



ZONING BOARD OF APPEALS
TOWN HALL WELLESLEY, MA 02181

JOHN A. DONOVAN, JR., Chairman
ROBERT R. CUNNINGHAM
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DEC 19 8 45 AM '90

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ZBA 90-85
Petition of Gerald Butterworth
183 & 185 Walnut Street/35 Prospect Street

Pursuant to due notice, the Permit Granting Authority held a Public Hearing on Thursday, November 29, 1990 at 8 p.m. in the Selectmen's Meeting Room (Conference Room B) of the Town Hall, 525 Washington Street, Wellesley on the appeal of GERALD BUTTERWORTH pursuant to the provisions of Section XXIV-C 1 of the Zoning Bylaw from the denial by the Inspector of Buildings of the following three building permits: 1) Construction of a one-story sunroom addition approximately 9 feet by 11 feet to connect the nonconforming single family dwelling at 183 WALNUT STREET, with less than the required front setbacks from WALNUT STREET AND PROSPECT STREET to the nonconforming single family dwelling at 185 WALNUT STREET, with less than the required left side yard, for the purpose of creating a two-family dwelling; 2) Construction of said sunroom addition to said nonconforming dwellings for the purpose of creating one single family dwelling; 3) construction of a single family dwelling on an unrecorded lot at 35 PROSPECT STREET. Said property is located in a Single Residence District.

On November 5, 1990, the petitioner filed his appeal in the office of the Town Clerk. Said appeal was received in the office of the Board of Appeals on November 7, 1990, after which due notice of the hearing was given by mailing and publication.

Presenting the case at the hearing was Edward Donlon, attorney for the petitioner, Gerald Butterworth, who was present. John Staniunas, architect for the project, was also present. Mr. Donlon explained that the proposal was to link the two existing structures on Walnut Street with a sunroom addition. Option 1 would use the addition for a two-family house; Option 2 would result in a single family house. The result would produce 1 dwelling on a 12,000 square foot lot, making the rear lot available for construction of another single family dwelling.

Mr. Donlon presented the argument that as the property was zoned General Residence in 1925, which allowed construction of two-family, double and semi-detached houses in the district, the houses, constructed under one building permit, are probably grandfathered. In his opinion, the use is certainly grandfathered as the houses have always been occupied by separate families. Mr. Donlon thought that they would fall within the definition of "double" or "semi-detached".

Mr. Donlon presented a second argument that if the nonconformity is not aggravated, construction can be done as a matter of right. He stated that there were no prohibitions in either MGL Chapter 40A or Zoning Bylaw banning the combining of the two houses by the addition of the sunroom into a single family dwelling. He said that he was before the Board under the second "except" clause of Section 6 of MGL Chapter 40A.

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Mr. Donlon said that the end result would be in compliance with area regulations which require 10,000 square feet for each dwelling. The objective is to connect the houses and build a third house. The Board must consider the three applications involving the parcel.

Further discussion followed regarding the status of the two houses, after which Mr. Donlon presented two letters favoring the petition from Alice Fleming, 15 Prospect Street, and Joseph DeStefano, 29 Damien Road.

Bradley Boyd, 4 Damien Road, gave a short history of the property. He felt that the sunroom addition would not be an improvement, as the space between the buildings should be increased rather than erased. Mr. Boyd stated that even if the two houses were joined by the sunroom addition, they would essentially still be two houses as they would have separate electrical, sewer and water service.

Leo Doherty, 45 Prospect Street, stated that the two houses were not built at the same time, and that the larger house is the original dwelling.

John Staniunas, 103 Walnut Street, supported the petition, stating that the neighborhood has had few improvements in the past 35 years.

Mary McCarthy, 55 Thackeray Road, said that she grew up across the street, and that her mother still resides in the family house. In the past, the property was well maintained, but has become an eyesore in recent years.

Mary Sullivan, 35 Hundreds Road, opposed the petition. In her opinion, by the joining of the two houses to make a single family house, the petitioner would be creating a financial hardship for himself. He then would be entitled to return to the ZBA at a future date for a Special Permit for a two-family house, as he would not be getting a fair financial return for a use regularly allowed in the district. Mrs. Sullivan felt it would be inconceivable that the petitioner could rent a house of the expanded size as a single family home.

