



TOWN OF BROOKLINE

Massachusetts

BOARD OF APPEALS

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PATRICK J. WARD, Secretary

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 060064

On September 29, 2006, the Petitioner, Jamie D. McCourt applied to the Board of Appeals for a special permit pursuant to Section 5.14 of the Zoning By-Law for relief from the applicable street width requirements to allow certain lot lines to be reconfigured regarding a four lot subdivision at the property located at 170 Sargent Road.

The Board of Appeals determined that the properties affected were those shown on a schedule in accordance with the certification prepared by the Assessors of the Town of Brookline and approved by the Board of Appeals, and fixed November 30, 2006, at 7:30 p.m. in the Selectmen's Hearing Room on the sixth floor of the Town Hall as the time and place of the hearing on the application for special permit. Notice of the hearing was mailed to the Petitioner, the attorneys of record, if any, to the owners of the properties deemed by the Board to be affected as they appeared on the most recent local tax list, to the Planning Board and to all others required by law. Notice of the hearing was published November 9, 2006 and November 16, 2006 and for the second night of said hearing which was scheduled for December 21, 2006 a second notice was published on December 7 and 14, 2006 in the *Brookline Tab*, a newspaper published in Brookline and mailed to all those required by law. A copy of the initial notice is as follows:

TOWN OF BROOKLINE
MASSACHUSETTS
BOARD OF APPEALS
NOTICE OF HEARING

Pursuant to M.G.L., C.39, sections 23A and 23B, the Board of Appeals will conduct a public hearing to discuss the following case:

Petitioner: **McCourt, Jamie D.**
Location of Premises: **170 Sargent Road**
Date of Hearing: **11/30/06**
Time of Hearing: **7:30 p.m.**
Place of Hearing: **Selectmen's Hearing Room, 6th Floor**

A public hearing will be held for a variance and/or Special Permit from:

Section 5.14; Special Permit of the Zoning By-Law to Single Family residence with frontage to be realigned to Cottage Street as a result of a planned subdivision at 170 Sargent Road, Brookline

Said Premise located in an S-40 district.

The Town of Brookline does not discriminate on the basis of disability in admission to, access to, or operations of its programs, services or activities. Individuals who need auxiliary aids for effective communications in programs and services of the Town of Brookline are invited to make their needs known to the ADA Coordinator, Stephen Bressler, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone: (617) 730-2330; TDD (617) 730-2327.

**Diane R. Gordon
Harry Miller
Bailey S. Silbert**

At the time and place specified in the notice, a public hearing was held by this Board. Present at the hearing was Chair, Diane Gordon and Board members Lawrence Kaplan and Enid Starr., The Petitioner was represented by Jeffrey P. Allen of Seegel, Lipshutz & Wilchins, P.C., of Wellesley, Massachusetts. On December 14, 2006 the Board conducted a site visit. The hearing on November 30, 2006 was not completed, and therefore, the Board scheduled a second night and continued the matter to December 21, 2006.

On November 30, 2006, the chair commenced the hearing by allowing Ms. Starr to make a public disclosure pursuant to G.L.c.268A with regard to her son being an attorney at the same law firm, Seegal, Lipshutz and Wilchins, P.C. as counsel for the Petitioner. Ms. Starr indicated that she has made the required formal written disclosure to the Board of Selectmen and they had made the

appropriate findings with respect to her ability to serve as a Board member on this case and other cases. A copy of that disclosure form is a public record on file with the Board of Selectmen's Office. The Chair asked if anyone present had any objection to Ms. Starr serving on the Board for this particular case. There being no objection, the Chair proceeded with the hearing.

The Chair stated that first the Board would hear from the Petitioner and then take up the motions filed by Attorney Neal Glick of Donovan Hatem, P.C. on behalf of the abutter, the Sargent Estates Trust.

PETITIONER'S APPLICATION FOR SPECIAL PERMIT

The Petitioner seeks a Special Permit with respect to frontage pursuant to Section 5.14 of the Zoning By-Law for the property located at 170 Sargent Road, Assessor's Atlas Sheet 81, Block 332, Lot 10 (the "Property"). The Property is in an S-40 zoning district and contains approximately 79,322 square feet. On June 5, 2006 an ANR subdivision plan was submitted to the Planning Board to realign the lot lines of 170 Sargent Road and 40 Cottage Street, however, the plan was withdrawn. The Petitioner is now before this Board seeking a Special Permit under Section 5.14 with respect to frontage for the Property on Cottage Street.

