

**ZONING BOARD OF APPEALS**

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January 21, 2021

7:00 pm

Remote Public Hearing

Zoning Board of Appeals Members Present: J. Randolph Becker
Robert W. Levy
David G. Sheffield
Derek B. Redgate

ZBA 2020-65, WELLESLEY COUNTRY CLUB, 300 WELLESLEY AVENUE (TENNIS COURTS)

Present at the public hearing were David Himmelberger, Esq., Ruth Mallett, Membership Liaison, Marty Ryan, General Manager Emeritus, Brian Lynch, General Manager, Jerry Burke, Stanmar, Chris Doktor, Architect, and Paul Matos, P.E., Allen & Major.

Mr. Himmelberger discussed the Applicant's response to comments from George Saraceno, Town Engineer, and Mr. Saraceno's email response of January 7, 2021, stating that DPW had reviewed a revised plan submittal prepared by Allen & Major Associates, Inc. for the WCC Racquet Facility under Site Plan Review, and a response letter to DPW comments dated 1/6/2021, and believe the Applicant's designer has appropriately addressed DPW comments as provided on the revised plans, calculations and the Construction Management Plan (CMP). He said that DPW noted that further soil testing will be required for this project prior to installation of the on-site infiltration systems and the Applicant has agreed to replace a section of the sanitary sewer service from the existing racquet building to a sewer manhole in the parking lot.

Mr. Becker discussed the two actions before the Board for a special permit under Site Plan Approval and a special permit for a major construction project in a Water Supply Protection District (WSPD). He discussed the special use permit standards in Section 25D of the Zoning Bylaw.

Mr. Matos confirmed that a Notice of Intent (NOI) was not required for the project, as it is outside of the buffer zone. He said that the project meets the requirements in the bylaw.

A Board member asked about anticipated uses of the Racquet Center. Ms. Mallett said that, in addition to using the facility for racquet sports, they use it for pickle ball and two golf simulators. She said that they hold a summer academy for tennis. The Board member asked about coordination if all of the operations of the golf club are happening at the same time. Mr. Himmelberger said that they can provide a letter to address that concern. He said that there is adequate parking even if all of the venues at the country club are being used. Ms. Mallett said that they are not increasing the number of courts but just bringing two courts

inside. She said that there will be additional use of the courts in the winter but the pool will not be used. She said that the issue was addressed in the traffic study for PSI. Mr. Redgate discussed inserting a condition that extra level of care be taken in understanding the events going on simultaneously to minimize the potential for parking problems.

Mr. Matos discussed the site layout plan, the ADA ramp, curb cut for access from the pool, and relocation of the sidewalk to access the patio at the back.

Mr. Redgate confirmed that there will be elevators.

The Board discussed closing the public hearing and sharing conditions to be discussed and voted at a business meeting.

Mr. Redgate said that there will be no additional impacts to the Water Supply Protection District. He said that they will be replacing two existing impervious outdoor courts with a larger building that incorporates existing impervious surface.

Mr. Redgate moved, Mr. Sheffield seconded the motion, and the Board voted unanimously to close the public hearing.

Mr. Sheffield voted aye.

Mr. Redgate vote aye.

Mr. Becker voted aye.

ZBA 2020-73, MICHAEL MCCULLOUGH, 11 ELMWOOD ROAD

Mr. Becker said that the Board had concerns about the history of the air conditioning condenser and intensification of the side yard setback at the previous hearing.

Present at the public hearing was David Himmelberger, Esq., Michael and Lindsey McCullough, the Petitioner.

