



## ZONING BOARD OF APPEALS

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

Thursday, July 13, 2017, 7:30 pm

Juliani Meeting Room  
Town Hall

Zoning Board of Appeals Members Present: J. Randolph Becker, Acting Chairman  
Robert W. Levy  
Walter B. Adams

ZBA 2017-46, PEET'S COFFEE & TEA, 9 CENTRAL STREET

There was no one present at the public hearing.

ZBA 2017-62, GREGORY & CATHERINE HUNTER, 52 MARTIN ROAD

Presenting the case at the hearing was Greg Hunter, the Petitioner. He said that they completed the process with the Conservation Committee this week and received a large document from them. He said that the request before the Board is to tear down the existing garage on the north side of the house and replace it with a garage with a bedroom above it.

Mr. Adams asked if Mr. Hunter had spoken to his neighbors about the project, especially the neighbor to the right. Mr. Hunter said that he had. He said that the neighbors to the right have a fairly large garage that is next to this garage and it is unburdened by any windows on that side. He said that there will be minimal impact to them. He said that they were fine with the plans.

Mr. Adams said that the proposed garage will have a large two window unit on the second floor. He said that the existing garage has two windows on that side. He said that they will not be increasing the number of windows facing the neighbor's property but they will be closer. He said that there are evergreens planted along the property line. Mr. Hunter said that there is a full hedge that runs along the property line from the front of the house to the back property line. He said that it is a hemlock hedge that is over 20 feet tall. Mr. Levy asked if the hedge is located on Mr. Hunter's property. Mr. Hunter said that it is a shared hedge that is located on the property line. Mr. Hunter said that they had direct conversations with the neighbor about what the project involved and the neighbors were supportive of the plans.

Mr. Becker said that the property is located in a Water Supply Protection District (WSPD), for which there are requirements for runoff and storm drainage. He asked what will happen to runoff from the addition, recognizing that it is only 40 square feet or so. Mr. Hunter said that it will go down the downspouts and pour onto the grass in the backyard. Mr. Levy confirmed that there will be no drywells.

Mr. Adams said that it is obvious that the layout of the house is not conducive to putting the second floor addition on the other side of the house. Mr. Hunter said that that would put the bedroom next to a bedroom and would not be ideal.

Mr. Becker said that there are two other homes on Martin Road that have done the same thing. He said that there are also several residences on Martin Road that have the same garage as this.

Mr. Levy said that the garage lines up with the back of the abutter's house. Mr. Becker said that the abutter's garage entrance is on the Martin Road side and is closest to the Petitioner's garage. Mr. Levy said that helps to mitigate any impact. He said that a five foot side yard setback is not very generous.

Mr. Becker asked if there was anyone present at the public hearing who wished to speak to the petition.

Mr. Becker read the Planning Board recommendation.

Mr. Levy moved that the Board make a finding that the proposed renovation shall not be substantially more detrimental and that the special permit be allowed. Mr. Adams seconded the motion. The Board voted unanimously to grant the special permit.

ZBA 2017-63, PETER KATSIKARIS, 15 MANOR AVENUE

Presenting the case at the hearing were David Himmelberger, Esq. and Peter Katsikaris, the Petitioner.

Mr. Himmelberger said that the request is for modification of an existing variance and a special permit to construct a one story addition, deck and reconfigured roof to a pre-existing nonconforming home, due to insufficient side yard setback.

Mr. Himmelberger said that, while this is a request for modification of a variance that was granted in 1972, the variance was granted because the house has a paper street on its left side, known as Rose Street. He said that it was the belief at the time that constituted frontage from which a 30 foot front yard setback needed to be maintained. He said that the variance that was sought in 1972 was to allow a 26.6 foot setback. He said that the determination of paper streets as frontage evolved over time. He said that it is the current determination of the Building Inspector that unless a paper street may be driven over, it does not qualify as frontage for the purpose of front yard setbacks. He said that, under today's standards, it would not be a front yard setback but rather a side yard setback. He said that as a side yard setback, the Petitioner would be seeking a special permit for a pre-existing nonconforming structure, namely the side facing garage. Mr. Adams said that the proposal is to add a garage.

Mr. Himmelberger said that this Board has typically shown deference to past decisions granting variances. He said that the Petitioner has cast this as a modification and/or special permit. He said that the home sits within the wetlands buffer and the project has been approved by the Wetlands Protection Committee (WPC). He said that the Order of Conditions has been recorded at the Registry of Deeds. He said that the addition is otherwise compliant with zoning and the neighbor to the left is in full support of the project. He said that neighbor's property is located on the other side of the paper street. He said that the paper street is actually a wooded and landscaped buffer. He said that the additional footprint will increase lot coverage from 10.3 percent to 13.7 percent, which is an additional 544 square feet. He said that the existing Total Living Area Plus Garage (TLAG) of 2,846 square feet will increase to 4,081 square feet. He said that the current peak height is 32.7 feet and will remain unchanged. He said that the new height of the slightly raised roof is 28.7 feet. He said that, based on the foregoing, the Petitioner is proposing that the proposed structure shall not be substantially more detrimental to the neighborhood than the existing nonconforming structure, or alternatively, that modification of an existing variance is appropriate, and would seek accordingly.

