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ZONING BOARD OF APPEALS
TOWN HALL WELLESLEY, MA 02181JOHN A. DONOVAN, JR., Chairman
ROBERT R. CUNNINGHAM
KENDALL P. BATESELLEN D. GORDON
Executive Secretary
Telephone
431-1019WILLIAM E. POLLETTA
FRANKLIN P. PARKER
SUMNER H. BABCOCKZBA 89-22
Petition of Robert E. Paul, III
3A Waban Street

Pursuant to due notice, the Permit Granting Authority held a Public Hearing on Thursday, April 27, 1989 at 8 p.m. in the Selectmen's Meeting Room (Conference Room B) at the Town Hall, 525 Washington Street, on the petition of ROBERT E. PAUL, III requesting a Finding pursuant to Section XVII and Section XXIV-D that the extension of the pre-existing non-conforming use and structure of his two-family dwelling to a three-family dwelling at 3A WABAN STREET, in a Single Residence District, shall not be substantially more detrimental than the existing non-conforming use to the neighborhood.

On April 10, 1989 the petitioner requested a hearing before this Board and thereafter due notice of the hearing was given by mailing and publication.

Presenting the case at the hearing was Robert E. Paul, III, who stated that the original architectural plans for converting the three floors at 3A Waban Street into three condo units did not meet state building codes as to fire egress and double access. New plans were drawn which combined the three floors as 1 two-floor unit using the second and third floor and one unit on the first floor. Mr. Paul wanted to reserve the basement space for future development as had been done at 3 Waban Street. Mr. Paul said that he intended to request that the 3 floors above ground level be converted to 2 units. Unfortunately, he did not realize that by the wording of the request, the right to have a third unit might be affected at a later date.

Mr. Paul said that it wasn't until March, 1989, upon receiving a second tax bill for Unit 3A-A (the basement), that he realized there had been an appraisal made on 3 units in the building. Mr. Paul said he had sold one unit, but still received two tax bills and therefore, believed he still had two units.

The Board questioned how the Assessor's office had become involved. Mr. Paul said that he was going to apply for a building permit for the third unit. Coincidentally, he met with the Assessor on the issue of abatements on other units in the complex. At that time, the Assessor advised Mr. Paul that in reviewing the tax bills on all the units, he had discussed them with the Building Inspector who had noted the two-year lapse in non-conforming status as a three-family dwelling.

The Board stated that the portion of the building that had been converted to two units was initially the total three apartments. If they had remained as 3 units, Mr. Paul would be seeking to add a unit in an area which could be considered a fourth unit. The space for the three units has been used.

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Mr. Paul said that he had used about 90% of the space which existed on the three levels. Due to the grandfathering provisions, he would not be able to add on living space in excess of 9.9% of the pre-existing space, so had saved 300 to 400 feet to develop.

Robert Paul, Jr., the petitioner's father, said the property had been purchased as a three-unit building and is being taxed as a three-unit building. Due to the fire codes, it was necessary to convert the three-unit space into two units. The only reason the third unit wasn't added at the time was due to expense.

Richard Levine, 3A Waban Street, spoke in opposition to the petition. He stressed the insufficiency of parking spaces, particularly in relation to the addition of a third unit; a problem with trash collection, which was referred to the Wellesley Board of Health and squirrel infestation which was referred to the Building Inspector. These problems continue to exist. Mr. Levine said that the existence of a third unit would exacerbate the existing problems.

Robert Terwilliger, owner of 1 Waban Street, also spoke in opposition. Mr. Terwilliger said the basement at 3A Waban Street has never been used for living space. He questioned why Mr. Paul had waited so long before wanting to add a third unit. He added that the existence of three tax bills is not prima facie evidence of the existence of a third unit.

Eugene Travers, former owner of the property, spoke in support of the petition.

Mr. Paul said that his interest is not in asking for something he had and lost, but for something on which he was depending to effect a successful project at an appropriate time.

Statement of Facts

The property in question is located at 3A Waban Street, in a Single Residence District on a 12,797 square foot lot. Prior to 1986, the dwelling on the lot was a three-family house which had pre-existing non-conforming status. The house consisted of three dwelling units, one on each floor, and a basement. Mr. Paul purchased the property in 1986.

On February 25, 1987, Mr. Paul applied for a Building Permit. On the application, he described the proposed construction as "conversion from 3 family to 2 family, gut rehab, 150 s.f. addition". On March 11, 1987, a Building Permit (#22620) was issued to "Convert 3 family to 2 family dwelling, gut rehab, add 2 story addition 9'9" by 13'". More than two years have passed since this Building Permit converting the three-family to a two-family dwelling was issued.

