

**CITY OF WALTHAM**  
**ZONING BOARD OF APPEALS**

April 9, 2013

The Zoning Board of Appeals held a public hearing at 7:00 P.M., Tuesday, April 9, 2013 in the Public Meeting Room of the Arthur Clark Government Center, 119 School Street, Waltham, MA. In attendance were Chair Barbara Rando and members Glenna Gelineau, Mark Hickernell, John Sergi and Gordon LaSane.

The chair called the meeting to order at 7:00 P.M.

Mrs. Rando: Tonight we have one continued case before us, Case No. 2013-02, Carlo Compagnone, 162-164 Brown Street

The first action this evening is for a motion to accept the minutes of the meeting of March 26, 2013.

On motion of Mr. Sergi. seconded by Mr. LaSane, the board voted to accept the minutes of March 26, 2013.

Will the clerk please read the Petition in Case 2013-02?

The clerk then read the petition of Carlo Compagnone, 162-164 Brown Street in an application for a variance to reestablish variance from 06/29/1946. The Petitioner seeks a variance to allow for and permit the third floor of the residence at 164 Brown Street to be permanently used as a separate apartment, and thus for 162-164 Brown Street to be designated a

lawful three-family dwelling, or multi-family dwelling. Location and Zoning District: 162-164 Brown Street; Residence B Zoning District.

Mrs. Rando: May we hear from the Petitioner or the Petitioner's representative, please?

Joseph Leone, Attorney, 1101 Worcester Road, Framingham, MA came forward.

Mr. Leone: I represent the Petitioner, Carlo Compagnone. This is a continuance but if you want I would summarize again what I have sort of, ah...

Mrs. Rando: All right. Maybe I could do it a little bit faster.

Mr. Leone: Okay.

Mrs. Rando: When you were here the other day you stated that there was a variance granted in 1946 on your petitioner's property. And that at that time they gave a variance for a third floor apartment that lasted for seven years.

Mr. Leone: That is correct.

Mrs. Rando: So that would have been 1953 that would it ran out.

Mr. Leone: That is correct.

Mrs. Rando: And the owner at that time did not come to the zoning board to have it extended which at that time that could have happened.

Mr. Leone: You are correct.

Mrs. Rando: Okay. They have used it as a three family continuously since that time.

Mr. Leone: I believe that to be true. That is correct.

Mrs. Rando: Okay. Now your client bought the house and bought it as a three family.

Mr. Leone: Yes, correct.

Mrs. Rando: But it's not a legal three family.

Mr. Leone: It is not at this time.

Mrs. Rando: Okay, so what can we do? Now you are asking us to designate this two family a legal three family, right?

Mr. Leone: That is correct.

Mrs. Rando: Because you thought you were getting a three family when you bought it. Correct, again?

Mr. Leone: That is correct, yes.

Mrs. Rando: But I think you know it's determined that we can no longer grant use variances.

Mr. Leone: That is correct.

Mrs. Rando: And that was a use variance.

Mr. Leone: That is correct, yes.

Mrs. Rando: And it's a two family residence, a Residence B?

Mr. Leone: It is, yes.

Mrs. Rando: So we have no authority to designate this a legal three family in this Residence B Zone. So, I believe that's unachievable. The question I have, why are you here tonight and you weren't here years back?

Mr. Leone: Sure.

Mrs. Rando: Because I found out that he bought the house in 1996.

Mr. Leone: That's correct.

Mrs. Rando: Okay. The building inspector didn't go to him. He came to us. Because somehow he found out it was not a legal three family and he wanted to make it a legal three family. Right?

Mr. Leone: If I could just - - -

Mrs. Rando: Go ahead.

Mr. Leone: What actually happened, Mr. Compagnone was actually present at the building as he has occasion to do so as time to time as a landlord. And what happened was that the building inspector actually approached him, pulled into the driveway and questioned Mr. Compagnone as to the number of families and, of course, he fully in good faith disclosed that it was a three family there and the building inspector had knowledge that it wasn't indeed a lawful three family. So it was at that juncture that Mr. Compagnone voluntarily, without any pressure from the building inspector or the City of Waltham, came forward to the City of Waltham and filed asking for an amendment to the variance and to reestablish that variance. Not for a use variance but to establish the variance that was given and to eliminate the conditions that were put on that variance.