Mr. Levy asked if the left side yard setback is the only nonconformity, other than the air conditioner. Mr. Himmelberger said that the air conditioner condenser is at 19 feet and is a pre-existing nonconforming element. Mr. Levy said that other than the air conditioning condenser, the nonconformity is the setback of the west side of the house at 26.6 feet. Mr. Becker said that a side garage requires 30 feet and they only have 26.6 feet. Mr. Adams said that it is appropriate to have further conversation. He said that the Board does tend to defer to previous granting of variances and not re-litigate the decisions. He said that the Board accepts the Board at the time's decision and that carries with the property so long as the modification is not substantially detrimental.

Mr. Adams said that he found the plot plan devoid of some information. He said that it does not show the retaining wall at the front. He said that it is a little hard to figure out. He said that the words, "Proposed Addition," did not show where that would be.

Mr. Becker said that the shed is located in Weston, not in Wellesley.

Mr. Levy asked if Rose Street is a derelict fee. Mr. Himmelberger said that he believed that it is a Derelict Fee Statute and the property owners have rights to the center of it. He said that it leads to someone's backyard. Mr. Becker said that some of the other streets that come to Weston from Manor Avenue do have residences on them. He said that, clearly, Rose Street won't have any residences on it. He said that it cannot be subdivided into two buildable lots.

Mr. Becker said that the Board would review two actions, one for a modification of a variance and the other for a special permit for an addition to a nonconforming structure. He said that the special permit ties back into Large House Review (LHR). He said that there will be no exemption for LHR if there is no special permit granted.

Mr. Levy asked how long the air conditioning condenser has been there. Mr. Himmelberger said that it has been there since 1992. Mr. Levy said that it is a pre-existing nonconformity.

Mr. Becker said that a larger than target TLAG would normally be of concern but this lot is significantly larger lot than 10,000 square feet. Mr. Levy said that the Town chose to enforce LHR based on Zoning District, not lot size.

Mr. Adams said that the house at 11 Manor is not really impacted by this. He said that it is only impacted by the existing nonconforming air conditioning condenser. Mr. Himmelberger said that 21 Manor Avenue, which is on the other side of Rose Street has its garage as the closest element. Mr. Adams said that there is heavy screening in between.

Mr. Becker said that the property is located in a Water Supply Protection District (WSPD). Mr. Adams asked if there will be any mitigation for runoff. Mr. Himmelberger said that there will be two catch basins.

Mr. Becker asked if there was anyone present at the public hearing who wished to speak to the petition.

Mr. Becker read the Planning Board recommendation.

Mr. Becker said that the Board would insert a condition that the decision is subject to the Order of Conditions.

Mr. Himmelberger said that the way that he looked at it, the variance was for the left side setback. He said that they also have the pre-existing nonconforming air conditioning condenser for a special permit.

The Board discussed the Bjorklund v Norwell case law. Mr. Himmelberger said that they will be doing more than what is permissible by right under Bjorklund.

Mr. Becker said that if it was not for Rose Street, the Petitioner could do what he was proposing to do. Mr. Levy questioned whether a variance is an appropriate solution. He said that he was reluctant to bootstrap a special permit onto it just to exempt it from LHR.

Mr. Becker said that he would be comfortable with granting modification of the variance. He said that it is central to the issue that makes the Board consistent with the 1972 decision without addressing the basis for the 1972 decision. He said that since the 1972 decision, the Town enacted the 30 foot setback for a side facing garage.

Mr. Himmelberger said that the variance for setback of the structure needs to be modified because they are expanding the structure at the same setback. He also suggested that the side facing garage is a new nonconformity. He said that it is new because it was made nonconforming when the Town adopted 30 foot side facing garage setbacks. He said that is the interpretation that the Building Inspector currently adheres to. He said that analyzing the later developed nonconformity, that one gets reviewed through today's lens, which says that it is a pre-existing nonconformity. Mr. Levy said that would be a variance because you are not allowed to exacerbate a nonconformity and that is what is proposed. Mr. Himmelberger said that they will intensify the nonconformity. He said that the question is whether they will be making it substantially more detrimental. He said that they are arguing that they do not. Mr. Levy said that the Board's position on special permits is that if you hold the current setback, the Board will consider it, but if you further encroach into the setback, it is a variance. Mr. Becker questioned why the 26.6 foot setback would not be covered by the variance. Mr. Himmelberger said that the variance was not granted for a side facing garage. He said that it was a variance for the structure. He said that you can have a setback that is appropriate for a structure but not appropriate for a side facing garage.

Mr. Levy said that if this came before the Board without the historical variance, the Board would consider that relief to be granted would be for a variance. Mr. Himmelberger said that his understanding is that when you worsen the setback it is variance. He said that they believe that this is an intensification and that leads to the question of whether it is substantially more detrimental.

Mr. Becker said that if this was a normal case, there would be a 20 foot setback but there could not be a side facing garage in the 20 foot setback. He said that he was still considering why the variance would not cover that. He said that the variance is for the setback from Rose Street. He said that applies to today's Zoning Bylaw as well. Mr. Himmelberger said that they are seeking to extend the garage, not make a worse but maintain it. He said that causes special permit analysis to be brought forth, as does the air conditioning condenser. Mr. Adams said that they will not be doing anything with the condenser. He said that if they got a variance on the property and want to do anything in the area related to the variance, it is a modification of the variance. Mr. Becker said that the purpose for that is to confirm that the new stuff is covered by the old variance. Mr. Adams said that this Board is considering whether the previous Board would have granted the variance, even with this current design. He said that he thinks that the previous Board would have granted the variance. He said that the Building Official now says that he would not require the variance. He said that Wellesley does not have the procedure where the application would be denied by the Building Official and then brought to the Zoning Board. He said that the Building Official seems to think that a variance is not required for this. Mr. Himmelberger said that they still have the issue of the air conditioning condenser. Mr. Adams said that when it was put in in 1990, it was conforming. Mr. Himmelberger said that it is pre-existing nonconforming. Mr. Levy said that it is the tail wagging the dog. Mr. Himmelberger said that it is a nonconformity. He said that nonconformities are not categorized by magnitude.

