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TOWN OF NEEDHAM
MASSACHUSETTS
BOARD OF APPEALS

Appeal of Building Inspector Decision
DENIED

Lauren and Wesley Soper, appellants
32 Mark Lee Road
Map 69, Parcel 43

January 20, 2022

Lauren and Wesley Soper, owners, have appealed a decision of a Building Inspector dated December 17, 2021 determining that a proposed addition and garage do not comply with setback requirements of the Zoning By-law. The subject property is a corner lot located at **32 Mark Lee Road, Needham MA** in the Single Residence B (SRB) District. A public hearing was held remotely on Zoom on Thursday, January 20, 2022, at 7:45 p.m.

Documents of Record:

- Application for Hearing, Clerk stamped December 17, 2021.
- Letter from Lauren and Wesley Soper dated December 17, 2021.
- Letter from Lauren and Wesley Soper dated February 8, 2022.
- Letter from Lauren and Wesley Soper dated March 8, 2022.
- Letter from Lauren and Wesley Soper Response to Neighbor dated March 8, 2022.
- Letter from David A. Roche, Building Commissioner dated December 17, 2021.
- Proposed Plot Plan of Land, prepared by Judy R. Pike, stamped by David A. Gosselin, Land Surveyor, dated August 18, 2006.
- Plan of Land, prepared by Field Resources, Inc, stamped by Bradley J. Simonelli, Land Surveyor, dated December 17, 2021.
- Plans, Schematic, and Elevation prepared by Susan B. Koslow, stamped by Susan B. Koslow, registered architect.
- Collection of Support Letters by appellants: Jennifer Palan Sherman; Tyler Young; Alex & Anna Weiss; and Joe McKee, dated December 16-17, 2021.
- Email from Dave Roche, Building Commissioner, dated December 28, 2021.
- Letter from Planning Board, prepared by Lee Newman, Director Planning and Community Development, January 4, 2022.

- Email from Carlos Argilagos dated January 19, 2022.
- Letter and photos from Carlos Argilagos and Linda Bruett, dated January 19, 2022.

January 20, 2022

The Board included Jon D. Schneider, Chair; Jonathan D. Tamkin, Vice-Chair; and Howard S. Goldman, Member. Also participating was Nik Ligris, newly appointed Associate Member. Mr. Schneider opened the hearing at 8:20 p.m. by reading the public notice.

Lauren Soper, owner appellant, reported that she is before the Board regarding the location of a new garage associated with an addition that is currently underway. She disagrees with how the Building Commissioner interprets rear setbacks and is appealing his decision.

Ms. Soper and Wesley Soper have hired a team of engineers and architect to design an addition that will accommodate their growing family. These plans assume that there was a ten-foot rear setback. This assumption was based on a Proposed Plot Plan of Land ("2006 plot plan") prepared in 2006 for the previous owners.

When seeking a Building Permit, the Building Commissioner took the position that a corner lot did not have a rear setback. He believes that a corner lot has two sides and two front setbacks. She and her design team were confused as the By-Law did not define a corner lot as having two sides and two front setbacks.

Ms. Soper argued that the Building Commissioner is taking a position different from the surveyor of the 2006 plot plan. She argues that the Zoning By-Law is ambiguous and the ambiguity favors the property owner. Ms. Soper researched 12 cases regarding ambiguity in property law and found no case which favored the municipality.

Mr. Schneider asked Ms. Soper if she had found any cases that addressed the issue of corner lots having a rear setback. She did not, but said that other municipalities identified corner lots as having rear lot lines.

Mr. Roche said that he has been the Town's Building Commissioner for ten years and has worked for municipalities for a total of twenty-five years. He has always interpreted corner lots as having two sides and two front setbacks with no rear setback.

Mr. Roche said that the 2006 plot plan had no relevance to the determination of the rear setback as the proposed addition met the required side setbacks.

Mr. Goldman requested that Mr. Roche identify the section of the By-Law that interprets corner lots. Mr. Schneider responded that it is found in the Definition section of the By-Law under *Frontage* which states *in the case of a corner lot frontage is between a sideline of such lot*. This can be read to say that corner lots have two sidelines and two frontlines.