Statement of Facts

The subject property is located at 183 and 185 Walnut Street, in a Single Residence District, and contains 22,834 square feet. A detached garage and two nonconforming single family dwellings exist on the property: 183 Walnut Street which has a minimum front setback from Walnut Street of 8.88 feet and a minimum front setback of 12.84 feet from Prospect Street; and 185 Walnut Street which has a minimum left side yard clearance of 1.09 feet. The two dwellings are 11 feet from each other at the left rear corner of #183.

Although there is no record of a building permit issued for the dwelling at 183 Walnut Street, a building permit was issued to a Mrs. Connors on August 29, 1928, to construct a one family dwelling, 40 feet from the street line, 10 feet from the side lot line, and at a distance 10 feet from the front and one side of the adjoining building known as 183 Walnut Street. The permit was granted to construct a single family dwelling known as 185 Walnut Street.

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The property was sold several times, and was purchased by Gerald Butterworth in April, 1986. In 1986, Mr. Butterworth filed an ANR plan with the Planning Board to subdivide the property into two lots: one 12,833 square foot lot with two dwellings and a detached garage; and a second vacant 10,001 square foot lot. The Planning Board noted on the ANR Plan that their endorsement did not constitute compliance with the Zoning Bylaw. The ANR Plan has never been recorded.

In 1988, Mr. Butterworth filed an application for a building permit to construct a house on the 10,001 square foot. The Building Inspector denied the application, citing the violation of Section XVIII, Area Requirements.

Recently, Mr. Butterworth filed 3 applications for building permits: 1. to construct a sunroom addition approximately 11 feet by 9 feet connecting the two nonconforming dwellings to form a two-family house; 2. to construct the same addition to form a single family dwelling; 3) refiled the application to construct a house on the unrecorded lot at 35 Prospect Street. The Building Inspector denied all 3 applications. Mr. Butterworth is appealing the denial of each application pursuant to Section XXIV-C 1 of the Zoning Bylaw.

The following information was submitted by the petitioner: copies of the 3 Applications for Building Permits dated October 19, 1990; construction drawing dated September 24, 1990, depicting the sunroom addition to combine 183 and 185 Walnut Street as a two-family dwelling; construction drawing dated September 24, 1990 depicting the sunroom addition to combine 183 and 185 Walnut Street as a single family dwelling; construction drawings and elevations dated February 24, 1977 for an 8 room single family dwelling; letter dated October 19, 1990 to Arthur LaConte, Inspector of Buildings, from Edward Donlon; letter dated October 29, 1990 from Arthur LaConte to Edward Donlon; and the 1986 ANR plan.

On November 19, 1990, the Planning Board voted to support the decisions of the Building Inspector.

Decision

This Authority has made a careful study of the evidence presented. The petitioner is appealing the denial of the Inspector of Building to grant each of the building permits noted in the foregoing Statement of Facts.

Option 1 - Two Family Dwelling

This Authority is of the unanimous opinion that the Inspector of Buildings was correct in denying the petitioner a building permit to construct an 11 foot by 9 foot sunroom addition connecting 183 and 185 Walnut Street for the purpose of conversion to a two-family dwelling, hereinafter known as Option 1.

According to Building Department records, the dwellings at 183 and 185 Walnut Street were not constructed at the same time, nor were they constructed under one building permit. Although when 185 Walnut Street was constructed the property was zoned General Residence, the two single family dwellings are not a two-family dwelling, nor can they be defined as a double or semi-detached dwelling as they have no party wall or foundation connection.

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Furthermore, in support of the Inspector of Building's decision regarding Option 1, Section II 8 (a) of the Zoning Bylaw requires that a special permit be obtained for a two-family residence in a Single Residence District. A special permit can be granted only

"provided that the building so used was in existence when this Bylaw took effect; and provided further that the Board of Appeals make a written finding that the original building can no longer be used or adapted at a reasonable expense and with a fair financial return for a use regularly permitted in the district." (underlining added)

In this instance, two buildings exist on the lot which have always been used as single family residences with separate addresses and separate municipal services. Each building has provided a fair financial return to the owner of record.

