



ZONING BOARD OF APPEALS

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

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ROBERT W. LEVY, VICE CHAIRMAN
WALTER B. ADAMS
DEREK B. REDGATE

February 28, 2019
7:15 pm
Juliani Meeting Room
Town Hall

Zoning Board of Appeals Members Present: Richard L. Seegel
J. Randolph Becker
David G. Sheffield
Walter B. Adams

BUSINESS MEETING

ZBA 2019-21, 80 WALNUT STREET LLC, 80 WALNUT STREET

Present at the meeting was Stanley Brooks, Esq., representing 80 Walnut Street LLC.

Mr. Becker said that the hearing was closed on January 24, 2018. He said that the Proponents have submitted materials that the Board asked for, subsequent to the public hearing.

The Board discussed proposed revisions to the draft decision and conditions.

Mr. Adams moved, Mr. Sheffield seconded the motion, and the Board voted unanimously to approve the conditions.

Mr. Adams moved, Mr. Sheffield seconded the motion, and the Board voted unanimously to approve Site Plan Approval.

As there was no further business to come before the Board, the meeting was adjourned at 7:18 pm.

ZBA 2018-74, PAULA ALVARY & JOSE VELEZ, 16 MOUNTVIEW ROAD - REMAND

Mr. Seegel said that this is a public hearing for the Board to hear the case on an order of remand from the Land Court. He said that the matter will be heard de novo. He encouraged the parties to be mindful that the Board knows what the case is about and hopes that it will not have to spend too much time rehashing it.

Christopher Heep, Esq., Town Counsel, said that the appeal originally came before the Board of Appeals (ZBA) on the appeal filed by the abutters of 16 Mountview. He said that the ZBA issued its first decision that was filed with the Town Clerk on November 15, 2018. He said that once that decision was filed with the Town Clerk, the owner of 16 Mountview filed an appeal of that decision to Land Court. He said that case

was at Land Court for a brief period of time before the Land Court ordered a remand of the case back to ZBA. He said that the remand was ordered for the purpose of allowing the ZBA to reconsider its initial decision and to consider new information, should it be submitted, that can be factored into a reconsidered decision from what it did the first time around. He said that the Land Court's order says that the hearing will be de novo and also says that the Board can consider all information that has been previously submitted to it. He said that taking the two parts together, his interpretation is that any new information can come from anyone present at the hearing who wants to present, and information that was already presented, either through testimony or documents submitted for the record, is already part of the record for the remand hearing. He said that there is no need to re-state things that have already been stated or to re-submit documents that the ZBA already has as part of its file.

Mr. Seegel said that the Board received since its last decision two letters from Testa Engineering that say the same thing except that the first one was incorrectly addressed to an attorney, whereas it should have been addressed to the ZBA. He said that the Board received two plans that were referred to in the letters, one is dated 11/4/18 and the other is dated 1/23/19. He said that the first is an exhibit plan of the stone wall locations and the second is a topographic plan of the 16 Mountview property.

Mr. Heep said that while the case was in litigation in Land Court, the owner of 16 Mountview, through Counsel, shared some documents with him because they were in Court. He said that some of that information was ultimately intended to reach the Board member but because it was in litigation. He said that they asked that the letters from the Engineer be re-addressed to the Board. He said that while they were in Land Court they had one conference with Judge Vhay talked about the case and the Board's decision on the appeal. He said that Judge Vhay talked said that the decision denied the Appellant's appeal with respect to finding a violation of the Building Code or of the Zoning Bylaw (ZBL). He said that it then went on to order the revocation of the Certificate of Occupancy (CO) for the house at 16 Mountview. He said that the Judge expressed some concern that revocation of the CO was based on findings of the Board related to Building Code and not of the ZBL, given that the first part had not granted the Appeal under the bylaw itself. He said that the Judge went on to question whether the Land Court had jurisdiction to consider an appeal of a decision that had been based primarily on matters concerning the Building Code. He said that Judge Vhay, without ruling on it, expressed the opinion that the Land Court does not have jurisdiction over strictly Building Code issues and the ZBA similarly did not. Mr. Heep said that the review of the Appeal, based on what he heard from the Land Court, consideration of this Appeal should be focused as heavily as possible on the ZBL.