Mrs. Rando: But why did he go recently? Why didn't he go back in 1996 when he bought it? I mean 2000, 2005, 2010?

Mr. Leone: This incident with the building inspector actually happened within the last six months, maybe less. He filed immediately thereafter. So he actually wasn't on notice. I've checked the records subsequent to our last meeting to see if in fact that was anything in title. If you recall he had bought the house on foreclosure. And I didn't do a title at that point because you buy it regardless of what the title effects might be. He didn't bother to do a title examination but I have done a search of the property through Mass Land records and there was nothing on property, nothing on chain of title that would give any indication to Mr. Compaganone that it's anything other than a three family.

Mrs. Rando: But no one went to the building department or checked city records?

Mr. Leone: I have the sheet and I believe I brought that sheet. There's nothing on the log sheet of improvements that have been made, that sort of thing. Nothing that shows it as a three family.

Mrs. Rando: So there was no permit taken out when they turned it into a three family, correct?

Mr. Leone: That's correct. There was a variance and that was basically it. So, and again, every other indications through the City of Waltham, municipal liens ---

Mrs. Rando: But there are public records that show it's a two family.

Mr. Leone: I don't know of any public records that it show it as a two family.

Mrs. Rando: Did you go to the building department and talk to him beforehand, before you bought the house?

Mr. Leone: No, Mr. Compagnone talked to him about that and---

Mrs. Rando: And that was after.

Mr. Leone: Right, correct.

Mr. Sergi: Madam Chair, may I ask a question?

Mrs. Rando: Sure. Go right ahead.

Mr. Sergi: Are you a real estate attorney, at all?

Mr. Leone: I do real estate, yes. I do some real estate.

Mr. Sergi: Then you're familiar with zoning opinions.

Mr. Leone: Yes. I've done zoning opinions before.

Mr. Sergi: Explain to me why one was not done when the purchase happened.

Mr. Leone: I don't know why the attorneys wouldn't have done a zoning opinion at that time. I don't know if there was any reason for them to do an opinion. I didn't know if there was anything that was necessary to put them on notice that one needed to be done. I don't think that a zoning opinion needs to be done certainly not done every time you buy a piece of property. As a matter of fact I would submit to you that 99% of the time, this is a residential piece of property, you don't do zoning opinions, that is for residential pieces of property every single time there's a real estate. We do transactions for banks and everybody else. We don't do zoning opinions every time a piece of property changes.

Mr. Sergi: I'm a banker. I know you do zoning opinions when you purchase properties.

Mr. Leone: Zoning opinions, for example, I've done one for an apartment complex that was you know that was a multi family apartment complex - -\

Mr. Sergi: You just can find out it's proper use. That's what you do.

Mr. Leone: Right. But I mean zoning opinions letters; I would submit to you that they are not done as a matter of course every time a piece of property changes hands.

Mr. Sergi: You wouldn't check the zoning opinion if you had a client buy a piece of property and you tell them, okay, this is a three family. You wouldn't check the zoning laws to make sure that it's zoned properly for a three family?

Mr. Leone: The attorney's job isn't necessarily to do that. No, as a matter of course, we don't do that. The bank doesn't require us to do that. I do conveyances for lenders as well. You don't do zoning opinions as a matter of course.

Mrs. Rando: So can he continue using this third floor apartment? I don't know. It's been used as a three family for 67 years now. Correct?

Mr. Leone: That is correct.

Mrs. Rando: Is it nonconforming?

Mr. Leone: It is nonconforming.

Mrs. Rando: Is it noncomplying? Can you prove to us its nonconforming. Would you have records from 1946 until now that it was continuously used and rented as a three family?

Mr. Leone: I don't have records to underscore the fact that it was continuously used as a three family but we have no reason to believe that it hasn't been. The structure has not changed at all. One of the requirements in 1952 ordinance was that you could have an alteration to a

building like a two family, for example, to allow for three families or four families as long as long as the transition wasn't injurious to the neighborhood and they stressed that there should be no exterior change to the character of the building and, of course, Mr. Compagnone hasn't done anything since 1996 in that regard and he has no reason to believe that anybody else has. There have been no permits pulled that indicate that there was any change to the exterior from 1946 on.