Therefore, the Board is of the opinion that the two single family dwellings do not have status as a two-family dwelling, nor is there any provision in the Zoning Bylaw under which a special permit or a variance to convert the two buildings into one two-family dwelling could be granted, were an application for such a permit to be made.

Option 2 - Single Family Dwelling

This Authority is of the unanimous opinion that the Inspector of Buildings was correct in denying the application to construct the aforesaid sunroom addition to join the two single family dwellings for the purpose of conversion to one single family dwelling hereinafter known as Option 2.

MGL Chapter 40A, Section 6 (Pre-existing Non-conforming Uses, Structures and Lots) states that a zoning ordinance shall apply to any change or substantial extension of use, to any reconstruction, extension or structural change of such structure to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner, or to a substantially greater extent

"except where alteration, reconstruction, extension or structural change to a single or a two-family residential structure does not increase the non-conforming nature of said structure." (Underlining added)

In this instance, the structural change for which application was made affects not merely "a single residential structure", but two non-conforming single family residential structures, thereby negating construction by right under this "except" clause.

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Single Family Dwelling - 35 Prospect Street

This Authority is of the unanimous opinion that the Inspector of Buildings was correct in denying a building permit to the petitioner to construct a single family dwelling on the unrecorded lot to be known as 35 Prospect Street.

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Section XVIII, Area Regulations, states:

"No lot on which a dwelling or club house is situated, whether heretofore or hereafter placed, shall be reduced in area, if such lot is smaller than prescribed, or if by such reduction it would be smaller than is hereby prescribed."

The existing single family dwellings at 183 and 185 Walnut Street are located on a 22,884 square foot lot in a district in which a minimum of 10,000 square feet is required for each single family dwelling. The ANR Plan showing the subdivision of the property into two lots; one with 12,883 square feet with two single family dwellings and one vacant lot with 10,001 square feet is in violation of the above referenced section of the Zoning Bylaw.

This Authority is of the opinion that as the ANR plan has never been recorded, the unrecorded lot proposed to be known as 35 Prospect Street does not exist. For the purposes of zoning and in fact, there is only one lot of land consisting of 22,884 square feet on which two single family dwellings exist. A building permit cannot be issued for construction on a nonexistent lot, nor can a building permit be issued for a third dwelling on this one lot.

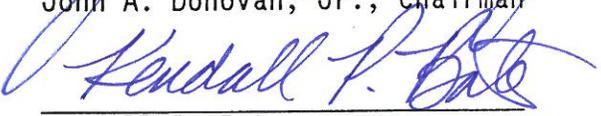
Furthermore, as this Authority has upheld the denial by the Inspector of Buildings for building permits for both Option One and Option Two, this Authority is of the opinion that allowance of a building permit to construct a single family dwelling on the lot proposed to be known as 35 Prospect Street would be in violation of Section XVIII of the Zoning Bylaw, and thus must be denied.

It is the unanimous opinion of this Authority that the Inspector of Buildings was correct in his denial of all three building applications. Therefore, this appeal is denied; the decisions of the Inspector of Buildings are upheld; and the request before this Board is 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


John A. Donovan, Jr., Chairman


Kendall P. Bates


Robert R. Cunningham



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ZBA 90-85
Decision Following Order of Remand
Gerald Butterworth
183-185 Walnut Street

In compliance with the Order of the Norfolk Superior Court, signed by Judge Brady on July 14, 1992, the Wellesley Zoning Board of Appeals held a public hearing on Thursday, November 19, 1992 at 8 p.m. in the Great Hall of the Town Hall, 525 Washington Street, Wellesley, after providing notice conforming to the provisions of Mass. Gen. Laws, ch. 39, s.23B, and giving notice by mailing and publication, to hear any further evidence the applicant might offer and to deliberate and vote on a finding, pursuant to the second except clause of G.L. ch. 40A, s.6, first sentence, concerning whether Option Two (so-called) will intensify the existing nonconformities or will result in any additional ones. "Option Two" is the applicant's proposal to join the two pre-existing nonconforming dwellings on the premises by means of a sunroom addition to create one single family dwelling.