Section XVII of the Zoning Bylaw states:

"Non-conforming uses and structures abandoned or not used for a period of more than two years shall be subject to all provisions of this Zoning Bylaw."

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Mr. Paul received tax bills in 1987 and 1988 for a three-family dwelling, and in 1989 for 2 units at 3A Waban Street, having sold one of the converted condo units to Richard Levine, who received a tax bill for his unit. Therefore, a total of three tax bills were issued for the property.

Mr. Paul now wishes to install a third living unit in the basement of the dwelling. He contends that the status of the property as a pre-existing non-conforming dwelling still exists as the property is taxed as three separate units and, despite his statement on the building application, he had reserved space in the basement for future development as a third living unit.

In the event that the pre-existing non-conforming status of the dwelling as a three-family dwelling has been lost, the petitioner is requesting a Finding pursuant to Section XVII of the Zoning Bylaw that the extension of the pre-existing non-conforming structure and use of his two-family dwelling to a three-family dwelling shall not be substantially more detrimental than the existing non-conforming use to the neighborhood.

A petition in support of the request, signed by one owner, Elizabeth Gardner, and four tenants at 3 Waban Street was submitted by Mr. Paul at the public hearing.

A petition in opposition to the request signed by Robert Terwilliger, owner of 1 Waban Street; Kathleen Anderson, 1 Waban Street; and Christine Huyge, 58 Church Street; was submitted by Mr. Terwilliger at the public hearing.

The Planning Board, on April 24, 1989, voted to oppose the granting of the request for a three-family house as exceeding the allowed limits of expansion of a non-conforming use.

Decision

This Authority has made a careful study of the evidence presented. The subject house does not conform to the present Zoning Bylaws as noted in the foregoing Statement of Facts.

It is the opinion of Town Counsel and this Authority that the issuance of three tax bills for the property at 3A Waban Street does not confer the legal status of a three-family dwelling to the property.

Furthermore, it is the opinion of both Town Counsel and this Authority that the Building Application signed by Mr. Paul, dated February 25, 1987, describing the proposed construction at 3A Waban Street as "conversion from 3 family to 2 family", is an intentional abandonment of the use and structure of 3A Waban Street as a pre-existing non-conforming three-family dwelling.

As cited in the foregoing Statement of Facts, Section XVII of the Zoning Bylaw states:

"Non-conforming uses and structures abandoned or not used for a period of more than two (2) years shall be subject to all provisions of this Zoning Bylaw."

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It is the opinion of this Authority that as more than two years have passed since the application on which the petitioner stated his intention to convert a three-family dwelling to a two-family dwelling, and issuance of the Building Permit for that purpose, the use and structure of the property at 3A Waban Street as a three-family dwelling has not been used and has been abandoned. Therefore, it is the unanimous opinion of this Authority that the property at 3A Waban Street has lost its status as a pre-existing non-conforming three-family dwelling.

Section XVII of the Zoning Bylaw states:

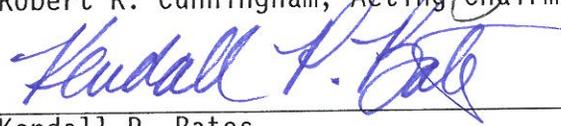
"Pre-existing non-conforming structures or uses may be extended or altered, provided that no such extension or alteration shall be permitted unless there is a finding by the Permit Granting Authority that such change, extension or alteration shall not be substantially more detrimental than the existing non-conforming use to the neighborhood."

It is the opinion of this Authority that a Finding to extend the use and structure at 3A Waban Street from a two-family dwelling to a three-family dwelling would be a reinstatement of the dwelling as a pre-existing non-conforming three-family dwelling. Since this Authority has decided that the pre-existing non-conforming status of 3A Waban Street has been intentionally abandoned and not used for more than two years, it is the unanimous decision of this Authority that a Finding pursuant to Section XVII and Section XXIV-D of the Zoning Bylaw is not applicable to this petition, and the petition is hereby dismissed.

APPEALS FROM THIS DECISION, IF ANY, SHALL BE MADE PURSUANT TO GENERAL LAWS, CHAPTER 40A, SECTION 17, AND SHALL BE FILED WITHIN 20 DAYS AFTER THE DATE OF FILING OF THIS DECISION IN THE OFFICE OF THE TOWN CLERK.

cc: Planning Board
Inspector of Buildings
edg


Robert R. Cunningham, Acting Chairman


Kendall P. Bates


William E. Polletta