The Petitioner's proposal realigns the lot lines of four existing parcels between Cottage Street and Sargent Road. The lot at 170 Sargent Road, currently with 92 feet of frontage along Sargent Road, would be divided approximately in half, but with no change to the aforementioned frontage on Sargent Road. The rear part of the property would be combined with an approximately 30-foot wide strip of land from the lot to the southwest (marked "Former Lot 3A" on the plan submitted by the Petitioner) to provide 29.7 feet of frontage along Cottage Street. The rest of this southwestern lot (Lot 3A), which does not have any structures on it besides a small playhouse, would be combined with the existing lot located at 40 Cottage Street (marked "Former Lot 2A" on submitted plan) creating Lot 4. Finally, the remainder of the lot at 170 Sargent Road (marked "New Lot 5" on submitted plan) would continue to use the existing access to Sargent Road. The lot to the west of 170 Sargent Road ("Existing Lot 1A") would not be changed. Each of the lots as proposed conform to the minimum lot size (40,000 s.f.) and the minimum frontage (25 feet) requirements of the Town's zoning bylaw. The proposal creates a "New Lot 6" with 29.7 feet of frontage along Cottage Street. The proposal before the Board

does not change the number of lots currently existing, nor does it change any frontage on Sargent Road. Cottage Street, a public way opened and dedicated to public use in 1841 varies in width from approximately 32 to 40 feet. Therefore, the Petitioner seeks a special permit pursuant to §5.14 of the Zoning By-Law. The Petitioner submitted two subdivision plans prepared by J.F. Hennessey Co. dated January 24, 2006 (depicting the current configuration of the four lots) and September 11, 2006 (depicting the proposed reconfiguration of the four lots). Both plans are incorporated herein by reference and attached hereto as Exhibits A and B respectively.

The Property is located between Cottage Street, a public way, and Sargent Road, a private way owned by the Sargent Estates Trust. Sargent Pond and its inlet stream abut 170 Sargent Road to the east. Currently, there is a single family home on the Property as well as a single family home on the property located at 40 Cottage Street. The two remaining lots (New Lot 5 and existing Lot 1A) which front on Sargent Road are vacant.

Attorney Jeffrey Allen of Seegel, Lipshutz and Wilchins presented the case for the Petitioner. Mr. Allen submitted a copy of a Power Point presentation dated November 30, 2006 containing color photographs, plans and other information a copy of which is incorporated herein by reference. Mr. Allen stated that under this proposal no additional lots are being proposed. Currently, there are four lots and this proposal realigns the lot lines of these four parcels, however, it does not create any additional lots. There is frontage for two of the four lots on Cottage Street and a driveway could be built as a matter of right on either of these two lots. The Petitioner, however, seeks to realign the lot at 170 Sargent Road to front on Cottage Street. Cottage Street is a one-way street less than 40 feet wide, therefore, the Petitioner seeks a special permit from the Board pursuant to Section 5.14 of the Zoning By-Law.

Section 5.14 – Lot Frontage provides:

Every lot shall have a minimum frontage of not less than 25 feet in S and SC Districts, and of not less than 20 feet in other districts, upon a street not less than 40 feet in width; except that the Board of Appeals may grant a special permit for use of a lot which has the required frontage upon a street not less than 30 feet in width, provided such street had been opened or dedicated to public use prior to 1922 or has been approved by the Planning Board as part of a subdivision. Such frontage shall not be obstructed from vehicular access to the street by walls, fences or other barriers.

Mr. Allen noted that the Board recently granted a special permit in a similar case for four lots on Heath Street, which is a two-way street. The Chair asked which lots were being

reconfigured. Mr. Allen stated that Lots 3A and 2A were being reconfigured resulting in a larger Lot 4 with the existing house at 40 Cottage Street, a new Lot 5 fronting on Sargent Road and new Lot 6 which they are requesting the Board grant a special permit to allow the frontage on Cottage Street. There are a total of four lots and the number of lots will not change. Mr. Allen also noted that a driveway off of Cottage Street was not being proposed, although in his opinion a driveway could be built off of the existing Lot 3A on Cottage Street that would comply in all respects with the Zoning By-Law.

Board Member Kaplan asked whether the new Lot 5 was a buildable lot. Mr. Allen stated that it was buildable, but the Sargent Road Trustees had raised an issue regarding the driveway. Mr. Kaplan asked whether access to the existing house on the Property would continue to be accessed through the driveway off of Sargent Road. Mr. Allen stated that until such time as the ownership of the lots changed the driveway off of Sargent Road would be used to access the house. In the future a driveway might be proposed for Cottage Street, but that was not being proposed at this time.

Mr. Allen concluded his presentation by opining that the standards for granting a special permit had been met. The site was appropriate for the use as a single family house lot because there are existing single-family homes on Cottage Street. Creating a lot with frontage on Cottage Street will have no adverse impact on the neighborhood because the house is in existence. Finally, the traffic report which was later confirmed by the Town's Engineer indicates that there is ample site distance should access via a driveway off Cottage Street be proposed in the future.