Present at the public hearing were David Himmelberger, Esq., representing the Appellant, Jose Velez, the Appellant, and Kevin Smith, Esq., representing the owner of 16 Mountview Road.

Mr. Himmelberger argued that the materials that were submitted to the Board since the last hearing should be give very little weight, if any. He said that in reviewing any documentary evidence submitted to the Board, the Board cannot suspend common sense or reality. He said that the Board has to look at the totality of the facts.

Mr. Himmelberger said that in Richard Testa's letter, he asserts that the base of the retaining wall is not supported on any organic material. Mr. Himmelberger said that he believes that the Board is entitled to rely upon the photographs previously submitted by the Petitioner that documented that the retaining wall is sitting on the roots of a significant tree. He said that, when confronted with that anomaly, the Board is entitled to reject the letter and further, it calls into question the accuracy and integrity of anything that Mr. Testa has said. He said that Mr. Testa identified early on that the wall should not sit on any organic material and said that he would personally inspect to ensure that it did not. He said that clearly that is not the case.

Mr. Seegel questioned how that issue relates to applying the ZBL, not the Building Code. Mr. Himmelberger said that it is more to attack the credibility of the letter that says that this is a wall that was

built in compliance with applicable ZBL. He said that it is the case that retaining walls in excess of four feet may not be located within 10 feet of the property line. He said that there is no dispute that this retaining wall is within 18 inches to two feet of the property line.

Mr. Himmelberger said that the height of a wall is computed from the base to the top. He said that if a wall is installed on a slope, it does not have a level base. He said that because the wall is sitting on a slope that is eroding, if you measure down the face of the wall, you do not get to the bottom of the block wall but several inches more. He said that Mr. Velez was out there today and took photos showing that now there are portions of the wall that are 50 inches, given the fact that there is no base under the edge of the wall. He said that because the wall is on a slope that has eroded, its measurement does not hit the ground until four inches further than if it was sitting on level ground. He entered the photographs into the record.

Mr. Seegel said that the only piece of evidence before the Board that is expert evidence is the letter from Mr. Testa, who is a Structural Engineer. He said that the Board, unless it has other evidence, has a right to rely on that letter. Mr. Himmelberger said that he may be an expert engineer but he is not an expert on the ZBL. Mr. Himmelberger said that he did not think that Mr. Testa's assertion that the wall is compliant with applicable ZBL has any greater weight than any other individual because he is not an expert of the application of Wellesley's ZBL. He said that he believes that the Board can take the photographic evidence and can hear testimony from his client that, given the fact that there is erosion because it is built on a slope, the face of the wall is taller than the actual block itself, as measured by the ZBL.

Mr. Himmelberger said that the photographs and documentation that was previously submitted show that the retaining wall constructed on the Mountview property is 1.5 feet from the property line and about two to three feet from another retaining wall on his client's property that is two to three feet tall. He said that the ZBL discusses measurement of retaining walls and terracing where the distance between the two walls must be two times the height of the higher of the two walls to be considered to be separate. He said that based on the terracing definition, this wall is in excess of four feet. Mr. Adams asked if it is Mr. Himmelberger's position that the property owner at 16 Mountview is bound by the fact that there is an existing retaining wall on an abutting property and that the conditions on the abutting property would impact their ability to put in a retaining wall on their own property. Mr. Himmelberger said that there is nothing in the ZBL that says anything to the contrary. He said that it does not talk about terracing only on one property or that terracing cannot cross property lines. Mr. Adams said that the ZBL typically applies to a specific property and not abutting properties. Mr. Himmelberger said that in this instance there is nothing in the retaining wall bylaw that precludes it being applied as he is suggesting it should be applied. Mr. Seegel said that he did not think that this approach is practical.

