

TOWN OF WELLESLEY



MASSACHUSETTS

ZONING BOARD OF APPEALS

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ROBERT W. LEVY
WALTER B. ADAMS
DEREK B. REDGATE

January 23, 2014

Michael J. Larkin Jr.
289 Main Street
North Reading, MA 01864

Re: ZBA 2014-02
646 Worcester Street

Dear Mr. Larkin:

Please be advised that the Board voted unanimously at the Public Hearing on January 9, 2014 to allow the petition to be withdrawn without prejudice.

Any future petition regarding 646 Worcester Street requiring relief from the Board of Appeals will require a \$200 application fee and a \$25 mailing and publication fee.

If you have any questions, or need further assistance, please do not hesitate to call me.

Sincerely,

A handwritten signature in blue ink that reads "Lenore R. Mahoney".

Lenore R. Mahoney
Executive Secretary, Zoning Board of Appeals

Town Clerk
Planning Board
Inspector of Buildings

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TOWN'S OFFICE
WELLESLEY MA 02482

From Minutes of ZBA Public Hearing, January 9, 2014

ZBA 2014-02, SHERRY STAUFFER, 646 WORCESTER STREET

Presenting the case at the hearing were Michael Larkin, Esq., representing Sherryn Stauffer, (the "Petitioner") and Christopher Byrne, Realtor.

Mr. Larkin said that the request is for a Special Permit and a Section 6 Finding to demolish a one-unit dwelling, a two-unit dwelling, a utility shed and a three-car garage with a storage loft and construct a new single-unit dwelling and a two-unit duplex style dwelling that will all meet setback and height requirements.

Mr. Larkin said that at the last meeting there was a threshold question that the Chair brought regarding the possible legal authority for the Board to grant the Special Permit.

Mr. Larkin said that both buildings were built prior to Zoning regulations in Wellesley. He said that the Inspector of Buildings, Mike Grant, issued an opinion in February 2013 that both the two-unit and single-unit dwellings had legal pre-existing nonconforming status. He said that, as legally pre-existing nonconforming structures, they are afforded special status under Chapter 6 of Mass. General Laws, which allows them to be rebuilt despite changes in the laws. He said that a question came up regarding the legal threshold. He said that there was a recent case, *Gale v ZBA Gloucester* in 2011, which confirms the review framework for any alteration, reconstruction, extension or structural change to a pre-existing nonconforming one or two-family home. He said that, in that case, there was a 1,000 square foot building proposed to be replaced by a 2,700 square foot building. He said that the Court held to grant the underlying permit. He read a few lines from the case, "Exterior alterations or reconstruction of a single or two-family structures that increase or intensify any pre-existing nonconformities may be authorized by means of a finding of no substantial detriment under the second sentence of the first paragraph of Chapter 40A, Section 6." He said that based on that he feels that this application can move forward.

Mr. Larkin said that he submitted a brief, dated January 2, 2014.

Mr. Levy said that there are two issues that Mr. Larkin needs to address. He said that there are two nonconformities here, nonconforming structures and nonconforming use. He said that you are only allowed to have one house on a lot in Wellesley. He said that the existing structures are nonconforming in several manners. He said that they do not comply with setback requirements.

Mr. Larkin said that there are two structures. He said that one structure has a minimum side yard setback of 16.3 feet and the rear structure has a minimum side yard setback of 12.4. Mr. Levy said that those structures are noncompliant and the current use is noncompliant, which is a two-family use in a Single Residence District.

Mr. Larkin said that under Chapter 40A Section 6, the intent is to continue the pre-existing nonconforming use and reconstruct the pre-existing nonconforming structures. He said that there will be

no change of use. He said that there are three existing residential buildings and the proposal is for three residential buildings. He said that there are four structures on the property. He said that the proposal is for two structures on the property, which is a decrease in the number of structures on the property. He said that there are 17 existing rooms in the dwellings and that number will remain the same. He said that currently there are only three parking spaces on the site. He said that they are proposing seven plus parking spaces, which doubles the amount of parking on the site and is a positive change. Mr. Adams said that there are more than three parking spaces on the lot. He said that there is a three-car garage and when he visited the site people were parked against the house.