Ms. Soper disagreed. She felt that the definition was ambiguous.

Mr. Goldman concurred it was not clear. Mr. Goldman asked Mr. Roche if there was any additional information that made him believe there are no rear setbacks for corner lots. Mr. Roche replied his determination was based on his interpretation of a corner lot. He thought corner lots should be spelled out more clearly in the By-Law and had asked Lee Newman, the Director of Planning, to bring the issue to the Planning Board. Mr. Roche noted that his interpretation has never been challenged before.

Mr. Schneider stated that the Planning Board agreed with the Building Commissioner's interpretation.

Mr. Tamkin said he lived on a corner lot and thought that he has a rear line. He agreed with Ms. Soper that the definition of sideline is not the same as a side setback. He wanted to know the negative impact of interpreting the existence of a rear for this case or any corner lot.

Mr. Roche said there would be a 4 ft. difference. A side setback has a 14 ft. requirement and a rear setback has a 10 ft. requirement. If one of the sides on a corner lot were a rear line a project could be four feet closer to a neighbor.

Ms. Soper said her current detached garage is 5 ft. from the property line. The new attached garage will be 10' from the property line. There is a breezeway connecting the house to the garage designed to soften the massing of an attached garage.

Mr. Schneider felt there were two ways that project could comply with the By-Law – 1) to attach the garage to the house without the breezeway or 2) move the garage back.

Susan Kloslow, architect, said that setback requirements limit designs that are sensitive to the historic architectural character of homes. She thought four extra feet of relief was insignificant in order to preserve the scale of the existing home.

Mr. Tamkin noted that the design was not the issue before the Board, but the interpretation of corner lot in the By-Law. Mr. Tamkin indicated that the Board is generally reluctant to oppose the Building Commissioner's interpretation of the By-Law.

Mr. Schneider said that he did not see a way for the issuance of a Special Permit under Section 1.4.6. The existing detached garage is more than 10' from the house. As an accessory structure, it is only required to be 5 ft. from the property line. Since the existing garage is conforming, relief under 1.4.6 is not available.

Ms. Soper said she was asking the Board to decide to honor their rear sideline. Mr. Schneider clarified that the Board is hearing an appeal from a decision of the Building Commissioner. This is a request that the Board interpret the definition of corner lot differently than the Building Commissioner.

Ms. Soper argued that the surveyor of the 2006 plot plan saw it as a rear line. Mr. Schneider responded that 2006 plot plan only indicates what the surveyor thought. It did not indicate what

the Building Commissioner thought or what interpretation the Town would follow.

Mr. Tamkin agreed with Ms. Soper that the definition of sideline and side setback was not the same and that the Town interpretation of corner lots was not consistent through history. He agreed it was ambiguous. Nevertheless, Mr. Tamkin thought the Board's decision would have a significant impact to the applicant and to all corner lots in the Town. Furthermore, deciding differently from the Building Commissioner and the Planning Board was a significant decision.

The Board requested that the Building Inspector provide more information on any harm from allowing a rear setback on a corner lot. Mr. Roche noted that corner lots have challenges that straight lots do not. He stated that a rear is not identifiable on a corner lot if a building is demolished or vacant. Identifying two side lines and two front lines for corner lots is constant whether there is a building or not and is unambiguous. In addition, inconsistencies would exist for two adjacent side properties sharing a street frontage; there would be different side setbacks with one property having a 14 ft. side setback and the another a 10 ft. one.

Mr. Roche hopes an amendment to the By-Law is adopted to clear up any ambiguity regarding corner lots. In the 10 years he has worked for the Town, issuing 2000 permits a year, this is the first challenge to his interpretation of a corner lot.

Mr. Goldman asked if the garage could be made less wide and longer to fit within the 14 ft. setback. Ms. Soper said the garage with a 19 ft. width barely accommodates two cars and she did not want to push it back and sacrifice the yard. Mr. Goldman thought that, since it barely accommodates two cars, why not make it narrower and longer. She likes her design and did not want it changed.

