



City of Malden

Massachusetts
Board of Appeal
110 Pleasant Street
Malden, Massachusetts 02148

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Malden, Mass.

BOARD OF APPEAL
DECISION
Meeting of July 19, 2017

96-98 Medford St.
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ORDER OF:

the Middlesex Superior Court, to the Board of Appeal, for consideration as to whether the property known as and numbered 96-98 Medford St., also known by the City Assessor's Parcel ID #067-303-307, owned by Antonio DeLauri, is grandfathered and should be recognized as a pre-existing, non-conforming use as a three family dwelling pursuant to M.G.L Chapter 40A and the Malden Zoning ordinances.

All Statutory Notice requirements have been met and this property is properly before the Board

HISTORY OF 96-98 MEDFORD STREET

April 1, 1984

Petitioner, Antonio DeLauri purchased 96-98 Medford Street (See legal reference 15546141).

Sept. 29, 1985

A petition was filed to legalize an illegal existing three family dwelling.

*No one appeared to present the petition.

The BOA voted unanimously to deny the petition.

February 20, 1986

A petition was filed to legalize an existing three family dwelling.

*No one was at the site when the Board members went to inspect the property. Therefore, the petition could not be heard and was unanimously denied by the Board.

May 15, 2014

A petition was filed to appeal the decision of the Building Inspector, dated March 13, 2014, to cease and desist use of the Occupancy of the structure as a 3-family house and to obtain all necessary permits to remove all the work installed to create the additional dwelling unit.

*The Board received a request that this petition be continued to June 19, 2014, without prejudice.

The Board voted unanimously to grant the petitioners' request.

June 19, 2014 (Continued from May 15, 2014 to appeal the decision of the Building Inspector)

The Building Inspector testified that he was alerted to the illegal unit by an appraiser who was researching the property to be sold. He further testified that the City has no records of any building, electrical, plumbing or other permits issued to create a 3rd unit and, the legal use and occupancy of the property is a two-family.

The petitioner stated that the property was being used as a three-family prior to current zoning laws and prior to the petitioner's ownership of the property. Petitioner asserts any work done to the property over the years was to maintain the property and denies having done any work to create a third unit.

Chairman Donnelly visited the property on June 19, 2014 before the hearing and stated that it was obvious the 3rd unit in the rear of the home was not original. There is no living room and the bedroom is in the basement where ceramic tile has been installed. Donnelly further stated that because Mr. DeLauri has previously filed two petitions to legalize the 3rd unit, he is aware that the unit is not legal.

The Board voted unanimously to deny the petitioner's request to overturn the decision of the Building Inspector.

April 12, 2017

A decision was made by the Superior Court.

That the action is remanded to the Zoning Board of Appeals for consideration as to whether the plaintiff's property is grandfathered and should be recognized as a pre-existing, non-conforming use as a three family dwelling.

FINDINGS OF FACT AND DECISION

The Petitioner, Antonio DeLauri and his Attorney, Richard DiGirolamo of 424 Broadway in Somerville, MA appeared before the Board on an Order from Middlesex Superior Court mandating that the Board consider whether the Plaintiff's property is grandfathered and should be recognized as a pre-existing, non-conforming use as a three-family dwelling (See Docket # 1481CV06496, Woburn Superior Court).

The petitioner's attorney, Richard DiGirolamo who appeared before the Board on July 19, 2017 stated that he now represented Mr. DeLaurie at the hearing. Attorney DiGirolamo did not represent Mr. DeLaurie in the Superior Court action.

Attorney, Richard DiGirolamo argued that 96-98 Medford Street should be protected and recognized as a pre-existing, non-conforming use as a Three-family dwelling relying on Chapter 40A, Sec. 7 as amended along with tax records and existing meters located on the premises. The petitioner's attorney did not provide the Board with any caselaw or statute related to "use". He relied on Chapter 40A, Sec. 7 as related to structures, which is not the issue before the Board. The issue is whether the plaintiff's property should be regarded as a pre-existing, non-conforming "USE" as a three-family dwelling.

In regards to "notice" as applied to the improvement, erection, and/or alterations to structures in Chapter 40A, Sec. 7, the petitioner had notice when his petition was denied to legalize his use of a three-family dwelling in 1985, 1986 and 2014.

Chapter 40A, Sec. 7 was amended by the commonwealth in 2016. Therefore, even if the statute applied, it would not apply here. The Board denied the petitioner's petition to legalize 96-98 Medford Street as a three-family dwelling on June 19, 2014.

Building Commissioner, Nelson Miller from the City of Malden testified the following:

- The plans on file for 96-98 Medford Street (1985) declare that the property is a two-family dwelling
- Plot plan from same set of 1985 plans says 96-98.
- 1985 Petition denied to legalize as 3 family by BOA.
- 1986 Petition denied to legalize as 3 family – owner not present at site for review

- 2014 cease and desist issued by Building Inspector Scott Vanderwall to remove additional living unit with the benefit of a permit. Order has not been complied with.
- There are no applications, permits, certificate of occupancy, or legal use determinations on file at the Building Department declaring it as a 3 family home.
- Building code and zoning laws: permitted structures and uses are grandfathered. Using a property illegally does not make it legal or grandfather the use.
- The number, location, or age of utilities and meters do not dictate the use and occupancy of a building.
- 40A, Chapter 7 references structures, not dwelling units. This issue is about the occupancy of a dwelling use, not the structure.
- According to the 2014 Ordinances:
 - 300.3.2.3 Prohibits 3 family homes in Residence A
 - Dimensional Controls: Current would not allow this type of use.
 - Existing Required
 - 7,000 18,750

Therefore, the residential two-family dwelling at 96-98 Medford St. is now considered a pre-existing, non-conforming use as a two- family.

After due hearing, the Board found and adopted the facts as alleged by the Petitioner and the Building Commissioner. The petitioner's evidence filed to establish that the residential two-family dwelling was ever grandfathered as a three-family dwelling. The Building Commissioners evidence established that the only use and occupancy of the building was as a two-family dwelling, not a three-family dwelling.

Upon motion of Mike Steene, which was seconded by Emery Haskell, the Board voted unanimously to deny this petition. The petitioner must obey the orders of the Building Inspector, Scott Vanderwall dated March 3, 2014.

MEMBERS OF THE BOARD VOTING WERE:

James O'Brien
Emery Haskell
Claire Croken
John King
Mike Steene
Shannon Brandano

Board of Appeal

Shannon Brandano
Legal Member