Mr. Larkin said that the existing driveway is insufficient. He said that have to drive straight onto the property and have to reverse straight to exit. He said that there is not sufficient turning radius. He said that the proposal is to create space for a driver to turn around on the property and exit facing out. He said that backing out onto Route 9 could be detrimental as far as causing an accident. Mr. Adams said that they could change the parking without demolishing the two structures that are there. Mr. Larkin said that the proposal is to fix the existing condition to make it less detrimental.

Mr. Larkin said that the new construction will meet all setback requirements. He said that the buildings are less than five feet apart. He said that the proposed structures will be separated by 40 feet to meet code and fire safety standards.

Mr. Larkin said that the height of the existing building is approximately 35 feet. He said that the height of the proposed buildings will drop down to 30 feet. He said that current rental units will become ownership units.

Mr. Larkin said that a neighbor concern was removal of trees. He said that the plan is to keep the large trees on site to maintain the view line.

Mr. Levy asked if the proposed units will be condominiums. He asked about the number of bedrooms. Mr. Larkin said that the number will remain at eight bedrooms. He said that the number of structures and rooms will not current. He said that the proposed construction will make the current situation better.

Mr. Adams asked if Mr. Larkin had investigated subdividing the property, putting in a cul de sac and getting enough frontage for the lots. Mr. Larkin said that the required turning radius would eat up most of the rear of the lot. He said that there would not be enough room to put structures on the property. He said that their Engineer looked at it and said that it would not be viable.

Mr. Larkin said that they spoke with the Planning Director about doing an 81 L, where they would put one structure on a conforming lot and keep the other one on a nonconforming lot. He said that the plan was to maintain the existing two-family on one lot and put a new structure at the rear on another lot. He said that the Planning Director encouraged them to move forward in the direction that has been proposed instead of doing the 81 L. Mr. Adams confirmed that Mr. Larkin had not explored ways to have two single family dwellings on two separate lots at this site. Mr. Larkin said that the economics did not work with just two units.

Mr. Levy said that it appears that a number of mature trees will have to be removed. Mr. Larkin said that they will be keeping the trees. He said that they will remove a 24 inch tree that is located next to the shed.

Mr. Levy confirmed that lot coverage will be increased by approximately 50 percent.

Mr. Redgate asked if there are any other examples of pre-existing uses in the neighborhood for a multi-family in a Single Residence District. Mr. Larkin said that in 2003 at 56-58 Oak Street there was the same situation. He said that there was a single family unit and a two-family unit. He said that the Board allowed the two-family to be changed to a single family and the single was allowed to be demolished and a new single family was put on the lot.

Mr. Redgate asked if there were any examples of other than those that were allowed by Special Permit. Mr. Larkin said that 64 Donizetti Street is one. He said that there are three streets in the area that have multiple units on one lot. He said that they did an 81 L where they subdivided the lot where neither lot conformed. He said that this situation is not unique to the area.

Mr. Adams asked if Mr. Larkin had considered renovating or expanding the existing structures. Mr. Larkin said that the previous Board questioned whether it had the authority to allow that.

Mr. Larkin said that the second unit is not set up to meet current code standards. He said that they spoke with an architect about renovating to bring the structures up to code. He said that they were told that it was cost approximately the same as having new construction.

Mr. Adams confirmed that one dwelling has 797 square feet and the other dwelling has 1,500 square feet. Mr. Larkin said that there is also a three-car garage of 800 square feet. Mr. Adams said that one of the new buildings would have 2,950 square feet and the other would have 1,865 square feet, for a 50 percent increase in floor area. Mr. Larkin said that this is similar to 33 Thomas Road where the Board granted a 372 percent increase. He said that the Board approved a 58 percent increase on Donizetti Street. He said that they are asking that the Board grant similar relief to what has previously been granted.

Mr. Adams said that he was present at the previous hearing but did not sit on the Board. He said that he agreed with the previous Board hearing a litany of other cases that were heard in Wellesley does not have bearing on this Board. He said that the Board renders decisions based on considered plans for a particular lot with unique characteristics. Mr. Larkin said that he brought them up because they were located on street nearby.

Mr. Levy said that no existing conditions floor plans were submitted. Mr. Adams said that the number of rooms will not increase but the rooms will get a lot larger.

