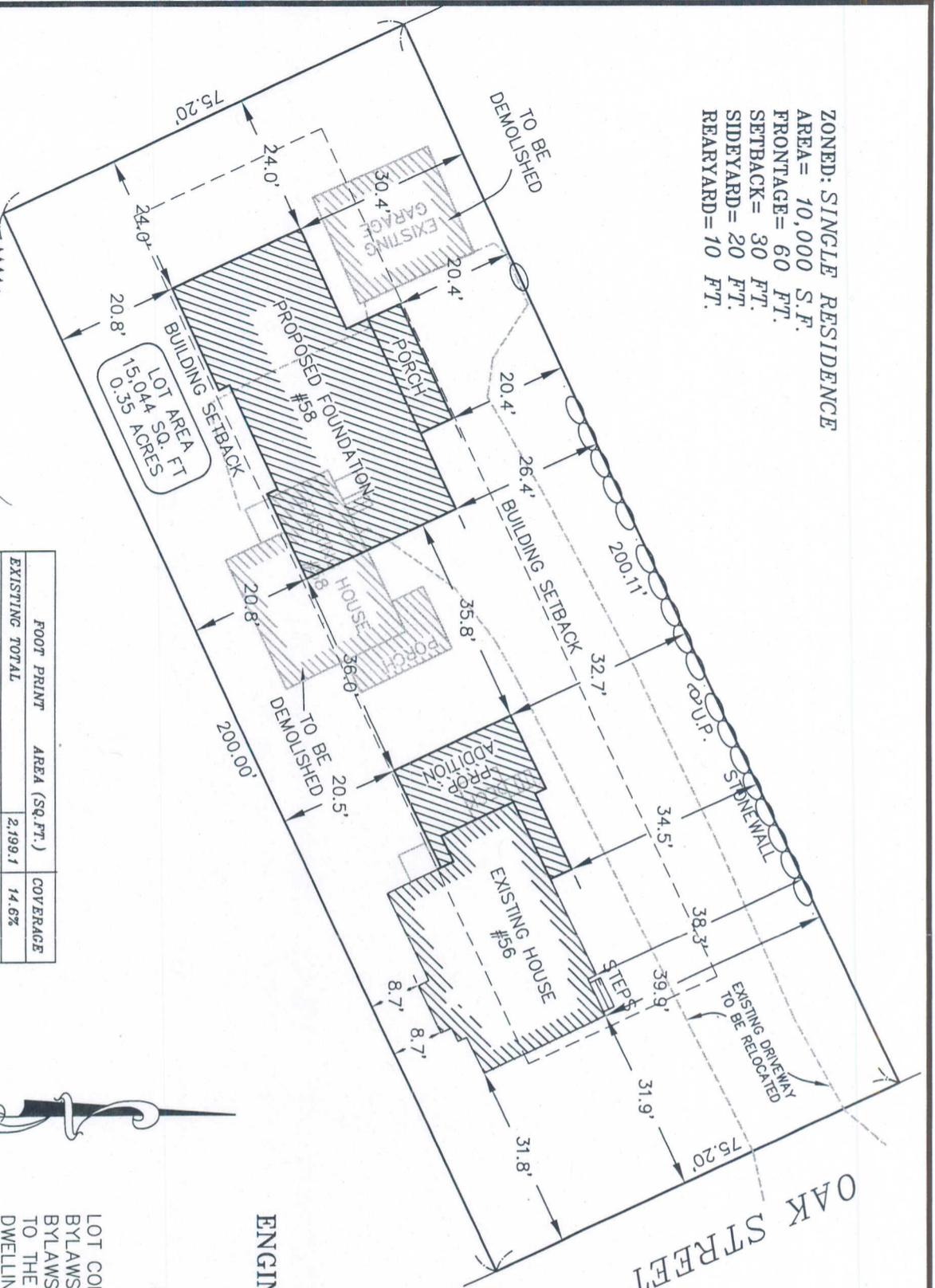
LOT CONFORMS TO CURRENT TOWN OF WELLESLEY ZONING BYLAWS; EXISTING HOUSE #56 PREDATES THE ZONING BYLAWS AND THE PROPOSED ADDITION ON #56 CONFORMS TO THE SETBACK REQUIREMENTS; AND THE PROPOSED NEW DWELLING CONFORMS TO THE DIMENSIONAL SETBACK REQUIREMENTS.

I CERTIFY THAT THE LOT SHOWN AND FOUNDATION THEREON ARE NOT WITHIN THE FEDERAL FLOOD HAZARD AREA.