Mr. Himmelberger said that the request is to decrease the existing side yard setback from 16.1 to 10 feet for the ac. He said that the homeowner investigated the history of the ac with respect to its being in the setback prior to the 2002 Zoning Bylaw (ZBL) prohibiting it in the setback. He said that the evidence suggests that the ac was there. He said that there was no installation paperwork for the left side unit or markings on the unit that indicated an installation date. He said that it may have replaced an older condenser. He said that Mr. McCullough contacted his current service provider, who did not have an installation date on record. He said that the unit pre-dated the predecessor family who owned the property from 2012 to 2016. He said that a Lennox HS 19 unit in the right side yard dates back to 1988. He said that documentation for the condenser on the right side references a second condenser, a Lennox SH 18 that also dates back to 1988, which is smaller than the HS 19 but similarly sized to the existing left side condenser. He said that it seems reasonable to presume that there were two Lennox units installed in 1988, a larger one on the right and a smaller one on the left. He said that, on balance the evidence would confirm that there was a condenser beginning in 1988.

Mr. Himmelberger said that the Board expressed concerns about decibel levels. He said that the existing condenser on the left side is a Bryant Legacy 113A, which is a single stage ac with an advertised decibel rate

as low as 72 decibels. He said that the homeowner intends to replace that unit with a new multi stage unit which is more efficient and carries a decibel rating in the mid 50's, which is approximately 100 times lower, based on how sound intensity relates to increasing or decreasing decibels. He

Mr. Himmelberger said that they believe that the evidence supports a finding that the existing ac location on the left side did pre-date the 2002 bylaw change.

Mr. Himmelberger said that landscaping and sound attenuation was another concern. He said that there is existing landscaping between 11 and 19 Elmwood Road on the left side. He said that he provided a plan that shows the full lot as well as a blow up of the section in question. He said that currently there is a six foot high cedar fence, three ten foot tall mature arbor vitae and a new proposed fence will abut the arbor vitae to form a continuous screen between 11 and 19 Elmwood Road. He said that mature plantings are already in place on the other side of the privacy fence facing 19 Elmwood Road. He said that the homeowner will add additional fencing around the proposed condenser to further mitigate noise. He said that the condenser will be upgraded to one that is 20 decibels lower.

Mr. Himmelberger said that the Board asked that other possible design alternatives be explored with respect to the side yard setback. He said that the homeowners worked on the design for over a year and did consider a number of alternatives but none of them were as rational as the option that was chosen.

Mr. Himmelberger said that his client did extensive research of the properties in the neighborhood, with a sample size of 53 homes along Elmwood, Cavanagh, Pilgrim and Weston Roads. He said that he determined that the average side yard setback for these homes was 14.7 feet and 43 of the homes, or 81 percent, had side setbacks of less than 20 feet, and the average side yard setback for already nonconforming homes was 13.1 feet. He said that proposed setback is 10 feet.

Mr. Himmelberger said that the 14 homes that immediately surround 11 Elmwood Road, 12 homes or 86 percent, had side yard setbacks of less than 20 feet. He said that the average setback for already nonconforming homes is 12.5 feet. He said that the relief being sought is consistent with pre-existing nonconforming homes in the neighborhood. He said that it is important to put the requested relief in the context of 19 Elmwood Road, which the abutter immediately to the left. He said that it is currently 48 feet from the structure at 11 Elmwood Road, and of that a little more than 28 feet is on 19 Elmwood Road. He said that the requested decrease of the setback to 11 feet will result in a total distance between the homes of 39 feet, which is a foot shy of what is commonly required of 20 and 20 on each lot.

Mr. Himmelberger said that there is strong neighborhood support, not just the abutters on either side. He said that the house and the proposed addition will enable the home to retain its low profile that is consistent with the neighborhood. He said that while it will expand widthwise, the height will remain very small. He requested that the Board make a finding that the requested relief will not be substantially more detrimental to the neighborhood than the pre-existing nonconformity.

Mr. Levy asked for confirmation that no changes were made to the design since the previous hearing. Mr. Himmelberger said that the only change is the proposed lattice around the ac on the left side. He said that it currently does not shown on the plan.

Mr. Levy discussed the burden of proof for the homeowner to prove a pre-existing nonconforming use. He said that Mr. Himmelberger stated that the condenser was replaced in 2008. He asked if they needed a special permit to do that. Mr. Himmelberger said that he thought that it might have been considered a repair.

