

TOWN OF WELLESLEY



MASSACHUSETTS

## ZONING BOARD OF APPEALS

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LENORE R. MAHONEY  
EXECUTIVE SECRETARY  
TELEPHONE  
(781) 431-1019 EXT. 2208  
Web: [www.wellesleyma.gov](http://www.wellesleyma.gov)

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

Thursday, October 5, 2017, 7:30 pm

Juliani Meeting Room  
Town Hall

Zoning Board of Appeals Members Present:

Richard L. Seegel, Chairman  
J. Randolph Becker  
David G. Sheffield, Acting Chairman  
Robert W. Levy  
Walter B. Adams  
Derek B. Redgate

### ZBA 2017-74, SUNLIFE ASSURANCE OF CANADA, 96 – 120 WORCESTER STREET

The Board discussed proposed conditions for the Site Plan Approval. Mr. Redgate moved and Mr. Sheffield seconded the motion to approve the proposed conditions. The Board voted unanimously to approve the proposed conditions.

### ZBA 2017-68, IC 16 MICA RE LLC, 16 MICA LANE

Presenting the case at the hearing were David Himmelberger, Esq., Randy Goldberg, Dan Mulloy, Michael Waters and Dan Dumais, Traffic Consultant.

Mr. Himmelberger said that the Applicant was previously before the Board seeking a special permit for a pre-existing nonconforming FAR and for Site Plan Approval. He said that the FAR that is in excess of 1 will remain identical. He said that a portion of the first floor will be placed on top of the existing two-story. He said that site plan approval will deal with issues surrounding traffic and parking.

Mr. Himmelberger said that it is the Applicant's contention that, pursuant to the Development Prospectus Rules and Regulations of Site Plan Approval, parking and traffic analyses are only triggered by construction of 10,000 square feet or in excess of 50 car trips per hour in any given hour. He said that there will be no increase in square footage and the Traffic Consultant has opined and BETA Engineering has confirmed that there will be no more than 12 trips per hour during peak hours. He said that, according to BETA, MDM has fully satisfied every concern they had with regard to traffic. Mr. Seegel said that the Applicant has agreed to put a double yellow line along Mica Lane and will install a stop bar. Mr. Himmelberger said that BETA provided a second letter that spoke to a couple of parking issues late last week. He said that this is a building that is not undergoing any

change of use, has been in existence prior to 1985 and is not subject to additional off-street parking requirements pursuant to the ZBL. Mr. Seegel said that the only issue is safety. He said that BETA feels that one of the spaces should be removed safety purposes. Mr. Himmelberger read Section XXI, Part D., Subpart 3. g of the ZBL. He said that the Applicant can address parking at space #19 by placing a sign that states that parking spaces 15 to 25 are restricted to employees only. He said that would satisfy the exception in the ZBL.

Mr. Seegel said that BETA had suggested signage at the entrance and exit. Mr. Goldberg said that was already included. He said that there was a design feature that was purposely done that BETA may have missed on the plan. He said that all of the curbing shown on the plans is purposely flush to allow extra room for vehicles. He said that the flush curbs will be concrete. He said that the curbs at the entry will be raised granite. He said that there will be concrete curb stops at each space.

Mr. Redgate said that people angle park against the building at 27 Mica Lane. He asked if the geometry of the 16 Mica Lane project will still allow that to happen. Mr. Goldberg said that it will not work. He said that they have been parking on the 16 Mica Lane property without authorization. He said that the plan is to work together to landscape that area. Mr. Redgate asked if signage will designate parking just for 16 Mica Lane. Mr. Goldberg said that the lot will be configured specifically for 16 Mica Lane. Mr. Redgate asked if a letter from 27 Mica Lane could be submitted stating that they understand that the parking will be eliminated. Mr. Goldberg said that they vetted the issue with George Saraceno initially. He said that vehicles for 27 Mica Lane are not supposed to be parking on 16 Mica Lane property. He said that they do not have right to access. Mr. Redgate confirmed that the 16 Mica Lane property is in line with the existing building and when vehicles from 27 Mica Lane park there they are encroaching. Mr. Goldberg said that Plan L100 shows 20 percent of the parking spaces on 16 Mica Lane with an island. He said that 27 Mica Lane will lose that parking. He said that there has never been an agreement between the two property owners.

Mr. Redgate asked about compact parking and the 30 percent. Mr. Seegel said that BETA was incorrect in their letter. He said that if it is a new parking lot of 15 or more spaces, only 30 percent of them can be for small vehicles. He said that it is not applicable to this.

Mr. Sheffield said that the parking is intended for 16 Mica Lane. He asked if there will be a sign for employees only. Mr. Goldberg said that there is not. He said that if it becomes an issue, they could put signage there that designates parking for tenants and guests. Mr. Sheffield said that employees will get used to parking in a tight lot.

Mr. Sheffield said that there are at least four other access roads to Washington Street from the southern side and none of them have no left turn restrictions.

Mr. Redgate asked if the actual owner of Mica Lane is in agreement to put the striping and double yellow line and stop line. Mr. Himmelberger said that Mica Lane is owned by the abutters. Mr. Seegel said that the markings can be put down because the Board will insert that as a condition.

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

Mr. Seegel moved and Mr. Redgate seconded the motion to grant a special permit to alter the existing nonconforming structure and make a finding that the altered structure shall not be substantially more detrimental to the neighborhood. The Board voted unanimously to grant a special permit.

Mr. Sheffield moved and Mr. Redgate seconded the motion to approve Site Plan Approval, subject to conditions to be approved at a subsequent business meeting. The Board voted unanimously to grant Site Plan Approval.

ZBA 2017-66 ROBERT SARAFIAN, 6 CLIFFORD STREET

Mr. Becker said that this is an Appeal of a decision of the Building Inspector that 6 Clifford Street was not subject to Large House Review. He said that the Board ended the last meeting by asking the Proponent to see if he could contact the property owner and resolve the drainage issue that was at the root of the appeal.

Presenting the case at the hearing were Hamilton Hackney, Esq. and Robert Sarafian, the Appellant, Trustee representing his mother's interests at 19 Cottonwood Road.

Mr. Hackney said that they did reach out to the Developer at 6 Clifford Street to propose a meeting and their response was that his client would need to bring a professional engineer to the meeting, which was an expense that his client felt that his mother should not have to bear just to discuss drainage. He said that they informed the Developer that retaining a professional engineer would be too expensive but they would be happy to meet with them. He said that the Developer said that they had a copy of a drainage plan. He said that his client requested a copy of that but they did not provide it. He said that they have not had an opportunity to discuss resolution of the drainage issue.

