



## ZONING BOARD OF APPEALS

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ZBA 2020-07  
Petition of Jefferson Road 18 LLC  
18 Jefferson Road

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Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, February 6, 2020 at 7:30 pm in the Juliani Meeting Room, 525 Washington Street, Wellesley, on the petition of Jefferson Road 18 LLC requesting a Special Permit/Finding pursuant to the provisions of Section 14E, Section 17 and Section 25 of the Zoning Bylaw that demolition and construction of a two story structure that will meet setback requirements, on a 10,582 square foot lot in a Single Residence District in which the minimum lot size is 15,000 square feet, in a Water Supply Protection District, at 18 Jefferson Road, shall not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

On January 8, 2020, the Petitioner filed a request for a hearing before this Authority, and thereafter, due notice of the hearing was given by mailing and publication.

Present at the public hearing were David Himmelberger, Esq., Reed Diamond and Nick Monahan, Managers, Jefferson Road 18 LLC, the Petitioner.

Mr. Himmelberger said that the request is for a special permit to construct a new home on a pre-existing nonconforming lot with less than required area of 10,582 square feet in a 15,000 square foot Single Residence District. He said that other than lot size, the proposed new home will be fully compliant with all Zoning dimensional requirements. He said that TLAG of 4,153 square feet is below the Large House Review threshold of 4,300 square feet for the district. He said that the proposed new home will have a ridge height of 26 feet 9 inches, with a height above average finished grade of 31 feet 8 inches.

Mr. Himmelberger said that the original existing home was razed in November, 2019 with a demolition permit that was issued in error, without the required ZBA approval. He said that his client received an email from the Building Department indicating that the demolition permit was issued in error. The Chairman said that the Building Department issued a permit that the Applicant requested.

Mr. Himmelberger said that the Applicant submitted photographs, floor plans and elevation drawings of the razed home. He said that the new home will increase lot coverage from 1,424 square feet, or 13.5 percent, to 1,901 square feet, or 17.97 percent, which is well within the permissible limits.

Mr. Himmelberger said that a Stormwater Report was submitted. He said that the proposed infiltration system will decrease the stormwater rate and volume from the existing conditions, sometimes in excess of 50 percent.

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ZONING BOARD OF APPEALS

Mr. Himmelberger said that the 20 foot tree yard on the right side and in the rear yard will remain undisturbed and will comply with the Tree Preservation Bylaw. He said that an Arborist Plan was submitted to the Building Department with the building permit application. He said that installation of the stormwater system will not result in removal of more trees.

Mr. Himmelberger requested that the Board make a finding that the dimensionally compliant proposed home is not substantially more detrimental to the neighborhood than the pre-existing nonconforming structure. The Chairman said that the Board has no way to evaluate what the previous nonconforming structure looked like or how it sat on the lot. He said that the Board received comments from the abutters regarding the scale and height of the proposed house.

The Chairman questioned whether a special permit is needed to demolish a house. He said that the Board typically sees applications for teardowns prior to demolition and questioned whether grandfathered status was lost by demolishing the house prior to applying for a special permit. He said that the question now is whether just the lot is grandfathered. He said that there is nothing before the Board that shows when the lot was created, whether it was in common ownership or whether it was subject to a Zoning freeze.

Mr. Himmelberger read an excerpt from Section 17 of the Zoning Bylaw regarding discontinued uses. He said that it has to be abandoned for more than two years for the bylaw to apply. He said that the nonconformity of the lot is directly related to having a home on it. He said that the application for a demolition permit with an accompanying building permit application shows that the intent all along was not to discontinue a single family home on the property but to rebuild one.

Susan Wasilauskas, 242 Oakland Street, said that present with her were her husband, Richard, and her neighbor at 248 Oakland Street, Dorothy Ellis. She said that their properties directly abut the rear of 18 Jefferson Road and they feel that they might be the neighbors who are most impacted by the proposed construction. She said that the house is significantly larger than what was there. She said that their biggest concern is that the building is being shifted on the lot. She said that what was a significant distance of 29 feet 10 inches from the rear lot line will now be 21 feet. She said that it is a very steep hill. She said that by moving the house further back, it will loom much larger over Oakland Street.