Mr. Allen next called on Joseph Geller of Geller DeVellis, Inc. the Petitioner's Landscape Architect to describe the proposal. Mr. Geller stated that Lot 1A was not being changed. The lot lines were being moved to create Lot 6 with the existing house at 170 Sargent Road to front on Cottage Street and Lot 5 which would be a vacant lot to front on Sargent Road. The remainder of Lot 3A would be combined to create Lot 4 with the existing house at 40 Cottage Street. Mr. Geller then briefly described the neighborhood and the existing homes and driveways on Cottage Street. With respect to Cottage Street Mr. Geller noted that it varies in width and that the frontage proposed is just past the backwards "S" curve in the road.

The next speaker was Ronald DeRosiers, P.E. of MDM Transportation Consultants, Inc. the Petitioner's Traffic Consultant. Mr. DeRosiers submitted a written report to the Board dated November 21, 2006 which is incorporated herein by reference. Mr. DeRosiers stated that they had conducted two field studies both a traffic study and speed study. The speed data on the street was

collected at a point 150 feet from the point where a driveway would be constructed to service the new Lot 6. The speed data indicated that the 50th percentile and 85th percentile observed speeds were 20 miles per hour and 23 miles per hour, respectively. Mr. DeRosiers stated that the 85th percentile speed data was what is utilized by traffic engineers for a safety analysis. Utilizing the 85th percentile data, the recommended stopping sight distance would be 140 feet and on this roadway the stopping sight distance in the area of new Lot 6 is approximately 210 feet, well in excess of what is considered safe. The Chair asked for his opinion on the capacity on Cottage Street. Mr. DeRosiers stated that volume data was collected which indicated that there were approximately 200 vehicles traveling on Cottage Street in the a.m. and p.m hours which operates at a service Level A which is the best possible level. He stated that Cottage Street was a very low volume road. During the peak p.m. hours only 10% of capacity was used and in the a.m. peak hours only 18% of capacity was used. Based on their studies there would be no traffic impact as it related to access in and out at the point where the frontage is proposed on Cottage Street.

Mr. Allen stated that because two Planning Board members were concerned about a future driveway off Cottage Street, Mr. Geller had prepared a design of a driveway to show that mature trees could be maintained and that a driveway could be built in accordance with the Zoning requirements. The Petitioner was not, however, proposing a driveway at this time. Mr. Allen concluded his presentation by stating that the proposed frontage on Cottage Street was reasonable and met all of the criteria for a special permit.

The Chair asked Ms. Selkoe to please point out where Sargent Pond was located and where the wetlands buffer area was. The Chair then asked if there was anyone present who wished to speak in favor of the proposal. There was no public comment in favor of the proposal.

The Chair then asked if there was anyone wishing to speak in opposition. The Chair recognized Mr. Neal Glick of Donovan Hatem, P.C.. Mr. Glick spoke on behalf of the Sargent Estates Trustees who are opposed to the proposal. Mr. Glick stated that he represented all of the Trustees of Sargent Estates, Samuel Pasternack, Claire Stampfer and Roger Servison.

Mr. Glick then requested that before the Board considers his two dispositive motions he wanted to first make a few comments. He opined that this proposal is more than reconfiguring lot lines. To find that that was all this proposal was about would ignore the history and context of this matter. The Petitioner first appeared before the Planning Board last March with an ANR subdivision for different lots and additional lots. Prior plans submitted to the Planning Board but

later withdrawn showed a driveway at 12% grade which the Planning Board calculated was a 14% grade. The prior plans also showed multiple retaining walls. Both times the ANR plans were withdrawn because Section 5.14 of the Zoning By-Law requires a special permit for the frontage on Cottage Street. While there are four lots presented, Mr. Glick opined that there would be more than 4 lots in the future. In his opinion, the narrow neck for the frontage on Cottage Street was used to maximize value, maximize the number of potential lots and ignored neighborhood and environmental concerns.

Mr. Glick noted that there was nothing in Section 5.14 that stated no special permit was required if the applicant was merely reconfiguring lot lines. In his opinion this was really two subdivisions. Mr. Glick then briefly described the properties affected and the importance of Sargent Pond and its inlet stream.

Mr. Glick then requested that the Board consider two motions. First, a motion to dismiss the matter because no special permit can issue since the paved area of Cottage Street in this area is only 21 feet. Since the paved area is only 21 feet in this area, as a matter of law they are not entitled to a special permit. Second, the case should be dismissed because his clients who are direct abutters and own, in fee, the pond and roadways in Sargent Estates were never notified of this hearing in accordance with the Board's Rules and Regulations as well as Chapter 40A, Section 11 of the General Laws.