Mr. Levy said that there is a room, which the Board will call a porch for the sake of consistency, that was built on the house which the Building Inspector determined was not subject to the TLAG requirement. He said that if that was included towards TLAG it would exceed the threshold for TLAG in this district. He confirmed with the Appellant that he would agree that if it was not included towards TLAG, the action of the Building Inspector was correct. He said that the question is whether this particular room should be in the TLAG calculation or not. He said that there are some other legal issues as to whether unheated porches should be exempt from TLAG under the bylaw.

Mr. Hackney said that the sole issue is whether to include a 9 by 12 area on the back of the house in the TLAG exclusion. He said that there are two issues there. He said that the LHR Bylaw does not discuss exclusion of unheated porches from the TLAG calculation. He said that the Planning Board issued regulations that identified unheated porches as an area that could be excluded from TLAG calculation. He said that the LHR bylaw authorizes the Planning Board to issue regulations regarding the process of LHR review of applications but it does not directly authorize the Planning Board to also create new exemptions from the TLAG calculation. He said that the bylaw does have specific terms in it regarding how TLAG should be calculated. He said that there is an authorization question. He said that the Board covered this a little bit at the previous hearing.

Mr. Hackney said that if you look at the LHR Bylaw, it talks about dwellings as being the building type that is subject to LHR. He said that it is a broadly defined term that is basically for human habitation. He said that the Planning Board's exclusion of unheated porches is inconsistent with the term dwelling, which was intended to be a broad term. He said that an issue is whether the Planning Board is authorized to create that exclusion. He said that if the Board is not prepared to deal with that directly, there is another way to address this problem.

Mr. Hackney said that the term "unheated porch," as used by the Planning Board was not defined in the regulations. He said that he believes that it is within the Board's discretion to decide how to interpret or define that term and how to apply it in this particular situation.

Mr. Hackney said that there are two issues, the first one being the question of whether this is a porch. He said that term is undefined. He said that the information that they have suggests that this is not even a room but is merely an extension off of the kitchen. He said that there is no fourth wall that separates this extension from the kitchen. Mr. Levy said that there is a sliding glass door to the house shown on the first floor plan. Mr. Hackney said that it is a sliding door, not a wall, so it is not a room. He said that it is inside the foundation of the building underneath a bedroom. He said that all of those things would indicate that it is an extension of the kitchen, not a separate room could be deemed a porch. He said that, in addition, there is a question of whether it is heated. He said that term is not defined in the ZBL or the Planning Board Regulations. He said that three sides of the room have glazing. He said that there is solar heating. He said that it adjoins the kitchen which is heated the bedroom above which is heated. He said that it is sitting inside the foundation. He said that all of those factors would indicate that the room is heated by the rest of the house. He said that ZBA could conclude that this is not an unheated porch. He said that the house was built to come up as close as possible to the 3,600 square foot limit. He said that in this case, what they are looking at is a breakfast nook that is presented as an unheated porch for the purpose of coming up with square footage under the 3,600 square foot threshold.

Mr. Hackney said that the impacts that LHR is supposed to address and mitigate are clearly present here, particularly, flooding impacts. He said that all of the factors would support the ZBA using its discretion to come to a conclusion that this is not an unheated porch and therefore should be included in TLAG calculations and subject to LHR.

Mr. Levy confirmed that under Mr. Hackney's theory, the TLAG calculation is 12 feet over the 3,600 square foot threshold.

Mr. Becker said that within the package that the Board had to review was a set of calculations for heat loss. He said that all of the spaces in the TLAG calculation are in that. He said that the sunroom/unheated porch is not. He said that the plans that were submitted also showed the location of the heat registers in the family room on the side of the wall that it shares with the sunroom porch. He said that speaks to the laymen's concept of heating and whether it is heated or not. He said that he recognizes Mr. Hackney's solar heating argument and the French doors opening it up to the family room.

Mr. Grant said that the plans clearly state that there is no heat in the space. He said that in the process of applying ZBL he has to make judgment calls from time to time. He said that the space is not heated or cooled, it is not considered habitable space because it does not meet Code for habitable space. He said that when LHR was developed in 2008 it used assessor's methodology, which few people understand. He said that he had to develop a document so that the public could understand what assessor's methodology meant. He said that the document was reviewed and approved by the Planning Board at the time. He said that in 2010 the Planning Board changed the bylaw with respect to attics and whether or the space would count towards LHR. He said that they removed assessor's methodology. He said that the public had two years of training with assessor's methodology. He said that they changed the attic portion of the affidavit to line up with what had been approved by ATM. He said that is what has been used since then. He said that a lot of what was carried over was so that the end user could understand. He said that many times modifications of bylaws add a huge amount of confusion. He said that in the interest of consistency, they held that consistency. He said that the porch/sunroom in question has a thermal wall that complies with the energy code of MA between the family room and the sunroom. He said that the sunroom requirements are for a certain percentage of the wall area to be glass. He said that there are sliders, a bay window and two windows on the side. He said that more than 50 percent of these walls are glass, so it meets the definition of a sunroom under the Code. He said that a sunroom is an unheated space, thermally separated from the main

house, which is what we have here. He said that he has to categorize it as something under the bylaw, so he categorized it as an unheated porch. He said that he feels that this house is in compliance and the standard has been consistently applied as he has to every permit that has come before him for LHR analysis from 2008 and 2010 to now.

Mr. Seegel asked what happens if they put in a piece of electrical heating such as a space heater. He said that it becomes a heated room. Mr. Grant said that would be a violation. He said that if someone files a formal written complaint, they will exercise the formal written complaint but he only has access to the house through the CO. He said that they make sure that it complies to the regulations at the time of CO and what the property owner does after they leave, they are obliged to comply with Zoning for the history of the building. He said that if they make changes to the building and do not notify the town and they are in violation, then it is a clear violation. He said that if they receive a formal written complaint, they need to act on it. Mr. Seegel asked if putting a space heater in the room a violation. Mr. Grant said that it is not. He said that the Proponent said that the room is solar heated.

Mr. Becker said that Mr. Hackney made an eloquent argument for heated versus unheated porch. He said that the real reason that the regulations have unheated porch in the column that says not applicable to TLAG is because it is consistent with the definition of TLAG. He said that TLAG says that you measure the floor area to the exterior walls of the building. He said that in looking at the plans, the exterior wall of the building is the wall between the sunroom and the family room. Mr. Levy said that one could argue that it is to the end of the sunroom. He said that from the outside it looks like it is part of the house. He said that when he thinks of a porch, he does think of a fully enclosed room. He said that he did not disagree with Mr. Grant that it may be a sunroom but does a sunroom make a porch. He asked if there is any provision in the Building Code or a definition that Mr. Grant can point to as to what a porch is. Mr. Grant said that there is nothing in the Building Code that specifies what a porch is. He said that a porch can be enclosed and partially open. He said that it falls back to the discretion of the Building Inspector to make a call to determine the exterior wall of the house. He said that it could be the thermal envelope of the house, which is the wall between the sunroom and the family room because there is no heat in there. He discussed the Energy Code. He said that there are unique ways that things are looked at as interior versus exterior. He said that he disagreed with the statement that the homeowner did this deliberately to circumvent LHR. He said that the average TLAG of homes in the 10,000 square foot district is 3,580 to 3,599 square feet. He said that almost everyone runs it to the edge. He said that this person has done what almost everyone else has done. Mr. Levy said that one has described any evil motives.