Ms. Soper noted that there was agreement about ambiguity on the definition of corner lots and argued that a decision should be made in favor of the appellant. Mr. Tamkin responded that ambiguity does not mean it is a successful argument or that it is going to be a rear setback.

Mr. Ligris asked what was being built over the garage. Ms. Soper did not know and they were keeping their options open.

Mr. Ligris asked about the status of the corner lot zoning amendment. Mr. Roche said that the language had been forwarded to the Ms. Newman for Planning Board consideration.

The hearing was open to Public Comments.

Mr. Schneider reported that Board had received several letters of support of the Appeal and one from the direct side abutter in opposition.

Carlos Argilagos, 26 Alfreton Road, was the abutter directly affected by the side setback. He was concerned about the proximity of the two-story addition. Currently, they have a single story garage facing their property and were opposed to a larger denser structure in the side setback. They concur with the Building Commissioner's interpretation of corner lots. From their vantage point, the adjacent property felt like a side property line.

Ms. Soper said the new garage will be 4 ft. taller and 4 ft. further away than the current garage. If the Appeal is denied, they will be making the addition taller.

Alex Weiss, 12 Mark Lee Road, was in support of the Appeal and had no issues with the addition.

Kathy Davis, 58 Warren Street, was in support of the Appeal.

Mr. Goldman appreciated the presentation and the sensitive addition in connection with the older structure. He agreed that the definition of Frontage for a corner lot is ambiguous. However, the Building Commissioner was unambiguous about his interpretation of corner lots which is supported by the Planning Board. He was also sensitive to the concerns of the direct abutter who will be impacted. He highlighted that the existing garage is in compliance under the Accessory Building section of By-Law and not eligible for Special Permit relief under 1.4.6 of the By-Law. When he engaged with the appellant to modifying the plans to comply with the setbacks, the appellant was set on the plans. Based on these factors, Mr. Goldman was in support of the Building Commissioner's interpretation. He was open to a continuance to review any case law that was favorable to the appellant where there is ambiguity in facts similar to this case.

Mr. Tamkin, for the first time in his 15-year tenure, disagreed with the Building Commissioner. Based on the ambiguity of the definition of corner lot and the different interpretation of rear line over the years, he was inclined to overruling the Building Commissioner. He was in agreement with the appellant in this case. He thought the Planning Board at Town Meeting should clarify this zoning issue regarding corner lots.

Mr. Schneider spent hours researching how to provide the relief sought. He looked for an avenue where the relief could be provided through a Special Permit, but could not find a way. He was reluctant to overrule the interpretation of the Building Commissioner and the Planning Board. However, Mr. Schneider was willing to continue the matter to allow the appellant an opportunity to present case law that will persuade the Board.

Mr. Schneider offered the appellants the option for the Board to take a vote or continue the item. He noted that the vote had to be unanimous to overturn the Building Commissioner's decision.

Ms. Soper asked for clarification as to what case law the Board was looking to move them.

Mr. Schneider responded that the Board would be looking for court decisions where, in the face of ambiguity, a court ruled that there should be a rear line on a corner lot.

Ms. Soper asked whether case law regarding ambiguity in By-Laws in general was sufficient. Mr. Schneider replied there is also a principal that courts should give deference to the administrative authority that interprets the By-Law. With the Planning Board writing the By-Law and the Building Inspector administering the By-Law both agreeing there is no rear to corner lots, compelling case law needs to be provided to move the Board.

Mr. Tamkin offered the appellants three options- Vote, Continue or Withdraw the Appeal.

Ms. Soper asked, if the Board denied their Appeal, could they go to Land Court. Mr. Schneider said they could go to court or redesign the project.

The Sopers did not want to redesign their project.

Mr. Tamkin offered Withdrawal without Prejudice as an additional option which would allow them to refile at a later date. The Sopers agreed to continued and look for case law regarding corner lots.