Mr. Kaplan stated with respect to the notice issue that it is his understanding that if the parties show up for the hearing they waive the notice issue. The Chair asked if the Trustees received individual notices. Mr. Glick stated they had not. Ms. Starr asked if his clients were prejudiced by not receiving notice. Mr. Glick stated they were, because they found out so late. The Board briefly discussed the notice issue and decided to hold a second night of hearing and both readvertise that hearing and send notice of the second night to abutters. Anyone who was unable to speak this evening would be given another opportunity to be heard at the second hearing which would cure any alleged notice issue. The Board instructed Polly Selkoe, Assistant Planning Director to send notice for the continuation of the hearing on December 21, 2006 to the addresses on the Assessor's tax list as well as the addresses provided by Mr. Glick for his clients. The Board denied the Trustees' motion to dismiss with respect to notice, because 1) the Town Clerk provided evidence that the requirements of G.L.c. 40A with respect to notice were met; 2) any notice issue would be cured by the continuation of the hearing which would be re-noticed and re-advertised; and

3) the Chair would provide an opportunity for any person not present at the November 30th hearing to speak on December 21, 2006.

With respect to the special permit Mr. Glick noted that Section 9.05 states that the Board shall not approve a special permit unless all five conditions are met. While he agrees that condition 5 pertaining to affordable housing is not applicable he requested that the Board focus on the use as developed, because in the future it will be developed, and there will be a driveway at some point in the future that will serve the existing house and maybe more than one house.

Mr. Kaplan noted that using a driveway for more than one lot would require another special permit and that the Board would have to consider that separately at another time. Mr. Glick agreed. Mr. Glick went on to note that the Board had received letters and testimony in opposition to granting this special permit and that at least two members of the Planning Board were opposed. Mr. Glick also represented that the Conservation Commission was opposed to this proposal.

The Chair noted for the record that the Board had not received anything from the Conservation Commission with respect to this application for a special permit. Ms. Selkoe indicated that there was no official position taken by the Conservation Commission on this proposal. Mr. Glick stated that the Conservation Commission had discussed the importance of the pond and its inlet stream and opined that these were the Town's two most important resources which would be adversely impacted if these lots were developed. He also noted that as configured this lot with frontage on Cottage Street would have no room for adequate storm water management or catch basins. The pond and stream would be affected as the lots are developed in the future.

The Chair stated that if the properties are further developed or a driveway is proposed in the future the owner would have to submit a storm water management plan at that time and at that time it would be reviewed. The only issue before the Board at this time is whether to grant a special permit under Section 5.14 for frontage on Cottage Street nothing more. The Petitioner is not proposing to develop anything right now. Mr. Glick stated that they are in fact proposing to develop the lots and build a driveway and that was clear from the plans previously submitted to the Planning Board.

The Chair stated that the plans that Mr. Glick keeps referring to were withdrawn and are not before the Board. She stated that it is inappropriate to refer to plans that were withdrawn at the Planning Board and are not before the Board for consideration.

Mr. Kaplan stated that the Board can not speculate as to future plans or analyze the matter on a worst case scenario basis. They needed to deal with the matter before them which was whether a special permit could be granted for frontage for the lot on Cottage Street. Mr. Glick noted that the use as developed must contemplate a driveway, because the petitioner has done a traffic study relative to the impact of a driveway in this location.

Mr. Kaplan stated that the traffic study is also important to show that access is adequate at this location and not illusory.

Mr. Glick stated that the use as it will be developed in the future will create a visual blight on the neighborhood and ruin the rolling hillside and historic stone wall. The opponents retained Robert Hicks, P.E. of Howard Stein Hudson Associates, Inc. to conduct a traffic study. A copy of this report dated November 29, 2006 was submitted to the Board and is incorporated herein by reference. Mr. Glick stated that their traffic study raises some safety concerns. Mr. Glick went on to state that the site is inappropriate and is the most dangerous area possible. He went on to state that he believes this site was chosen in order that another lot may be developed in the future thereby increasing the number of lots from 4 to 5. He noted that there are no details with respect to a future driveway in this location and no information as to how many lots this driveway would serve. He concluded by stating that the special permit should not be granted even with conditions, because conditions can not address the neighborhood and environmental concerns.

The next person to speak in opposition to the proposal was Kevin McCarthy of 88 Cottage Street. Mr. McCarthy indicated that in addition to his home at 88 Cottage Street he also owns a separate one-acre buildable lot which abuts the Property. Mr. McCarthy is opposed because he believes it is not a safe area. The petitioner is not a Brookline resident and the proposal negatively impacts the neighborhood. In his opinion it is a bad precedent to set, because if this curb-cut is allowed 3 or 4 more will follow. The location is dangerous, because it is at the narrowest, windiest spot on Cottage Street. He requests that the Board deny the application.