Mr. Becker said that in the design of the balance of the house, the basement is elevated and it sits up higher than the surrounding houses. He said that the fill that is being placed in there comes up as a four foot hill. He said that the only reason to do that is to make sure that the TLAG is less than 25 percent for the basement. He said that there is nothing in the bylaw that prohibits that.

Mr. Hackney said that there is a space on the first floor off of the family room/kitchen that is being designated as exterior. He said that there is a bedroom on top of that and there is a full foundation under it. He said that there is an exterior wall that wraps around the perimeter. He said that they heard that the wall on the first floor is different from the wall on the second floor. He said that it looks identical and it has a full foundation under it. He questioned how that could be considered to be exterior space when the bedroom above it is considered to be interior space. Mr. Becker said that it highlights the difficulty of having consistent definitions in terms of TLAG.

Mr. Levy said that there are two issues, one of which is whether this is an unheated porch. He said that the other question is whether the Planning Board has the authority to exempt unheated porches from LHR. He said that the bylaw is clear when it talks about measurement from the exterior face of the

exterior walls, which is probably the footprint of the house. He said that the bylaw says that the Planning Board can issue Rules and Regulations but it appears to limit those rules and regulations to procedural rules. He said that adding an exemption goes beyond the procedure. He said that the Rules and Regulations go on to say that calculations shall be in accordance to Rules and Regulations adopted by the Planning Board. He questioned whether there is a provision that allows the Planning Board to authorize exemptions or just to come up with the formula for the mathematical calculations.

Mr. Becker said that the second question is something that the Board need not be concerned with because it is the definition as to exterior wall which is in the bylaw that actually makes that question moot. Mr. Levy said that if the Board finds that the exterior wall is the wall between the house and the sunroom/porch, it is done. He said that the Board is done if it goes the other way unless it determines that the Planning Board had the right to exempt heated porches and the Board finds that this is a porch, which he was not confident that the Board could find.

Mr. Levy questioned the standard for review for this. He asked if it would be de novo or abuse of discretion. Mr. Hackney said that he believed that it is the latter. Mr. Levy said that it is a higher standard for the Board to find an abuse of discretion versus de novo where the Board makes the decision. Mr. Adams said that it could be much simpler. He said that it could be whether the Board agrees with the interpretation of the Building Inspector. He said that it would not be a decision as to whether the Building Inspector abused his discretion. He said that no one is suggesting that Mr. Grant was inappropriate in his actions. He said that the question is whether he correctly interpreted the Code in this regard. Mr. Levy said that it is also the legal standard whether he is entitled to deference.

Mr. Becker discussed hearing the petition de novo because he did not think that the Board is qualified to decide whether the Planning Board did the right thing in making its exemption. Mr. Levy said that the Board has to interpret the bylaw. Mr. Grant said that even though the bylaw has a second section about Rules and Regulations, he thinks that the bylaw does give the Planning Board the authority to promulgate regulations as to how they want to have a house calculated. He said that the bylaw states that calculations shall be determined in accordance with the Rules and Regulations adopted by the Planning Board. He said that the bylaw gives the Planning Board the authority under the Rules and Regulations Statute that they can. Mr. Levy said that could also be determined to be calculations and how you measure it, not what you include and do not include. He said that there is a separate section in the bylaw that talks about exemptions. Mr. Grant said that the Planning Board can set how a house is calculated and that could extend to what is exempted and what is not exempted.

Jessica Yee, 6 Clifford Street, said that she was not present at the previous public hearing. She said that there had been a lot of discussion at that meeting about her unwillingness to meet with the Appellant. Mr. Becker said that there was no need to do that because the Board was dealing with the two questions that Mr. Levy brought forth. Mr. Levy said that one of the reasons that the Board continued the hearing was because the homeowner was not there. He said that the Board encouraged the Appellant to talk with the homeowner to try to resolve this so that the Board does not have to make a difficult decision.

Ms. Yee said that at the beginning of this year when she started this project, she went over to the property to introduce herself. She said that a lady came out and said that she did not want to talk with her. Mr. Becker said that information is in the record via an email that was submitted. Mr. Levy said that the Board's decision will not be based on whether the homeowner spoke with the Appellant. He said that the Board encourages neighbors to talk but it will not make its decision based on personal relationships between neighbors.

Ms. Yee said that she has lived in Wellesley for 14 years. She said that she purchased this property three years ago. She said that her son attends the high school. She said that she intends to occupy this property. She said that, prior to buying this property, she was not aware of the big pool of water behind the house. She said that they elevated house to deal after her builder said that she could not have a deep basement there or she would have water and sump pump issues all of the time. She said that it is a custom designed home. She said that she met with the Building Inspector numerous times to make sure that the design would be in compliance. She said that it is a modular home, which was built in a factory. She said that there cannot be any room for mistakes when the modules are shipped. She said that they made sure that the exterior walls between the family room and the sunroom is an exterior wall with a door, fully insulated. She said that the room is not off of the kitchen. Mr. Levy said that the Board can see on the plans that it is off of the family room. Ms. Yee said that it is not a dining or breakfast nook, as presented by the Appellant. She said that the kitchen has a hood facing the back wall. She said that there is no room for her to put a window there. She said that a neighbor had talked about the view. She said that she did not understand why the issue of the unheated sunroom is coming up now. She said that she feels like she is being singled out for this. She said that things were said during the hearing that assumed that she would be doing something illegal by putting heat in the sunroom. She said that she is not going to. Mr. Becker said that the suggestion that someone could put an electric heater in was not that they were going to do that but was to test a hypothetical to test an argument to see how that argument and result could change under those circumstances. He said that the Board does that all of the time. Ms. Yee said that she followed all of the bylaws when she designed the home. She said that there is an exterior wall with an exterior door that leads to the sunroom.

Mr. Becker said that the issue before the Board is not whether Ms. Yee has done anything illegal but whether the Building Inspector made the correct choice in saying that Ms. Yee's house and application were exempt from the TLAG calculation. Ms. Yee said that it is written on the TLAG form that any unheated porch is exempt. Mr. Levy said that what the Board is struggling with is whether this a porch. He said that the reason for the appeal has to do with the drainage. He said that the Appellant is looking to get some understanding as to how that could affect them. He said that if this went through LHR proceedings as the Appellant maintain it should, that issue would have to be addressed before the Planning Board.