Mrs. Rando: Right but he would have to prove to us that it was a continuous use for it to be a nonconforming.

So I tried to think how we could help this man. And there was some kind of a rule that if that structure is used in a certain way for X number of years it would be protected. But that would be the structure that wouldn't be the use. So, we can't go that way. So, then I looked at the zoning. What was the zoning back in 1946 for that neighborhood and it was a Residence 2B, right.

Mrs. Rando: Yes. Alright. And in 1953 which would have been the time limit, the seven years, it was a Residence B.

Mr. Leone: Yes, correct.

Mrs. Rando: And it's still a Residence B.

Mr. Leone: Yes, correct.

Mrs. Rando: So, I don't see what we can do. It's a dilemma. I don't know. You bought this house as a foreclosure in 1996 and you bought it as it was. I know that the legal notice did state, because I saw it on line that it was a three family and I know that you are paying taxes on a three family but you have been making money on the rent on a three family. Sometimes they are assessed a three family but they are not a legal three family like yours has been used since 1946, no 1953, as an illegal three family but you are paying taxes on the three family and getting use out of the three family.



Mr. Leone: It's our understanding that the building has been used as a three family since 1946. We have no reason to believe that it hasn't been. There are three separate units, separately metered which would indicate that it was indeed used as a three family continuously and again separate water, separate gas, separate electricity, egress and ingress from the third floor, there's every indication that it was - - -

Mrs. Rando: Right it was assessed as a three family but it was not a legal three family. And for us to turn it into a three family in a Residence B would be a use variance and we do not have the power to grant use variances.

Mr. Leone: But do you not have the power to amend, to reestablish the variance that was given and then to amend that variance. If I'm not mistaken it has been done by this board before.

Mr. Hickernell: It has and it has been done unanimously.

Mr. Leone: Correct.

Mrs. Rando: Therefore, where it is a legal two, I don't feel we can do anything for you. I'm sorry, but maybe the mortgage company that said it was a three family should have done some research.

Mrs. Rando: Mr. Sergi, does the bank take more interest in a property that is a foreclosure before they grant a mortgage?

Mr. Sergi: Well foreclosures are a little differently. They buy the property with all the risks associated with the foreclosure, so it's up to the buyer to do the due diligence and I was ---

Mrs. Rando: Well doesn't the bank care that this ---

Mr. Sergi: Is there a mortgage? I didn't ask. Is there a mortgage on the property, I am

not sure.

Mrs. Rando: And also, do you live there?

Mr. Leone: Mr. Compagnone doesn't live there at the time but I am being told that there was indeed a title search done at the time contrary to my understanding before. There was indeed a title search done and nothing came up at that time showing that it would be anything less than a three family.

Mr. Sergi: A title search relates to the change of title.

Mr. Leone: Exactly.

Mr. Compagnone: You're saying it's a two family area, residence B.

Mrs. Rando: It's a Residence B, two family. It's a legal two family and it was granted you a variance because they needed housing. At that time, we have a lot of houses –

Mr. Compagnone: There are six families in that area, there are four families.

Mrs. Rando: There are so many houses over there that they gave variances to for the veterans.

Ms. Gelineau: Or if it was built in 1930 or 40 or 50 as a - - -

Mr. Leone: Madam Chair, if I could, it's my understanding that subsequent to the time where the board was no longer able to grant use variances this board has indeed amended those types of variances and allowed for the elimination of the conditions.

Mr. Hickernell: I did sit on such a case and there was a similar situation with the veterans allowance and we removed that condition as well as the earlier condition. Actually I looked at

the file when I was at the zoning board but I didn't bring it with me, so I don't remember. It was on the south side somewhere.

Mrs. Rando: We had a case on Cherry Street that was a use variance and we weren't able to change the parking plan because it was attached to the use variance. So, I don't believe that there is anything that we can do, in my opinion.

Does anyone else have anything to add?

Mr. Hickernell: If I may, Madam Chair, I think we can amend the conditions that were put on a prior variance granted by the board in a way that the petitioner seeks. We have done it before without challenge and I don't see any reason why we can't do it here. And I would so vote.

