

**ZONING BOARD OF APPEALS**

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ZBA 2016-54

Petition of John Fitzpatrick
9 Hastings Street

Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, July 14, 2016, at 7:30 p.m. in the Juliani Meeting Room, 525 Washington Street, Wellesley, on the petition of John Fitzpatrick requesting a Special Permit/Finding pursuant to the provisions of Section XIVE, Section XVII and Section XXV of the Zoning Bylaw that demolition of an existing nonconforming structure and garage, and construction of a two-story structure with an attached two-car garage that will meet all setback requirements, on a 10,882 square foot lot in a Single Residence District in which the minimum lot size is 15,000 square feet, in a Water Supply Protection District, at 9 Hastings Street, shall not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

On June 28, 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.

WITHDRAWN WITHOUT PREJUDICE

Presenting the case at the hearing were David Himmelberger, Esq. and Michael Cremin, BuildRite LLC.

Mr. Himmelberger said that after meeting with Building Inspector it was determined that this is not a classic pre-existing nonconforming lot. He said that the lot was created lawfully due to an exception to lot size granted in 1970 pursuant to a provision of the then Zoning Bylaw (ZBL). He said that it is a pre-existing nonconforming condition for an exception that was lawful at the time the lot was laid out. He said that the property is located in a 15,000 square foot Single Residence District. He said that there is no change to the size of the lot. He said that Mr. Grant determined that because exceptions are no longer permissible it made this a pre-existing nonconforming lot. He said that Mr. Grant said that the property owner had a choice to file for a building permit, be denied and appeal the Building Inspector's denial or come in for a special permit for the lot as a pre-existing nonconforming lot, as determined by the Building Inspector.

Mr. Himmelberger said that the lot was created pursuant to an exception provision within the ZBL in 1970 when the existing lot was divided into two lots. He said that Lot 9 contained 10,082 square feet and a new lot at 15 Hastings Street contained 10,875 square feet.

Mr. Himmelberger said that a special permit/finding is needed to raze and rebuild the house. He said that the existing structure is pre-existing nonconforming with a 16 foot front yard setback and a garage with less than required side yard setbacks. He said that the proposal is to build a compliant structure. He said

that lot coverage will increase from 13.28 percent to 19.53 percent. He said that impervious area will be reduced in excess of 10 percent due to removal of the garage and driveway. He said that the proposed TLAG will be less than the 3,600 square foot trigger for Large House Review in a 10,000 square foot district. He said that this is located in a 15,000 square foot district. He said that the front yard setback will be increased to 31 feet, the side yard setbacks will be 20.5 and 43 feet, and the rear yard setback will be 16.5 feet. He said that the height will be 34.56 feet.

Mr. Himmelberger said that the rear setback will have no impact on abutting lot at 185 Cedar Street, as the yard there is deep. He said that the proposed house is appropriate, tasteful, in scale with the neighborhood and will be not substantially more detrimental.

Mr. Levy asked if the Petitioner is asking the Board to make a determination if it is a nonconforming lot.

Mr. Levy said that the proposed house is 2.5 times bigger. He questioned whether the intent of the ZBL exception was to build small houses. He questioned whether this has always been a 15,000 square foot district. He said that granting the exception in the 1970's made it compliant. He said that the rules have changed and the exception was removed from the bylaw.

Mr. Himmelberger said that if the Board believes that it is a lawful lot, it can render a decision that they deny a special permit because they believe it is a conforming lot or the Board can take no action because they believe that it is a lawfully conforming lot. The Board discussed those options further.

Mr. Levy said that for the Board to grant a special permit/finding for a pre-existing nonconforming lot, it has to make a finding. He said that this zone has always been for 15,000 square feet and the structure was built under an exception. Mr. Adams said that what has changed was the removal of a right under the bylaw. Mr. Levy questioned whether the Board can issue a special permit/finding under Section 6, Chapter 40A, M.G.L.

Mr. Levy said that the question is whether this is a legal lot or not. He said that if it is a legal lot, the Board cannot give relief. He discussed the options of allowing the petition to be withdrawn without prejudice or continuing the hearing to get an opinion from Town Counsel.

Catherine Johnson, Planning Board, said that the Planning Board did not review the petition.

Mr. Levy asked if there was anyone present at the public hearing who wished to speak to the petition.

Mr. Himmelberger asked if the Board was able to give feedback on the proposed building. Mr. Adams said that he thought that it was an appropriate size.

Mr. Adams moved and Mr. Redgate seconded the motion to continue the petition to July 28, 2016. The Board voted unanimously to continue the petition.

July 28, 2016

Presenting the case at the hearing was David Himmelberger, Esq., representing John Fitzpatrick, the Petitioner. Mr. Himmelberger said that the request is to withdraw the petition without prejudice.

Mr. Levy said that the petition had been continued from the July 14, 2016 public hearing.

Mr. Himmelberger said that he had conveyed the analysis that was discussed at the last hearing with the Building Inspector and Town Counsel. He said that Town Counsel agreed that this is a unique matter concerning exceptions that are no longer provided for in the Zoning Bylaw. He said that Town Counsel opined that, in the absence of case law and whereas the lot otherwise satisfies dimensional requirements, it should be treated as a conforming lot and not require a special permit as a nonconforming lot.

Mr. Adams moved and Mr. Redgate 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.