Ms. Yee said that she met with the Town's Engineering Department a few times and filed plans. She said that the drainage was completed on April 3<sup>rd</sup>. She said that she has not seen flooding at the property after that. Mr. Levy said that sharing drainage and engineering plans with the neighbors might have helped. He said that he believes that this is an issue should be able to be resolved between neighbors. He said that if the Board makes a decision tonight, someone is going to be unhappy. He said that the best time to resolve a dispute is when both parties have some risk.

Mr. Levy confirmed that a drainage system was put in. Mr. Grant said that a drainage system is shown on the plot plan. He said that was not required under the bylaw but was provided. He said that it is shown at the rear edge of the property. Mr. Levy asked Mr. Hackney if his client was aware that a drainage system had been installed. Mr. Hackney said that they were informed about the drainage plan about a week ago. Mr. Levy when the drainage system was installed. Ms. Yee said that it was installed in June. Mr. Levy asked Mr. Sarafian if he has seen any improvement in the drainage. Mr. Sarafian said that it is his mother's home and he does not live there. He said that had not witnessed any flooding there. He said that his sense is that it would probably be a late winter/early spring type of phenomena when the water table is high and snow is melting. He said that they tried to avoid this meeting tonight. He said that they very much wanted to resolve this outside of the Board and not take up its time. He said that they have reached out and have been unable to engage in a friendly conversation and to see the plans and see what is going on. He said that his hope and his sense is that

it will be resolved in this fashion. Mr. Levy said that it is not the Board job to resolve disputes. He said that he firmly believed that this could be resolved without the Board's intervention. He recommended that the parties talk to see if they can get to a meeting of the minds. He said that the Board is here if people want them to.

Ms. Yee said that she responded to Mr. Hackney's email stating that she is willing to meet. She said that because her drainage plan is already done, she feels that the meeting would be efficient if there is someone who is knowledgeable about the drainage system present to review it with them. Mr. Hackney said that they are happy to meet and review the drainage plan with the Town Engineer.

Mr. Sheffield asked if there was a letter stating that the Town Engineer had reviewed the Drainage Plans. Ms. Yee said that she can provide that.

Mr. Levy asked if the drainage issue is resolved will the Appellant withdraw the appeal. Mr. Hackney said that he will.

Joanna Winkleman, said that she is the abutter whose property goes alongside this property. She said that at this point she just wants the property to be completed. She said that it has been quite disruptive to those who live nearby. She said that her professional background is in design review. She said that one thing that has been left out of the discussion is the nature of the porch. She said that there is no definition of what a porch is in Wellesley. She said that it is quite common to define a porch as having a different flooring from the rest of the home, a different kind of wall and single pane windows that are different from the rest of the home. She said that is a bona fide enclosed porch. She said that if that space has a modern window, the same finishes and flooring as the rest of the house, it changes the matter. She said that it would not necessarily be a porch. She said that there is no definition for that. She said that it is not a matter of heat but of finishes. She said that she has a heated porch that is not included in her square footage because it has different flooring, wall and windows from the living space. She said that it is sad that the Town does not have a definition of porches. She said that there need to be guidelines for all properties going forward. Mr. Becker said that is why the Board wants the neighbors to resolve their drainage issue. He said that this would be much easier to deal with if there were definitions in the bylaw.

David Himmelberger, Linden Street, said that he found the Attorney's arguments compelling, particularly the extent to which the Planning Board may have inadvertently exceeded its boundaries in crafting an exemption in its Rules and Regulations because the Rules and Regulations that they are permitted to make are procedural. He said that Rules and Regulations is capitalized. He said that in the reference previous to that, it is still limited by the fact that those Rules and Regulations must be procedural in nature. He said that he found it interesting that attics that are not heated are included in TLAG. He said that the simple, ordinary language of the bylaw, which is the controlling document, talks about the exterior wall. He said that you think about exterior as opposed to interior. He said that there is no question that between the wall that is being claimed to be an exterior wall, it is interior to the outermost wall. He said that the outermost wall is exterior. He said that he googled definitions of porches and they all refer to appendages to buildings, frequently covered entrances to buildings. He said that he is now convinced by the Attorney's argument that the Planning Board overstepped when they created the exemption for unheated porches, his guess is that they were contemplating unheated exterior appendages to the main structure of the house because that is how we typically view a house. He said that this is probably the first time that someone has tried to make a space that is interior to all of the exterior walls fit the definition of a porch simply by being unheated space. He said that it is a case of first impression for this Board. He said that depending on which way the Board rules, there may be a lot of homes designed with interior unheated porches.

Mr. Adams said the Counselor's comments made him think about this a little further in that there is something in the exterior wall that is more than just insulated. He said that the exterior wall is also a moisture barrier and a method of keeping the outside out, aside from the temperature, and the inside in. He said that the Board should think carefully about what the term exterior wall means and how it will influence its decision.

Mr. Hackney said that if the homeowner is willing to provide a copy of their drainage plan for the Appellant to review, they would be willing to continue the hearing to give them time to review, hopefully have a follow up discussion and resolve the issue without a Board decision. Ms. Yee agreed to supply a copy of the drainage plan. She said that the Engineering Department already has a copy on record.

Mr. Levy said that the Board strongly suggests that the neighbors try to resolve this. He move that the hearing be continued to December 7, 2017. He said that according to Mr. Grant it will not hold up the CO or any other part of the project. He said that it is at the homeowner's risk that if the Board goes forward and find against Mr. Grant, the project will be stopped and will have to undergo LHR. Mr. Grant said that he would have to issue a violation notice, revoke the CO, and issue a violation notice the homeowner had gone through LHR and complied with the decision. Mr. Redgate seconded the motion. The Board voted unanimously to continue the hearing to December 7, 2017.

Mr. Levy said that if the issue is resolved outside of the hearing, the Board would need to get an email or a letter to request that the petition be allowed to be withdrawn without prejudice. He said that no attendance would be required at that hearing.

ZBA 2017-83, PETER KATSIKARIS, 15 MANOR AVENUE

Presenting the case at the hearing was David Himmelberger, Esq. and Peter Katsikaris, the Appellant.

