

TOWN OF WELLESLEY



MASSACHUSETTS

## ZONING BOARD OF APPEALS

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ZBA 2024-02

Petition of Kingsbury Street 32 LLC  
32 Kingsbury Street

Pursuant to due notice, the Special Permit Granting Authority held a Remote Public Hearing on Thursday, January 4, 2024, at 7:30 pm, on the petition of Kingsbury Street 32 LLC requesting a Special Permit/Finding pursuant to the provisions of Section 5.1 and Section 6.3 of the Zoning Bylaw that demolition of an existing nonconforming two-family dwelling with less than required left side yard setbacks and a garage with less than required right side yard setbacks, and construction of a two-family structure that will meet all setback requirements, at 32 Kingsbury Street, in a 10,000 square foot Single Residence District, shall not be substantially more detrimental to the neighborhood than the existing nonconforming structures.

On December 4, 2024, 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## **WITHDRAWN WITHOUT PREJUDICE**

Present at the public hearing were David Himmelberger, Esq., Kent Duckham, Architect, and Denis Cronin, Manager, Kingsbury Street 32 LLC.

Mr. Himmelberger said that the request is for a special permit for reconstruction of a pre-existing two-family dwelling located at 32 Kingsbury Street that is nonconforming with respect to the two-family use and setbacks. He said that the proposed two-family structure will be fully conforming with all Zoning dimensional requirements. He said that a special permit is required to continue the two-family use.

The Chairman said that he and Town Counsel are not aware of any authority to allow the use to be continued once the existing structure is torn down. He discussed Section 5.1 of the Town's Zoning Bylaw. He said that the only provision in the bylaw for continuing a use once the structure is no longer there is for a disaster rebuild. He said that the proposal before the Board is for a significantly larger project to voluntarily rebuild what appears to be two townhouses, not a two-family house. He said that the Board will need to see some case law that permits continuation of a use in a structure that is different

from the one that the use was originally pertaining to. He said that all of the cases that he saw regarding transfer of a use to a new building were not upheld on appeal.

Mr. Himmelberger said that what is proposed is a substantial extension of the use. He said that Section 5.1 of the Zoning Bylaw is entitled, "Pre-existing Nonconforming Uses, Structures and Lots and says that the rights concerning pre-existing nonconforming uses, structures and lots shall be as set forth in Section 6 of Chapter 40A M.G.L. He said that Section 6 of Chapter 40A says that except as herein provided, the Zoning Bylaw shall not apply to uses lawfully in existence or lawfully begun but shall apply to any change or substantial extension of the use. He said that they will extend the use by making it slightly larger but the use will not be abandoned and recreated.

Mr. Himmelberger said that Section 5.1 A of the Zoning Bylaw says that, "except for the repair and reconstruction rights of an owner under Section 5.1.C, non-conforming uses and/or structures abandoned or not used for a period of more than two (2) years shall be subject to all provisions of this Zoning Bylaw." He said that if the Chairman's analysis is what is supposed to pertain, the bylaw would not need the abandonment piece but would say that you could not have the uses after a period of time. He said that nonconforming uses are allowed so long as they are not abandoned for two years or more.

The Board discussed the Zoning Bylaw definitions of two-unit dwellings and duplexes. Mr. Cronin said that the existing two-family structure has one unit on the first floor and basement and one unit on the second floor and attic. He said that two separate entrances are accessed from one door at the front. A Board member said that both units have entrances off of the driveway.

Mr. Himmelberger said that they are not proposing a new use. He said what is proposed is a good use for a lot that has a pre-existing nonconforming two-family dwelling. The Chairman said that it is a 14,000 square foot lot and a reasonably sized house can be built on the lot. He said that there is nothing in the bylaw that authorizes the Board to make a finding relative to a pre-existing nonconforming use and whether that is substantially more detrimental. Mr. Himmelberger said that the Board can find that the structure, when it is rebuilt and fully conforming, will not be substantially more detrimental to the neighborhood than the existing two-unit structure that is itself nonconforming.

### March 7, 2024

The Chairman said that Mr. Himmelberger provided a memorandum that was illuminating and helpful in the Board's analysis. The Chairman said that he spent some time doing research into the matter before the Board and spoke with the Building Inspector and Town Counsel for guidance on the matter.

The Chairman said that there is an existing nonconforming structure and the proposal is to build an as of right structure that conforms to all aspects of the Zoning Bylaw. He said that Town Counsel agreed with him that there is no relief needed from this Board for the structure. He said that the Board has to identify the nonconformities and, in this case, there aren't any. He said that just because it was nonconforming does not require that it come before the Zoning Board. He said that the use is a different issue. Mr. Himmelberger said that Mr. Grant, Building Inspector, required the Applicant to come before the Board.

The Chairman said that the plot plan shows the proposed lot coverage at 2898 square feet, which is seven square feet higher than what is allowed. He said that if the Building Inspector picks up on the

discrepancy, the Applicant has the option to reduce the square footage or convince the Building Inspector that the percentage was rounded. Mr. Himmelberger said that in the past, the Board has granted relief for *di minimis* matters of inches or feet.

The Chairman said that Mr. Himmelberger's position, as he understands it, is that the use will not be changed. Mr. Himmelberger said that they will maintain the two family use, its two unit status, and will not substantially extend the use. The Chairman said that the matter never gets to the Powers Test because, as Mr. Himmelberger presented, there will be no change or extension of the use. He said that the law says that there has to be a change or substantial extension of the use in order for the Board to grant relief.

The Chairman said that there is no relief that the Board can grant. He said that the Board can't grant a special permit for the structure and the Applicant's claim is that the use is not being changed or extended. He said that the avenue forward is to go back to the Building Inspector and provide the case law that was discussed in Mr. Himmelberger's memorandum.

A Board member said that if Mr. Grant had put his determination in writing, the Applicant could have appealed it. The Chairman said that the Applicant can apply for a building permit, and if it is denied, he can appeal it.

Mr. Himmelberger requested that the Board allow the petition to be withdrawn without prejudice.

The Board voted unanimously to allow the petition to be withdrawn without prejudice.