Mr. Himmelberger said that he believes that the rip rap to the right of the concrete block wall is also a retaining wall. He said that at least one member at the previous hearing felt that stacked boulders might not constitute a retaining wall. He said that there is nothing in the bylaw to compel that conclusion. He said that they previously submitted documentation that showed a four foot square being unable to be held in a vertical position on the rip rap because the rip rap has a pitch that is steeper than 1:1 over the first four feet. He said that the plans that were submitted by the builder assert that there is less than 1:1 from the top to the bottom, ignoring that across the base of the wall there are elevations and pitches that are in violation in that they do comprise a retaining wall. He said that, in determining whether a wall is a 1:1 slope, one takes that bottom and takes the top and averages it. He said that you have to look to see whether or not the wall as constructed is greater than four feet retaining unbalanced fill, which is a condition that is shown by the four foot square.

Mr. Himmelberger said that it was previously submitted that the Petitioner's engineer asserted that the wall fails to meet industry standards. He said that the case is before the Board because the wall failed and it was the subject of a stop work order issued by the Building Inspector that required that after completion of all work, the stabilization engineer, Mr. Testa, submit a final written report that includes the stabilization and

engineer's certification that the inspection area is stable, safe and presents no current or future risk to the safety of the public.

Mr. Himmelberger said that the wall is actively in the process of failing again. He said that some members of the panel have been out there and seen the erosion and the fact that the walls are bulging out, and have seen the gaps that are developing between the blocks as they bulge out. He said that it is an extremely unsafe condition. He said that there is sufficient evidence by which the Board can conclude that the wall, as presently constructed, be it the concrete wall with the eroded base or the rip rap wall that is in excess of 1:1 over a four foot section is in violation of the retaining wall bylaw. He said that the previous Board was sufficiently appalled by the poor construction and that was how it reached the decision that it reached. He said that the Board has the ability to find that, based on how the ZBL requires a wall to be measured, the height of the wall is taller than just the exposed face of the concrete block. He said that the builder's engineer said that the height of the block wall itself is four feet. He said that the Board can find that terracing can be applied here but it need not be applied for the Board to reach the conclusion that the height of the wall from the top to the bottom soil, not the base of the exposed block, is greater than four feet and within 10 feet of property line and is in violation. He said that the stacked rock to the right is also at the property line, greater than four feet in retainage and is not retaining balanced fill, which the Building Inspector has determined as a 1:1 slope. He said that a four foot square cannot be applied, which they content as evidence that of a wall in excess of four feet. He said that the photographs show the four foot measuring stick being held against some of the rip rap and the gap at the base of the block wall. He urged that the Board find a violation of the retaining wall bylaw. He said that the wall should never have been rebuilt as it was the first time, which resulted in a catastrophic failure and will fail again. He said that the Board has the ability, based on the retaining wall bylaw, to find that it is taller than four feet within 10 feet of the property line and must be remedied.

Mr. Himmelberger said that Mr. Velez is willing to attest that the measurement tools that he used today accurately reflects the current conditions and that the photographs corroborate the evidence.

Mr. Adams said that the photographs and the Retaining Wall Section Detail, S.1, dated 1/10/19, stamped by Richard Testa, show the condition that Mr. Himmelberger talked about. He said that it measures the retaining wall to a distance of four feet but at the face of the retaining wall there is a space that is not a dimensioned measurement but is clearly a space below the base of the retaining wall. He said that shows that the retaining wall is more than four feet in height. He said that they certified that the distance from the bottom edge of the retaining wall which is shown as above grade to the top of the retaining wall is four feet but there is a space that he could not measure specifically. Mr. Seegel said that the bottom stone appears to resting on the ground. Mr. Adams said that it is resting on the ground at the back but not at the front. He said that the measurement is at the grade at the front of the retaining wall to the top of the three block wall section.

Mr. Adams said that there is another letter from SFC Engineering referenced a survey prepared by Framingham Survey Consultants dated 11/2/18. He said that the Board has two slope details, both of which are dated 2/4/19. He said that the letter provided by SFC does not reference the new drawings. Mr. Seegel said that the SFC letter was sent to Mr. Grant on December 12, 2018, after the close of the hearing. He said that the most important thing set forth in that letter is that SFC Engineering originally was of the opinion that the slope was well and constructed and met the design requirements but the slope was modified and failed, which invalidated their prior letter. He said that SFC stated that it is their opinion that the slope and wall have been repaired back to the original design conditions, that they visited the site and observed the design conditions, which were reviewed by Framingham Survey Consultants. He said that the Board received a letter dated 2/27/19 that stated that the work was done according to the plans and specification and in accordance with applicable zoning bylaw. He said that is the only expert evidence that the Board has on that issue.

