

TOWN OF WELLESLEY



MASSACHUSETTS

ZONING BOARD OF APPEALS

TOWN HALL • 525 WASHINGTON STREET • WELLESLEY, MA 02482-5992

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ROBERT W. LEVY
WALTER B. ADAMS

April 19, 2012

David Himmelberger
One Hollis Street, Suite 400
Wellesley, MA 02482

Re: ZBA 2012-17
599 Washington Street

Dear Mr. Himmelberger:

Please be advised that the Board voted unanimously at the Public Hearing on April 5, 2012 to allow the petition to be withdrawn without prejudice.

Any future petition regarding 599 Washington Street requiring relief from the Board of Appeals will require a new application and a check for an application fee of two hundred dollars and twenty-five dollars mailing and publication fee.

If you have any questions, or need further assistance, please do not hesitate to call me.

Sincerely,

A handwritten signature in cursive script that reads "Lenore R. Mahoney".

Lenore R. Mahoney
Executive Secretary, Zoning Board of Appeals

Town Clerk
Planning Board
Inspector of Buildings

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January 31, 2012

Richard L. Seegel, Esq.
Chairman, Wellesley Zoning Board of Appeals
Town of Wellesley
525 Washington Street
Wellesley, MA 02482-5992

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Re: Petition for Modification of Special Permit for 599 Washington Street, Wellesley

Dear Mr. Seegel:

I represent Nancy Erne, the record owner of 599 Washington Street, and have submitted a Petition for Modification of a Special Permit, to allow the continued usage of the above property as a two-family dwelling without the requirement that Mrs. Erne remain as an owner occupant of the property. The following sets for the underlying facts and rationale in support of this Petition.

Facts

The subject property is a two story, two-family, condominium structure located in a Townhouse zoning district on Washington Street, between a Business District and a Single Residence District, and across the street from a multi-family residence district.

The subject property was converted from a single family residence to a two-family residence as part of the Wiswall Circle Condominiums Townhouse development in 1981. This development was the subject of Site Plan Review by the Zoning Board of Appeals, which gave permission to divide the house horizontally into two dwelling units. The Zoning Board of Appeals noted at the time in its decision that while the house did not "meet the criteria for definition as a "Townhouse" within the meaning of

the Zoning Bylaws of the Town of Wellesley”, it was “located within a Townhouse District and is to be part of an overall “Townhouse” complex”. It was the unanimous decision of the ZBA that granting of a Special Permit to allow the single family house to be used as a two-family house within the proposed “townhouse” project would not be injurious to the neighborhood nor to the public good and would be in general harmony with the intent and purpose of the Zoning Bylaw. A Special Permit was granted for a two year period.

Thereafter, the Special Permit was renewed without incident for eight three year terms commencing in 1983. In 2002, the ZBA imposed, for the first time, a new condition that Nancy Erne be the owner occupant of one of the two dwelling units for the duration of the Special Permit. This condition was subsequently imposed in the Special Permit renewals in 2005, 2008, and 2011.

Mrs. Erne is 90 years old and would like to have the flexibility of no longer being required to reside in one of the units, and when the time comes, also wishes to be able to pass the property to her heirs in its current status as a two-family structure.

Rationale

Section XXV of the Town’s Zoning Bylaws, providing for the allowance of special permits, provides that they may only be granted for uses which are in harmony with the general purpose and intent of the Zoning Bylaw, and shall be subject to general or specific provisions as set within the Zoning Bylaw. Additionally, the permits may also impose conditions, safeguards, and limitations on time or use, in order to further the objectives of the Zoning Bylaw. It is respectfully submitted that the imposition of condition that Mrs. Erne be an owner occupant of the subject premises is wholly inconsistent with the Board’s exercise of discretion to impose those conditions, safeguards, or limitations on time or use to further the objectives of the zoning bylaws. It is unclear what objective is obtained by so conditioning the Special Permit to Mrs. Erne as an owner occupant.

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The creation of the two-family structure was done in conjunction with a thoughtful and comprehensive review attendant the development of the condominium townhouse project. This is not a scenario where a two-family structure is situated in the midst of a single family residence district, but rather one in which the two-family condominium fits squarely within the ambience of the neighborhood.

While the Board correctly observed in its 2002 decision that the Special Permit ran to Mrs. Erne and not to the land, it does not follow, in so running, that Mrs. Erne must occupy the property, nor that should it be sold, that a new Special Permit should not be granted.

In Huntington v Zoning Board of Hadley, 12 Mass. App. Ct. 710 (1981), the court observed that while special permits may be limited to a particular applicant, the considerations on which the permit is granted still relate to the land rather than the applicant. Huntington, at 717. Having determined that the issuance and renewals of the Special Permit for the continued use of the structure as a two-family residence was neither injurious to the neighborhood or public good and was in harmony with the general intent and purpose of the Zoning Bylaw, it is difficult to comprehend how that finding would in anyway be altered should Mrs. Erne cease to be the owner occupant of the premises.

It has been also held that a special permitting authority may not consider past zoning violations of an applicant when determining whether to issue a Special Permit. Dowd v Board of Appeals of Dover, 5 Mass. App. Ct. 148, (1976). By reverse analogy, if it is impermissible to consider the character and reputation of an applicant, it necessarily follows that it should be impermissible to limit the Special Permit to a single individual, to the exclusion of all others.

Conclusion

As the imposition of a condition that Mrs. Erne continue to be an owner occupant of the subject premises does nothing to further the purpose and intent of the Zoning

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Bylaws, the Petitioner respectfully requests that the Special Permit be modified and Condition 1 removed.

Very truly yours,



David J. Himmelberger

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