Mr. Soper asked for clarification about Withdrawal without Prejudice. Mr. Tamkin explained that after a full hearing, the Board could agree to a Withdrawal without Prejudice, which would allow the appellant to refile at any time giving them more time to find relevant case law and/or possible legal representation. Mr. Schneider noted this would also allow the appellants the opportunity to build the garage later or modify the garage plans.

Ms. Soper asked, if there was a denial by the Board, they could go to Land Court. Mr. Schneider again affirmed that they could go to Land Court. Mr. Goldman mentioned that Land Court would require that case law be provided. Ms. Soper understood and said her attorney told her they would do fine at Land Court. Ms. Soper requested a continuance.

Mr. Goldman moved to continue the Public Hearing for Appeal of Building Inspector Decision to the February 17, 2022 meeting at 7:30pm on Zoom. Mr. Tamkin seconded the motion. The motion was unanimously approved.

The meeting adjourned at 9:15 p.m.

February 20, 2022

The Board included Jon D. Schneider, Chair; Jonathan D. Tamkin, Vice-Chair; Howard S. Goldman, Member. Also participating was Peter Freidenberg, Associate Member and Nik Ligris, Associate Member. Mr. Schneider opened the hearing at 7:30 p.m. by reading the public notice.

Mr. Schneider reported that the Sopers had submitted a request to continue the Public Hearing to March 17, 2022.

Mr. Goldman moved to continue the Public Hearing to March 17, 2022. Mr. Tamkin seconded the motion. The motion was unanimously approved.

The meeting adjourned at 7:32 p.m.

March 20, 2022

The Board included Jon D. Schneider, Chair; Howard S. Goldman, Member and Nik Ligris, Associate Member. Also participating was Peter Freidenberg, Associate Member. Mr. Schneider

opened the hearing at 7:46 p.m. by reading the public notice.

Mr. Schneider assigned Mr. Ligris to be a voting member of the Board noting that he had been present at the prior hearings.

Mr. Schneider informed the Sopers that the Board had received and read their submitted materials and had also read the cases cited.

Ms. Soper said their materials included relevant case law and the *62 Central Avenue – ZBA Variance – 8-21-1984* (“1984 Variance”) regarding a corner lot. She noted that the Appeal was based on the agreed ambiguity in the By-Law regarding the definition of corner lot; the definition of sideline and side yard not being the same; the interpretation by the Building Commissioner not being a correct interpretation of the By-Law; the history of different interpretations of corner lots by different Building Commissioners; the reluctance by the Board of setting precedent was not sufficient grounds for a Decision; and the modesty of the project.

Mr. Goldman thought, given the ambiguity, the project could be accommodated by a narrow decision.

Mr. Schneider noted that, if the Appeal were approved on the basis requested, the appellant and property owners of corner lots could build a house 10 ft. from the adjoining property line. Though this project proposal was not imposing and would result in the garage being further away from the property line, the Decision would extend beyond this project allowing houses to be built 10 ft. away from an abutting property with the owner’s discretion to determine what is the rear lot line.

Ms. Soper argued that the rear lot line would be determined by the location of the front door not by the owner. Mr. Schneider remarked that, when a corner lot is vacant, a rear line could not be identified.

The meeting was open to public comment.

Mr. Arguilagos, the affected side property owner, said that he would be at a disadvantage with a side setback of 10 ft. instead of 14 ft. A 14 ft. side setback should be consistent for both abutting neighbors.

Mr. Ligris stated that he read the referred cases and did not see any pertaining to corner lots. He asked if there were any corner lot in the cases. Ms. Soper said she could not find any.

Mr. Ligris asked Ms. Soper the source she used to define a sideline to mean any boundary line. He understood sideline to mean sideline. Ms. Soper said she found the definition of sideline on an online dictionary which stated a sideline was an outer boundary. In addition, when doing research on Building Permits for corner lots, she encountered building permit cards and plot plans referring to sidelines for boundary lines which she understood not to mean side yard or side setback.

Mr. Friedenberg reported that he reviewed all the materials, the reference case law and watched the video of the January hearing. He understood that a determination by the Building Commissioner, as the official Zoning Enforcement Officer, requires a certain amount of deference and that specific compelling evidence is required to counter his conclusion.