Mr. Levy said that if the Petitioner owned Rose Street and did not have a setback issue on the west side, this would not be before the Board. He said that they would not come before the Board solely for the nonconforming condenser. He said that it would be a different story if the proposal was to add another condenser.

Mr. Adams said that he was inclined to agree with Mr. Becker that the Board only needs to approve the modified variance based on a previous Board's determination regarding the original basis for the variance, that the proposed modification will not be more detrimental and that the previous Board would have granted a variance for the proposed design.

Mr. Himmelberger said that they would prefer that the Board also grant a special permit in addition to the modification so that they can avoid going through LHR. Mr. Levy said that granting a special permit would moot that issue, however, not granting it does not prevent arguing that there is a nonconforming lot and, as such, is exempt under the bylaw. He said that the exemption is based upon having a nonconforming lot, not based on a finding by this Board that it is nonconforming. He said that they can still go to the Planning Board and tell them that they have a nonconforming lot that is exempt. Mr. Himmelberger said that would probably go before the Building Inspector, not the Planning Board. Mr. Levy said that they would have a better argument because the Board would have to make a finding under Section 6. Mr. Himmelberger said that they would have to argue that it is a change to a single family dwelling subject to a finding in accordance with Section 6 for an exemption from LHR. Mr. Becker said that Mr. Himmelberger's argument is that by extending the structure, they need a finding. He said that the Board is saying that the modification to the variance will cover that. Mr. Levy said that he was not convinced about the argument that the fact that there is an existing nonconforming air conditioning condenser that this will require a special permit. He said that a variance is a higher relief than a special permit. Mr. Himmelberger said that this will extend a pre-existing nonconforming setback for a side facing garage. Mr. Levy questioned whether that would be a new variance. Mr. Himmelberger said that the Board is not required to adhere to past variance or the rationale for it, in light of the Building Inspector's opinion. Mr. Levy said that if this came in today, it probably would not receive a variance under today's standards. Mr. Himmelberger said that they would be seeking a special permit for the extension of the pre-existing nonconforming side facing garage. Mr. Adams said that the Board has not heard from the Building Inspector on this issue. He said that the Board would have to decide if it agreed with the Building Inspector or not. He said that if the Board agreed with him, it could possibly treat this as a special permit. He said that he was not so sure that he was inclined to agree with him though. He said that, at the moment, it is considered a street. Mr. Himmelberger said that the Petitioner has rights to use the paper street but does not own it.

Mr. Himmelberger asked if the Board would consider granting a special permit contingent upon confirmation from the Building Inspector that he views that as a side yard. Mr. Adams said that the Board would then have to decide if it agrees with the Building Inspector or not. Mr. Himmelberger said that the Building Inspector's rationale for it is that in order to have frontage there has to be a way in existence when subdivision control was enacted and it cannot be just a paper street. He said that it has to be actually laid out and usable. He said that the Building Inspector follows the law in that regard and says that if you cannot drive the street, it is not a street for frontage. He said that has been used to control development because Wellesley has a lot of paper streets. He said that the Zoning Bylaw defines frontage in Section XIX. Yard Regulations.

Mr. Levy asked why this petition is before the Board. Mr. Himmelberger said that this is a pre-existing nonconforming structure by virtue of the side facing garage with less than 30 feet of setback.

Mr. Himmelberger read an excerpt from Section XIX. Yard Regulations of the Zoning Bylaw that defines Frontage. He said that the Building Inspector interpreting this as a side yard is following the bylaws for frontage. Mr. Adams asked if Mr. Himmelberger thought that the Planning Board should decline to certify this as an adequate way. Mr. Levy asked if someone could improve the way. He said that the purpose of the Derelict Fee Statute is to provide a mechanism for the owners of unaccepted roads to have fee interest to the center line. Mr. Becker said that Rose Street is shown but not labeled on the Zoning Map. Mr. Himmelberger said that it is not a way in existence.

Mr. Levy asked if a special permit granting relief from the required 30 feet for the side facing garage would get the Petitioner to where he wanted to be. Mr. Himmelberger said that the special permit will allow the

construction above the house. He said that the entire project will be encompassed in the special permit, not just the part that is in the offending nonconformity. He said that a special permit would get them to where they want to be.

Mr. Adams said that it goes against his judgment from the past that whenever you had a variance, it was for the structure that existed at the time it was requesting the variance. He said that the variance was granted for the structure at that time. Mr. Himmelberger said that in the instances where the Board has shown deference, it has been when there has been a judgment as to hardship, shape or topography. He said that here the Board is dealing with a current interpretation that is legally based but different from the past. Mr. Adams said that the Board tries to be very consistent but each case is unique.

Mr. Becker said that when he looked at the original decision, it seemed to him that the Board was trying to find a way to do what the landowner proposed. He said that the arguments that they put together did relate to hardship but did not relate to topography, shape of the lot or any of the usual things that the Board considers. He said that it could be because the rules may have been different in 1972 or it could be that is just what they did.