Mr. Himmelberger said that this is an Appeal from a determination of the Building Inspector that the project would be subject to Large House Review (LHR), as it was granted modification to a variance by this Board and not granted a finding under Chapter 40A, Section 6. He said that the matter was previously before the Board on July 13, 2017. He said that the Board issued a blanket modification of a previously issued variance rather than a modification and a special permit for a pre-existing nonconformity that was not covered by the original 1972 variance. He said that one of the issues that he raised in July was that the structure was pre-existing nonconforming by virtue of a side facing garage with less than 30 feet and would be otherwise exempt from LHR because it would be subject to a finding, in accordance with the language in the bylaw. He said that the Board stated that if the Building Inspector determined that the project would have to go through LHR, the determination could be appealed. He said that after the Board's decision was finalized and recorded, Mr. Himmelberger submitted a request for a determination that, as the Applicant's proposed addition was to a pre-existing nonconforming single family dwelling, it was subject to a finding in accordance with Chapter 40A, Section 6 and Section XVII of the ZBL and therefore specifically exempted from LHR. He said that in a letter dated August 28, 2017, Mr. Grant stated that it was his opinion that the project required LHR because it had not received a Chapter 40A, Section 6 finding. Mr. Himmelberger said that he then appealed Mr. Grant's zoning interpretation. He said that the crux of the appeal is predicated upon the Building Inspector's interpretation only changes that actually received a finding rather than, in accordance with the ZBL, being subject to a finding. He said that, in this case, the Applicant is effectively penalized by a 45 year old variance that no longer has a basis in fact. He said that the only issue addressed by the 1972 variance was the purported inadequate frontage on a paper street. He said that Rose Street is not a street but is a side yard property line. He said that the only dimensional deficiency is the side facing garage that became nonconforming in 2002 when the bylaw was changed

to required 30 feet. He said that their argument is that there is no rational basis for a 1972 variance for insufficient front yard setbacks could be expanded to cover inadequate setbacks for a side facing garage that did not come into existence until 30 years after the original and now moot variance. He said that they believe that the enactment of the 2002 ZBL for side facing garages renders this to be a pre-existing nonconforming structure for which changes to it are expressly governed by and subject to Section 6 of Chapter 40A and Section 17 of the ZBL. He said that the proposed project increased the lot coverage by only 544 square feet. He said that TLAG increased from 2,846 to 4,081 square feet, with the increased lot coverage behind the existing home. He said that the only visible increase was the raising up of a small side section of house that will remain four feet lower than the highest existing ridge line. He said that the Board has to look to the LHR bylaw for guidance. He said that, of the various standards and criteria, the only one that would be marginally implicated is scale, which the Applicant believes would be resolved in his favor. He said that drainage has been addressed to the satisfaction of the Wetlands Protection Committee (WPC). He said that the Applicant is seeking to avoid the increased cost and time of the LHR process. He said that they believe that relief can be granted here without subverting the LHR process or the ZBL. He said that all they are seeking is the application of clear language, namely a recognition that the proposed addition is to a pre-existing nonconforming single family home with a side facing garage and is therefore subject to Section 6 finding. He said that the Planning Board concluded that this project is subject to a finding, even though it has not received one, and is exempt from LHR. He said that the same Board that is charged under the bylaw for implementing LHR agrees that this project is exempt. He said that the Applicant believes that the Building Inspector's interpretation was incorrect and that, as it is a pre-existing nonconforming structure by virtue of the 2002 bylaw change rendering side facing garages subject to a 30 foot side yard setback, it need not receive a finding but has to be subject to a finding. He said that, based on the fact that it is subject to a finding, he believes that it is exempt from LHR and asked that the Board decide in the Appellant's favor.

Mr. Levy said that he sat on the panel at the July hearing. He said that the Board's statement that the Building Inspector's determination could be appealed was not necessarily an endorsement that the Board would find one way or another. He said that the Board was stating that it was a right that the homeowner could pursue. He said that the issue whether a house that is a nonconforming structure that would require a special permit under Section 6 if an addition was made to the house is sufficient to exempt it, notwithstanding whether that finding was ever sought.

Mr. Himmelberger said that the Applicant did seek a special permit/finding at the previous hearing. He said that the Board said that it would issue a blanket variance and that would do away with the need for a special permit/finding. He said that the Board said that granting of a modification of a variance would render consideration of a request for a special permit moot because it would allow the construction as requested. He said that the Chairman said that if the Building Inspector tells the Applicant that they have to go for LHR, the Applicant can appeal the decision of the Building Inspector. Mr. Levy confirmed that the Board's decision, ZBA 2017-63, was not appealed.

Michael Grant, Building Inspector, said that the Applicant filed for a determination as a modification or a special permit/finding. He said that he read the minutes from the July 13, 2017 public hearing. He said that the Applicant had the opportunity and argued vigorously for a special permit/finding, which the Board felt was not appropriate. He said that the Board granted a modification of the variance. He said that the Applicant had more than ample time to argue that he should have a special permit/finding and was not granted it. He said that under the ZBL, it states that the project must be subject to it. He said that it is the case and there was no modification of a variance involved, and if the Board did not grant a special permit, he questioned whether he can issue a permit for a project and not have it subject to LHR even though it did not receive the special permit/finding. He said that he thought that the concept of subject to extends out to also receiving the special permit/finding. He

said that Mr. Himmelberger sent a letter that contained a lot of case law that requires a lot of extensive review. He said that he forwarded the letter and meeting minutes to Town Counsel and they agreed that it is subject to LHR. He said that, due to time constraints, Town Counsel was not able to render a written response in time for this public hearing.

Mr. Himmelberger said that if a special permit had been sought and was denied, there is no opportunity to apply for a building permit for a nonconforming structure. He said that it would be denied based on that alone and they would not be addressing the issue of whether LHR should apply or not. He said that the issue is whether this project was subject to a finding. Mr. Adams said that the project was subject to a variance. Mr. Himmelberger said that this meets the criteria for a finding under Section 6 because it is a change being made to a pre-existing nonconforming structure. He said that the Board can choose to issue a variance, as it did, but that does not negate or undercut the fact that it is subject to a Section 6 finding because it is a pre-existing nonconforming structure.

Mr. Levy discussed a hypothetical situation regarding an agenda item on the hearing schedule. He said that if that house was on a nonconforming lot and the permit issues. He said that the homeowner later decides that they would like to add heat to the porch and go to the Building Inspector for a permit. He questioned whether they would need a Section 6 finding. He said that they would not have to come before the Board to enclose or heat the porch because they are not changing the footprint of the house. He asked Mr. Himmelberger if he thought that should be exempt from LHR just because it is a nonconforming lot. Mr. Himmelberger said that they are exempt from LHR because they are not subject to a Section 6 finding for the enclosure of a porch. He said that it is one of the exceptions under Bjorklund. He said that only if the change that they were seeking is one that qualifies for or requires a finding in order to go forward, would they then have to go for LHR. He said that there are certain building permits that do not trigger it on nonconforming lots. He said that there are five or six exceptions under Bjorklund that do not require a special permit, regardless of whether it is on a nonconforming lot. Mr. Levy said that the structure is even if it is not for the renovation. He said that it is a nonconforming single family which is subject to a finding. Mr. Himmelberger said that it is not subject to a finding if what is being sought does not require a finding. He said that in this case, they require a finding. Mr. Levy said that the Board decided that the special permit is moot. He said that the Board's determination was not appealed. Mr. Himmelberger said that there was no need to appeal the determination because the relief that they were seeking to build was granted. He said that they are appealing the fact that, although the Board went beyond what the Applicant was asking for, the project was subject to a finding. He said that the Planning Board agrees with that.