Mr. Wasilauskas said that the previous garage was 22.8 feet at the closest point to the rear property line. He said that the new structure will be closer and 32 percent larger. He said that the roofed area will increase from 1,424 square feet to 1,878 square feet. The Chairman said that the house is constrained by the front setback but it appears that it could be shifted two feet forward. He said that it is a much larger house with larger massing. He said that the 12 to 13 foot grade change is significant.

Ms. Wasilauskas said that the plans do not show a porch or deck. She asked how they will use the back without putting something in there because it is so steep. She said that there are doors coming out of the basement level. Mr. Diamond said that those doors are for second egress and for more light. He said that they did not want a retaining wall. He said that backfilling might disturb tree root systems.

Mr. Wasilauskas discussed concerns about installation of the proposed storm drain and disruption of tree roots. He said that there are some significantly sized trees in the area that it will go in. Ms. Wasilauskas asked if it would be possible for the builder to mark where the infiltration system will be located. The

Chairman said that the system is shown at the rear right of the property on Plan 2 of 5. Mr. Himmelberger confirmed that the existing trees are shown on the plan.

Ms. Wasilauskas said that any outdoor lighting at the back will shine into her and Ms. Ellis' houses. The Chairman said that the Board will consider imposing a condition for that.

Katherine and Kevin McDonald, said that they are the direct abutters at 22 Jefferson Road. Ms. Macdonald discussed concerns that this project sets a precedent to take down a house and ask for forgiveness later. The Chairman said that the Petitioner asked for and received a permit to tear down the house. He said that if the Petitioner realized that they were going to get into this quagmire, they probably would have waited to demolish until after they had applied for a special permit. Mr. Himmelberger said that he was retained by his client after the Building Department told him that he needed a special permit.

Ms. McDonald said that two mature trees at the front of the house were removed. Mr. Himmelberger said that the trees were removed pursuant to the tree plan that was submitted.

Mr. McDonald said that the lot slopes from front to back and from one side to the other. He said that the intention is to move the driveway to the other side of the property, next to their house where there is a screen of mature trees on their property. He said that he would like to be assured that excavation related to moving the driveway, leveling the lot to build a house on, and other things will not disrupt the root structure of trees that have been there for at least 75 years. The Chairman said that the new house will be four feet closer to the lot line but well within the setback. A Board member recommended that there be more protection in the area of erosion control that is shown on Sheet 5 of 5 to keep equipment out of the tree area. Mr. Diamond said that throughout the project they will have a fence that establishes where the tree lawn is. He said that they have specific protection plans from a certified arborist. He said that during the excavation phase, an arborist will be on site to mitigate any impacts. He said that they understand that it is important to protect the roots for trees on this and abutting properties.

A Board member asked about the use of the stair at the back. Mr. Diamond said that it should not be there. He said that it would make more sense to have a small deck off of the kitchen or family room. He said that they can have a window instead of a door there and work to create any outdoor space toward the front of the property, which will limit any impact of lighting to the abutters to the rear.

The Chairman discussed concerns about a Section 6 finding to use a house that was demolished prior to filing for a permit as a basis for a special permit. He said that if there was a zoning freeze on the lot based upon Zoning at the time that it was created and the lot was not held in common ownership with abutting lots, the Board would not have to get to the issue of timing and the appearance of precedence.

The Board voted unanimously to continue the petition to March 5, 2020.

### March 5, 2020

Mr. Himmelberger said that all of the issues that were voiced by the Board or the neighbors have been addressed and have been incorporated in the revised drawings that were submitted. He said that the house was moved closer to the street, the rear deck and stairs were removed, the door off of the kitchen was replaced with a window, and cut sheets were submitted for dark sky lighting.