The Chair then set Thursday, December 14, 2006 at 3:15 p.m. for the Board's site visit. The Chair requested that counsel for both sides be present at the site visit, however, she stated that no testimony will be taken.

The next speaker in opposition to the proposal was Roger Servison one of the Trustees of the Sargent Estates Trust. He stated that he had tried to work this matter out with the McCourts, but

they did not respond. He requested that the Board consider whether there is a better and safer way to do this for the environment.

Ms. Starr suggested that the Board conduct its site visit before hearing from any other speakers so that they would have a better understanding of the issues. The Chair first asked whether there was anyone present who wished to speak who would not be available for the continuation of the hearing on December 21, 2006. There were no further speakers.

Mr. Kaplan asked that the Board have the Town Engineer take a measurement of the street at the proposed frontage and get an opinion from Town Counsel with respect to measuring the width of the roadway. The Chair also requested the Town's traffic department to provide an opinion on the dueling traffic reports. The Chair stated that it was always her understanding that a street is measured by the width of the right of way not just the paved portion. Nevertheless, an opinion from Town Counsel on this issue will be requested.

The Board then heard again from the Petitioner's Traffic Consultant, Mr. DeRosier of MDM Transportation Consultants, Inc.. Mr. DeRosier stated that with respect to the report prepared by Howard Stein Hudson Associates, the speed studies were not taken from appropriate locations. The speed studies were conducted at the exact access point which was not appropriate and prior to the curve in the road which was not the correct distance. Based on his data there would be absolutely no queuing of cars at this location. Finally, he pointed out that the report at page 2 concludes that site distances are in fact met.

The Board then concluded the first night of the hearing and continued the matter to December 21, 2006. Present at the hearing on December 21, 2006 was the Chair, Diane Gordon and Board members Lawrence Kaplan and Enid Starr. The Board had conducted the site visit as scheduled on December 14, 2006. Present at the site visit was Polly Selkoe, Assistant Planning Director, Michael Shepard, Zoning Administrator for the Town, attorneys Jeffrey Allen and Neal Glick, Joseph Geller, Landscape Architect for the Petitioner, Ronald DeRosier, P.E. of MDM Transportation Consultants, Inc., Town Counsel Jennifer Dopazo and Board Members Gordon, Kaplan and Starr.

The Chair first called on Town Counsel, Jennifer Dopazo to present her opinion as to whether, for the purposes of determining lot frontage under Section 5.14 of the Zoning By-Law, the width of a street should be measured by the width of the right of way or the paved portion of the right of way only. The Chair noted that Town Counsel had provided a written opinion on

this issue dated December 19, 2006 which is incorporated herein by reference. Town Counsel stated that based on her review of the case law and past practice of this Board it is her opinion that the proper measurement is the width of the right of way. Town Counsel noted that the Board must interpret the provisions of the Zoning By-Law. In interpreting the by-law the Board may look to past practice, the common meaning of the language used in the by-law, logic, common sense and reason. Section 5.14 provides, in relevant part, "...the Board of Appeals may grant a special permit for use of a lot which has the required frontage upon a street not less than 30 feet in width, provided such street had been open or dedicated to public use prior to 1922... ." Section 2.19(4) of the Zoning By-Law defines a Street as "A public or private way, alley, lane, court, or sidewalk which is open or dedicated to public use and parts of public squares and places which form traveled parts of highways."

According to the Town's 1951 List of Public Ways, a copy of which was attached to Town Counsel's opinion as Exhibit A, Cottage Street was accepted and dedicated to public use on March 1, 1841. The width of the right of way for Cottage Street is listed as 35-40 feet and the width of the pavement is 22.50 feet. Town Counsel indicated that the Town Engineer recently measured the roadway cross-section at 40 Cottage Street and found that the width of the right of way in this particular location is 32 feet (approximately 22 feet of pavement and 5 feet of shoulder on each side from the stone wall in to the pavement). Currently, there are several existing single family house lots with frontage on Cottage Street. Town Counsel represented that according to her discussion with the Town Engineer, a way is always measured by the right of way and not solely the paved portion of the right of way.