He found the By-Law silent on the issue of corner lots and didn't see where the Building Commissioner came to his interpretation from the definition of *Frontage* where sideline was used twice with different meanings - sideline over road and sideline of the lot. He could not conclude the meaning of sideline.

He did not find the cases convincing pertaining to corner lot. He researched zoning resources and found no cases. He arrived at the conclusion of the existence of side yards on corner lots from a rational experience. As a pedestrian walking along a corner lot he perceived side yards, not rear yards.

He did not find the 1984 Variance relevant because the determination of whether the lot line was side and rear yard was not the issue to build in the 15 ft. setback. The relief would be the same for either a side or a rear yard; and they were granted a variance.

He did not find compelling evidence that different Building Commissioners, over time, had different interpretations. Though unfortunate for this appellant, he felt that if the Board upheld the appeal, it would mean that from now on the Town would understand that corner lots had a front, a side and a rear. He was unable to see how a rear yard would be determined as the By-Law does not specify that or who would do that. He concluded that the line in question was a side yard and not a rear yard.

Mr. Schneider said the back of the house did not face the rear of another house and he felt that the neighbor's house should be given the protection of a side setback. On a policy matter, serving for two years on the Big House Zoning Committee, the committee recommended zoning amendments which would increase side setbacks from 10 ft. to 14 ft. to provide relief from large houses overwhelming the neighbors. If the Board were to concur with the appellant, it would mean that going forward owners of corner lots could build a house 10 ft. from the abutting side property. He believed that would be bad policy. He agreed the By-Law is not explicit on matters of corner lots, but the Board has a tradition of maintaining the interpretation of the Building Commissioner unless there is a clear reason for overturning it. He thought, based on policy, that it made sense to keep neighbors 14' away from their side neighbors.

Mr. Ligris was sympathetic of the appellants. However, he agreed with the Chair's reasoning and deferred to the Zoning Enforcement Officer.

Mr. Goldman found the appellants' proposal reasonable. However, he could not see overturning the decision of the Building Commissioner based on the historic policy and the conclusions made by Board members.

Mr. Ligris moved to deny the Appeal of Building Inspector Decision. Mr. Goldman seconded the motion. The motion was unanimously approved.

The meeting adjourned at 8:15 p.m.

Findings:

On the basis of the evidence presented at the hearing, the Board makes the following findings:

1. The premises is a 15,728 square foot lot improved with a single-family home and a detached garage located in the Single Residence B District. The lot is at the corner of Marked Lee Road and Atherton Road.
2. The appellants propose to build a two-story addition (approximately 15 ft. x 10 ft.) to the rear of the existing house. They also propose to demolish the existing detached garage and replace it with a new two car garage irregular in shape, but approximately 20 ft. by 23 ft. The new garage will be only 7 ft. from the expanded house and attached with a breezeway. Since the new garage is less than 10 ft. from the expanded house, it is considered to be part of the house. The appellants propose to locate the new garage 10 ft. from the property line.
3. When the appellants applied for a building permit, the Building Commissioner determined that the new garage was being built on a side line that required a 14 ft. setback. He denied a building permit. The appellants brought this appeal.
4. The appellants argue that the new garage is being built on a rear line that requires only a 10 ft. setback. The Building Commissioner takes the position that corner lots have no rear line, but only two front lines and two side lines.
5. The appellants could easily modify the project in a variety of ways to comply with the ruling of the Building Commissioner including a) moving the garage closer to the house so it would have a 14 ft. setback, or b) eliminating the breezeway and moving the garage 10 ft. from the house where it would be an accessory structure that requires only a 5 ft. setback. The appellants refuse to change their plans.
6. The appellants argue that the current position is contrary to the position taken by prior Building Commissioners. The Board does not agree that either of the incidents cited by the appellants represent substantive decision that a corner lot has a rear lot line. In 2006, a prior owner filed a plot plan in connection with a proposed addition to the house that identified the lot line in question as a rear line. There was no work proposed that effected the setbacks. The fact that the Building Department did not return the plot plan to the surveyor to change the designation of the line from rear to side is not an expression that the Building Commissioner agreed that the lot line was a rear line. In 1984, an owner of a corner lot sought a variance to add a deck to the rear of his house. The owner described the lot line behind the house as a rear line and the Board referred to it as a rear line in its decision. However, a letter from the Building Commissioner indicated that the side setback and rear setback were both 15 ft. The Board never discussed the issue of whether

the line behind the house was a rear line or side line and it was irrelevant to the decision granting a variance.

