



ZONING BOARD OF APPEALS

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ZBA 2016-77

Petition of 37 Pond Road Realty Trust
 37 Pond Road

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Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, October 6, 2016 at 7:30 p.m. in the Juliani Meeting Room, 525 Washington Street, Wellesley, on the petition of 37 Pond Road Realty Trust requesting renewal of a Special Permit that was granted on July 23, 2009 pursuant to the provisions of Section II A 8 (a) and Section XXV of the Zoning Bylaw and extended pursuant to the Permit Extension Act, (St. 2010, c. 240 § 173) As Amended (St. 2012, c. 238, §§ 74-75), to allow the premises at 37 Pond Road, in a 40,000 square foot Single Residence District, to be used as a two-family dwelling, which is a use not allowed by right.

On September 21, 2016, the Petitioner filed a request for a hearing before this Authority, and thereafter, due notice of the hearing was given by mailing and publication.

Presenting the case at the hearing was Frank Hunnewell, representing 37 Pond Road Realty Trust, the Petitioner. He said that the request is for renewal of a special permit for a small apartment on one side of the house that has been there since 1973. He said that the most recent special permit was granted in 2009, which is when he and his family moved into the house. He said that they renovated the apartment at that time and have had three tenants since then.

Mr. Hunnewell said that there is no congestion issue because the property is located in a part of town that is not built up. He said that it will not add a lot of traffic because the apartment is suitable for one person only. He said that the apartment does not diminish the value of the property or the neighbors' properties.

The Board said that Mr. Hunnewell made the assertion that, with respect to this house and the neighborhood, no one will know that the apartment is there. The Board said that is not the underlying basis for making its decision. The Board said that could set a precedent for anyone in town with a secluded lot wanting a rental apartment in their house.

The Board asked Mr. Hunnewell to address the finding that the Board has to make 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. Mr. Hunnewell said that he was not sure what that meant. He said that determination was made at the previous hearing. He said that the apartment has been there since 1973. He said that it has its own entrance and kitchen. He said that the apartment and the rest of the house are connected by two doors together that are both locked.

The Board said that the last decision talked about a renovation going on at that time. The Board asked if Mr. Gibson is still the tenant. Mr. Hunnewell said that Mr. Gibson was the tenant for the past year but moved out at the end of September because he wanted a bigger space and this apartment is only suitable for one person. He said that the apartment is vacant right now.

The Board said that last time the tenant had moved out for the renovation and intended to move back in, which involved a sympathetic factor. The Board said that the tenant has now voluntarily vacated and it is a vacant apartment with no prospective tenant lined up. The Board said that now might be the time for the Board to determine that it is not an appropriate use under the bylaw. A Board member questioned whether it is a self-imposed hardship because Mr. Hunnewell renovated the apartment when he knew that he had temporary permission for the use.

The Chairman said that the documents did not seem to reflect any limitations on whom the tenants might be or how often they might turn over. He questioned what part the characteristics of that particular tenant played in granting the previous permit. Mr. Hunnewell said that, at the last meeting there was a conclusion that whatever funds the apartment generates support the use of the path.

The Chairman said that the prior decision talked about a fair financial return because of the loss of the income to offset those expenses which are taken on behalf of the town. He said that decision talked about the owner having expenses that were unique to this property that related to maintaining the walkway around the pond for public use. The Board asked if the tenant maintains the walkway around the pond. Mr. Hunnewell said that the tenant does help him. The Board asked if there are any other out of pocket expenses to maintain the walkway. Mr. Hunnewell said that he is probably down at the walkway one or two days a month. He said that he makes sure that his insurance provides sufficient coverage. He said that there are also real estate taxes. He said that hundreds of people use the walkway.

John Pattillo, 7 Allen Road, said that the value of the pathway is worth tens of thousands of dollars every year to Wellesley for all of the people who use the walkway. He said that it is a staggering gift from the Hunnewell family.

The Chairman said that he fully believes that the town does get extraordinary value from the path. He said that the Board had not heard any evidence that the walkway will not be continued without the income derived from a tenant in the apartment. Mr. Pattillo suggested that, as a condition, the tenant be required to assist in maintaining the pathway.

The Chairman said that the lever in the bylaw is that the town grant the right to do this because it would be unreasonable to adapt the home to a single family use, which is the use that is allowed in that district. He questioned whether lopping off an apartment to make it a single family dwelling would somehow mean that the owner could not get a fair financial return if he decided to sell the property.