NOTES

THIS PLAN IS PREPARED FROM LINES OF OCCUPATION. THE TIES TO THE LOT LINES ARE NOT TO BE USED IN THE SETTING OF FENCES, HEDGES, ETC.

ZONED: SINGLE RESIDENCE  
 AREA = 10,000 S.F.  
 FRONTAGE = 60 FT.  
 SETBACK = 30 FT.  
 SIDEYARD = 20 FT.  
 REARYARD = 10 FT.



ROBERT A. GEMMA  
 No. 31967  
 REGISTERED PROFESSIONAL ENGINEER  
 5/22/03

| FOOT PRINT   | AREA (SQ. FT.) | COVERAGE |
|--|----------------|----------|
| EXISTING TOTAL   | 2,199.1        | 14.6%    |
| LOT AREA   | 15,044         |          |
| PROPOSED ADDITION = 1,918.0<br>LESS OVERLAP AND PORTIONS<br>TO BE DEMOLISHED = 1,223.8 |                |          |
| PROPOSED CHANGE IN COVERAGE  | 694.2          | 4.6%     |
| PROPOSED COVERAGE GROSS  | 2,893.3        | 19.2%    |



OAK STREET

PROPOSED ZBA  
 PLOT PLAN  
 IN  
 WELLESLEY, MASS.

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 WELLESLEY MA 02482

SCALE: 1" = 20' DATE: MAY 22, 2003  
 LOCATION: #56 & #58 OAK STREET

PREPARED FOR:  
 DESIGN WEST

ENGINEERS & SURVEYORS:



METROWEST ENGINEERING, INC.  
 75 FRANKLIN STREET  
 FRAMINGHAM, MA 01702  
 ROBERT A. GEMMA, PLS 37046

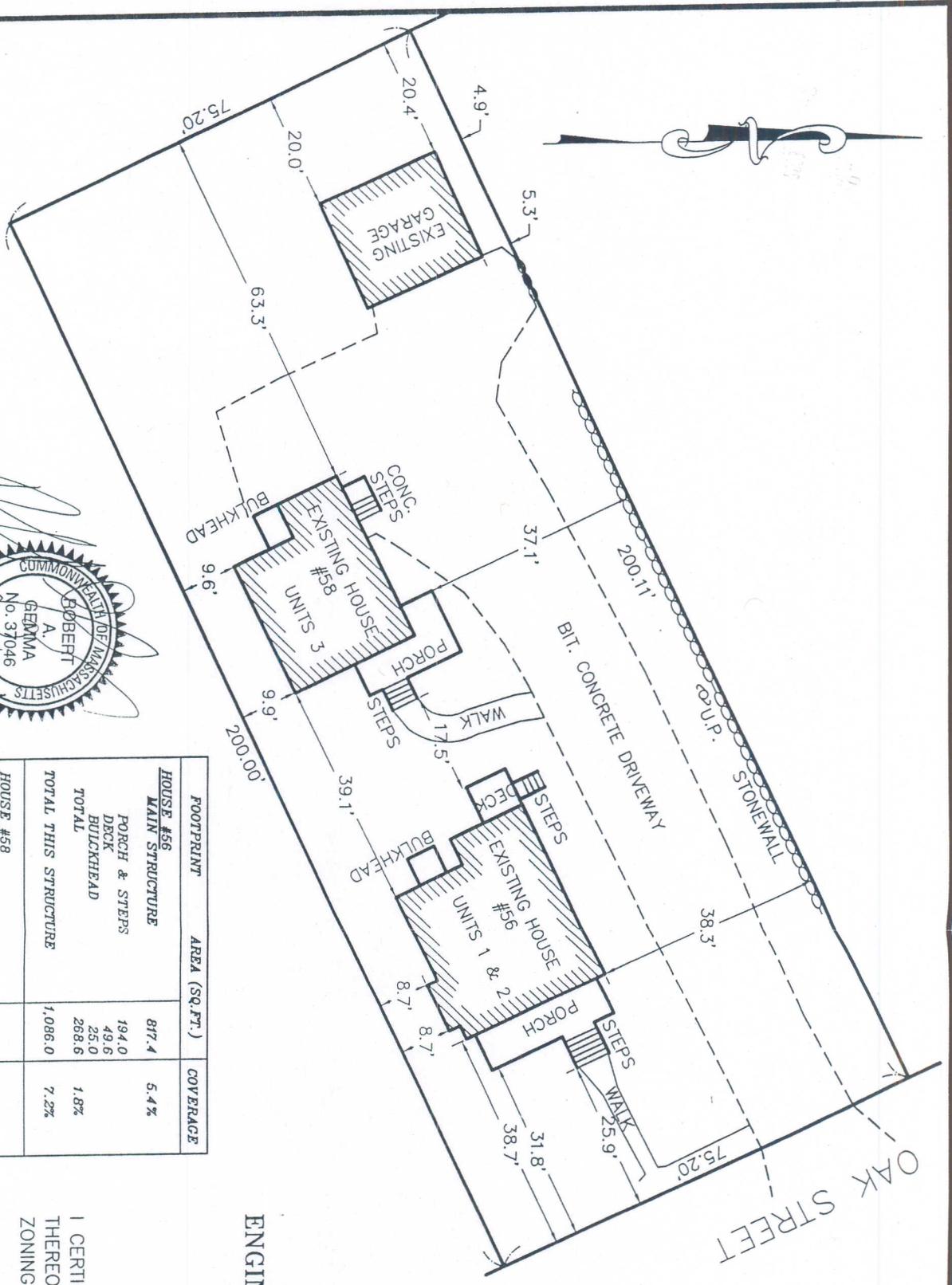
LOT CONFORMS TO CURRENT TOWN OF WELLESLEY ZONING BYLAWS; EXISTING HOUSE #56 PREDATES THE ZONING BYLAWS AND THE PROPOSED ADDITION ON #56 CONFORMS TO THE SETBACK REQUIREMENTS; AND THE PROPOSED NEW DWELLING CONFORMS TO THE DIMENSIONAL SETBACK REQUIREMENTS.