Mr. Seegel questioned whether Mr. Testa's 1/10/19 plan meant to show the wall on the black line. Mr. Himmelberger said that the photographs are the most compelling evidence and they clearly show the void. Mr. Becker questioned whether, using Mr. Himmelberger's logic, that any wall in town would be in violation if a void occurs after a bad storm, unless it was moved back to 10 feet. Mr. Himmelberger said that it is highly unusual to build a retaining wall on a slope without a proper base. Mr. Seegel said that the Engineer's letter says that the wall was built in accordance with the ZBL. Mr. Himmelberger said that Mr. Testa is not an expert on the ZBL. He said that Arthur Cabral, Coweaset Engineering, said that it was not built to industry standards. Mr. Adams said that Mr. Cabral observed the wall after it was rebuilt. Mr. Himmelberger said that the wall, as originally designed, showed it resting on a three inch concrete leveling pad. He said that plan was stamped by Mr. Testa. He said that when he and his client pointed out that there was no concrete leveling pad, Mr. Testa erased the three inch levelling pad. He said that you can still see the 3.5 inch reference on the plan next to existing grade. He questioned how a wall could be installed on a slope of dirt. Mr. Seegel confirmed that Mr. Cabral's letter is from August. Mr. Himmelberger said that there has been no work done since August.

Mr. Adams said that Mr. Testa's S.1 Retaining Wall Section makes some reference to the rip rap but does not give details about it other than alleging that it has a three foot depth of rip rap. He said that it only references the retaining wall itself and does not defend any specific details about the rip rap, whereas the two land surveys are only referencing the rip rap and make no representations about the retaining wall itself.

Mr. Himmelberger said that on Plan S.1, Mr. Testa talks about a two foot plus gravel backfill. He said that the May 29, 2018 status report from Mr. Testa details the reconstruction of the wall and there is no mention of gravel backfill. He said that the blocks are 24 inches deep. He said that they have photographs that show a 30 inch depth on the measuring tape because there is a void behind it. Mr. Adams confirmed that Mr. Himmelberger was questioning the reliability of Mr. Testa's statements. Mr. Himmelberger said that if there was gravel backfill, it would be spilling out of the two inch plus gaps between.

Mr. Smith said that he was representing Mr. Behrend. He said that he did not believe that this de novo review is a total do over. He said that the only issue that was appealed to Land Court was whether this Board had the authority to direct the Building Inspector to revoke the CO.

Mr. Smith said that Mr. Testa was a third party engineer who was hired at the direction of the Building Inspector. He said that Mr. Testa had never worked with Mr. Behrend before. He said that Mr. Testa is a registered engineer who submitted documents to the Building Inspector certifying what had been done. He said that he inspected the work as it was being done and after it was done and made a representation to the Building Inspector that it was done in accordance with industry standards, plans and specifications.

Mr. Smith said that they were at Land Court and after numerous conversations with Town Counsel, he said that he asked Mr. Testa to go back out to inspect the whole area. He said that Mr. Testa went to the property in early January and wrote a letter that was subsequently supplemented at the request of Mr. Heep. He said that Mr. Testa is an engineer who looked at this and made a certification. He said that Mr. Himmelberger presented photographs but an engineer has gone out there as recently as January of 2019 and inspected the wall. He said that he asked Mr. Testa to look at the wall to see how it relates to the shortcomings that Mr. Himmelberger says exist. He said that Mr. Testa wrote those letters as a result of his inspection. He said that it is engineering evidence from a structural engineer. He said that Mr. Himmelberger has not brought in a structural engineer to tell the Board that the wall is not structurally sound. He said that Mr Testa's letter is more than sufficient evidence for the Board to determine that this was not a Zoning violation and the wall as constructed is in accordance with the manufacturer's specs.