Town Counsel noted that according to the 1951 List of Ways the width of the right of way for most streets in Brookline is 40 feet. This is consistent with Section 5.14 of the Zoning By-Law requiring lot frontage upon a street not less than 40 feet in width. The width of the paved portions of the majority of streets in Brookline is less than 30 feet. According to the Planning Department, many lots in Town front on streets where the paved portion is less than 30 feet wide. Town Counsel provided the following examples where the paved portion of the right of way is less than 30 feet:

Beech Road - 21'
Cameron Street - 13-24'
Existing homes on Cottage - 22'
Elm Street - 20'

Grigg's Terrace - 20'
Hart Street - 20'
Linden Court - 15'
Warren Street - 20-28'
Portions of White Place - 17'

Town Counsel stated that although several cases were cited by the parties in their written memoranda, one thing is clear in the case law, and that is that great deference is given to local Zoning Boards to interpret their own by-laws. With respect to some of the cases cited by the parties and mentioned in her memorandum Town Counsel clarified several points. First, Jenckes v. Building Commissioner of Brookline, 341 Mass. 162 (1960) has not been overturned. The issue in that case was whether a certain provision of a by-law was constitutional. Although not on point, the case is somewhat instructive. For example, in Footnote 2 of the Jenckes case the Court noted with respect to the width of the roadways in Brookline:

The parties by stipulation also agreed that 'Fairmount Street is paved its entire length; a maximum width of 20.7 feet at the easterly end; a width between 19 and 20 feet throughout except for a short distance near [one driveway west of the locus] where the paved surface is 15.7 feet. There are many 40-foot accepted streets in Brookline where the paved surface is 24 feet wide,' the remainder being sidewalks, 'although present requirements for a 40-foot street are a 30-foot paved surface with two 5-foot wide sidewalks.'

The Sargent Estates Trustees rely heavily on *Shea v. Board of Appeals of Lexington*, 35 ass.App.Ct. 519 (1993). In this case, the Court found that the portion of the street (Rockville Avenue in Lexington) at issue in the case was not actually built, and, therefore, access for the purposes of creating lot frontage at that location of Rockville Avenue was illusory. The Court stated:

"...the section of Rockville Ave upon which the lot fronts does not exist in fact. A fire truck cannot drive on a plan. A zoning by-law which requires frontage on a way shown on an approved plan must be understood, if the purpose of the by-law is not to be undermined, to require an actual way, constructed on the ground, not just a depiction of a way on a plan. The planning board's approval may have legal significance under the zoning by-law's definition of a "street" if the way depicted on an approved plan has been constructed as approved (Rockville Avenue is shown on the assertedly approved plan as a way forty feet in width) but not where it has never been constructed at all."

Shea at 523.

Town Counsel noted that the facts in the matter before the Board are quite different than in the *Shea* case. Cottage Street is a public way in existence since 1841 that currently services several other existing homes.

Town Counsel informed the Board that she met with the Fire Chief and asked him to inspect the area of the proposed frontage. She indicated that the Chief had a conflict in his schedule this evening, however, she represented that he had no concern with access on Cottage Street itself, and finds that the street as a one-way is accessible and serviceable by emergency vehicles. The Fire Chief did express concern that any future driveway be designed in a manner to provide both an adequate turning radius off of Cottage Street as well as adequate width for fire trucks to access the existing house should the current access from 170 Sargent Road change.

Therefore, if the Board grants a special permit under Section 5.14 of the Zoning By-Law Town Counsel recommended that the permit contain a condition requiring that any future driveway plan be reviewed and approved by the Fire Chief or his designee.

Town Counsel stated that the matter before the Board is whether the lot meets the requirements of Section 5.14 of the Zoning By-Law pertaining to frontage in order to consider granting the application for a special permit. Ultimately, how to interpret the by-law and whether the conditions for approval of a special permit have been met under Section 9.05 rests with the Board. Town Counsel concluded by thanking the Board for its time and making herself available for any further questions. The Board had no further questions for Town Counsel.

Claire Stampfer, a Trustee of the Sargent Estates Trust spoke in opposition to the proposal. She expressed her concern over setting a precedent for pork chop lots on this unique street. She stated Cottage Street is very unique in its proximity to the city yet maintaining its rural ambience. She believes the lot shape is out of place and there will be no room for landscaping should a driveway go in in the future. If a driveway is proposed in the future the house will be visible from the street and a rare Japanese Lace Bark Pine which is said to be the largest in North America will be lost. She is also concerned about storm water management should a driveway be put in off Cottage Street. Finally, she stated that some people do speed on Cottage Street and she believes this proposal is dangerous and will be detrimental to the neighborhood. She requested that the Board deny the relief requested.

The next speaker was Werner Lohe of 25 Salisbury Road. Mr. Lohe stated he was a member of the Town's Conservation Commission but was not speaking on behalf of the

Commission, which had not officially considered this matter. He asked that the Board take into consideration the effect of the subdivision and development of this immediate area on Sargent Pond and its inlet stream which are very important resources to the Town.

There being no further speakers, the Chair asked whether Mr. Glick had anything further to add to his pending motions.

