

TOWN OF WELLESLEY



MASSACHUSETTS

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ZBA 2022-50
Petition of Scott & Elizabeth Lashway
38 Lowell Road

Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, July 7, 2022, at 7:30 p.m. in the Juliani Meeting Room, 525 Washington Street, Wellesley, on the petition of Scott & Elizabeth Lashway requesting a Special Permit/Finding and/or a Variance pursuant to the provisions of Section 5.1, Section 5.3, Section 6.2 and Section 6.3 of the Zoning Bylaw that construction of a two car garage with a front yard setback of 32 feet, at 38 Lowell Road, in a 20,000 square foot Single Residence District, shall not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

On June 9, 2022, the Petitioner filed a request for a hearing before this Authority, and thereafter, due notice of the hearing was given by mailing and publication.

DISMISSED WITHOUT PREJUDICE

July 7, 2022

Present at the public hearing were Scott and Elizabeth Lashway, the Petitioner.

Mr. Lashway said that the request is for zoning relief as a special permit or a variance. He said that the request was previously withdrawn from ZBA 2021-32 because the Board wanted to see more documentation with respect to the proposed carriage house and compliance with the 500 Foot Rule. He said that the subsequent submittal addresses some decision making activity by the town.

Mr. Lashway said that the existing house is nonconforming at 19.3 from the side property line. He said that the proposed carriage house will be conforming.

The Chairman questioned what jurisdiction the Board has in granting relief for a special permit. He said that the request is for a special permit for a pre-existing nonconforming structure that does not exist. He said that the lot meets the minimum size requirements. He said that the remedy to contest the Building

Inspector's application of the 500 Foot Rule is to apply for a permit, have the permit denied and appeal the denial.

Mr. Lashway said that for their original submittal on March 31, 2022, they looked at a number of properties that they believed should be measured within 500 feet, including 44 and 45 Lowell Road. He said that at the time they submitted their application, 44 Lowell Road received a building permit to build an addition on the front of the home with a setback of 31.7 feet from Lowell Road. He said that 44 Lowell Road is a corner lot. He said that prior to construction, the front yard setbacks were 60.45 feet to Lowell Road and 36.62 feet to Edmunds Road.

The Chairman said that the Building Inspector's position is that 44 Lowell Road now has frontage on Edmunds Road. He said that if Mr. Lashway disagrees with that determination, he can appeal it or request an enforcement order. Mr. Lashway said that they met with the Building Inspector on March 31, 2022 and asked him if they are within the setback of 44 Lowell Road, as a foundation had been dug and a building permit was approved. He said that Mr. Grant told them that he asked the homeowner at 44 Lowell Road to change her address during the construction process. The Chairman said that according to the Building Inspector, the Fire Department and the Select Board, the currently legal address for that property is Edmunds Road.

Mr. Lashway said that 44 Lowell Road is within 500 feet and the frontage is Lowell Road and Edmunds Road. He said that the frontage is defined as a property line that abuts a public way. The Chairman said that Michael Grant, who is the Zoning Enforcement Officer, interprets the bylaw and it is his position that for the purposes of the 500 Foot Rule on corner lots, you only consider one street, not both. Mr. Lashway said that the ZBA has a right to identify whether 44 Lowell Road is within 500 feet, such that the setback for the carriage house could be 32 feet. He said that Mr. Grant told them that they need to come to the ZBA to ask that specific question. The Chairman said that the correct way to tee that up would be to appeal Mr. Grant's decision as to the applicability of the 500 Foot Rule. He said that the ZBA would have jurisdiction to rule on it.

The Chairman discussed M.G.L. Chapter 40A, Section 6. Mr. Lashway said that the ZBA can grant a special permit because the Zoning Bylaws (ZBL) explicitly allow the Board to assess the side and rear yards for accessory buildings. The Chairman discussed State case law, Comstock v Gloucester. He said that the proposal before this Board is to create a new structure. Mr. Lashway read an excerpt from Section 5.3 of the ZBL. He said that the bylaw refers to, and the Board has authority to determine, if any additional building or structure can be built on a lot where there is a nonconforming structure.