Mr. Adams asked Mr. Smith if he believes that Mr. Testa is a Zoning expert. He said that Mr. Testa stated that the wall was constructed in accordance with the applicable ZBL. Mr. Smith said that Mr. Testa has to deal with ZBL whenever he works on a project. He said that Mr. Testa is not telling the Board what the ZBL

is. He said that Mr. Testa believes that the wall was designed in accordance with ZBL, which is something that he does every day. He said that the letter is not to suggest that he is an expert on Wellesley's ZBL but that the wall was designed in accordance with what he reads in the ZBL. Mr. Adams said that Mr. Testa designed the retaining wall to be placed where he was directed to place it by the property owner. Mr. Smith said that the Building Inspector was also involved in this. Mr. Smith said that he was not present when the discussions took place many months ago. He said that what he does know is that the Building Inspector said that the placement of the wall in that location complied with Zoning and according to the structural engineer, the wall is sound and built in accordance with the plans and specifications.

Mr. Adams said that the neighbor believes that the retaining wall is not in compliance with the ZBL.

Mr. Becker confirmed that Mr. Smith and Mr. Behrend did not see Mr. Testa's letters before they were sent to Mr. Smith. Mr. Smith said that he passed the letters along to Mr. Heep after he received them and Mr. Heep suggested that the letters be re-addressed to the Board and consolidated. Mr. Himmelberger said that there was a change of the letters dated January 10, 2019 and January 23, 2019. He said that the letter of February 27, 2019 is the first reference to applicable ZBL.

Mr. Himmelberger referred to Mr. Becker's comment about winter conditions and effects on walls. He said that the photographs that were part of the November submittal were taken shortly after the wall was installed. He said that they show the voids. He said that he is not surprised that there are voids because the wall is placed on a slope

Mr. Seegel said that when the Board voted to revoke the CO, the reason that it was doing so is because the Board did not have a letter from an engineer with a plan where it was certified that it was structurally sound. He said that the Board has received that letter. He said that his recollection is that there was nothing beyond those items that the Board asked Mr. Grant to obtain. Mr. Himmelberger said that the Board already had those letters. He said that a letter, dated August 2, 2018, attested to the fact that the work was acceptable to support the wall and slope above, had installed a drainage system at the wall at the top, not shown on the as-built. He said that Mr. Testa was saying that today and as prior to the Board's consideration in November, with the only additional piece being added on February 27, 2019 that it is in compliance with Zoning.

Mr. Seegel said that the letters that the Board received reflect the Board's request. He said that he was not sure if the Board had the authority to rescind the CO.

Chris Heep said that his experience with this case since it went to litigation is that the owner of 16 Mountview has been attempting in serial fashion to provide the ZBA with an additional level of assurance that the wall was built safely. He said that it is fair for the Board to question the content of those letters. He said that there may have concern that the first letter was not sufficient to address all of the concerns that the Board might have in remand, so another letter came in. He said that when he looked at the letters a few days prior to this hearing, he noticed that they were addressed to Mr. Smith and asked that the letters be re-addressed to the ZBA, which is more suitable for a public hearing such as this. He said that it is entirely up to the Board to challenge the content of the engineering letters if it so chooses. He said that the fact that there were multiple letters represents that there was a good faith effort to do what the Board asked after the initial decision was filed.

Mr. Himmelberger said that they were suggesting that, as measured today, this wall is in excess of four feet.

Mr. Adams said that the Board was concerned at the previous hearing about how and if the wall was modified to address the conditions that led to its initial collapse. He said that there was also discussion as to what the actual height of the wall was. He said that his viewing of the drawings and Mr. Himmelberger pointing out that there are measurements today that clearly appear to indicate, based on a tried and true measure method, that this wall is more than four feet.