Mr. Levy said that if Board is to consider this as a special permit, it will have to look at moving the addition four feet to make it conforming. Mr. Himmelberger said that it lines up with the existing structure.

Mr. Adams said that the Board at the time granted a variance to what is otherwise an ordinary lot. He said that the uniqueness is the paper street there. Mr. Himmelberger said that the reason that the Board granted the variance previously was to overrule the Building Inspector who said that it was a street. He said that the current Building Inspector has a contrary view. He said that he would argue that the Board should respect this Building Inspector's view and deem it a special permit situation.

The Board discussed moving the addition four feet. Mr. Himmelberger said that the floor plan is design to flow from the existing structure. He questioned whether the Board has previously advanced the notion that a special permit is impermissible even if it is not substantially more detrimental. Mr. Levy said that the Board likes to make things conforming, if possible. He said that is the intent of the bylaw. Mr. Himmelberger said that they will not be making it less conforming. Mr. Levy said that he was concerned that granting a special permit would be a way to avoid LHR.

Mr. Adams said that the argument that the side plane needs to be maintained is not a strong argument. He said that they could have set it back in four feet. He said that the kitchen would not have been substantially more unusable. He said that, on the other hand, he is prepared to vote approval for a variance that would grant this based on the determination by a former Board that they did not view this as a street. Mr. Becker said that the paper street has not been built on in the past 45 years.

Mr. Levy said that it is up to the Applicant to choose what they would like to have the Board vote on. He said that there are requests for modification of a variance and a special permit. He said that the Board could vote approval of the modification of the variance and consider the request for the special permit moot. Mr. Becker said that if the Building Inspector tells the Applicant that they have to go to LHR, the Applicant can appeal the decision of the Building Inspector.

Mr. Himmelberger asked for a moment to speak with his client.

Mr. Adams moved to grant modification of the previously granted variance, based on the previous Board's decision that the adjacent paper street is a uniqueness of the lot that created a hardship for the applicant at that time and the proposal to extend an addition at the rear of the property with a garage that subsequently became nonconforming by a change in the bylaw, and that Board would equally have granted a variance for the currently proposed structure.

Mr. Becker said that the Planning Board recommendation recommended approval of the special permit and/or modification of the variance while considering the criteria for LHR. Mr. Levy said that is a standard request for projects which would have been subject to LHR had it not been for the special permit. He said that his position is that it is exempt.

Mr. Levy seconded the motion. The Board voted unanimously to grant modification of the previously granted variance.

Mr. Levy said that the special permit request is moot because modification of the variance will allow the construction as requested.

#### ZBA 2017-64, GLEN MAGPIONG, 89 RUSSELL ROAD

Presenting the case at the hearing were David Himmelberger, Esq., Mark Iacocca, Architect, and Glen and Jane Magpiong, the Petitioner.

Mr. Himmelberger said that the request is for a special permit and a variance to raze and reconstruct a 1962 ranch house at 89 Russell Road. He said that the variance is to allow for a front setback of 17.4 feet and to permit air conditioning condensers in the side yard setback. He said that the special permits are for the pre-existing nonconforming side yard setbacks that will be improved with the new construction but still noncompliant.

Mr. Himmelberger said that this end of Russell Road has houses only on the pond side of the road. He said that this property has a 38 percent slope from Russell Road to the pond, for a 46 foot drop. He said that the existing home has two terraced sections at the rear and the proposed construction will stay forward of those terraced sections so as to not require additional engineering work in that area. He said that, given the topographical challenges and the costs of building a house back to a 30 foot setback, the Petitioners have sought a 17.4 foot front yard setback, which is consistent with the one next door at 81 Russell Road that was recently granted relief by this Board to build at 17 feet and a similar one at 77 Russell Road to build at a 17 foot front yard setback. He said that the abutter to the left received a variance where the Board recommended that the house be moved forward from 30 feet to 24 feet to fit in better with the neighborhood. He said that the average front yard setback on this section of Russell Road is 13.74 feet.

Mr. Himmelberger said that the house sits so that rear remains shy of the rear facades of 93 and 81 Russell Road, the direct neighbors. He said that all but one house is subject to a variance on this section of Russell Road.

Mr. Himmelberger said that the house has been designed to present beautifully at the street. He said that it will be 21 feet tall at street level. He said that the Planning Board, while giving some favorable consideration to this proposal, ultimately decline to recommend approval, raising concerns about the scale of the home as impacting the neighbors to the right and left, and the scale as might be seen from Morses Pond. He said that he submitted letters of support from the direct neighbors. He said that the homes to the immediate right and left have been designed to take advantage of pond views and have not been designed with significant side facing windows. He said that all of the orientation is towards the pond. He said that the house will have eight arbor vitae screening on the left side and ten arbor vitae screening on the right side. He submitted copies of photos that were taken from the pond. He said that the photos dramatically underscore the fact that there is substantial screening between the pond and the proposed house.

Mr. Himmelberger said that the project has been approved by the Wetlands Protection Committee (WPC). He said that because of the substantial screening, the concerns of the Planning Board do not exist, where the

abutters support the project and it is difficult, if not impossible, to see the site from the pond. He said that the Planning Board did concede that the design and scale of the house is consistent with the accepted style of the neighborhood.