7. The current Building Commissioner refers to the definition of “Frontage” in Section 1.3 of the By-law as a basis for his position. It says “Frontage – a continuous portion of a sideline of a way, public or private, between the sidelines of a lot in common ownership and in the case of a corner lot, between a sideline of such lot and the intersection of sidelines of ways”, The Building Commissioner acknowledges that the By-Law is ambiguous. He says that he has always followed the interpretation that corner lots have no rear line for his 25 years as a building regulator and that no one has previously challenged his interpretation.
8. The appellants argue that the By-Law is ambiguous and that ambiguous provisions should be interpreted in their favor. However, the appellants could point to no provision in the By-Law that supports their interpretation and could not find any case law where a court ruled that a corner lot has a rear line when the applicable by-law was silent or ambiguous.
9. The Board normally gives deference to interpretations of the By-Law by the Building Commissioner since he is the party with the most experience in administering the By-Law. The Board would overturn his ruling if the appellants could point to a provision of the By-law that supported their interpretation or if the position of the Building Commissioner were not logical.
10. From a policy perspective, the situation does not involve the rear of the applicant’s house facing the rear of another house. It faces the side of their neighbor’s house and that neighbor should be entitled to the benefit of a side setback. The Town increased the side setback several years ago in response to objections that large houses and additions were being built close to side lines that were offensive to neighbors. The determination by the Building Commissioner is logical and consistent with the policies reflected in the recent amendments to the By-Law.
11. Relief is not available under Section 1.4.6 which authorizes the Board to issue a special permit for the alteration or reconstruction of a legally non-conforming structure. The existing detached garage is more than 10 ft. from the existing house and located 5 ft. from the property line. As an accessory structure, Section 4.2.9 allows the detached garage to be 5 ft. from the side line and the existing garage is a conforming structure. The proposed garage will be less than 10 ft. from the expanded house and attached by a breezeway so it is no longer an accessory structure and considered part of the house.
12. The appellants argue that proposed garage will be further from the neighbor than the existing garage and should be less objectionable. If the applicant were proceeding under Section 1.4.6, this argument probably would persuade the Board to grant relief. However, the appellants seek a ruling that the garage borders on a rear line which would mean that the appellants (and other owners of corner lots) could build 2 1/2 story homes only 10 ft. from the lot line.

Decision:

On the basis of the foregoing findings, following due and open deliberation, upon motion duly made and seconded, the Board declines to reverse the ruling of the Building Commissioner.

SIGNATORY PAGE – 32 MARK LEE ROAD

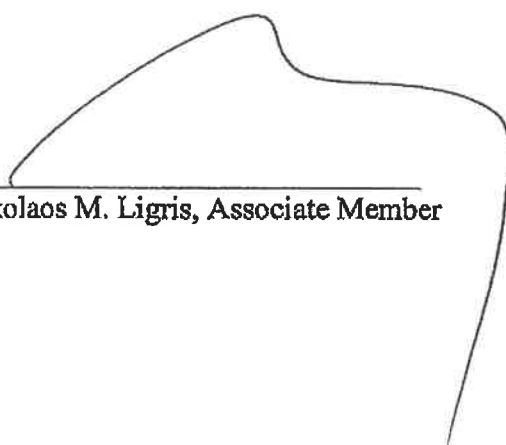

Jon D. Schneider, Chair

SIGNATORY PAGE – 32 MARK LEE ROAD



Howard S. Goldman, Member

SIGNATORY PAGE –32 MARK LEE ROAD



Nikolaos M. Ligris, Associate Member