Mr. Becker said that he disagreed with Mr. Adams. He said that, to take a defect that arises from the construction process and try to bend it into the definition of height that is in the ZBL is a stretch, at best. He said that the remedy to this issue is to go back to repair the soil at the base of the wall, not move the wall back to 10 feet. He said that the design of the wall is based on something that is less than four feet. He said that it was installed, according to Mr. Testa and others, in accordance with the drawings. He said that the concrete portion of the retaining wall is exempt under the bylaw because the unbalanced fill is less than four feet. He said that to take the rip rap portions of the site and try to apply the retaining wall provisions in the bylaw is not consistent with what people are being taught in structural and civil engineering classes in universities today. He said that it is not a retaining wall.

Mr. Adams said that if you design a retaining wall that is measured against the fill that it retains, there are some areas of the rip rap fill that stick above the retaining wall, so one could argue that if a piece of that stone was touching the retaining wall, that would be part of the balanced fill. He said that if someone chooses to build a retaining wall within 18 inches of the property line, they should be prudent in the design to ensure that it remains four feet because they do not have much room between the neighbors and the property line to build up the grade to make it comply. He said that building up the grade does not solve the problem because dirt that is added to the front will eventually erode. He said that if someone wanted to build a retaining wall to allow them to retain a slope so that they could gain more back yard, they should have given themselves enough space at the base of the retaining wall to maintain the four foot height.

Mr. Becker said that the elements of the proper design are in the Building Code that there are certifications for. He said that part of the issue is not in the ZBL. Mr. Adams said that the ZBL establishes a maximum four foot height for a retaining wall unless it is set back 10 feet. He said that it is assumed that it will be maintained into the future.

Mr. Seegel said that the measurements show the tape resting three to four inches below the bottom of the wall. Mr. Himmelberger said that is grade, where a straight line touches down when you run it along the face of this wall. He said that is the starting point from which to measure the wall.

Mr. Becker said that the design that was presented shows the unbalanced fill as less than four feet and is therefore exempt from the ZBL. Mr. Seegel said that Mr. Testa's January 10, 2019 letter talks about the concern that the wall was built on organic material. Mr. Testa said in his letter that that base of the wall is not supported on organic materials. Mr. Himmelberger said that there is a tree right there. He asked how anyone could certify that it is not on organic materials when there is a tree right under the wall. He said that was why he attacked Mr. Testa's reliability because it does not comport with what is there in the field. Mr. Becker said that Mr. Testa was talking about the soil material underneath not having deleterious material, and that includes organic matter. Mr. Himmelberger asked if a tree root is organic matter. Mr. Becker said that it is a tree root. He said that Mr. Testa was talking about the material underneath that is intended to provide support to the wall, not a tree root. He said that there is nothing in the ZBL that talks about a 1:1 slope or any other slope and how stable it is.

Mr. Seegel said that he agrees that the wall meets the ZBL. Mr. Himmelberger said that there is no testimony as to whether the wall retains balanced or unbalanced fill. He said that Mr. Testa said that design and stability of the 1:1 slope has not been evaluated. Mr. Becker said that Mr. Testa was talking about the likelihood of a slope failure with the material above the wall coming down, independently of the wall.

Mr. Himmelberger said that, as measured in September, continuing through today, the face of the wall as measured from the top of the wall to where it hits the ground is greater than four feet and the wall, as constructed, is already showing evidence of failure.

Mr. Adams said that the ZBL does not actually talk about the height of the retaining but says that a retaining wall that retains less than four feet of unbalanced fill shall be exempt from the requirements of the section of the bylaw.

Mr. Himmelberger said that his Client's frustration is that they made several complaints two years ago. He said that the wall was built and failed. He said that Mr. Grant, in his Stop Work Order, required that a final written report in which there is a certification from Mr. Testa that the inspection area is stable, safe and presents no current or future risk to the safety of the public. He said that his Client is down gradient of this.

Mr. Adams said that the letter from SFC Engineering, dated December 12, 2018, provided that certification. He said that it does not cite the documents that have been submitted to the Board recently. Mr. Himmelberger said that he did not receive a copy of that.

Mr. Adams said that he shares a number of Mr. Velez's concerns about the wall but they are not within the Board's jurisdiction. He said that he is concerned that the wall appears to be retaining some of the boulders.