Mr. Himmelberger said that Total Living Area plus Garage (TLAG) will be 4,804 square feet that is due to a basement that is larger because of the slope. Mr. Adams said that it is usable space. Mr. Himmelberger said that TLAG is typically used as a measure of massing as perceived by people who can see it. He said that the two neighbors support the project. He said that it is impossible to see it from the pond. He said that it presents at 21 feet at the street. He said that the impact of how it is situated on the lot undercuts concerns about TLAG.

Mr. Himmelberger said that a variance is warranted as literal enforcement of the Zoning Bylaws would involve substantial hardship owing to topography, will not affect the zoning district in which the lot is located, the hardship has not been self-created, and that desirable relief may be granted without substantial detriment to the public good, and without nullifying or substantially derogating from the intent or purpose of the Zoning Bylaw.

Mr. Himmelberger said that the special permits are warranted as the proposed side yard setbacks will not be substantially more detrimental than the existing structure is to the neighborhood.

Mr. Adams said that he is mindful of the property at 77 Russell Road. He said that he was on the Board that approved it. He said that all projects here are difficult to decide what is the appropriate thing to do. He said that it is complicated when you have a complying lot. He said that there is a severe topography issue here but the lot is fully compliant. He said that they could easily design a house that would comply. He said that he did not have a problem with the front setback but he was concerned about the side setbacks. He said that to equate the fact that the original house had 6.9 setbacks at two corners on a narrow house and provide 12.5 foot side setbacks for a much larger house is not quite equal. He questioned why the design was not a little more narrow and deeper into the lot. He said that this house would not even comply with the 15,000 square foot TLAG threshold. He said that he was uncomfortable with approving such a large house. He said that it would be hard to argue that other people were not entitled to the same thing.

Mr. Himmelberger said that the variance that was granted at 81 Russell Road is a smaller lot. Mr. Adams said that the lot is more narrow as well. He said that 93 is a narrow lot and 77 is a wider lot. He said that the size of those two lots is almost identical. Mr. Himmelberger said that a 30 foot wide house is narrow, particularly when one is trying to take advantage of the pond view. He said that this Board has consistently found that variances are appropriate for all of the homes on this street.

Mr. Becker said that he did not have an issue with a variance for the front setback. He said that TLAG is a concern. He said that there were some things in the design that could have been done to make it compliant with at least a portion of the regulations. He asked about other designs that were considered before coming before the Board. Mr. Iacocca said that to maintain the amount of area that clients wanted in the home, they could make it more narrow but that would push it further back. He said that because the grade drops off steeply down to the pond, it lowers the average existing grade. He said that they would run into an issue with exceeding the height limit of the home. Mr. Becker asked why the upper level is above the garage at the street. Mr. Iacocca said that it was the preference of the client to not have a reverse living situation. He said that they considered a flat roof early in the process but they wanted something more traditional. He said that they were going with the went with neighbors' setbacks as a guide to make the design work. He said that with a front facing garage at 24 feet wide, it does not leave a lot of width for the entry and spaces off to the side. He said that they tried to utilize as much width as they could get.

Mr. Himmelberger said that 81 Russell Road is same width at 70 feet. He said that the Board granted a variance for a 12 foot side yard setback on the side that is closest to 89 Russell Road.

Mr. Iacocca asked if the Board members had seen the two tier landing at the back. He said that right now the basement walks out to the first tier. He said that there is a retaining wall that drops eight to nine feet. He said that they wanted to stay back as much as they could from that. He said that the basement ceiling height is pretty high already. He said that a narrow house that goes further into the lot would be more visible from the neighbors' space. He said that they wanted to avoid coming to where the next tier drops off. Mr. Adams asked if they will be building a retaining wall. Mr. Iacocca said that there is already a retaining wall there that they would like to preserve and repair.

Mr. Becker said that rather than changing dimensions to reconfigure the living space, the Board is saying that the living area is too big. He said that it is one-third greater than the trigger in the bylaw for a 10,000 square foot lot and would be above the trigger for a lot in a 15,000 square foot district. Mr. Himmelberger said that it will not be viewed by anybody. He said that the abutters say that they will not view it because they face out to the pond and it cannot be seen from the pond. Mr. Becker said that it is more than simply seeing. He said that they will be filling up the lot and that is part of what Large House Review (LHR) is about as well. Mr. Himmelberger said that the lot coverage is satisfactory.

Mr. Adams said that the Board does not want to see a wall of building that fills up the lot. Mr. Himmelberger said that it is not capable of being seen. Mr. Adams said that it is a public road and a beautiful place to walk. Mr. Himmelberger said that from the street it is a modest structure. He said that there will not be much difference in the aperture around the façade from 81 Russell Road. Mr. Adams said that 81 Russell Road has a wider side yard. Mr. Himmelberger said that you will not see it walking up the street or from the pond. He said that the idea of TLAG is to help minimize the appearance of largeness. He said that they do not have vantage points here to see the largeness. Mr. Adams said that people walking down the street will look down to the pond and just see a wall going down to the pond. He said that a number of the lots that were granted variances are under 10,000 square feet and this one is not. Mr. Himmelberger said that walking out to a street view, you are looking out to water.

Mr. Levy asked if there will be a view of the pond from the house. Mr. Himmelberger said that it is easier to see through the trees when you are in the trees. Mr. Levy said that it looks like the house on the left took down a bunch of trees. Mr. Himmelberger said that they will not be taking any trees down. Mr. Levy asked if the trees are trees fully leafed most of the year. Mr. Himmelberger said that half of them are pines. He said that they will not be taking any trees down expect for a small tree that is leaning. He said that the trees are protected by Wetlands.