Mr. Levy asked if any permits were pulled for the condenser. Mr. Himmelberger said that he did not find any evidence of that in the building jacket for this or the 1988 condensers.

Mr. Levy said that the request is for the Board to make a finding that it is a pre-existing structure, based upon the supposition that when it was replaced on or after 2008, it was replacing one that was installed prior to 2002. Mr. Himmelberger said that the standard is preponderance of the evidence. He said that there is documentation for a second Lennox condenser for which there would no reason for a second set of paperwork for a smaller unit. He said that there was a separate manual for the HS 18, which is consistent with the smaller condenser on the left side. He said that it rises to a preponderance of the evidence that it existed. Mr. Levy said that there was no special permit, electrical or other permits found for it in the town records from 2008 or after. Mr. Himmelberger said that work was done in the 2000's but does not break it out on the website. He said that the website shows that work was done in 2008.

Mr. Becker discussed the change in setback from 19.1 feet to 11 feet. He said that under Chapter 40A, Section 6 and the Zoning Bylaw, the Board has to determine if there is an intensification of the nonconformity, and if not, the applicant is entitled to a special permit. He said that the nonconformity is intensified, the Board has to determine whether the proposed structure will be substantially more detrimental to the neighborhood or not. He said that both sides agree that it is an intensification of the nonconformity.

Mr. Levy discussed concerns about morphing a three inch nonconformity into a 9 foot one. He said that if the setback was 20 feet, the request would be for a variance. He said that he was troubled about taking a diminished nonconformity and morphing that to a much lesser standard of review.

Mr. Sheffield said that there is an intensification but in looking at the overall project, it is not substantially more detrimental to the neighborhood.

Mr. Sheffield said that the site plan shows several outbuildings on the property. He said that there is a shed on the western side of the property and some outbuildings at the north and south far corners. He asked what those buildings are. Mr. Himmelberger said that the shed on the right side is used for storage. He said that it is within the setback but is less than 100 square feet. He said that a gazebo is outside of the setback. He said that there is a concrete pad, an electrical panel and a storage box that services the pool. Mr. Sheffield said that the surveyor should indicate the square footage or dimensions of the outbuildings on the plot plan so that the Board can see if they conform to the bylaw. Mr. Himmelberger said that they will submit a supplemental plan that shows the dimensions and that they are within the permissible parameters.

Mr. Sheffield said that the pump facilities for the pool create some noise but less than an ac condenser. Mr. McCullough said that it was replaced two years ago with a variable speed motor, which is very quiet.

The Board discussed Section 19 of the Zoning Bylaw with respect to noise emission. Mr. McCullough said that the pool dates from 1988. Mr. Himmelberger said that they can submit the building permit for the pool. He said that it is located inside the side yard setback.

Mr. Becker said that he appreciated the work that went into the neighborhood setbacks study. He said that in his research, he found that the average year built for homes in the neighborhood was 1951. He said that it is likely that a lot of the homes pre-dated the bylaw. He said that he looked at Bellalta, Diedrich and Bransford and it was clear to him that what the law tries to do is protect homeowners from vagaries of the town so that, if the town changes the rules, homeowners are not adversely affected. He questioned whether the proposal is something that is protected or is it simply an expansion because it is there.

Mr. Becker said that he looked at surrounding homes and found that it is an eclectic neighborhood. He said that because of the magnitude of the change in the setback, he questioned whether the requested relief would affect a protected right or would be more of a benefit to the homeowner. He said that he was not convinced that it would be substantially more detrimental to the neighborhood.

Mr. Levy confirmed that the house was constructed in 1958. He said that it would not be shocking to find that the intent was for the setback be 20 feet but the sophistication of the survey equipment was not what it is today.

Mr. Himmelberger said that, in terms of determining whether the proposed structure will be more detrimental, he looks at the totality of the neighborhood. He said that in this case, so many of the homes have similar side yard setbacks, and if this built, it will not stick out as being different. He said that they will end up with 39 feet between the two houses, with 29 feet of it being on the other property.