Mr. Himmelberger said that there is yet to be a letter, compliant with Mr. Grant's requirement that there be a certification that this does not pose a present or future threat to public safety.

Mr. Seegel said that he did not see where this fails to comply with the ZBL. He said that it is clearly shown that the wall is retaining less than four feet of unbalanced feet at the back side. Mr. Himmelberger said that how you determine the height is measuring from the grade at the base at the face of the wall. He read an excerpt from Section XXIID. Retaining Walls C. General Provisions, of the ZBL. He said that it does not comply. Mr. Seegel said that B.1 of Section XXIID clearly makes this wall acceptable, in combination with Mr. Testa's letter. He said that was what the Board was looking for when it revoked the CO. Mr. Adams said that the Board had an almost identical letter before the previous hearing with the exception that it did not say that it complies with Zoning.

Mr. Himmelberger said that Plan S.1 shows fill to the top of the face of the wall at four feet. He said that now you measure down to see if it is four feet or more. Mr. Seegel said that the exemption talks about retaining less than four feet of unbalanced fill. He said that he understands Mr. Velez's concerns. He said that when he re-read everything, he did not see how this wall would not be exempt from the bylaw.

Mr. Himmelberger said that in determining height, it talks about measuring from the grade at the base at the face of the wall to the grade at the back of the wall at the same section. Mr. Seegel said that section discusses things that are not exempt. He said that this does not reach the general provisions.

Mr. Adams said that the bylaw is not clear about what constitutes the fill at the back of the wall. Mr. Becker said that it is the stuff that is providing the lateral load which the retaining wall is intended to resist. He said that the soil on the slope is treated in the design as what is called surcharge. He said that there is extra load that is applied to the soil behind the wall to account for the stuff above. He said that Mr. Testa said that they did that. He said that it does not matter what the material is. Mr. Adams said that would assume that there is a level of continuation between the fill at the base. Mr. Seegel said that the wall is built with a slope behind it. Mr. Adams said that the grade that the wall is on is also sloped. He said that the material being retained, to the degree that some of the boulders are resting against the retaining wall, raises a question as to whether that is part of the unbalanced fill.

Mr. Himmelberger said that the exemption in the bylaw talks about retaining walls that retain less than four feet of unbalanced fill. He said that Plan S.1 shows the wall retaining four feet. Mr. Becker said that the plan shows four feet to the peak of the wall and the slope comes down at the back of the wall. Mr. Himmelberger said that the plan shows rip rap going to the top of the wall. Mr. Adams said that the rip rap is below the top of the wall in some spots. Mr. Himmelberger said that this goes to the reliability of Mr. Testa.

He said that Mr. Testa certified what is in the field and that it is compliant with Zoning. He said that by Mr. Testa's own drawing, the wall is not compliant. He said that Mr. Testa is writing what needs to be written. Mr. Becker said that he checked the publicly available information on registrations for all of the engineers involved in this case. He said that all of them have been registered for ten or more years. He said that Mr. Testa has been registered for 25 years. He said that none of the engineers had any outstanding cases against them.

Mr. Himmelberger said that Mr. Testa's plan is labeled as an as-built.

The Board discussed language for its motion with Mr. Heep. Mr. Heep said that the first time that the Board voted this application, it voted as two separate components. He said that suggested that it does not make sense at this stage to deal with it that way. He said that the key question is whether the ZBA finds there to be a Zoning violation, and if the answer to that is in the negative, it will follow that the Board will not revoke the CO.

Mr. Becker moved and Mr. Seegel seconded the motion to deny the Appeal of Paula Alvary and Jose Velez concerning the property located at 16 Mountview Road, and further that the ZBA vote to order the Certificate of Occupancy for 16 Mountview Road to be restored. Mr. Seegel and Mr. Becker voted affirmatively to deny the appeal and Mr. Adams voted negatively to deny the appeal. Mr. Seegel said that the appeal is denied and the Certificate of Occupancy is to be reissued.

As there was no further business to come before the Board, the hearing was adjourned at 8:55 pm.

Respectfully submitted,

Lenore R. Mahoney
Executive Secretary

DRAFT