Mr. Himmelberger said that the pre-existing house was built in 1947. He said that when Wellesley enacted Zoning Bylaws (ZBL) in 1925, 18 Jefferson was designated as being located in a single family residence district. He said that the Town amended the ZBL in 1937 to require a minimum of 10,000 square feet. He said that the ZBL was amended again in 1940 to create 10,000, 15,000 and 20,000 square foot districts. He said that he provided a Zoning Map from 1940 that shows that Jefferson Road was located in a 10,000 square foot district. He said that the ZBL and Zoning Map were amended in 1951 to rezone the Sheridan Road area in which Jefferson Road is located from a 10,000 square foot to a 15,000 square foot district. He said that he attached the 1951 Warrant Article and the new Zoning Map from 1952. He said that he submitted the original building permit dated October 27, 1947 that included an as-built survey depicting the lot as containing 10,582 square feet.

Mr. Himmelberger said that 18 Jefferson Road was originally part of a Lot 2 on a plan recorded in 1937. He said that Lot 2 had frontage on Jefferson Road. He said that it was re-divided in 1947 and a new plan was recorded where Lot 2 became Lot 2 B, containing 10,582 square feet. He said that when the lot was created in 1947 it had 10,582 square feet, which was lawful because it was in a 10,000 square foot district.

Mr. Himmelberger said that the lot at 18 Jefferson Road abuts 14 and 22 Jefferson Road, 242 and 248 Oakland Street. He said that he provided the deed history for all five lots to show that none of the lots were in common ownership at the time that the Zoning was changed, after the house at 18 Jefferson had been built on a lawful 10,000 square foot lot. He said that the Warrant Article from 1951 acknowledged that many of the homes had already been built on undersized lots. He said that the evidence is clear that at all times 18 Jefferson Road was a lawfully sized lot. He said that in 1951, when the Zoning district changed to 15,000 square feet, the lot was not in common ownership with any abutting lots. He said that when the dimensions were increased by re-zoning, the lot itself became pre-existing nonconforming.

The Chairman said that Section 6 refers to nonconforming structures and uses, not lots. Mr. Himmelberger read an excerpt from Section 18A of the ZBL and said that it specifically addresses this particular instance. A Board member said that the Zoning Act does not prohibit a single family dwelling to be built on a lot that has at least 5,000 square feet and sufficient frontage. The Chairman questioned if the petition is appropriately before the Board if the house could be built as a matter of right. He said that the request before the Board is for a Section 6 Finding. He said that the Petitioner can apply for a building permit and if he is denied, can appeal to the Zoning Board. Mr. Himmelberger said that his client submitted a demolition plan that indicated that they would demolish and construct a new structure. He said that the Building Department issued the demolition permit and when his client applied for the building permit, the Building Department said that they would not have issued the demolition permit if they had understood that the lot was nonconforming.

The Chairman discussed having the Petitioner apply for a building permit and show that, based on Mr. Himmelberger's research, it is a buildable lot. He said that if the Building Department refuses the building permit, the decision can be appealed to the Zoning Board. He questioned whether this would be appropriate for a Section 6 Finding because it is not a pre-existing nonconforming structure. Mr. Diamond said that they applied for a building permit before the house was taken down. He said that they were directed to come to the Zoning Board for approval to build on what was deemed to be a nonconforming lot after they applied for the building permit. He said that during the building permit process they went through Tree Preservation and Historical Commission review and got approvals. He said the demolition permit included a proposed plan with the new structure.

Mr. Himmelberger said that his client met with the neighbors who were present at the previous hearing and revised the plans to address the neighbors' and the Board's concerns regarding the structure itself.

Mr. Himmelberger said that the Board can find that it is a pre-existing nonconforming use in that there was a single family dwelling on a nonconforming lot. He read the communication between his client and the Building Department. A Board member said that his impression is that the Building Inspector believes that you need a special permit to demolish and rebuild on undersized lots.