Mr. Levy said that the whole exemption came about as a result of a public meeting with the Planning Board that he attended and was chaired by Mr. Frisardi. He said that he posited the question if it was unfair to make homeowners go through both LHR and a Section 6 finding. He said that the purpose was to prevent someone from having to go through both with the idea being that, implicit in a finding of not substantially more detrimental to the neighborhood, this board would consider a lot of the factors entailed in LHR. He said that the Board never got there in the July hearing. He said that the Board never considered whether this would be substantially more detrimental. He said that all the Board did consider was whether there were grounds for modification of a variance. He said that the idea behind the exemption, is that people would not have to go through the rigors of a Section 6 finding and LHR. Mr. Himmelberger said that they did submit for a special permit. He said that the two hours that the Board spent on this that night was a rigorous process. He said that they believe that this house would sail through LHR but at a cost of expense and time. He said that the bylaw does not talk about projects that are subject to and receive a finding under Section 6 are exempt. He said that the bylaw talks about projects that would be subject to a Section 6 finding. Mr. Levy said that the bylaw does not say that nonconforming lots are exempt. Mr. Himmelberger said that it is a nonconforming structure. Mr. Levy said that Mr. Grant said that subject to a finding encompasses

whether a decision was made one way or another. He said that the Board never got to the point of making a decision that this structure was not substantially more detrimental to the neighborhood. He said that the safeguard of the exception of LHR was not operative.

Mr. Adams said that he was struck by the zoning related events that have impacted this structure. He said that the initial variance was to allow a nonconforming building with less than 30 feet from Rose Street. He said that a prior Board granted relief because they felt that there was no reasonable basis to treat Rose Street like a street. He said that a subsequent bylaw change which is the basis for which this is now nonconforming. He said that Mr. Grant determined that it is not reasonable to apply front yard setback requirements to the side of the building that faces Rose Street. He said that the current building would be considered compliant safe for the fact that it has garages that open on that side of the building. He said that it is a coincidence that the front yard setback and the requirement for a side facing garage are 30 feet. He said that it seems reasonable to him that, by granting modification of the variance, the Board was reinforcing the decision that was made in in the past. He said that he thought that it is clear that the proposed work, even with the side facing garage, will not create a hardship for the abutting property. He said that there is a significant buffer between the properties. He said that this is still a property that was subject to a variance. He said that, based on Mr. Grant's determination which is different from the Board's determination at the time they granted the variance, it is nonsensical to say that it is still a front yard because it will never be developed as a street and therefore has become a space that is available for use for the owners on either side. He said that with the addition and where it is placed, the building would not raise concerns if it did go through LHR. He said that it is not a huge house with the amount of land around it already. He said that the common space used to be called Rose Street. He said that what the homeowner is proposing to do is not unreasonable, including adding an additional garage that faces the side. He said that the variance piece was the neatest way to address the problem. He said that his thinking is that any property that has had a variance for whatever reason, any further action will be a modification or reinforcement of the variance.

Mr. Himmelberger said that when he pressed the fact that a special permit was warranted because there was no way that the 1972 variance could cover a nonconformity that only came into existence in 2002. He said that the Board said that it would issue a variance and the special permit will be moot. He said that he raised the issue about LHR. Mr. Levy said that the Applicant applied for a modification of a variance. Mr. Himmelberger said that was for the portion of the house above the existing first floor left side. He said that the special permit is needed for extending the garage. He said that the Board said to not worry about it because the Applicant could always ask the Building Inspector for an interpretation.

Mr. Levy said that the Planning Board has already said that LHR does not apply. Mr. Himmelberger said that LHR is time consuming. He said that the Planning Board will be bound by the Building Inspector's interpretation if this Board upholds it. He said that they have no provisions within their Rules & Regulations to give a waiver for the entire process. He said that it is a three to four month process that costs between \$5,000 and \$10,000, at a minimum. He said that the clear language of the statute of the bylaw says subject to, not receiving. He said that the Board can grant this without doing any harm to the bylaw, its application or the ethic of LHR. He said that this is about as benign a LHR, if it qualified for one. He said that it is not fair to insert words into the bylaw. He said that the bylaw says subject to, not subject to and receiving. He asked the Board to exercise its discretion and uphold the appeal.

Mr. Levy asked Mr. Grant about a situation where there is a nonconforming structure or lot and someone is seeking to do a renovation or addition that would not require a special permit but would trigger LHR. Mr. Grant said an example would be someone wanting to enclose a porch. He said that

if they wanted to enclose it and make it a habitable part of the house, they would have to calculate TLAG. He said that they would not be required to obtain a Section 6 finding. He said that if the house sits on a nonconforming lot but dimensionally meets all of the setbacks, and they do not change the footprint or create any new nonconformities, they would not be required to get a Section 6 finding. Mr. Himmelberger said that, Bjorklund says, as a matter of law, enclosure of a porch does not require a Section 6 finding because it does not increase the nonconformity of the house. He said that the Board is concerned about others going through a perceived loophole, and he is arguing that there is no loophole because everyone who is subject to it has to get relief, whether it is a special permit or a variance. He said that if they are subject to it, they require relief. He said that there is no basis for someone to say that they are subject to it but do not require relief. He said that it does not exist under the laws and bylaws.

Mr. Levy said that the intent of the exception was to prevent people from having to do both.

Mr. Adams said that if Mr. Grant is saying that Rose Street is not a street, what relief is needed for the addition that they are putting on, aside from the garage that is too close to the property line? Mr. Himmelberger said that they need relief for the additional volume of the house that will bring it to over 3,600 square feet, because of the side facing garage. He said that the side facing garage is what creates the nonconformity. Mr. Levy said that the whole purpose of the exemption was that if this Board would make a finding that it was not substantially more detrimental to the neighborhood, that was sufficient to exempt it from LHR. He said that this Board never got to that finding. Mr. Sheffield said that the Board chose to go with a variance rather than a special permit/finding, which seems like it was the simplest way to grant relief for this.

Mr. Levy asked Catherine Johnson, Planning Board member, if there is a quick and far less costly way to go through LHR. Ms. Johnson said that there are lots of waivers that can be put in place. She said that there has to be a formal request to the Planning Board. She said that everything that is waived is a reduction in the costs.

Mr. Levy said that the house exceeds TLAG. He said that some type of determination has to be made that it is an appropriate house for the town, either through LHR or making a finding that it is not substantially more detrimental to the neighborhood, and neither of those occurred. He said that the Applicant could have asked for a variance from LHR. Mr. Himmelberger said that they sought a variance for that which they thought was appropriate.