Mr. Levy asked if the remedy would be to go to Town Meeting to change the setback to 10 feet for this area of town. He said that the Board is charged with enforcing the bylaw. He said that his feeling is that the Board, whenever it can, try to make houses comply with the bylaw not create circumstances where they will be significantly worse than what they started with. Mr. Himmelberger said that the bylaw provides the relief that they are seeking, namely, where the applicant seeks to intensify a nonconformity and the Board allows that if its makes a determination that the proposed structure will not be substantially more detrimental to the neighborhood. He said where this fits in with the context of the neighborhood and where there is 39 feet between the two buildings, it supports the determination that it is not substantially more detrimental. He said that there is strong neighborhood support, the building is less than 30 feet tall, and it fits into the neighborhood nicely even with the addition. He said that the main house is 22 feet tall and the addition is 20.5 feet tall. He said that there is extensive screening, a majority of the homes in the neighborhood have pre-existing nonconformities that are comparable to what they are seeking, and it is not unreasonable to reach the determination that it is not substantially more detrimental.

Mr. Levy said that the nonconformity will increase from three to 106 inches. He said that the sheer volume of it is what should be analyzed under a variance standard. He said that the Planning Board, in their recommendation, had a similar reaction.

Mr. Becker said that this kind of a case that reaches back to Bellalta puts pressure on the Board to define what more detrimental to the neighborhood means. He said that he thought that 11 feet would be more detrimental to the neighborhood.

Mr. Himmelberger discussed homes on Elmwood with five and six foot setbacks. Mr. Becker said that those homes may have pre-dated the bylaw. Mr. Himmelberger said that the question is how does the house fit. He questioned how it could be substantially more detriment if it is substantially similar to other homes in the neighborhood.

Mr. Levy said that he thought that the remedy is town meeting changing the side yard setback.

Mr. Sheffield said that a third dimension of bulk also comes into play in the determination of being substantially more detrimental. He said that if the house was to be torn down and replaced, the replacement house could be much larger even if it meets setback requirements. Mr. Levy said that it is the Board's job to

try to get house to conform to the bylaw. He said that the house can be rebuilt in accordance with town rules.

Mr. Himmelberger said that the neighbors are supportive of this. He discussed setbacks for the homes in immediate proximity. He said that question is if it will be substantially more detrimental to the neighborhood not whether it will be substantially more nonconforming. He said that this is consistent or better than some in the neighborhood and there will be 39 feet of separation. Mr. Levy said that the house next door could be replaced with a new home with a 20 foot setback.

Mr. Himmelberger said that if almost every house on the street had conforming setbacks, this would be substantially more detrimental to the neighborhood. He said that 85 percent of the homes are nonconforming. He said that to expand the nonconformity, as requested, does not make it substantially more detrimental. He said that the setback will end up at 11.5 feet. Mr. Becker said that they will be adding a car to the garage. He said that it is 1.5 story house and there is plenty of room above the house to add a master suite. He said that it is not the master suite that is driving this. Mr. Levy said that there is plenty of room to expand to the rear without the garage component. Mr. Himmelberger said that, in looking at the context of the neighborhood, the Board found that a similar project in the Elm Street area was not more detrimental. He said that one of the issues that the Board focused on there was the fact that there was additional land on the side of the property. Mr. Levy discussed the issue of precedence. Mr. Himmelberger said that the neighbors do not think it this is out of context and if it is not out context, it does not rise to the level of substantially more detrimental.

Mr. Becker discussed other features of the project. He said that in the existing front elevation, your eye goes to the house and in the proposed front elevation, your eye goes to the garage because the gable is toward you and the dormer goes off to the left, which is not characteristic of things that are happening in the neighborhood. Mr. Himmelberger said that the garage is set back and the forward house draws your eye, which is difficult to see that with a two dimensional drawing. He said that the dark roof of the house will draw your eye and the siding will be the same. Mr. Becker said that the proposed house does not look like other houses in the neighborhood. He said that it does not have the clean lines that the other houses have.