Mr. Hunnewell asked what had changed since the previous approval. The Board said there are two different Board members hearing this petition. The Chairman said that there has been a general tightening within Wellesley and the State so that decisions are more consistent with the General Laws.

The Chairman said that the use would not be injurious or offensive to the neighborhood because neighbors would not see it. He said that the Board is trying to understand what is different about this case from anyone else in Wellesley who would like to have an apartment as well. Mr. Hunnewell said that he would have to remove the kitchen. He said that he was not sure what he would have to do to make it a one-family dwelling. The Board said that there are no prohibitions for having two kitchens in a house.

A Board member said that the special permit would expire if Mr. Hunnewell sold the house because it was granted only as long as Mr. Hunnewell resides there. He said that he thought that there was some intent to have it go back to a single family use eventually. He said that the question is when that should happen.

A Board member said that since the special permit would expire if the house was sold, and since the special permit will have to be renewed every three years with the current owners being residents of the property, it would not set a precedent for the rest of the town.

A Board member said that, from a land use perspective, the proposed use is not objectionable, given the size of the lot and the privacy. He said that, from a statutory perspective, this has to satisfy the language of the bylaws.

The Chairman questioned whether there should be a development agreement with the Board of Selectmen and codification of the use of the path. A Board member said that would probably require Town Meeting approval to rezone it. He said that it is a two-family house in a single family district. He said that Wellesley's bylaw does not permit use variances.

Catherine Johnson, said that she is a resident, a member of the Planning Board and a realtor. She said that this is not a house where you can have a tenable hypothesis of putting it on the market and selling it because of its history and its configuration with the rest of the Hunnewell properties. She said that rezoning it would be spot zoning, which is something that is never done. She said that the cost of taking out a kitchen can be significant and that could be a financial burden. She said that the second kitchen may be located in a place where one would not want one. She said that converting this to a single family may not just be a simple closing or opening up of a doorway.

The Chairman said that the Board has to make two findings: that the building was in existence when the bylaw took effect; and 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. He said that evidence was submitted that the building was in existence when the bylaw took effect.

Mr. Hunnewell said that there would be no financial return to him to return to the permitted use. He said that there would be an expense and no return. A Board member said that, with that argument, everyone in town would be allowed to put an accessory apartment in their house. Mr. Hunnewell said that this apartment is already there. He questioned whether that would set a precedent for others to add an apartment.

The Chairman said that the Board has granted special permits for two-family use where it has found that financial hardship was involved, based on confidential information such as tax returns that show that the

resident cannot afford to live in the house without the income. Mr. Hunnewell said that is not the case here.

The Chairman said that when the current permit was granted, there was some thought about whether this should go on in perpetuity. He said that stopping access to the walkway is not part of the decision except where it says that the town gets a benefit. He said that is the core of the reason to grant the special permit. A Board member said that the Board could insert a condition for public access to the walkway. Mr. Hunnewell said that he was not sure that he would accept that. He said that if the Board told him that he would either have to give up \$6,000 in income or make the path open to the public in a formal way, he would give up the income. He said that there are security issues associated with the path. The Board said that is a hardship that other people do not have.

A Board member said that the prior decision said that the owner has expenses unique to this property related to maintaining the walkway around the pond for public use, including maintenance and insurance, and the building cannot be used or adapted at reasonable expense and with a fair financial return because the loss of the income to offset those expenses which are taken on behalf of the town would not result in a reasonable expense or fair financial return.

Mr. Hunnewell said that he was struggling to understand the meaning of fair financial return in the bylaw. He questioned if the expense to return it to a one-family has to result in a fair financial return. He said that there would be a reduction of income and the cost to return the house to a one family permitted use. He said that there would be no financial return for that transaction.

The Chairman said that this property is unique. He said that not every property has public access to a path.

The Chairman said that he would discuss this matter further with Town Counsel.

The Board voted unanimously to continue the petition to November 3, 2016.

November 3, 2016

The Chairman said that he had two discussions with Town Counsel since the previous hearing. He said that the first discussion was to describe the situation and the second discussion was specific to a portion of Section II 8a of the Zoning Bylaw.

The Chairman said that the Board must make a determination that the building so used was in existence when the Bylaw took effect, and make a written finding that the original building can no longer be used or adapted with at a reasonable expense and with a fair financial return for a use regularly permitted in the district.

The Chairman said that the property is located in a single residence district. He said that the proposal before the Board is that the owner be allowed to have a tenant in an apartment, which would be a use not allowed except with a special permit. He said that a public path crosses this property. He said that Mr. Hunnewell said that he has added expenses for insurance because of public access to the path.