Mr. Lashway said that 44 was on Lowell Road at the time of the Lashway's application. The Chairman said that there is no statutory provision for a Zoning freeze on this type of application. Mr. Lashway said that Zoning regulations in the US and Mass laws are built to restrict its owner property rights and in doing so, Zoning Boards are to interpret and apply Zoning regulations that do not overly restrict those rights. He said that their request is not a change from what is contained in Chapter 40A, Section 6. He said that because of Mr. Grant's instruction for them to come before the ZBA and his subsequent change of the address of 44 Lowell Road to an Edmunds Road address, is for the Board to consider either a special permit or a variance. He said that a special permit is appropriate when they are within the yard regulations of Section 5.3 of the ZBL, as applied by the town.

The Chairman said that with a special permit the Board has to make a finding that the proposed structure will not be substantially more detrimental to the neighborhood than the existing nonconforming structure. He said that the carriage house will be a lot closer to the street than the houses on Lowell Road within 500 feet. He said that the current condition is open space.

Mr. Lashway discussed including 45 Lowell Road in determining applicability of the 500 Foot Rule. He said that there is nothing in the bylaw that says that you cannot cross the street. He read an excerpt from the ZBL defining frontage. He said that the 500 Foot Rule explicitly reads that you start with the frontage of 500 feet. He said that 44 Lowell Road has a boundary line abutting a public way, which is Lowell Road and Edmunds Road. He said that arguably, 44 Lowell Road would have two frontages.

The Chairman said that the purpose of the 500 Foot Rule was for infill lots, lots that have not been built on between two lots to create a setback that is at least equal to the largest setback within 500 feet. He said that it sets the streetscape on the side where the houses are sought to be altered or built. He said that it has been this Board's position and that of the Building Inspector that you do not turn the corner or look across the street. He said that it goes between two intersecting streets.

Mr. Lashway said that the Building Inspector does not have the authority to change the frontage of 44 Lowell Road by changing the address. He said that it is clear that the frontage of 44 Lowell Road is within 500 feet, no matter what the address is. He said that Mr. Grant said that he looks to address but it should be that he looks to frontage. He read an excerpt from the ZBL regarding the definition of front yard. He said that front yard looks to the street line and there is no reference to address. The Chairman said that the Code Enforcement Officer has taken the position that the new construction next door to 38 Lowell Road cannot be used for consideration of the 500 Foot Rule. He said that if 44 Lowell Road is not included in the calculation for the 500 Foot Rule, a variance is the only relief that the Board can grant.

The Chairman asked about shape, topography or soil conditions causing a hardship. Mr. Lashway said that there is a large oak at the front of the property and large trees at the back. He said that if they put the carriage house 20 feet from the side property line, they will have to take down an 80 to 100 year old large oak tree. He said that there is a sloping hill with a six foot drop and issues with setbacks at the back of the property. He said that the Historical Commission raised concerns about pulling it closer to the house. He said that granite in the front yard runs deep and would have to be chipped if they were to put something there. He said that a granite ledge on the left side runs to the back of the house, underneath the new addition. He said that the property is located on a hill and a curve in the road.

Mr. Lashway said that all of the neighborhood houses have garages. He said that an existing unusable garage on their property was enclosed to make an office and an entryway to the house. He said that they want to have a garage for cars and storage in New England weather while maintaining the aesthetic of the historic home. He said that having a garage in light of how this neighborhood presents and the taxes that they pay is definitely a benefit and should be considered with respect to the hardship. He said that it is aesthetically consistent with the streetscape, as presenting to the neighborhood. He said that two houses in the neighborhood received building permits to come within 31.7 and 36.5 of the street. He discussed undue hardship with respect to enjoyment of their property and the Board's ability to consider that when evaluating a variance. The Chairman questioned whether any of those reasons meet the statutory definition of a hardship.

A Board member said that the Petitioner should show that they tried to meet the 500 Foot Rule as best as possible within the confines of the site. He said that without seeing the numbers, it seems like the Petitioner is trying to put the carriage house as far forward as they can.

Ms. Lashway requested that the Board allow the petition for a special permit to be withdrawn without prejudice. She asked that the petition for a variance be continued to the next available hearing date to allow them time to provide additional information to the Board.

The Board voted unanimously to allow the petition for a special permit to be withdrawn without prejudice and to continue the petition for a variance to September 1, 2022.

September 1, 2022

As there was no one present at the Public Hearing representing the Petitioner, the Board voted unanimously to dismiss the petition without prejudice.

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