Mr. Levy asked if you cannot see the house, how can the house see the pond. Mr. Himmelberger you can see from the inside out but a normal pond user will not see it. Mr. Becker said that the LHR bylaw does not talk about largeness that you cannot see. Mr. Himmelberger said that LHR is also about what it does for the site and the neighbors. He said that, in this case, it is fine for the site because it passed muster with the WPC. He said that this Board is cognizant of the fact that the WPC makes detailed findings to minimize any impacts to the site from construction. He said that they have done that in their design. He said that, with respect to impact to the neighbors, they are supportive of the project. He said that the side setbacks are fairly routine up and down the street because of the way that the houses were built and the size of the lots. He said that the lot is 70 feet across and is not super wide. He said that they will be improving the setbacks and do not believe it will be substantially more detrimental than the pre-existing structure. He said that they see this as a house that is consistent with what is being built on the street and what will be built on the street.

Mr. Adams asked who owns the land across the street. Mr. Himmelberger said that the Town Water Works owns the land.

Mr. Iacocca said that on the TLAG Calculation Plan, Basement Area 1 Floor Plan, areas K and L are all air. He said that it is open down to below and is not usable square footage. He said that is almost 1,000 square feet. Mr. Adams said that there is floor at that level. Mr. Iacocca said that he meant to say that it was Basement

Areas N and O. He said that if they do a narrower lot, they will still have the issue with the grade dropping off. Mr. Himmelberger said that steep slopes may not have been fully considered when the LHR bylaw was written because the steep lots are fairly rare.

Mr. Becker said that the Board recognizes that these are tough lots in terms of size, shape and topography. He said that he was still struggling with a TLAG that is one-third greater than the requirement for the district. Mr. Himmelberger said that there is a 1,000 square feet of air being counted in TLAG because of the topography. He said that because of the steep slope they count the height of the basement and so it's factored in at close to double the actual square footage. He said that the actual living space is considerably less. Mr. Becker said that it will be the largest house on the street.

Mr. Levy said that the house is almost 42 feet on the rear elevation. Mr. Iacocca said that looking at the house to the right if you are facing 89 Russell Road, this will be inches below that. He said that they will also be below the house to the left. He said that they could go back more into the lot but they would be looking at a reverse living situation or a flat roof. Mr. Himmelberger said that the height is not dissimilar to the houses that are shown in the photos that were submitted. Mr. Levy said that the house that is under construction is lower. Mr. Adams said that this is higher up on the hill.

Mr. Himmelberger said that they could agree to put screening in along the sides, horizontal to the street. He said that then one would only see the street facing façade, which would eliminate the concern about seeing down along the house. Mr. Adams said that is not the concern. He said that there is greater space between the other houses. Mr. Becker said that when you drive down Russell Road, you do not see the pond through narrow slits between the houses. Mr. Himmelberger said that if the concern was that looking down the hill you would see the side of the house, they could put screening at the front to preclude that. He said that the purpose is to avoid the appearance of massing. He said that there is no vantage point to view the massing other than from the neighbors who support the project.

Mr. Becker asked where the three air conditioning units will be and what their specifications will be, in particular, what the noise emissions will be. Mr. Himmelberger said that they are shown on the site plan on the left side. He said that the plan does not show the landscaping which is the eight arbor vitae that will run along the property line. Mr. Iacocca said that they are not shown on the Elevations. He said that they will be underneath the side entry ramp where the window is. He said that he asked the General Contractor about the noise and was told that it will not be an issue. Mr. Becker said that one of the things that the Petitioner is asking for is variance for the air conditioners and the Board has no information on what they are. Mr. Himmelberger said that the abutter has said that he has extra insulation on the sides of his house and has no issue with them being there. Mr. Becker said that information is not in any letter that the Board received from abutters. Ms. Magpiong said that the house next door is solar powered, so there is extra insulation. Mr. Himmelberger said that if the units were put at the rear, they would be exposed to the neighbor and his patio area, which is why the neighbor prefers that they be in between. He said that the side yard setbacks will almost be doubled from 6.8 to 12.5 feet. Mr. Becker said that the plan is to put air conditioners in the space that is created. Mr. Himmelberger said that if the Board wanted to have lattice work around the air conditioners in addition to the arbor vitae screening, the Petitioner would be willing to accept that as a condition. Mr. Adams said that would reduce the side yards more. Mr. Himmelberger said that the side yards are not functional. He said that you would have difficulty navigating them without falling down.

Mr. Becker asked if there was anyone present at the public hearing who wished to speak to the petition.

Ed Jacobs, 97 Russell Road, said that he has lived in the neighborhood for 20 years. He said that he does communicate with neighbors and in general, the neighbors support this project.

Mr. Becker read the Planning Board recommendation.

Mr. Himmelberger said that there is no scenario from which the air conditioners can be seen because they will be screened by arbor vitae and under the ramp. He said that they could further enclose them with lattice. He said that the Planning Board also said that the scale and design is consistent with the accepted style in this neighborhood. Mr. Levy said that the intent of the setbacks of the air conditioners is for sound. Mr. Becker said that the Board would like to see specifications for noise for the air conditioning units.