Mr. Levy said that his concern is that the safeguards that Town Meeting put in place to cover which exceed TLAG have not been met in this case. Mr. Himmelberger said that when the Board grants modifications of variances, it has repeatedly stated that it applies a special permit test. Mr. Levy said that the Board applies a variance test. Mr. Adams said that includes the basic test of a special permit when it decides if it would derogate from the intent of the bylaw. Mr. Levy said that the bylaw does not say that houses with variances are exempt. Mr. Himmelberger said that the Board did consider whether this addition was detrimental because, otherwise it would not have modified the variance. Mr. Levy said that the Board applied variance standards.

Mr. Adams said that the previous Board in 1972 felt that the distance to the side paper street was reasonable. Mr. Himmelberger said that the previous Board said that it was not a paper street, that it was a side yard. He said that they overturned the Building Inspector's interpretation that it was a street. He said that Mr. Grant supports the previous Board's interpretation that it is not a street because it is not capable of being traveled on.

Mr. Levy said that he was concerned about setting a precedent. Mr. Himmelberger said that this will not set a precedent because the people will come before the Board seeking a special permit. He said that only in those instances where there is a pre-existing variance on the property that pertains to some of which they are seeking, can the Board choose to extend the variance to cover all of the changes.

Mr. Adams confirmed that the appeal is of the decision of the Building Inspector that LHR is required. He said that he would be prepared with this lot and previous variances to a reasonable decision.

Mr. Levy said that the bylaw talks about nonconforming single family dwellings which are subject to a finding. He said that Mr. Grant says that means that a finding was heard and granted. He said that the purpose of the exception was to not require people to go through LHR and ZBA review, which is a loophole in the bylaw. Mr. Himmelberger said that an applicant has to come before the Board in any instance where they are subject to a Section 6 finding. Mr. Levy said that this is a house that exceeds TLAG that has not gone through a special permit/finding proceeding or a LHR proceeding. Mr. Himmelberger said that there was a lengthy discussion about a special permit. Mr. Levy said that no finding was made. He said that Section 6 requires two findings. Mr. Himmelberger said that is if you are not otherwise subject to a variance. He said that they received a variance, which rendered it moot. He said that they were subject to and went through the process and that is all that is required under the bylaw. Mr. Adams said that subject to means that there is a finding and you have to live with it.

Mr. Himmelberger said that they have an approved variance. He said that they could go back before the Board to seek a special permit to increase or alter the size. Mr. Levy said that this would probably get through the Planning Board quicker.

Mr. Levy discussed making changes and coming back for a special permit/finding. Mr. Grant said that if the Board makes a finding that it is not more detrimental, they will be exempt from LHR.

Mr. Levy said that the size of the house could be reduced. Mr. Himmelberger said that it is the size that the homeowner desires for his needs. He asked if the Board would consider an application for a variance from LHR. Mr. Levy said the Board has not done that before. Mr. Himmelberger said that he is looking to avoid increased costs and time delays.

Mr. Levy asked about the TLAG. Mr. Himmelberger said that it will be 4,081 square feet. Mr. Levy said that it is located in a 10,000 square foot Single Residence District. Mr. Sheffield said that it will exceed the TLAG threshold by approximately 600 square feet. He said that it will not be more detrimental to the neighborhood. Mr. Adams said that the property abuts Weston.

Mr. Himmelberger said that the application was submitted in June when the garage was not included in TLAG. He said that the garage would now be included. He said that it would be appropriate to exclude the garage.

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

Mr. Levy moved and Mr. Adams seconded the motion to uphold the appeal to overrule the Building Inspector's determination. The Board voted unanimously to uphold the appeal.

ZBA 2017-84, GERALDINE JARVIS, 26 HARRIS AVENUE

Presenting the case at the hearing were David Himmelberger, Esq., and Jeri Jarvis, the Petitioner.

Mr. Himmelberger said that the request is for renewal of a special permit for a home occupation for Doggy Day Care in a Single Residence District and also for a modification to allow for overnight boarding for dogs of existing clients. He said that, in support of that petition, Ms. Jarvis submitted letters of support from all of her neighbors on Harris Avenue and Minuteman Lane, which abuts the rear of the property. He read a letter from the direct abutter at the rear.

Mr. Himmelberger said that he is a classmate of Ms. Jarvis from Wellesley High School and a customer. He said that he can personally attest to the fact that Ms. Jarvis is a dog whisperer. He said that he has a black lab mix who did not get along at a prior daycare and was asked to leave. He said that after going to Jeri's Day Care, the dog has changed. He said that support from the neighborhood for the modification is compelling. He said that there will be less traffic if a dog is left overnight. He said that traffic is not an issue now. Mr. Sheffield said that the statement from the Animal Control Officer was compelling as well.

Mr. Sheffield read the conditions that are in effect. He confirmed that the request is to modify Conditions #2 and #4, related to hours of operation and overnight boarding.

Mr. Levy asked how many dogs would stay overnight. Ms. Jarvis said that there would be a maximum of seven.

Mr. Adams confirmed that the petition was advertised as a renewal. The Board discussed modifying the existing permit. Mr. Levy said that the Board can change the conditions. He said that he would prefer to leave condition #2 the same but change #4 to permit a certain number of overnight dogs.

Mr. Adams said that he was concerned that the Board is not giving full notice to the public to give them an opportunity to voice any opposition. Mr. Himmelberger said that if the Board needs to re-notice the petition, the Petitioner requests that the petition be continued. He said that if Mr. Levy believes that the decision can be modified and given the fact that the petition has the support of all of the neighbors, the Petitioner would request that the Board vote tonight.

Mr. Adams said that the first that he heard that Ms. Jarvis would be seeking permission for overnight was today. He said that if the Board just heard about it today, it is not clear that it was something that was originally considered. He said that the Board could renew the decision and the Petitioner can come back for a modification at a new public hearing.

Mr. Sheffield said that he would like to see some indication of how the dogs will be cared for overnight. He said that it is quite different from the daytime.

Mr. Adams moved and Mr. Levy seconded the motion to grant renewal of the decision under the current conditions. The Board made findings in accordance with Section II A 8 (h) of the Zoning Bylaw. The Board voted unanimously to grant renewal of the special permit.

#### ZBA 2017-81 JONATHAN MANTAK, 37 LONGMEADOW ROAD

Presenting the case at the hearing was Michael Collins, Architect, representing Jon Mantak, the Petitioner. He said that Mr. Mantak submitted a letter. He said that the request is to demolish and replace a pre-existing nonconforming garage. He said that the new garage will be moved closer to the rear of the property and further away from the eastern property line where it is nonconforming by six inches. He displayed a rendering of the proposed garage. He said that although the proposed garage will be larger, it will not be more detrimental to the neighborhood. He said that it will be pushed back 110 feet from the street for a significant setback. He said that the new garage will be taller. He said

that they designed the front end gable to mimic the existing house. Mr. Adams said that the gable on the existing garage went in the other direction.