Mr. Adams asked about the number of tenants legally residing on the property today. Mr. Larkin said that previously there were three sets of tenants but now there is one tenant. He said that there was a total of five occupants.

Mr. Larkin said that they will be targeting an age group of 55+. He said that there will be a master bedroom on the first floor with two bedrooms upstairs. He said that they are looking for people who would like to downsize as empty nesters. Mr. Levy confirmed that it would not be an age restricted project. Mr. Larkin said that they have done a similar project in Medfield. Mr. Byrne said that two of the three units at the Medfield project are under agreement with that demographic. He said that he already has potential buyers for this property who would like to downsize and be close to the downtown walking area.

David Himmelberger, Esq., said that he was representing Helen Robichaud, who is the direct abutter to the east. Mr. Himmelberger said that this is the identical proposal that was submitted on December 5, 2013. He said that at that time the Chair, Mr. Seegel, advised that given the fact that this property involved not only pre-existing nonconforming structures but pre-existing nonconforming uses, he found no support under the law. He said that he had looked at law and found nothing that would support the proposition for razing and reconstructing structures that are also nonconforming uses. He said that the Applicant was given the opportunity to withdraw the petition without prejudice to produce any legal citations or support for the proposition that one can raze and reconstruct pre-existing nonconforming structures which are, in addition, pre-existing nonconforming uses. He said that the Applicant has not done that. He said that none of the cases that were submitted involved any fact pattern where there is a pre-existing nonconforming structure and a pre-exist nonconforming use. He said that there is nothing in Wellesley's bylaw or State Statute to allow for razing and reconstructing pre-existing nonconforming structures which are, in addition, pre-existing nonconforming uses. He said that here there is the nonconforming use of two dwellings on a single lot in addition to which there is the nonconforming use of a two-family dwelling on a single family lot. He said that there are two nonconformities.

Mr. Levy said that Chapter 40A section 6 discusses alteration or extension of pre-existing nonconforming structures or uses. Mr. Himmelberger said that the Courts have held that extended or altered does not entail razing and reconstruction. He said that is why reconstruction is seen in the prior sentence with regard to pre-existing nonconforming structures. He said that you do not see it with regard to pre-existing nonconforming uses. He said that they can only be altered or extended. He said that, in this case, it would mean that the Applicant has the ability to come before the Board and seek the relief to add onto the buildings but he cannot raze and relocate these buildings. He said that it is not permitted under law.

Mr. Levy said that Chapter 40A, Section 6 goes on to talk about abandoned or not used for a period of two years or more nonconforming uses or structures. He said that abandonment would require some intent. Mr. Himmelberger said that abandonment does require some finding of intent but non-use does not require a finding of intent. Mr. Levy asked if they would be grandfathered because it would be less than two years. Mr. Himmelberger said that there is no right to raze and rebuild a nonconforming structure that is also a nonconforming use. He said that pre-existing nonconforming structures or uses may be extended or altered, not reconstructed. Mr. Levy said that the ZBL does not provide for reconstruction. Mr. Himmelberger said that it does under Disaster Rebuild. He said that this is not a disaster rebuild and that is why they cannot do what they are seeking to do.

Mr. Levy said that the Board traditionally granted Special Permits for teardowns. Mr. Himmelberger said that teardowns in those instances are pre-exist nonconforming structure which are conforming uses. He said that is the critical distinction.

Mr. Himmelberger said that he took issue with the Board being told that the Planning Director is suggesting that the Applicant follow this route. He said that he has spoken with the Planning Director and the 81 L proposal that was out here. He said that the reason that the Applicant has chosen to not go through the 81 L route is because he cannot rebuild under 81L. He said that 81L gives the right to divide a property that has two structures on it that pre-date zoning and sell them off as single family lots. He said that it does not give the right to rebuild unless the buildings are in compliance with all Zoning. He said that is not possible here.

Mr. Himmelberger said that the ZBL were not designed to guarantee profit for developers. He said that we do not change the law because it is not economical to do something. He said that this property is under agreement but it is still owned by the original property owner. He said that it could sell as a single family residence lot and the buildings can come down.