Mr. Levy said that the request before the Board is for two reliefs for a variance and a special permit. He asked why the whole petition is not for a variance. He said that there is a topography issue here and a variance could cover all of the relief. Mr. Himmelberger that the Board issued a variance for front yard setback and a special permit to improve a side yard setback at 81 Russell Road that would still be noncompliant. Mr. Levy said that this lot has the criteria for topography. Mr. Adams said that although other lots on the street have topography issues, this lot could qualify as being unique. He said that the house is nicely designed but it is too bulky. He said that he would need to be convinced that they tried hard enough to comply with the setbacks, at least to better than what is proposed, and maybe bring it closer to the street. He said that the 800 square foot balcony adds to the TLAG and bulk of building. He said that he was not comfortable with this design. He said that the ramp takes up space in the side yard. Mr. Himmelberger said that 93 Russell Road sits close to the side lot line. He said that these side yards are not physically usable for activity because of the steepness of the slope. Mr. Adams said that they let sun and air onto the property. Mr. Becker said that they provide fire safety as well. Mr. Himmelberger said that the Building Code addresses fire safety. He said that the neighbor has super insulated house because of solar power and does not look out to the side. He said that they can put screening at the front to screen the side from the street. He said that the neighbors support the project. He said that these are unique properties that are focused on the rear view. He said that they have limited side views and practical use of side yards. He said that the request is for a special permit to say that they are not substantially more detrimental to the neighborhood than the pre-existing nonconforming side yard setbacks that they will be almost doubling.

Mr. Adams said that you cannot see the roof of the existing skinny little house from the street. Mr. Himmelberger said that the proposed house will look much nicer. He said that they can screen across the front so that you only see the front of the structure. Mr. Adams said that he did not want the sides screened off so that you do not see it. He said that it is good to be able to see down to the water. Mr. Magpiong said that they do not want to screen off the view of the pond.

Mr. Adams said that the Board is confronted with speculative builders who try to fit as much as they can on a lot. He said that bigger houses are going into the neighborhood but this will be the biggest house with combined narrow side yards. He said that he was concerned that this could set a precedent. Mr. Magpiong said that it is not the builder who is trying to get the most out of it. He said that they moved from California about 15 years ago. He said that they bought a home in California four years ago, thinking that was where they wanted to retire. He said that they found this property on the east side of a body of water and his wife loves sunsets. He said that they decided that this is where they want to be. He said that there is where they want to have their grandchildren come. He said that this is their dream home. He said that they wanted to get input from the neighbors. He said that they did not want to move out into the lot to impact the neighbors' views. He said that there is no parking for cars across the street but their cars will be put away. He said that they are trying to do the right thing. He said that the slope makes it difficult. He said that they want to have enough room for their kids and grandkids. He said that they are willing to get the quietest air conditioning units available. Ms. Magpiong asked if it would help to take out the ramp.

Mr. Becker discussed the LHR bylaw. He said that if the request is to exceed the limits, it is important for the Board to understand why. He said that he was sympathetic to the fact that there is open space that cannot be used. He said that if the structure had a TLAG of 4,000 or 3,800 square feet, he would not be as concerned. He said that 4,800 square feet is a lot. Mr. Himmelberger said that the standards for LHR review include preservation of landscape. He said that they will preserve the back 50 feet of existing terraces. He said that

they will retain all of the trees in the 100 foot buffer except for one leaning tree. He said that they will take out four trees that are outside of the buffer and compensate with replacements of the required caliper.

Mr. Levy said that lot coverage will be increased from 1,339 square feet to 2,495 square feet.

Mr. Himmelberger said that with respect to the standard for scale of building, the Planning Board conceded that the scale and design is consistent with the neighborhood. He said that they have maintained vegetated buffers at the whole back 50 feet and will add vegetated buffers in the side yard where none exist now. He said that there have been no issues raised with lighting. He said that with respect to open space, the house will not be visible from the pond in any significant way. He said that the two abutters support the project. He said that they satisfied drainage requirements through compliance with the WPC Order of Conditions. He said that with respect to circulation, there is no parking on site and the plan is to add a two-car garage with parking in front of it. He said that even if the Board was to apply LHR criteria, it could still find that this is satisfactory and compliant with the goals of LHR. He said that there should be some weight to the immediate abutters and the neighborhood because this is a unique section of street in Wellesley overlooking the pond.

Mr. Becker said that doubling the footprint takes away open space. He said that they will be treating the remaining open space appropriately. He said that he was struggling with the scale of the building. He said that when he looked at the lot and the house, there are a lot of good things there. He said that it is clear that this is not a spec building.

Mr. Levy said that his biggest concern is the elevation from the pond. He said that the screening might not be there in perpetuity. Mr. Adams said that the top level is set back 12 feet on the rear elevation. Mr. Levy said that the rear elevation will be more than 42 feet high. Mr. Iacocca said that the basement walk out will be at the same elevation as the existing house. Mr. Adams said that you cannot see the existing house.

Mr. Himmelberger asked if the Board has concerns about the design of the side elevations. Mr. Adams said that it is an envelope. He said that it is the volume that is the issue. Mr. Iacocca said that the existing house is essentially the bottom two floors of the proposed house and they will be adding 1.5 stories over that. Mr. Himmelberger said that the façade that is closest to the pond is not 41 feet, it is 34 feet. He said that the two dimensional drawing does not fairly depict the massing if it could be seen from the pond because the upper floor is recessed. He said that 34 feet elevation facing the pond is consistent with the other houses that are shown in the photos that were submitted.