Mr. Levy asked about proposed TLAG of 3,693 square feet. Mr. Himmelberger said that TLAG will be 93 square feet over the threshold for the district. Mr. Levy said that the three inch setback deficiency keeps this project from undergoing Large House Review by the Planning Board and a request for a variance from the Zoning Board.

Mr. Sheffield said that the architect included an eyebrow over the garage doors at gutter height, it would have changed the scale at that whole end of the house. He said that providing down lighting at the face of the garage doors would mitigate side glare.

Mr. Himmelberger requested that the hearing be continued so that the design can be further refined.

Mr. Levy said that the applicant should consider the Board's concerns. He asked if the structure can be pulled in somewhat.

Mr. Levy moved, Mr. Sheffield seconded the motion, and the Board voted unanimously to continue the hearing to April 1, 2021.

Mr. Sheffield voted aye.

Mr. Levy voted aye.

Mr. Becker voted aye.

Christine Lal, 7 Elmwood Road, said that her property abuts on the western side of 11 Elmwood Road. He discussed the sound of the pool pump and the ac. She said that she has lived next door for 14 years and has never heard the pool pump or the ac. She said that the town should be thrilled that the applicant is investing in Wellesley. She said that the McCulloughs are the fourth family to live there since she moved in. She said that encouraging people to invest in their homes builds a stronger neighborhood. She said that they are trying to do something to their home to make it more functional for a modern family. She said that most families would prefer to have a two car garage when they have three children and they have bikes, sports equipment, strollers, etc. She said that they are wonderful neighbors. She said that there have been a lot of renovations in the neighborhood that were much more disruptive. She said that the proposed renovations add to the neighborhood because they are functionally adding what modern families want and are not tearing them down and building something that might be more conforming but do not necessarily add to the character of the neighborhood. She said that when people invest in their homes, they add to the stability of the neighborhood by building a home that they will want to live in for a long period of time. She said that is a commitment. She said that there is a sense of community in the neighborhood. She said that the neighbors would hate to lose the McCulloughs over a couple of feet for a setback.

Jorden Esten, 19 Elmwood Road, said that he agreed with everything Ms. Lal said. He said that he agreed with the idea of trying to keep people here and letting them make small improvements to these wonderful old houses. He said that his greatest fear is that the house will get knocked down and a three story house will be built on top of them. He said that it is a lovely house with a great family in it. He said that he has been there for four years and has known the McCulloughs the whole time. He said that it would be a shame to see that a small house with some improvements is replaced with a large new one that would impact the neighborhood much more. He said that he is wholeheartedly in favor of this. He said that the McCulloughs discussed their plans with him. He said that they will be adding to the curb appeal of the house and there will be a better view from his side. He said that he has never heard their ac.

Mr. Levy said that the Zoning Board of Appeals is a quasi-judicial board that is subject to a set of rules, the bylaws, which it is required to enforce. He said that if the policy is archaic to the neighborhood, the solution is to get Town Meeting to change the rules. He said that every house and project is different. He said that this is a neutral Board that looks at projects based on the evidence and the rules.

Mr. Becker said that the Board members live in Wellesley and understand what the issues are. He said that the issues are not with the Board but with the bylaw. He said that the bylaw written about 100 years ago when the town had a lot of open space. He said that the rules do not necessarily apply in the same way in 2021 that they did in 1926. He said that the remedy is go to the Planning Board to change the bylaw.

ZBA 2020-75, FARDAD FARAHMAND, 183 WALNUT STREET

Present at the public hearing were Fardad Farahmand, the Petitioner, and Bennie Ber, Architect.

Mr. Farahmand said that the request is for a special permit to improve the existing left side of an existing nonconforming structure. He said that he had an approval from the Zoning Board for a previous design but decided to not go through with that particular plan. He said that the goal of the new design is to use the existing foundation as opposed to a total demolition of the left side. He said that the proposed design will use the existing foundation on the left side. He said that they are trying to add a master bedroom on the

second floor and improve the flow of the first floor. He said that the property is unique in many ways. He said that it was originally built as two separate single family houses that were connected together and turned into a single family house by a previous owner. He said that he has lived there for 20 years. He said that they are trying to improve the house to make it better for them to live there. He said that they like the neighborhood. He said that they spoke with the neighbors.