The Chairman said that Mr. Himmelberger's argument is that they do not need a permit but they are asking the Board to issue one. Mr. Himmelberger said that his argument is that this is a lawful pre-existing nonconforming lot and the house was taken down without an intent to abandon the ability to rebuild on the lot. He said that the Board can make a finding, based on what was submitted in terms of photographs and dimensioned elevations for the existing structure that was there before it came down, that what is proposed here is not substantially more detrimental to the neighborhood than the pre-existing nonconforming structure. Mr. Diamond said that the existing plot plan that was submitted shows how the pre-existing structure sat on the lot.

#### Statement of Facts

The subject property is located at 18 Jefferson Road, on a 10,582 square foot lot in a Single Residence District in which the minimum lot size is 15,000 square feet, in a Water Supply Protection District.

The Petitioner is requesting a Special Permit/Finding pursuant to the provisions of Section 14E, Section 17 and Section 25 of the Zoning Bylaw that demolition and construction of a two story structure that will meet setback requirements, on a 10,582 square foot lot in a Single Residence District in which the minimum lot size is 15,000 square feet, in a Water Supply Protection District, shall not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

Letter to Zoning Board of Appeals with attachments, dated 2/14/20, from David J. Himmelberger, Esq., an Existing Conditions Plan, dated 6/27/19 and a Civil Plan, dated 12/11/19, revised 2/18/20, stamped by Peter J. Nolan, Professional Land Surveyor, Detail Plans, dated 2/11/19, stamped by Edmond Spruhan, P.E., Existing Floor Plans and Elevation Drawings, dated 10/28/19, prepared by Howland Architecture Studio, and Proposed Floor Plans and Elevation Drawings, dated 12/5/19, revised 2/17/20, prepared by McKay Architects, Bulbrite Fixture Type SC Bulbs, Quoizel Lighting MHE8409K Fixture, NOX-56 Series Light Fixture and photographs were submitted.

On February 5, 2020 the Planning Board reviewed the petition and recommended that a special permit be approved, subject to conditions.

#### Decision

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

The Board found that the Design and Operation Standards in Part F are adequately satisfied and not otherwise prohibited in Part D.1, of Section XIVE of the Zoning Bylaw for Water Supply Protection Districts.

It is the opinion of this Authority that the proposed new structure on a nonconforming lot will not be substantially more detrimental to the neighborhood than the structure that was recently demolished within a time frame sufficiently contemporaneous with the application for this Board to treat it as being existing, and will not result in the intensification of existing nonconformities, and will not result in additional nonconformities.

Therefore, a Special Permit is granted, as voted unanimously by this Authority at the Public Hearing, for demolition and construction of a two story structure that will meet setback requirements, on a 10,582 square foot lot in a Single Residence District in which the minimum lot size is 15,000 square feet, in accordance with the submitted plot plan and construction drawings.

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

If construction has not commenced, except for good cause, the Special Permit shall expire two years after the date time stamped on this decision.

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CITY OF PORTLAND  
PLANNING DEPARTMENT

ZBA 2020-07  
Petition of Jefferson Road 18 LLC  
18 Jefferson Road

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APPEALS FROM THIS DECISION,  
IF ANY, SHALL BE MADE PURSUANT  
TO GENERAL LAWS, CHAPTER 40A,  
SECTION 17, AND SHALL BE FILED  
WITHIN 20 DAYS AFTER THE DATE  
OF FILING OF THIS DECISION IN THE  
OFFICE OF THE TOWN CLERK.



Robert W. Levy, Acting Chairman



Walter B. Adams



Derek B. Redgate

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ZBA 2020-07  
Applicant Jefferson Road 18 LLC  
Address 18 Jefferson Road

**NOT VALID FOR RECORDING UNTIL CERTIFIED BY TOWN CLERK**

In accordance with Section 11 of Chapter 40A of the Massachusetts General Laws, I hereby certify that twenty (20) days have elapsed after the within decision was filed in the office of the Town Clerk for the Town of Wellesley, and that no appeal has been filed, or that if such appeal has been filed, that it has been dismissed or denied.

Date:

Attest:

\_\_\_\_\_  
Cathryn Jane Kato  
Town Clerk

cc: Planning Board  
Inspector of Buildings  
lrm