



Ruthanne Fuller  
Mayor

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By Brenda Belsanti, ZBA Clerk at 10:02 am, Sep 14, 2023

**CITY OF NEWTON, MASSACHUSETTS**

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**ZONING BOARD OF APPEALS**

Brenda Belsanti, Board Clerk

**#05-23**

**DETAILED RECORD OF PROCEEDING AND DECISION**

Petition #05-23 Liam M. Ryan of 125 Grasmere Street, Newton, Massachusetts, pursuant M.G.L. c. 40A, § 8 and 15, appealing the May 2, 2023 issuance of a building permit by the Commissioner of Inspectional Services for the interior remodeling of the subject property and the May 5, 2023 Decision of the Commissioner of the Inspectional Services granting an accessory apartment. The subject property is at 129 Grasmere Street, Newton, Massachusetts within a Single-Resident 3 (SR-3) zoning district.

The Zoning Board of Appeals for the City of Newton (the “Board”) held a virtual public hearing via ZOOM on Monday, July 24, 2023, at 7:00 p.m.

Due notice of the public hearing was given by mail, postage prepaid, to all “parties in interest” in accordance with M.G.L. c. 40A, § 11 and by publication in *The Boston Herald*, a newspaper of general circulation in Newton, Massachusetts, on July 10, 2023, and July 17, 2023.

The following members of the Board were present:

- Michael Rossi (Chair)
- Brooke K. Lipsitt
- Stuart Snyder
- Elizabeth Sweet
- Jennifer Pucci

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The following documents were submitted to Board and/or entered into the record at the public hearing: 129 Grasmere Street Appeal Application, received June 8, 2023; letter with exhibits from Attorney Hugh Starkey dated June 30, 2023; and an opposition letter from Attorney Peter Harrington dated July 18, 2023.

**THE PUBLIC HEARING**

1. Attorney Starkey, representing the Petitioner, stated that there were two primary issues with the issuance of the permit. The first issue is whether the ownership, use, and habitable space calculations complied with the requirements set forth for internal accessory apartments in the Newton Zoning Ordinance. The second issue is whether the legally nonconforming status of the lot has lapsed since its use as a single-family dwelling had been abandoned.
2. Attorney Starkey stated that George Marry, the co-owner of the property who intends to reside in the accessory apartment, only owns a 25% interest in the entity that owns the subject

property. Based on this fact, he states that Section 6.7.1.C of the Newton Zoning Ordinance would be violated because an indirect property owner, as defined in the Zoning Ordinance would not reside at the property.

3. Attorney Starkey stated that the total number of bedrooms exceeds the number of individuals that would be permitted to reside in the dwelling.
4. Attorney Starkey stated that the habitable space was incorrectly calculated because a portion of the first floor is incorrectly labeled as "common area" on the submitted plans when it should be labeled as part of the accessory apartment.
5. Attorney Starkey stated that the use of the lot should be considered abandoned since it has been illegally used as a multi-family for more than two years. As the use has been abandoned, the undersized non-conforming lot should lose it's by-right protection.
6. Attorney Starkey stated that ISD should not issue any building permits until the lot conforms to the dimensional requirements of the zoning ordinance.
7. Commissioner of ISD Anthony Ciccariello and Zoning Code Enforcement Officer Andrew Mavrelis stated that there are no current violations of the accessory apartment rules and that the petitioner's arguments are premature. They stated that the plans were labeled correctly and that the habitable space calculations were correct.
8. Attorney Harrington, representing Marry Grassmere Realty LLC, stated that the arguments raised by Attorney Starkey are not ripe because no violations of the Zoning Ordinance have actually occurred.
9. Attorney Harrington stated that if ISD determines that George Marry does not have a sufficient ownership interest to issue the certificate of occupancy, they are prepared to rectify that if and when the time comes.
10. There were no comments from the public.
11. A motion was made by Brooke Lipsitt to close the public hearing, seconded by Elizabeth Sweet. The motion passed 5-0 and the public hearing was closed.
12. The Board then discussed and deliberated the merits of the petition. Board members focused their discussion on whether the challenged building permit was issued in violation of the Newton Zoning Ordinance.

### **FINDINGS, DETERMINATION & CONDITIONS**

After careful study of the materials submitted and the information presented at the public hearing, the Board makes the following findings and determination:

1. *The appeal does not set forth a violation of Section 6.7.1.C of the Newton Zoning Ordinance. Section 6.7.1.C.3 states that the "property owner or indirect property owner must occupy either the principal dwelling unit or the accessory apartment." Section 6.7.1.C.4 states that*

*"[I]he total combined number of individuals residing in the principal and accessory dwelling units may not exceed the number allowed in the principal dwelling unit alone." The accessory apartment is not yet being occupied since a certificate of occupancy has not been issued. Any assertions of occupancy in violation of Section 6.7.1 are premature, so there is no violation of this Section.*

2. *The appeal does not set forth a violation of Section 6.7.1.D of the Newton Zoning Ordinance. Section 6.7.1.D sets forth the minimum and maximum amounts of habitable space in an internal accessory apartment. The common areas were properly designated and the measurements upon which the habitable space calculation was based were properly taken. The habitable space amounts comply with Section 6.7.1.D.*
3. *The appeal does not demonstrate that use of the subject property has been abandoned and that it must meet the new lot requirements for a single-family detached dwelling to sustain future residential use under Section 3.1.3 of the Newton Zoning Ordinance. Section 7.8.1.B of the Newton Zoning Ordinance states that nonconformities will cease to be lawful when "[a]ny nonconforming building or structure not used for a period of 2 years or any nonconforming use [is] abandoned for a period of 2 years." Neither situation has occurred in this instance. First, the appeal does not set forth facts suggesting that the dwelling was unused for a period of two years. There is no legal support for the argument that use of a lot in violation of zoning ordinance constitutes nonuse of a lot such that it has been abandoned. Second, use of the dwelling as a single family is not nonconforming, as it is allowed by right. Therefore, Section 7.8 does not apply to the subject property and the new lot requirements set forth in Section 3.1.3 do not have to be met.*
4. *The appeal does not set forth a violation of Section 7.8.1.C of the Newton Zoning Ordinance. Since we have found that Section 7.8 does not apply to the subject property, there can be no violation of Section 7.8.1.C.*
5. *The appeal does not set forth a violation of Section 7.8.2 of the Newton Zoning Ordinance. A special permit is not required for the construction of an internal accessory apartment, which is allowed by right in all residential districts.*
6. *Based on the above findings, the building permit by the Commissioner of Inspectional Services for the interior remodeling of the subject property and the May 5, 2023 Decision of the Commissioner of the Inspectional Services were properly issued and were not in violation of the Newton Zoning Ordinance.*

Accordingly, a motion was made by Brooke Lipsitt, duly seconded by Stuart Snyder to deny the appeal. The motion passed five in favor, none opposed. Therefore, the appeal is denied.

AYES: Michael Rossi  
Brooke Lipsitt  
Stuart Snyder  
Betsy Sweet  
Jennifer Pucci

NAYS: None



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Michael Rossi, Chairperson

The City Clerk certified that all statutory requirements have been complied with and that 20 days have lapsed since the date of filing of this decision and no appeal, pursuant to Section 17, Chapter 40A has been filed.

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Carol Moore, City Clerk