Mr. Himmelberger said that the Applicant is asking to create a new nonconformity. He said that townhouses are not allowed in Single Residence Districts. He said that a non-permitted use. He said that there cannot be a use variance. He said that they are seeking to transform the upstairs/downstairs two-unit dwelling to a duplex style structure that fits the bylaw criteria as a townhouse, with two or more units with a common party wall, each with access and egress on the ground floor. He said that is what they are proposing. He said that they are seeking to add a third nonconforming use without any basis for that request. He said that these are impermissible uses. He said that they are entitled to renovate the existing structures. He said that the Board has made clear that other cases stand on their own. He said that those cases do not bear resemblance to this. He said that the Oak Street property went from three units to two units. Mr. Levy said that this petition will stand on its own merits.

Mr. Himmelberger said that it is not permissible under the Zoning Bylaw or State Statute to raze and reconstruct pre-existing nonconforming structures that are also pre-existing nonconforming uses. He said that the Board raised the issue about abandonment and non use. He said that a review of the Town's census records going back over the last three years calls into question whether or not these nonconforming uses have been extinguished by non use for more than two years. He said that beginning in 2011, Unit 1 in the front and the Rear Unit were reported as vacant. He said that Unit 1 and the rear Unit were reported as vacant in 2012. He said that Unit 1 was reported as vacant in 2013. He said that one of the two unit apartments was vacant for more than two years, which would extinguish its two-unit use. Mr. Adams said that he was not sure that he agreed with that. He said that just the fact that it has not been rented constitutes an abandonment. Mr. Himmelberger said that it constitutes the second disjunctive clause of not used for two years or more. He said that the case law is clear that it is the disjunctive and is not abandoned for more than two years but abandoned for any period of time or not used for two or more years. He said that according to the census records that is the case with regard to the two-family status in the front and the rear unit. He said that he did not think that the Board has to render its decision on that ground. He said that it is enough that they are seeking impermissible relief, namely, to be able to raze and reconstruct pre-existing nonconforming structures that are also pre-existing nonconforming uses. He said

that it is not permitted under the law. He said that even if the Board disagrees that it is not permitted under the law, he would still argue that this will be substantially more detrimental to the neighborhood.

Mr. Himmelberger said that this is the identical submittal from last time. He said that there is no basis under law or the bylaw to grant the requested relief.

Mr. Levy discussed the definitions of two-family and townhouse. He said that they are two separate dwelling units. Mr. Adams said that a two-family has to be one unit over the other, according to the bylaw. Mr. Himmelberger said that the rationale behind that is that a two-family more closely resembles a one-family rather than a side by side that looks more like a townhouse in a Single Residence District. Mr. Levy read an excerpt of the definition of townhouse in the Zoning Bylaw. Mr. Adams said that the townhouse requires living space on the ground level for both units.

Mr. Himmelberger said that you cannot have a Variance for a nonconforming use.

Mr. Levy asked about the interplay of a condominium falling into this. Mr. Himmelberger said that it does not matter whether it is a condominium or not. He said that they could take the existing structures and make them into condominiums. He said that they cannot raze and reconstruct the dwellings and call them whatever because it is simply not permitted.

Mr. Levy asked Mr. Himmelberger to comment on the substantially more detrimental aspect. Mr. Himmelberger said that the proposal is to significantly increase the square footage and lot coverage on the lot, this will be a more intensive use, and two of the multiple large trees will be coming down. He said that he laid out in his letter the various bases upon which he believes the project will be substantially more detrimental. He said that he believes that the Board does not get to reach that because they are seeking something that is not permitted under the Zoning Bylaw or State Law. He said that there are multiple nonconforming uses.

Mr. Levy said that the Board received a petition with several signatures that asked the Board to not grant the requested relief.

Elizabeth Murillo, 77 Donizetti Street, said that she signed the petition that was submitted to the Board. She said that this is her third time before the Board. She said that this is an identical application as the one that was submitted for December 5, 2013. She said that she did not believe that the current owner should be rewarded because the property is in a state of disrepair.