Catherine Johnson, Planning Board, said that the drivers of LHR that the Planning Board would be looking at are mass and scale. She said that the Town voted to approve new TLAG recommendations at Town Meeting where garage space counts, which is approximately 500 square feet for this house. She said that the Planning Board would also look at drainage and water runoff with respect to the roof runoff, stormwater and where does it go. She said that they do not want the runoff to go down the hill and into the pond. She said that involves a certain amount of engineering to be able to get into subsurface collection systems. She said that there is not a lot of exterior lighting but there are a lot of beautiful windows. She said that the Planning Board would be concerned about light spillage as viewed from the pond if all of the lights are on.

Mr. Levy asked Ms. Johnson if she thought that this project would this get through LHR without any substantial modifications. Ms. Johnson said that her biggest concern is mass and scale and the second is drainage, which is not addressed in the current plan. Mr. Himmelberger said that they reduced runoff to the satisfaction of the WPC. Ms. Johnson said that the Planning Board looks for a review from the Department of Public Works' Engineering Division. Mr. Himmelberger said that Engineering looked at the submittal to WPC. He said that it took a couple of meetings to get the comments from Engineering. He said that they did receive them and incorporated them to the satisfaction of the WPC.

Mr. Levy asked if the bylaw change for TLAG is retroactive. Ms. Johnson said that it is retroactive to April 12, 2017.

Mr. Adams asked what the hardship would be if the Petitioner were to cut 1,000 square feet from the building. Ms. Magpiong said that they were building space for their kids to visit, each with their own room with a bath. Mr. Magpiong said that it is not a hardship. Mr. Adams said that it is a Zoning term that is associated with variances.

The Board discussed granting a variance for the two side yards and the front yard and then having the project go through LHR. Mr. Himmelberger said that the Board has not done that in the past. He said that when there have been pre-existing nonconforming side yard setbacks and a variance is sought for the front yard setbacks, the Board has granted a variance and a special permit. Mr. Adams said that this is pushing it to the limits because this is a big deep house that has a lesser nonconformity. He said that in his past experience as a building official, once the house down, it is an empty lot.

Mr. Himmelberger said that the standard is not if this is worse but that it will not be substantially more detrimental to the neighborhood.

Mr. Becker said that most of the tear downs that the Board encounters are torn down and rebuilt conforming. Mr. Himmelberger said that may be the predominance. He said that this Board has historically granted numerous special permits for tear downs where the nonconformities remain but are improved. He said that this is not a deviation from past practices.

Mr. Adams said that his feeling is that this is too much. He said that he would like to see the Petitioner try to come up with an alternate design with more side yard. He said that the plans may show that they cannot be done another way.

Mr. Himmelberger asked for some guidance from the Board as to side yard setback. Mr. Becker said that his concern is about TLAG. He said that if the TLAG could be reduced to near 3,600 square feet with the same setbacks that are proposed, he would not have an issue. Mr. Iacocca said that the revised TLAG bylaw will compound the problem somewhat.

Mr. Himmelberger said that if the Board grants a special permit on whatever re-design is made, it is exempt from LHR. He asked if the Chairman would be inclined to view this in terms of current TLAG calculations. Mr. Becker said that would be consistent with the Board's past practices. He said that houses that come before the Board for a special permit are exempt from LHR. He said that the Board still gets TLAG because that is a measure of whether it is more detrimental to the neighborhood or not. He said that the Board is not bound by 3,600 square feet.

Mr. Adams said that he would like to see a reduction in the combined width of the building. He said that they are currently offering 25 feet of horizontal side yard. He said that it does not have to comply. He said that they may be able to take corners out of the building to reduce the perceived bulk. Mr. Iacocca said that he can scale it back. He said that because of the slope, pulling the sides in and pulling it will still result in an imposing design.

Mr. Becker said that the property is located in a Water Supply Protection District (WSPD). He said that a requirement in the bylaw is that they reinject the captured runoff from the new building, which means everything off of the roof. He said that the WPC may have other requirements for once the runoff is captured because they are concerned about sediment going into the pond where the WSPD is concerned about capturing good water and putting it back into the ground.

Mr. Himmelberger asked if the Board would consider continuing the petition to allow for re-design.

Mr. Levy said that the Board would like to see information about the air conditioning units, roof runoff, and lighting from the pond view.

Mr. Himmelberger said that Zoning cannot regulate the interior of homes. He asked if light from within a home capable of being regulated by Zoning, as opposed to exterior lights. Mr. Becker said that the closest that the bylaw comes to regulating lighting is requirements relating to spillage off site. Mr. Levy said that could be criteria for determining whether it would be more detrimental to the neighborhood. Ms. Magpiong said that they could put blinds in.

Mr. Himmelberger said that the bylaw for LHR discusses exterior lighting. He said that they can provide details on exterior lighting. Mr. Becker said that the talk about interior lighting stems from the trend toward dark skies that looks at human lighting that disturbs the environment. He said those requirements are not in the Zoning Bylaw. He said that the Board looks at lighting and its effects on the neighborhood. He said that whatever the Petitioner can tell the Board about how interior lighting will or will not escape to the neighbors will be useful in its decision.

Mr. Himmelberger asked if the Board would allow the petition to be continued. Mr. Levy moved and Mr. Adams seconded the motion to allow the petition to be continued to August 10, 2017. The Board voted unanimously to continue the petition.

Respectfully submitted,

Lenore R. Mahoney  
Executive Secretary

DRAFT