Mr. Adams said that the proposed garage was moved from the side yard setback by five inches. He asked why it was not moved further away for a more substantial reduction in the nonconformity. Mr. Collins said that he did try for a foot. He said that the client felt strongly about maximizing the yard as much as possible. Mr. Adams said that there is a tree that would keep them from moving the garage five feet over. Mr. Collins said that the actual function of coming into the driveway and making the turn and into the garage, the further west that it would move would make the turn more difficult and add more pavement.

Mr. Adams asked about the use of the second floor of the existing garage and the proposed garage. Mr. Collins said that the second floor of the existing garage is approximately 200 square feet and has ladder access for storage. He said that the new second floor space will not be finished except for a floor and stair with fire enclosure on the floor below and above. He said that the existing basement is old and wet. He said that this will be used as additional storage and play space for the kids and a potential studio for artwork. Mr. Adams said that no water would be allowed. Mr. Collins said that there is a slop sink proposed at the back of the garage on the first floor.

Mr. Sheffield said that the Board would insert a condition that there be no plumbing on the second floor of the garage. He asked if the stair will be open or enclosed. Mr. Collins said that it will be enclosed on the second floor for fire rating. He said that the stair will go up to a landing that will be posted and from that landing the stringers will go up to the second floor. He said that there will be drywall under the stair to separate the garage.

Mr. Adams said that the two immediate neighbors provided statements that they are aware of the proposed design and have no objection.

Mr. Sheffield asked if the lighting will be in soffits over the garage doors. Mr. Collins said that there will be two downlights in the overhang. He said that there is no room for carriage lights. He said that the soffit lights are more dark sky compliant.

Mr. Levy said that allow the garage will be pulled five inches further away from the side property line, the new garage will be eight feet higher. He said that the effect of it will probably be more dramatic. Mr. Collins said that it will be a sloped roof on the east side but it will not be as close an imposing as it currently is. He said that the existing garage has no architectural relation to the house. He said that they will match the roof pitch of the house.

Mr. Levy moved and Mr. Adams seconded the motion to approve a special permit, subject to the condition that there shall be no plumbing on the second floor. Mr. Adams identified the nonconformities and the Board made findings in accordance with Section XVII of the Zoning Bylaw.

Mr. Sheffield read the Planning Board recommendation.

The Board voted unanimously to grant a special permit.

#### ZBA 2017-82, ROBERT NASCIMENTO, 15 RIVER GLEN ROAD

Presenting the case at the hearing was Robert Nascimento, the Petitioner. He said that the request is for a special permit for a retaining wall that will be over four feet at the rear property line. He said that the wall will span 100 feet and vary in height from 4.5 to 7.5 feet. He said that the neighbor behind is

a contractor who tried to develop a plan to terrace the two properties. Mr. Nascimento said that he felt more comfortable coming before the Board for relief for the height of the wall.

Mr. Adams said that he was concerned about a 7 + foot wall right on the property line. He said that it is his understanding that the neighbor will grant access. He asked if any consideration was given to not being granted access if the neighbor's property is sold. He said that it could be difficult to maintain the retaining wall. He asked about siting it in two feet. Mr. Nascimento said that they were looking to gain as much yard space as possible. He said that they would be happy to follow any recommendation of the Board.

Mr. Sheffield read excerpts from Section XXIIB of the Zoning Bylaw regarding swimming pools. Mr. Nascimento said that the pool will be 11 feet from the side property line. He said that he spoke with Michael Grant, Building Inspector, and his interpretation of the bylaw was that because it will be an in ground pool, it would be ten feet. Mr. Nascimento said that his calculations were based on Googling what the walkway railings would be and it appeared to be at the edge of the water. Mr. Adams said that those dimensions are not shown on the plans that were submitted. Mr. Levy said that the Petitioner is not seeking any relief for the pool. Mr. Nascimento said that he has not applied for the pool permit yet.

Mr. Sheffield discussed the elevations from the adjacent property. He said that there will be a four foot protective railing on top of a seven foot high wall. He said that at least, a six foot fence will be required around the pool. He said that if the height of fences and walls was coordinated in the design of the pool. Mr. Nascimento said that the pool was shown on the plans because they may have to go down three feet or so. He said that if he has to rebuild a wall, he would have to come back before the DRB. He said that the northeast corner of the home down to Mr. Malafai's property, the wall would have to be rebuilt if they go down to put the pool in. He said that he would like to have a special permit for all of the walls and make a decision about the pool later. He said that he is requesting a special permit for the height and the setback of the retaining walls. He said that the rear and side walls will be the same whether they do the pool or not. He said that the interior may change if they build the pool.

Mr. Adams said that fencing will come under Mr. Grant's jurisdiction. He said that most of the walls will require fencing where there is more than a 30 inch variation. He said that he was concerned that the wall will be on the property line. Mr. Levy said that is the Petitioner's risk. He said that the Board would be approving the walls along the rear of the property and the north elevation.

Mr. Levy asked about the heights of the wall. Mr. Nascimento said that it will be four to seven and a half feet. Mr. Adams said that there is a separate law for retaining wall fencing and anything that is adjacent to a walking surface, whether it is grass or sidewalk. Mr. Sheffield said that is a building permit issue.

Mr. Levy moved and Mr. Adams seconded the motion to grant a special permit for a retaining wall, in accordance with the plans dated, July 26, 2017. Mr. Adams identified the nonconformities and made findings in accordance with Section XXIID of the Zoning Bylaw. The Board voted unanimously to grant a special permit.

#### ZBA 2016-67, ANDREW & GAIL WINDMUELLER, 12 POPLAR ROAD

Present was Gail Windmueller, who said that the request is for a minor modification to an existing special permit for a deck that was originally to be 8 feet 8 inches wide by 13 feet. She said that the

request is to increase the size of the deck to 12 feet by 13 feet. She said that it will remain inside the appropriate setbacks for the side yard.

Mr. Adams said that the reduced setback is di minimis because it is still within the setback that was granted for the building addition. Mr. Sheffield said that a 12 foot deck will be far more functional than an 8 foot deck.

Mr. Levy moved and Mr. Adams seconded the motion to make a determination that this is a minor modification that does not require a public hearing. The Board voted unanimously to made a determination that the requested change is a minor modification that does not require a public hearing.

As there was no further business to come before the Board, the hearing was adjourned at 10:30 pm.

Respectfully submitted,

Lenore R. Mahoney  
Executive Secretary

DRAFT