Ms. Murillo discussed the project being substantially more detrimental. She said that the long strip of driveway that is proposed runs against the line of four properties on Donizetti Street. She said that those are small, undersized lots. She said that they would have a runway of driveway along the back line of their lots. She said that Unit 1 will be backing up cars where the Murillo's have their swing set. She said that there is nowhere else to put the swing set because they have a small lot. She said that this will not only be an increase in the square footage but will also be an increase in the number of cars and people who are there, lights, and noise. She said that it will be a more detrimental use of the property. She said that it will be an intensification of the use in an already dense, high traffic area. She said that they bear

the burden of a lot of the cut throughs to and from the Middle School and the Sprague School. She said that what should be on this lot is a single family residence, if that is what it is zoned for. She said that the rules should not be bent or broken to accommodate a proposal that is just to earn money for an out of town developer. Mr. Levy said that it is the Board's intention to follow the rules.

Mr. Adams said that the Board does not take into consideration whether the owner lives in Wellesley or not. He said that is not the basis to make the decision.

Ms. Murillo said that they have lived in their house since 2011. Mr. Levy asked how many occupants she has seen on the 646 Worcester property. Ms. Murillo said that there has been a flow but she is not sure who lives in which building.

Mr. Adams asked if Ms. Murillo considered having the existing nonconforming structures close to her property less detrimental than the proposal for larger buildings with a greater setback. Ms. Murillo said that it is more in keeping with what has been there. She said that the rest of the Donizetti Street to Route 9 have been there for decades. She said that adding the new nonconformities that are proposed, namely, the condominium ownership and the additional square footage would be more detrimental for the property and the neighborhood than what is existing.

Mr. Adams said that the Board and probably the neighbors would like to see this property well kept that could support a family or perhaps more than one family that would be welcomed and become part of the neighborhood. He said that right now it does not seem that this property attracts residents who connect with the neighborhood. Ms. Murillo said that she does not know any of the occupants of 646 Worcester Street.

Donna Scott, 55 Albion Road, said that she is a Realtor and a personal friend of Sherryn Stauffer. She said that Ms. Stauffer has owned the property since 1976. She said that she has been renting the property for 20 years. She said that there has typically been two people in each home and each have had two cars for a total of six. She said that turning around or trying to back out onto Route 9 is extremely dangerous. She said that the house is in disrepair. She said that the owner does not have the money to fix it. She said that the owner has lived in Virginia for the past ten years. Ms. Scott said that she thought that any improvement should be welcome to the neighborhood. She said that she has lived in Wellesley for more than 30 years and all of the houses in her neighborhood have been razed and rebuilt.

Ms. Scott said that they have always been able to rent the property at 646 Worcester Street. She said that it does look terrible. She said that she thought that any improvement would be welcomed. She said that she has seen Mr. Larkin and Mr. Byrnes' projects in other towns and they are nice workmanship and they are very nice people.

Mr. Larkin said that the statute talks about reconstruction of a single or a two-family dwelling. He said that the second sentence is about altering or expanding a pre-existing nonconforming use. He said that single and two-families get special protection. He said that case law says that if you have a single family, it is protected status, and you are allowed to redevelop it. Mr. Levy said that this is not a typical case because here there is a single family and a two-family on one lot. Mr. Larkin said that every other use can

be altered or expanded. He said that in a recent case Shirley versus Wayside, there was a mobile home park that was expanded. He said that was allowed under the standard that is was not substantially more detrimental than the current use. He said that is the expansion/alteration clause. He said that Section 6 is a difficult paragraph to understand. He said that they looked at it multiple times. He said that is where the special protection is afforded to the single and the two-family.

Mr. Levy said that is geared to a single family on one lot or a two-family on one lot, but not both on one lot. Mr. Larkin talked about coming to the Board about altering a single family unit.

Mr. Levy said that he was interested in the change of use from a two-family to a townhouse. Mr. Larkin said that they would be relocating the party wall from horizontal to vertical. He said that it will not be a change of use. He said that it will still be a two unit residential dwelling. He said that the bylaw says that it is two or more units, the International Building Code says that a townhouse is three or more units. He said that Wellesley has a Townhouse District where the structures contain four or more units. He said that you could not have a two unit townhouse in the Townhouse District. He said that there seems to be some discrepancy between the definition of townhouse and the actual Townhouse District in the Zoning Bylaw. Mr. Levy said that he was focusing on the definitions in the bylaw. He said that the bylaw describes a townhouse as, "a dwelling containing two or more dwelling units, each sharing one or more party walls with another dwelling unit, and each having at least one floor at ground level with direct access to open space on two or more sides." He said that appears to apply to this project. He said that the bylaw describes a two-family dwelling as, "a detached dwelling other than a town house containing two dwelling units." He asked how Mr. Larkin would reconcile that this is not a townhouse versus a two-family dwelling. Mr. Larkin said that the definition under Section 6 says that a nonconforming use can be altered or expanded. He said that the proposal is to change to vertical party wall. Mr. Levy said that would make it a townhouse. He said that it would not be a two-family any more. He said that the two-family is the grandfathered use. Mr. Larkin said that he would not consider that to be a change of use. He said that it will still be two units.

