



BOARD OF APPEAL

RICHARD O. ALDRICH
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 235-1664

Appeal of Trubiani Realty Trust

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 8:35 p.m. on May 25, 1967, on the appeal of Trubiani Realty Trust from the refusal of the Inspector of Buildings to issue a permit for the construction of a dwelling on Lot 1, Seaward Road. The reason for such refusal was that the Inspector of Buildings contended that the lot involved was not within a subdivision as required by Section 81Y, Chapter 41, of the General Laws, and that said lot did not have the required frontage on a street as required by Section XIX of the Zoning By-law. Said appeal was made under the provisions of Section XXIV of the Zoning By-law.

On May 5, 1967, the Inspector of Buildings notified the appellant in writing that a permit could not be issued for the construction of a dwelling on said lot for the above-mentioned reasons, and on May 8, 1967, the appellant took an appeal from such refusal. Thereafter due notice of the hearing was given by mailing and publication.

Francis L. Swift, Attorney, represented the appellant at the hearing.

The Planning Board, in its report, opposed the granting of relief.

Statement of Facts

The lot involved is located within a Single-residence District requiring a minimum lot area of 20,000 square feet. It contains 34,517 square feet and is a portion of a larger parcel of land which was purchased in 1955 by the predecessor of Trubiani Realty Trust. The remaining portion of the land was laid out as a subdivision and approved by the Planning Board on February 6, 1956. This plan shows a layout of lots 2 - 13 inclusive, but lot 1, the lot involved, was not included in said plan for approval.

It is the contention of the appellant that the Inspector of Buildings was in error in the denial of the application for a permit to construct a dwelling on the lot involved. To support the argument, it was pointed out that the lot involved did not abut the proposed new way laid out on the subdivision plan; the rear boundary line of lots 1 and 2 was common to both. Since the existence of a lot of land to the West of the proposed subdivision and not a part thereof, was known or should have been known, the approval of the plan as filed at least by reference, if not in fact, approved lot 1 as a buildable lot. This is further supported by the fact that two years prior, the Planning Board certified a plan wherein the deed accompanying said plan set out a way giving access to Lot 1 and "others entitled thereto". A way did exist on which lot 1 did front, and the extent of the frontage far exceeds the required forty feet. Therefore, this lot was the front lot of the entire plot purchased by DiGiando and Trubiani Realty Trust, who conveyed the lot involved to the appellant, and it being on a way, was not part of the subdivision plan, and was not created by the subdivision wherein Maugus Avenue was extended.

In the Inspector's denial of a permit, it was found that the only requirement not met, in his opinion, was frontage as required under Section XIX of the Zoning By-law.

Frontage as defined in the Zoning By-law is, "A lot boundary line which abuts a public or private way." The legal definition of a way is a passage, path, road or street. It is right of passage over land. A right-of-way, by the same definition, is a right of passage or of way imposed by law or convention and by virtue of which, one has the right to pass over the land of another. The contract by which this right-of-way in question was created, is the conveyance from Bridges to Leonard et ux. This right enures to the benefit of grantee, the grantor, his heirs and assigns and others entitled thereto for all purposes for which ways are customarily used in Wellesley. For all intents and purposes it is a way open to the use of the public. Added to this fact, Town water is extended with this way and this is shown on the Town plans by virtue of a hydrant location some distance into this right-of-way.

Therefore, it is the opinion of the appellant, that this right-of-way as described is a way within the meaning of the Zoning By-law, and that the requirement as set forth in the Zoning By-law, Section XIX is met.

Decision

We believe that the Building Inspector's denial of subject building permit is based in part on his view that the lot in question was created by a subdivision within the meaning of G. L. (Ter.Ed.) Ch. 41, S 81L, that said lot has not received the requisite approval of the Planning Board and that it does not possess a way furnishing access to the lot and having the characteristics required by G. L. (Ter.Ed.) Ch. 41, S. 81Y. We concur with the Building Inspector's conclusion. A subdivision was created and a plan therefor approved by the Planning Board on February 6, 1956. This plan did not include Lot No. 1, the lot in question, which was then owned by the same owner as were the lots included in the plan and had a common rear boundary line with Lot No. 2 which was included in the plan.

The Board is of the opinion that it was subdivider's responsibility to see to it that all lots created by the act of subdividing in 1956 were included in the plan presented to and approved by the Planning Board; that Lot No. 1 was part of a subdivision within the meaning of the law and that no approval of Lot No. 1 by inference arose from the 1956 transaction nor is the Planning Board estopped to take the position which it apparently did in 1962 - that said lot was part of a subdivision which had not been approved as required by applicable statute.

However, the Board is also of the opinion that enforcement of the provisions of 81Y relative to issuance of a building permit in this case would entail practical difficulty and unnecessary hardship to the appellant. Moreover, the existence of the right-of-way to Seaward Road makes it unnecessary that the proposed house be related to any way shown on the approved subdivision plan.

The Building Inspector also based his denial of a permit on an alleged absence of the required frontage on a street as required by Section XIX of the Zoning By-law. Section XIX defines "Frontage" as, "A lot boundary line which abuts a public or private way." The right-of-way to Seaward Road created by the 1954 deed clearly is a "private way" within the meaning of the term long accepted in Massachusetts jurisprudence. See Opinion of the Justices, 313 Mass. 779. The lot in question has ample frontage on the right-of-way and the owners are entitled to the use thereof.

Accordingly, the Board directs the Building Inspector to issue a building permit subject to appellant's compliance with all other applicable provisions of law within the Building Inspector's cognizance.

Richard O. Aldrich
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Dana T. Lowell
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F. Lester Fraser
F. Lester Fraser

Filed with Town Clerk _____

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MAY 10 1958
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