Mrs. Rando: Well, I remember a case on the island, such a case, and it went to court and the building inspector handled it and we had to get our own attorney, if you remember.

Mr. Hickernell: And we won. That was a different case. That was, I think, a four to a three family. So, again, we won our case.

Mrs. Rando: So, in my opinion, it's a legal two family and we can't touch it. I think the only recourse is to go, look into the mortgage company and whoever advertised it as a three family.

Mr. Leone: Well I would ask you to reconsider. Like I say, it's been that way for Mr. Compagnone. It's been treated as a three family. The city has been treating it as a three family for quite some time.

Mrs. Rando: But that doesn't mean that it is a legal three family.

Mr. Leone: Right, exactly. But if the board does indeed have the authority to do so, I

think it would be sort of a symbiotic or it would be helpful to both the city and to Mr. Compagnone bringing in the revenues.

Mrs. Rando: It certainly would be helpful because there are people that need rentals but -

Ms. Gelineau: What's your lot size?

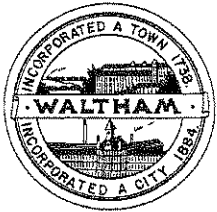
Mr. Leone: 60 x 81 I believe. These photographs weren't included, copies of photographs of the parking if you would like to see that. I also have the abutters list that is sort of color coded that shows that about 36% of the houses in that neighborhood, within that 300 foot radius, 36% of them are either multi family use, three family or four to eight families in that area as well and the parking that he has is significant. There are roughly seven or eight spots when he would need six.

Mrs. Rando: I know. Everything else fits. Everything else is fine. So at this time, I make a motion that we reject the petition on the grounds that it was a use variance that was not reinstated in 1953 and it has been used illegally as a three family since 1953. Do I have a second?

Ms. Gelineau seconded the motion and the roll being called: Mr. Sergi, yes; Mr. Hickernell, no; Ms. Gelineau, yes; Mr. LaSane, yes and Mrs. Rando, yes. The vote was 4-1 in favor of rejecting the petition.

There being no further business, on motion of Mr. Sergi, seconded by Mr. LaSane the board voted to adjourn at 7:25 PM.

*Barbara Rando, Chair*  
5/7/13



**City of Waltham**  
COMMONWEALTH OF MASSACHUSETTS

**ZONING BOARD OF APPEALS**

**LEGAL NOTICE**

DATE FILED: January 22, 2013

THE ZONING BOARD OF APPEALS OF THE CITY OF WALTHAM WILL HOLD A PUBLIC HEARING IN THE GOVERNMENT CENTER, 119 SCHOOL STREET, WALTHAM, MA ON March 5, 2013 AT 7:00 P.M. ON THE FOLLOWING:

**Case No.:** 2013-02. **Petitioner/Owner:** Carlo Compagnone. **Nature of Application/Petition:** Application for Variance – reestablish variance from 06/29/1946. **Subject Matter:** Petitioner seeks a variance to allow for and permit the third floor of the residence at 164 Brown Street to be permanently used as a separate apartment, and thus for 162-164 Brown Street to be designated a lawful three-family dwelling, or multi-family dwelling.. **Location and Zoning District:** 162-164 Brown Street; Residence B Zoning District. **Provisions of Zoning Ordinance Involved:** Article III, Sections 3.24 & 3.618 or Article VII, Section 7.1, Subsection 7.33. **Specific Manner in Which Subject Matter Varies from Zoning Ordinance:** The property is located in a residence B Zone in which dwellings are restricted to two-family houses, double houses, and a house for two families on each side of a common party wall. The property was used as a three-family, multi-dwelling pursuant to a variance granted for seven years back in 1946. The property has been used as a three-family dwelling continuously since that time, and has been taxed as a three-family dwelling. In all other respects, the building is in compliance with the building code. Further information and plans concerning this case may be viewed at the Zoning Board of Appeals' Office, 119 School Street, Waltham, Massachusetts 02451; Hours: Monday - Friday 8:30-4:30. **MEMBERS:** Chair Barbara Rando, Michael Cotton, Mark Hickernell, John Sergi, Glenna Gelineau. **ASSOCIATE MEMBERS:** Edward McCarthy, Oscar LeBlanc, Marc Rudnick, Michael Squillante, Gordon LaSane.