I CERTIFY THAT THE LOT SHOWN AND FOUNDATION THEREON ARE NOT WITHIN THE FEDERAL FLOOD HAZARD AREA.

NOTES

THIS PLAN IS PREPARED FROM LINES OF OCCUPATION. THE TIES TO THE LOT LINES ARE NOT TO BE USED IN THE SETTING OF FENCES, HEDGES, ETC.

PP052203



PLOT PLAN  
IN  
WELLESLEY, MASS.

SCALE: 1" = 20' DATE: SEPT. 12, 2002  
LOCATION: #56 & #58 OAK STREET

PREPARED FOR:  
RUTH & DAVID WHITEHOUSE

ENGINEERS & SURVEYORS:



METROWEST ENGINEERING, INC.  
75 FRANKLIN STREET  
FRAMINGHAM, MA 01702  
ROBERT A. GEMMA, PLS 37046

I CERTIFY THAT THE LOT SHOWN AND FOUNDATION THEREON CONFORM TO THE TOWN OF WELLESLEY ZONING BY LAWS.

I CERTIFY THAT THE LOT SHOWN AND FOUNDATION THEREON ARE NOT WITHIN THE FEDERAL FLOOD HAZARD AREA.

NOTES

THIS PLAN IS PREPARED FROM LINES OF OCCUPATION. THE TIES TO THE LOT LINES ARE NOT TO BE USED IN THE SETTING OF FENCES, HEDGES, ETC.



ZONED: SINGLE RESIDENCE  
AREA= 10,000 S.F.  
FRONTAGE= 60 FT.  
SETBACK= 30 FT.  
SIDEYARD= 20 FT.  
REARYARD= 10 FT.

| REVISION NO. | DATE     | DESCRIPTION         |
|--------------|----------|---------------------|
| 1            | 01/22/03 | ADD FOOTPRINT AREAS |

| FOOTPRINT            | AREA (SQ.FT.) | COVERAGE |
|----------------------|---------------|----------|
| <b>HOUSE #56</b>     |               |          |
| MAIN STRUCTURE       | 877.4         | 5.4%     |
| PORCH & STEPS        | 194.0         |          |
| DECK                 | 49.6          |          |
| BUCKHEAD             | 25.0          |          |
| TOTAL                | 268.6         | 1.8%     |
| TOTAL THIS STRUCTURE | 1,086.0       | 7.2%     |
| <b>HOUSE #58</b>     |               |          |
| MAIN STRUCTURE       | 614.0         | 4.1%     |
| PORCH                | 154.6         |          |
| STEPS                | 27.3          |          |
| BUCKHEAD             | 28.6          |          |
| TOTAL                | 192.1         | 1.3%     |
| TOTAL THIS STRUCTURE | 824.7         | 5.4%     |
| <b>GARAGE TOTAL</b>  | 423.8         | 2.8%     |
| <b>GRAND TOTAL</b>   | 2,315.9       | 15.4%    |