



ZONING BOARD OF APPEALS  
TOWN HALL WELLESLEY, MA 02181

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ZBA 94-78  
Petition of William A. Moynihan  
9 Waban Street

Pursuant to due notice, the Permit Granting Authority held a Public Hearing on Tuesday, December 6, 1994 at 9:00 a.m. in the Selectmen's Meeting Room (Conference Room B) at the Town Hall, 525 Washington Street, Wellesley, on the petition of WILLIAM A. MOYNIHAN appealing the decision of the Inspector of Buildings pursuant to the provisions of Section XXIV-C and Section XXIV-D of the Zoning Bylaw, to allow construction activity at 7 WABAN STREET, in a Single Residence District, without notice to interested parties or a Public Hearing, on the use of the premises as a three-family dwelling.

On November 14, 1994, the appeal was filed in the office of the Town Clerk, whereupon it was transmitted to both the Inspector of Buildings and the office of the Board of Appeals on the same day. Thereafter, due notice of the hearing was given by mailing and publication.

Presenting the case at the hearing was William Moynihan, who gave a short history of the events preceding the filing of his appeal. He stated that he has always known the property to be a single family home. In his opinion, the building permit issued in 1979, which describes the premises as a three-family dwelling, and which the Building Inspector used as justification for issuance of the building permit for interior remodeling as a three-family dwelling, is not a substitute for a special permit or variance allowing the use of the premises as a three-family dwelling.

Mr. Moynihan submitted a chart depicting the occupant history of 7 Waban Street from 1970-94. At times there have been two additional non-family residents, and at other times, only the family has been in residence. He has never known the property to be other than a single family home with incidental renters in it. He added that he understood that the zoning laws indicate that if a multiple unit dwelling is not used as such, it loses its status as such.

Mr. Moynihan explained that the critical dynamic is the shift in the balance in the neighborhood from single to multiple family residence, and therefore that the conversion of 7 Waban Street from single family to multiple family assumes great importance. Owners of single family homes are feeling threatened and would like protection and preservation of their single family neighborhood.

The Board asked Mr. Moynihan if he knew how many apartments were contained in the 7 Waban Street building. Mr. Moynihan replied that he did not know how many apartments

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there were, as he had never been inside the house.

The Board noted that the zoning district in which 7 Waban Street is located is classified as Single Family, but the Assessors classify the property as a four apartment building. The Board further noted that confusion may exist between the zoning definition of "family" and "dwelling unit". The construction plans show that there are four apartments or "dwelling units" in the building.

Mr. Moynihan responded that the property next door never had the appearance of a multiple family home. It is a single family home with incidental renters and conforms to the Zoning Bylaws as a single family home.

Richard Doherty, 14 Waban Street, expressed concern about the procedure, and the determination of the status of a building.

Stephen Velky, owner of the property at 7 Waban Street, submitted letters from 10 neighbors in support of the proposed remodeling. He stated that he remembered the dwelling as a four-family dwelling, which was rented most of the time. He is proposing to reduce the number of apartments from four to three. There is sufficient parking on the premises behind the house and in the carriage house at the rear.

William Whitman, attorney for Mr. Velky, noted that even if there had been a question regarding the Building Permit issued in 1979, the six year Statute of Limitations has expired, which legalizes the permit. He believes that the Town had requested the installation of the fire escape as a means of egress from the third floor apartment. If the apartment did not exist, a separate egress would not have been necessary.

#### Statement of Facts

The subject petition is an appeal pursuant to the provisions of Section XXIV-C of the Zoning Bylaw that the Inspector of Buildings issued a construction permit for interior demolition and remodeling of the interior of the premises at 7 Waban Street, in a Single Residence District, for use as a three-family dwelling without notice to interested parties or a Public Hearing.

On November 15, 1994, subsequent to the filing of the appeal on November 14, 1994, the office of the Board of Appeals requested the Inspector of Buildings, pursuant to Section XXIV-C-2 of the Zoning Bylaw, to

"transmit to the Permit Granting Authority copies of all documents and papers constituting the record of the case in which the appeal is taken..."