Mr. Adams said that the framers of Chapter 40A use the terms single family or two-family residential structures. He said that the townhouse and a two-family could both be a two-family residential structure.

Mr. Levy said that under the bylaw, the town accepts the bylaw definition of townhouse. Mr. Adams said that Chapter 40A does not discuss townhouses anywhere. He said that the Building Code has no bearing on this determination.

Mr. Larkin said that the Board should be cognizant that all of these increases still meet the required setbacks, square footage and lot coverage. He said that they will not be intensifying the use. He said that it will still be three units. Mr. Levy said that the Board heard anecdotally that the units have been traditionally occupied by six people and that number could increase to eight with the proposed project. Mr. Larkin said that the use will still be the same. He said that he cannot control the number of children who might live there.

Mr. Larkin said that they specifically designed the project to preserve the existing large trees. He said that they thought that moving the driveway and setting the houses back 40 feet from the properties on Donizetti Street would be better.

Mr. Levy said that there will be a 50 percent increase in the lot coverage.

Mr. Larkin requested a brief recess.

Following commencement of the hearing, Mr. Larkin requested that the Board allow the petition to be withdrawn without prejudice.

Mr. Levy asked about the current configuration of the two-family. Mr. Larkin said that it is up and down. He said that there is a door at either end. He said that in new development that is a style that is no longer used. He said that style was used in the 1930's and 1940's where the parents lived in the top unit and the children lived in the first floor unit. He said that everything now is the townhouse style development or apartment style with 40 or so units in one building. He said that the townhouse style is safer with party walls for fire protection.

Mr. Adams said that the Town of Wellesley does make a distinction between a two-family dwelling and a townhouse. Mr. Larkin said that Wellesley's Townhouse District does not even allow two unit townhouses. Mr. Levy said that he did not believe that they had this situation in mind when the bylaw definitions were developed. Mr. Adams said that he thought that the intent of the definition of the Townhouse District was that they would be a development of townhouses not a two-unit townhouse stuck on a square lot.

Mr. Levy said that the Board has the authority to allow the petition to be withdrawn without prejudice as well as the authority to bring this to a vote on the petition, as presented to it. He said that if it was to have a negative determination, it would restrict the ability to come back before the Board for two years without having gone through a process with the Planning Board for a super majority finding that there has been a substantial change from the petition that was presented. He said that the Board typically does allow the petition to be withdrawn without prejudice.

Mr. Himmelberger said that this is a classic case of a fact pattern that calls for exception to the norm. He said that this is the third time back before the Board. He said that this hearing is nothing other than a replay of December 5, 2013. He said that it seems that there is no reasonable basis to grant the request and bring the neighbors back a fourth time. He requested that Mr. Larkin's request to withdraw the petition without prejudice be denied.

Mr. Larkin said that he withdrew the petition without prejudice in December to give him time to present new legal paperwork. He said that he would rather not put the onus on the property if the petition was denied. Mr. Larkin said that he does not own the property.

Mr. Adams said that he thought that the Board gives up some of its authority to make determinations as to how properties are developed by allowing petitions to be withdrawn without prejudice.

Mr. Levy said that the petitioner before the Board is not the owner of the property. He said that he did not want to burden the property with a two year restriction. Mr. Adams said that he would not want the owner to come back with the exact same plan. Mr. Levy said that denial would force them to go through a whole other process before the Planning Board and he did want to cause the owner undue delay. He said that the Zoning Board could review the petition in one hearing.

Mr. Redgate moved and Mr. Adams seconded the motion to allow the petition to be withdrawn without prejudice. The Board voted unanimously to allow the petition to be withdrawn without prejudice.