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The Chairman said that a special permit for the use was first granted in 1973. He said that the last renewal as granted in 2009.

The Chairman said that his discussions with Town Counsel focused on value and trying to understand whether the original building could be used or adapted for today. He said that realtors said that the house with 22 to 35 rooms is not very saleable. He said that the house was built in 1875 and was originally used for family and servants. He said that a building that large does not make sense now. He said that when the property changed hands last time it was so the owner could preserve the historic value of the house. He said that, in addition to its historic value, there are benefits to the neighborhood. He said that the house is hardly visible.

He said that the Board has to consider in its written finding that the building cannot be adapted, that there is no market for a house that large in a Single Residence District, and there are additional expenses for maintaining the path and insurance.

A Board member said that although Mr. Hunnewell was not present at the hearing, the Board would proceed because this was a legally noticed hearing.

The Chairman suggested an additional condition for the special permit to lapse if the owner elects to not provide public access to the path.

A Board member suggested that the Board insert a condition that the apartment only be occupied by someone under a lease so that it does not become a transient location.

There was no one present at the public hearing who wished to speak to the petition.

Statement of Facts

The subject property is located at 37 Pond Road, in a 40,000 square foot Single Residence District, in a Water Supply Protection District, on a 7.96 acre lot. The house, built in 1875, has been in the family since the original construction. The house contains thirty-five rooms and cannot be used economically as a single family dwelling. Ownership of the property has been assumed by Francis and Emily Hunnewell, who occupy one-half of the premises.

The Petitioner is requesting renewal of a Special Permit that was granted on July 23, 2009 pursuant to the provisions of Section II A 8 (a) and Section XXV of the Zoning Bylaw and extended pursuant to the Permit Extension Act, (St. 2010, c. 240 § 173) As Amended (St. 2012, c. 238, §§ 74-75), to allow the premises at 37 Pond Road, in a 40,000 square foot Single Residence District, to be used as a two-family dwelling, which is a use not allowed by right. Special Permits for this use have been granted regularly since 1973.

Decision

This Authority has made a careful study of the information submitted. It is the opinion of this Authority that the original building was in existence when the bylaw took effect, that the current owners have expenses unique to this property related to maintaining the walkway around the pond for public use,

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including maintenance and insurance costs, and that the building cannot be used or adapted at reasonable expense and with a fair financial return because the loss of the income to offset those expenses which are taken on behalf of the Town would not result in a reasonable expense or fair financial return.

It is the opinion of this Authority that the use of the premises as a two-family dwelling, with Francis & Emily Hunnewell in residence, shall not substantially reduce the value of any property within the neighborhood, and shall not be injurious or offensive to the neighborhood.

Therefore, renewal of a Special Permit is granted, as voted unanimously by this Authority at the Public Hearing, pursuant to the provisions of Section II A 8 (a) of the Zoning Bylaw, to allow the premises at 37 Pond Road to be used as a two-family dwelling, subject to the following conditions:

1. Said dwelling shall not be occupied by more than two families at any time, and one of the families in residence shall be that of Francis & Emily Hunnewell.
2. Applicable state and local laws and regulations shall be complied with by the petitioner, Francis & Emily Hunnewell.
3. This Special Permit shall expire if any of the Conservation Restrictions for this property expire.
4. This Special Permit shall expire if the land is subdivided and there is an additional residence built.
5. This Special Permit shall have no precedential value for any subsequent owner.
6. There shall be no short term rentals or transient use.
7. The special permit shall expire upon the public no longer having access to the path.
8. Application for a special permit shall be reviewed de novo in three years.
9. This Special Permit shall expire three years from the date time stamped on this decision.

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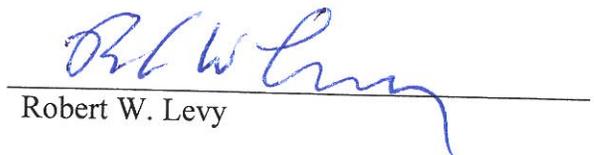
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APPEALS FROM THIS DECISION,
IF ANY, SHALL BE MADE PURSUANT
TO GENERAL LAWS, CHAPTER 40A,
SECTION 17, AND SHALL BE FILED
WITHIN 20 DAYS AFTER THE DATE
OF FILING OF THIS DECISION IN THE
OFFICE OF THE TOWN CLERK.


J. Randolph Becker, Acting Chairman


David G. Sheffield


Robert W. Levy

cc: Planning Board
Inspector of Buildings
lrm