The Zoning Board of Appeals heard comments from Edward C. Donlon, counsel for the Plaintiff, who, at that time, refused to comply with the request of the Board of Appeals for further information in the form of a floor plan, location of utility connections, and facade drawing, made in a letter sent to Counsel on September 10, 1992. The Zoning Board of Appeals informed Mr. Donlon that the additional information described above was critical in the formulation of its decision, as there was insufficient evidence, without this additional information, to indicate that one single family dwelling would result from the proposed construction.

On December 21, 1992, counsel for the Plaintiff submitted the following materials to the office of the Board of Appeals: Plans & Elevations/Residence 183-185 Walnut Street/One Story Sun Room/A-1 and A-2, dated September 24, 1990, stamped by John C. Staniunas, Architect; Letter of Transmittal dated 12/2/92 from John C. Staniunas to Ed Donlon; Fax Cover Sheet dated 11/25/92 from John Staniunas to Ed Donlon; portion of undated unsigned plot plan; drawing of water connection to 183 Walnut Street; 3 pages of information regarding electric, water and sewer billing for 183 and 185 Walnut Street.

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Gerald Butterworth
183-185 Walnut Street

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The Board of Appeals held a Business Meeting on Tuesday, January 5, 1992 at 8 a.m. in Conference Room A at the Town Hall, which was noticed in the office of the Town Clerk. The purpose of this meeting was to deliberate and reach a decision on the case. Both Edward C. Donlon and John C. Staniunas were present.

The Board discussed the evidence, including the aforementioned materials submitted on December 21, 1992. The Board expressed its strong concern that upon completion of construction, the residence would, in fact, be a single family dwelling. The Board finds that if the premises were not, in fact, to become a single family dwelling, then the proposed construction would intensify the existing nonconformities.

The Board also expressed its strong concern that there be no encroachments from the premises onto abutting properties, including the septic system and leaching fields, or any other physical encroachments, particularly the existing oil tank, the concrete pad on which the oil tank is located, and the bituminous concrete paving. The Board finds that if there are, in fact, any such encroachments, then the proposed construction will intensify the existing nonconformities. The Board further finds that it could not grant a Special Permit under circumstances whereby violations of the current Zoning Bylaw exist, as said violations are not protected as legal nonconformities.

Based upon the foregoing considerations and the evidence submitted, the Board voted and unanimously found that, provided the following conditions are met, the proposed construction of "Option Two" will not intensify the existing nonconformities or result in additional ones:

1. There shall be single electric service with a single electric meter and single water service with a single water meter consistent with a single family dwelling on the premises.

Satisfaction of this condition shall be met by letters from Gary Babin, Superintendant of the Electric Division, and Joseph Duggan, Superintendant of the Water Division, documenting compliance with this condition.

2. The premises must be designated by a single street number.

Satisfaction of this condition shall be met by a letter from the Board of Selectmen stating the single house number which has been assigned to this property.

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3. The domestic sewer system and leaching fields must be less than 10 feet from any property lines in any direction.

Satisfaction of this condition shall be met by a certified plot plan drawn by a Registered Land Surveyor showing the location of the existing system and the boundaries of the existing leaching fields.

4. There shall be no physical encroachment whatsoever from the subject premises onto abutting properties, particularly in regard to the existing oil tank, the concrete pad on which the oil tank is located, and the bituminous concrete paving.

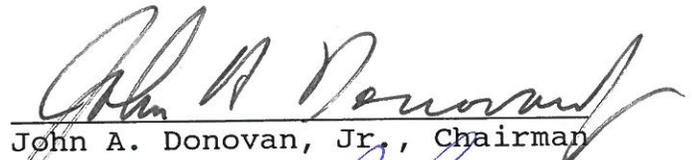
Satisfaction of this condition shall be met by submission of a certified plot plan drawn by a Registered Land Surveyor depicting that of the date of certification, no such encroachments exist.

Upon the filing with the office of the Board of Appeals all of the above listed documentation certifying compliance with the aforesaid conditions, and subject to construction in accordance with the construction drawings as submitted, a Special Permit for the construction of "Option Two" will issue.

Following compliance with the aforesaid conditions, the Inspector of Buildings is hereby authorized to issue a permit for the construction upon his receipt and approval of a building application and detailed construction plans.

APPEALS FROM THIS DECISION, 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
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