Mr. Glick stated that even if the paved portion of the way on Cottage Street was the paved portion plus the sidewalks it would be less than 30 feet. Mr. Glick referred to several letters and memoranda which he submitted to the Board dated June 7, 2006 (addressed to the Planning Board), December 1, 2006 (e-mail), December 14, 2006, December 19, 2006 (via e-mail) and December 21, 2006 copies of which are incorporated herein by reference. In his opinion, prior Town Counsel agreed with him that the proper measurement under Section 5.14 of the by-law is the paved portion of the right of way. He opined that the 1951 Street List was out-dated and the data unreliable. He stated that the fear of many properties being non-compliant is unreasonable as variances or other relief could be granted as needed.

Mr. Allen then spoke on behalf of the Petitioner with respect to the motion to dismiss. Mr. Allen had submitted a letter in opposition to the motion to dismiss dated December 20, 2006. A copy of Mr. Allen's December 20, 2006 letter is incorporated herein by reference. Mr. Allen stated that prior Town Counsel never issued an opinion stating that the proper measurement under Section 5.14 is the paved portion of the way only. The prior opinions of Town Counsel dealt with ANR plans under G.L.c.41, s.81 and whether the private ways in Sargent Estates were open to the public for the purposes of the subdivision control law. Any suggestion that Town Counsel's prior opinion addressed the proper measurement of the width of a way under Section 5.14 is simply not true.

Mr. Allen noted that Section 2.19(4) of the Zoning By-Law defines the term "Street" as a public or private way. It does not state the "paved portion". The right of way for Cottage Street is over 30 feet. Mr. Allen noted that the Board in the past and as recently as a few months ago in a case dealing with four lots at 464 Heath Street measured the width of the street by the width of the right of way. Section 5.14 also speaks of the way and that portion dedicated to public use. The Planning Board, the Zoning Board and Town Counsel have always interpreted it this way. He noted that Cottage Street has other existing single family homes. He questioned how they came into existence, because the width of the paved portion of Cottage Street had not changed.

The Chair then asked Board members for their comment on Mr. Glick's Motion to Dismiss, because the Property was not located on a way with 30 feet of pavement.

Mr. Kaplan stated that he agreed with Town Counsel's analysis of the law and the past practice of this Board, the Planning Board and the Town Engineer with respect to interpreting Section 5.14. He noted that nothing in the by-law suggests that the width of a street is to be measured only by the paved portion of a way.

The Chair stated that she spoke to Peter Ditto, the Town's Engineer and he felt very strongly that to measure a way only by the paved portion would result in many properties being in violation of the by-law. Mr. Kaplan stated that virtually every property in Town would require some form of zoning relief. The Chair stated that she was confident that the Town did not intend for the by-law to be interpreted as suggested by Mr. Glick. Ms. Starr agreed and stated that the portion to consider is that portion open and dedicated to public use which is the width of the right of way. Based on all of the testimony and the documents submitted the Board unanimously voted to deny the Trustees' motion to dismiss.

The Board then went back to the issue of whether to grant a special permit under Section 5.14 and heard from Polly Selkoe, the Assistant Planning Director for the Town. Ms. Selkoe reported that the Planning Board was split 2 to 2 on its recommendation. The Planning Board had submitted a Memorandum with attachments dated November 9, 2006 a copy of which is incorporated herein by reference. Two Planning Board members supported approving the use of the new lot as shown on the subdivision plan prepared by Richard Watson and dated Sept. 11, 2006 provided that so much of the wall as obstructs vehicular access was removed. The two supporting members acknowledged that the use might result in the need for access from Cottage Street but noted that any driveway would need to meet the requirements of the Town's Zoning Bylaw or seek the appropriate zoning relief. Additionally, the width of Cottage Street did not appear to pose a safety hazard, especially because Cottage Street is a one-way public roadway. Although Cottage Street is not 40 feet wide in all sections, it is no less than 30 feet wide along the subject lots' frontage. The zoning bylaw specifically allows for a special permit for public streets not less than 30 feet wide. Since several curb cuts and access points already exist along Cottage Street, they believed one more was appropriate; would not adversely affect the neighborhood; and would not present a serious hazard to vehicles or pedestrians. In addition, the attorney representing the Sargent Trust stated that the Trust would not allow any new driveways

onto Sargent Road, even the use of the existing abandoned driveway, limiting the access options for the subject lot to Cottage Street.