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On November 16, 1994, the office of the Board of Appeals received the following documents from the Inspector of Buildings to substantiate his determination that the premises at 7 Waban Street enjoys non-conforming status as a multi-family dwelling:

1. Building Permit #18,916 issued on December 4, 1979 for the installation of a fire escape to extend to the upper floors of 7 Waban Street. On line #5 of the building permit application, the question as to the existing occupance of the building was answered "three families". On line #6 of the same application, the question as to the proposed occupancy of the premises was answered with the same response.

It is the opinion of the Inspector of Buildings that the former Building Inspector, Joseph Scammon, would not have issued a permit for three-family use that would have proved to be in violation of the Zoning Bylaw.

2. Board of Assessors records showing that the building at 7 Waban Street is listed under Residential Classification as 111, Apartment with four (4) to eight (8) units.
3. Construction plans submitted for interior alterations of the building contain existing floor plans, which show four kitchens: one on the first floor, two on the second floor and one on the third floor.

The Inspector of Buildings also included copies of all correspondence between Mr. Moynihan and himself relating to the property at 7 Waban Street.

No information, other than the letter of appeal dated November 14, 1994, signed by William A. Moynihan, was submitted with the appeal.

Copies of all documents filed with the office of the Board of Appeals were sent to the Planning Board.

#### Decision

This Authority has made a careful study of the materials submitted and the information presented at the hearing. The petitioner is appealing the decision of the Inspector of Buildings to issue a construction permit, without notice to interested parties or a Public Hearing, for the use of the premises at 7 Waban Street as a three-family dwelling.

The Inspector of Buildings has presented documentation showing that in 1979, the existing and proposed use of the premises at 7 Waban Street was for three-families. The petitioner has raised the question regarding abandonment of the use, if it ever existed.

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The abandonment of a nonconforming use results from the concurrence of two factors: 1. the intent to abandon and (2) voluntary conduct which carries the implication of abandonment. Pioneer Insulation and Modernizing Corp. v. Lynn, 331 Mass. 560 (1954); Dobbs v. Board of Appeals of Northampton, 339 Mass. 684 (1959). It is the opinion of this Authority that there was no intent to or conduct implying the intent to abandon the use of the premises as a three-family dwelling.

Section IA of the Zoning Bylaw defines a "dwelling unit" as:

"a room, group of rooms, or dwelling forming a habitable unit for one family with facilities for living, sleeping, cooking and eating, and which is directly accessible from the outside or through a common hall without passing through any other dwelling unit".

According to the Existing Floor Plans, EX-1 and 2, drawn by Sarah N. Hines, A.A., dated 7/24/94, four separate dwelling units existed at 7 Waban Street, prior to interior demolition.

Section IA of the Zoning Bylaw defines "Family" as:

"(A) One (1) or more persons related by blood, adoption or marriage and not more than (2) additional persons all residing together as a single housekeeping unit;  
(B) A number of persons but not exceeding three (3) residing together as a single housekeeping unit where such persons are not related to one another by blood, adoption or marriage."

It is the opinion of this Authority that the number of people occupying the premises at any given time since 1970 did not exceed the number allowed under the aforementioned definition. It is the further opinion of this Authority that the number of people in residence, whether family or unrelated singles, does not determine the status of the premises as a nonconforming three-family dwelling.

In the opinion of this Authority the Inspector of Buildings has provided sufficient documentation to substantiate his decision to issue a permit for the remodeling of the premises as a three-family dwelling.

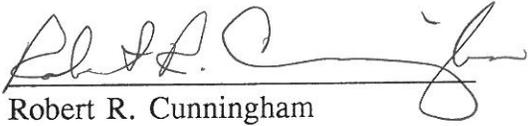
Therefore, it is the unanimous opinion of this Authority to uphold the decision of the Inspector of Buildings, to deny the appeal of the petitioner, and to dismiss this petition.

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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  
Town Clerk  
Stephen Velky

  
Kendall P. Bates, Acting Chairman

  
Robert R. Cunningham

  
William E. Polletta

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