



BOARD OF APPEAL

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Appeal of Rudolf Penndorf and
Erna Penndorf

Pursuant to due notice the Board of Appeal held a public hearing in the hearing room on the second floor of the Town Hall at 8:25 p.m. on June 25, 1970, on the appeal of Rudolf and Erna Penndorf from the issuance of a building permit by the Building Inspector to Francis T. Kinlin for the alteration and repair of a barn into a recreational building on the premises at 144 Oakland Street. Said appeal was taken under the provisions of Section XXIV-B of the Zoning By-law.

On May 27, 1970, the appellants filed their appeal with this Board and thereafter due notice of the hearing was given by mailing and publication.

Albert Auburn, Attorney, represented the appellants at the hearing.

Rudolf Penndorf, 148 Oakland Street, testified under oath, that the latter part of May, a large amount of lumber, windows and other materials were delivered to the site. On Wednesday, May 20, 1970, he called the Building Inspector and was told an application had just been filed for the proposed work. On May 21, 1970, the building had already been started and he called the Building Inspector again on Thursday, May 28, 1970. Work stopped three or four days after May 28, 1970.

Erna Penndorf, 148 Oakland Street, testified under oath, that she met and talked with her neighbor (Mr. Kinlin's daughter), who stated that she was going to get married and was going to live in the building involved. She felt that as it was her property, she could use it as she desired.

Joseph E. Scammon, Building Inspector, stated that he did not feel that the 20-foot side yard requirement applied in this case.

Statement of Facts

The property involved is located within a Single-residence District, requiring a minimum lot area of 15,000 square feet. The lot contains 12,721 square feet and has on it a single-family dwelling and a large building which was originally a barn, but in recent years has been used by the owners, it was stated on the application, for recreation purposes.

On May 19, 1970, Francis T. Kinlin, filed an application with the Building Department for a permit to perform the following work on the building involved, "Miscellaneous alterations - replace rotted windows, close garage doors and replace with window. Erect brick chimney." It was stated on the application that the building had last been occupied as a "Barn - Recreation Area," and would be occupied for the same purpose. A permit for the proposed work was issued by the Building Inspector of May 21, 1970.

Subsequently, on May 21, 1970, another application was filed by Mr. Kinlin for a permit to build a "deck" on the building. Said permit was granted on June 24, 1970.

At the hearing attorney Auburn expressed his view that there were two issues to be determined by the Board of Appeal. The first he stated to be whether or not a recreational building is to be considered an auxiliary building under the Zoning By-laws so as to be exempt from the 20-foot side yard requirement of Section XIX of the Zoning By-law; and the second being whether or not an auxiliary building, such as a barn or garage, can be altered or reconstructed into a recreational building and still retain its status as an auxiliary building.

Appellants' counsel maintained in effect that a recreational use is not a recognized adjunct or auxiliary use under Massachusetts law so as to exempt a recreational building from the side yard requirement otherwise applicable to buildings and structures under Section XIX of the Zoning By-law. He was further of the view that an existing barn or garage, which may properly be considered as an auxiliary use to a dwelling, cannot be altered or changed so as to be used for an entirely different, non-accessory use, to wit, a recreational building. Reference was made (presumably by way of analogy) to Chapter 40A, Section 5, of the General Laws which specifically provides that a non-conforming use loses its immunity or exemption to conformity with Zoning By-laws where its use is substantially changed.

Appellants concluded, therefore, that the existing garage or barn, though properly considered an auxiliary use or adjunct to the dwelling, will lose that classification when it is altered or changed into a recreational building, and, therefore, must conform to the twenty-foot side yard requirement of Section XIX of the Zoning By-law, as well as any other requirements of the By-law applicable to buildings and structures.

Decision

The Board has made a careful study of all the evidence submitted and has taken a view of the Locus. The question presented to the Board for its decision is whether the building permit issued by the Building Inspector on May 21, 1970, should be revoked. The Board is unanimously of the opinion that said building permit should be revoked for the separate and independent reasons hereinafter set forth. The Board is incidentally of the same view with respect to the permit which was granted on June 24 subsequent to the filing of this appeal, but is restricting its order herein to the permit granted on May 21, 1970.

1. Assuming the accuracy and completeness of the building permit applications' stated purposes, the Board is of the opinion that a recreational building and use of the nature and scope here indicated is not a permitted "customary accessory use" within the meaning of Clause 7 of Section II of the Zoning By-law and that the building permits should not have been granted.

2. Putting aside the question of the propriety of the accessory use, the Board believes the uncontroverted testimony of Mrs. Penndorf relative to a conversation with her neighbor indicating an intent to use the remodeled premises for residence purposes. The very large size of the structure and the nature of the work already accomplished, as well as those further alterations apparently contemplated, are more consistent with such an intended use than with the limited purpose stated in the building permit applications. It is noteworthy that the person to whom this statement of intent was attributed

was present at the hearing and chose not to testify. Therefore, the Board is of the opinion that both of the building permits referred to above were sought for the ultimate purpose of changing the barn to a residence and that such conversion has been proceeding in violation of the Zoning By-law.

3. The Board also is of the opinion that the alterations, proposed and underway, are illegal and that the building permit granted on May 21, 1970, should be revoked for further reasons unrelated to any intended residential use. The structure in question is a very large one, clearly exceeding in height the one and one-half stories permitted in the side yard exception for certain accessory buildings by Section XIX of the Zoning By-law. The structure prior to the alterations now underway, even viewing the circumstances in a manner most favorable to the owners, constituted a non-conforming accessory use under Section XIX, being properly used as a barn and garage with possibly some secondary incidental recreational use. Viewing the evidence most favorably to the owners, we have here an attempt to alter the structure substantially, to extend and change its use drastically - a course clearly in contravention of Section XVII of the Zoning By-law governing non-conforming buildings, structures and uses.

Therefore, the Board finds that the subject building is being altered in violation of the Zoning By-law and that the building permit granted on May 21, 1970, was and is invalid ab initio. Accordingly, the appeal is granted and the building permit is revoked.

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