The remaining two Planning Board members were concerned that a future proposed driveway entrance location as a result of the ANR subdivision would be very close to the limits for safety and visibility with respect to Cottage Street's existing alignment. A presumed driveway in the proposed access strip would not be characteristic of other driveways along Cottage Street and they believed would adversely affect neighboring properties, due to the nature of the steep grade change between Cottage Street and the vehicle court at the existing house. They believed that such access may require retaining walls on the sides of the driveway. A reconfiguration of the lot lines in this ANR subdivision might provide a safer and more appropriate access location to the property that would have less detrimental impacts on the neighborhood. Also, the statement by the attorney representing the Sargent Trust that the Trust would not allow new driveways, even the existing abandoned driveway, to access Sargent Road raised a further concern about the ability to gain access to the proposed New Lot 5, and thus the viability of the proposed subdivision. Therefore, the Planning Board voted (2-2) on a motion to recommend approval of the requested special permit based on the subdivision plan prepared by J.F. Hennessy Co. and dated September 11, 2006.

The next speaker was Frank Hitchcock, Building Inspector for the Town. Mr. Hitchcock stated that all zoning requirements have been met. Mr. Hitchcock noted that the 4 lots as reconfigured were still 4 lots. The parameters of the entire parcel had not changed under this proposal. The only issue is Section 5.14 and whether a piece of land is appropriate for frontage on Cottage Street. In his opinion all other zoning requirements are met and the criteria under Section 9.05 are met. He noted that the lots are near Sargent Pond and the inlet stream, but there is a buffer zone that addresses the environmental concerns and there is no driveway proposed at this time. There are existing homes on Cottage Street. He stated that the Building Department had no objection to the granting of a special permit in this case.

The Board then heard closing arguments from counsel for the opponents, Neal Glick and counsel for the Petitioner, Jeffrey Allen.

The Board deliberated on this matter and having considered the testimony and the reports and other documents submitted as well as the site visit made the following findings:

1. Cottage Street is a public way opened and dedicated to public use in 1841.

2. A Street is measured by the width of the right of way.
3. Cottage Street is a one-way street which varies in width from 32 to 40 feet.
4. At the point where the frontage for "New Lot 6" is proposed Cottage Street is approximately 32 feet wide.
5. Cottage Street is safe and accessible for emergency vehicles.
6. The Property is located in a single family residential district.
7. There are existing single family homes on Cottage Street.
8. The proposed use of the "New Lot 6" for the existing single family home is appropriate and the lot meets the minimum 40,000 square foot requirement for this S-40 zoning district.
9. The proposed "New Lot 6" has frontage of approximately 29 feet on Cottage Street.
10. The stone wall at the area of the frontage for "New Lot 6" can be removed.
11. The use of "New Lot 6" for a single family home will not adversely affect this single family residential neighborhood.
12. No driveway from Cottage Street is proposed at this time for the "New Lot 6".
13. Traffic reports indicate that: 1) there are adequate site lines at the proposed frontage for the "New Lot 6"; 2) Cottage Street is a low volume street; 3) only 10-18% of vehicular capacity is utilized at peak traffic times on Cottage Street; 4) if a driveway is developed at the location of the frontage for the "New Lot 6" there will be no safety hazard to pedestrians or vehicles; 5) there were no accidents on this portion of Cottage Street for the past three years; and 6) if a driveway were developed off of Cottage Street for "New Lot 6" it would have no impact on queuing of vehicles.
14. The proposed creation of a "New Lot 6" with frontage on Cottage Street to be used as a single family residential lot does not create a nuisance or serious hazard to vehicles or pedestrians.
15. Adequate and appropriate facilities exist for the currently proposed use since access for vehicles and emergency apparatus to the existing single family house on the "New Lot 6" is by way of Sargent Road through "New Lot 5". Both lots are under the same ownership.
16. The Petitioner's proposal will not adversely affect the supply of affordable housing.
17. The Petitioner's proposal meets all of the criteria required by Section 9.5 of the

Zoning By-Law for the granting of a special permit.

Accordingly, the Board unanimously voted to grant a special permit pursuant to Section 5.14 of the Zoning By-Law, subject to the following condition:

1. Any future design for a driveway at the Property from Cottage Street shall, prior to the issuance of a building permit, be reviewed and approved by the Fire Chief or his designee with respect to adequate turning radius off of Cottage Street, width of the driveway for emergency vehicles and any other safety concerns.

Unanimous Decision of
The Board of Appeals:

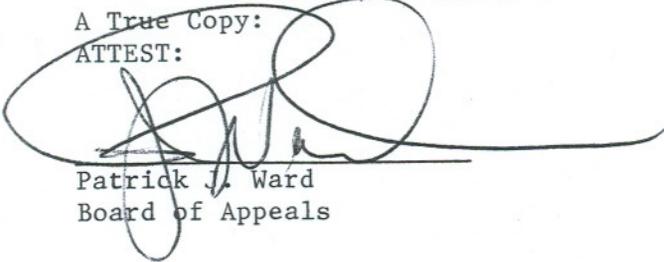


Diane Gordon, Chair

Filing Date: January 8, 2007

A True Copy:

ATTEST:



Patrick J. Ward
Board of Appeals

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