Mr. Ber displayed plans. He said that the main house is nonconforming in the front yard. He said that the wing on the left side that was attached to the main house is lower by two or three steps and the flow is problematic. He said that the location of the existing front door does not work well. He said that the plan is to reuse the existing foundation on the left and build additional footprint. He said that the existing left side yard setback is one foot side yard setback. He displayed photographs taken from the abutting town land showing a severe topographical drop.

Mr. Ber said that the previous design that was approved by ZBA, Planning and the Historic Commission entailed demolition of the left wing and construction of a more conforming structure in its place. He said that when spoke with builders they found that three line items of construction drove the cost of the work out of proportion. He said that the cost of demolition of the wing, excavation for a new foundation and construction of a new foundation was not viable. He said that building the structure according to the previously approved plan would be riskier in an environmentally sensitive area of the site.

Mr. Ber said that the main issue is that the town is the direct abutter. He said that it raises the question of precedence for future projects. He said that there are unique characteristics to this particular property in this location that would be difficult to match.

Mr. Levy said that it is a unique property. He confirmed that the property will not be expanded further into the setback and the only improvements are within the setback.

Mr. Farahmand said that the plan is to add one level on top of the left side to make it even with the right side. He said that looking at the structure from the front, it will appear as two stories with the bedrooms lined up on the second floor. He said that looking at it from the back, because of the slope, they will build an additional floor on the top of the left side. Mr. Ber display renderings of the existing and the proposed structures from the back. He said that the proposed structure will meet the height requirements.

Mr. Levy said that the Board got revised comments from the Planning Board, who are more stewards of public land in town than the ZBA. He said that the Planning Board is now recommending approval of the proposed design.

Mr. Becker said that his only other issue was the TLAG, which he did not quite understand until he looked at the history of the property. He said that it is really two houses, the size of which is consistent with the other houses on the street. He said that it is a large house but you do not see the total volume of it from the front and are not overwhelmed by the mass of it.

Mr. Becker said that the existing nonconformities are the front yard depth, which will be unchanged, and the side yard depth that will be unchanged. He said that there is no intensification of any nonconformities. He said that is 20 percent larger than required and can withstand the house.

Mr. Levy asked if there are TLAG calculations. Mr. Becker said that there is a table on one the drawings, AS102 with the R model, that shows the existing and proposed square footage and the increase in the square

footage. Mr. Levy said that the house will go from 4,600 to 6,000 square feet. Mr. Ber said that the square footage includes a detached garage. Mr. Levy said that the property is located in a 10,000 square foot Single Residence District where the threshold for Large House Review (LHR) for 3,600 square feet. Mr. Becker said that the square footage got to be that way because it is two houses. Mr. Levy said that special permits are exempt from LHR.

Mr. Sheffield said that architecturally, there were a lot of little things that had to be solved to make the structure become one. He said that an area shown in yellow on Plan AS102 shows an addition that encroaches in the setback on the west side. Mr. Becker said that there will be additional volume in the setback area but the setback will still be the same. Mr. Sheffield said that it will be an increase in footprint as well. He said that the proposed structure will be an improvement to the neighborhood.

Mr. Becker asked if any member of the public wished to speak to the petition.

Mr. Becker read the Planning Board recommendation.

Mr. Levy moved, Mr. Sheffield seconded the motion, and the Board voted unanimously to approve a special permit and make a finding that the proposed structure will not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

Mr. Sheffield voted aye.

Mr. Levy voted aye.

Mr. Becker voted aye.

As there was no further business to come before the Board, the hearing was adjourned at 9:25 pm.

Respectfully submitted,

Lenore R. Mahoney
Executive Secretary