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Barney Heath
Director

PUBLIC HEARING/WORKING SESSION MEMORANDUM

DATE: November 9, 2017
MEETING DATE: November 14, 2017
TO: Land Use Committee of the City Council
FROM: Barney S. Heath, Director of Planning and Development
Jennifer Caira, Chief Planner for Current Planning
Neil Cronin, Senior Planner
CC: Petitioner

In response to issues raised at the City Council public hearing, the Planning Department is providing the following information for the upcoming continued public hearing/working session. This information is supplemental to staff analysis previously provided at the public hearing.

PETITION #228-17

69-71 Cherry Street

Request for Special Permit/Site Plan Approval to extend the nonconforming two-family use to allow three units and legalize the noncompliant lot area per unit.

The Land Use Committee (The "Committee") opened a public hearing on this petition on Tuesday, October 3, 2017, which was held open so the petitioner could respond to questions and concerns raised in the Planning Department's Memorandum and at the public hearing by the Committee as well as by members of the public. In addition, the petitioner was seeking a determination from the Commissioner of Inspectional Services as to whether lot area per unit is a dimensional control which can be legalized via a "Section 6 finding" of the City Council under the recent change to M.G.L Chapter 40A Section 7.

At the public hearing, the discussion amongst the Committee concerned what the legal standard is when determining whether an increase in a nonconforming use "is substantially more detrimental" than the existing condition. The property at 69-71 Cherry Street contains a nonconforming, two-family use because the property is located in the Single Residence 3 (SR-3) zone, which does not allow two-family uses. In addition, this property has been used as a three-family for decades, without the benefit of proper permitting. This unique situation sparked some debate amongst the Committee as to what the existing condition is. Subsequently, the Law Department drafted a memo summarizing the legal standard when determining this criterion (**Attachment A**). Ultimately, the Committee must find that the extension of the existing nonconforming two-family use to allow three units is not

substantially more detrimental than the legal nonconforming two-family use. In its initial memorandum, the Planning Department believed the three-family use was not substantially more detrimental than the existing two-family use because the petition did not require any changes to the site or historic structure, parking could be accommodated on site, and the three-unit structure existed for many years without complaint.

If the Committee finds that the three-family use is not substantially more detrimental, the nonconforming lot area per unit must be legalized via a "Section 6 finding" per MGL 40A. This provision states that noncompliant dimensional controls having existed for more than ten years, without enforcement, are nonconforming and be legalized by the City Council.

The SR-3 zone requires a lot area per unit of 10,000 square feet. The site contains 23,511 square feet of land, thereby falling short of the 30,000 square feet requirement for a three unit residence. At the time of the first public hearing, the Commissioner of Inspectional Services had not yet determined if lot area per unit was a dimensional control which could be legalized. However, the Commissioner has consulted with the Law Department, and concluded that the lot area per unit qualifies under the law. As a result, using this provision, the Committee may find that the nonconforming lot area per unit is not substantially more detrimental than the existing structure.

ATTACHMENTS:

Attachment A: Law Department Memorandum, dated October 18, 2017
Attachment B: DRAFT Council Order

**CITY OF NEWTON
LAW DEPARTMENT
MEMORANDUM**

DATE: October 18, 2017

TO: Councilor Marc C. Laredo, Chairman, Land Use Committee

CC: Councilor Gregory R. Schwartz, Vice-Chairman, Council President Scott F. Lennon, Councilor Jacob D. Auchincloss, Councilor James R. Cote, Councilor Deborah J. Crossley, Councilor John W. Harney, Councilor Richard A. Lipof, Committee Clerk Nadia Khan, Senior Planner Neil Cronin

FROM: Robert J. Waddick, Assistant City Solicitor

RE: Petition #228-17, 69-71 Cherry Street

At the public hearing on October 3, 2017 regarding the above-referenced petition, the Law Department was asked to provide guidance with respect to a finding that the Land Use Committee (“LUC”) is required to make in approving the special permit which seeks an extension of a non-conforming use.

An extension of a non-conforming use requires the LUC make a finding in accordance with the requirements of M.G.L. Chapter 40A, § 6.¹ Specifically, the LUC must find that the proposed use is not substantially more detrimental to the neighborhood than the existing non-conforming use. Because the proposed use (3 units) actually exists on the site (albeit as a legal non-conforming two-family house with an illegal 3rd unit), in the present case, the Committee wanted to know whether the proposed use (3 units) should be compared to the existing use (3 units) or to the valid nonconforming two-family use.

Section 6 of Chapter 40A requires the Committee to compare the proposed use to the **valid** nonconforming use (two-family) and make a finding that the proposed use (3 units) is not substantially more detrimental than the existing nonconforming use to the neighborhood. Making that finding in this instance is complicated by the fact that the proposed use already exists. However, the legal standard is clear. Even though there are presently 3 units on the site, for the purposes of making the required finding, the proposed use (3 units) must be evaluated in terms of how it differs from an existing valid nonconforming two-family use, and whether or not it is substantially more detrimental to the neighborhood than the two-family use.

¹ M.G.L. Chapter 40A, § 6 states in pertinent part: “Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that **such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood** [emphasis added].”

CITY OF NEWTON
IN CITY COUNCIL

ORDERED:

That the City Council, finding that the public convenience and welfare will be substantially served by its action, that the use of the site will be in harmony with the conditions, safeguards and limitations set forth in the Zoning Ordinance, and that said action will be without substantial detriment to the public good, and without substantially derogating from the intent or purpose of the Zoning Ordinance, grants approval of the following SPECIAL PERMIT/SITE PLAN APPROVAL to extend the nonconforming two-family use to allow three units, and encroach upon the maximum lot area per unit, as recommended by the Land Use Committee for the reasons given by the Committee, through its Chairman, Councilor Marc Laredo:

1. The proposed extension of the nonconforming two-family use to allow three units will not be substantially more detrimental than the legal nonconforming two-family use because the petition does not require any alterations to the site or historic dwelling, parking can be accommodated on site, and the structure, with three units, has existed on site for many years without complaint. (§3.4.1 and §7.8.2.C.2)
2. The proposed encroachment of the lot area per unit will not be significantly more detrimental than the existing nonconforming structure is to the neighborhood because the lot area per unit of the structure with three units will be consistent with the density of the surrounding neighborhood (§3.1.3 and §7.8.2.C.2).

PETITION NUMBER: #228-17

PETITIONER: Cappadona Cherry Group, LLC

LOCATION: 69-71 Cherry Street, on land known as Section 34, Block 42, Lot 15, containing approximately 23,511 square feet of land

OWNER: Cappadona Cherry Group, LLC

ADDRESS OF OWNER: 956 Washington Street
Franklin, MA 02038

TO BE USED FOR: Multi-Family Dwelling

CONSTRUCTION:	Wood frame
EXPLANATORY NOTES:	§3.4.1 and §7.8.2.C.2, to extend the non-conforming two-family use to allow three units; §3.1.3 and §7.8.2.C.2, to encroach upon the lot area per unit requirement
ZONING:	Single Residence 3 district

Approved subject to the following conditions:

1. All buildings, parking areas, driveways, walkways, landscaping and other site features associated with this special permit/site plan approval shall be located and constructed consistent with:
 - a. Topographic Site Plan, 69-71 Cherry Street, signed and stamped by Joseph R. Porter, Professional Land Surveyor, dated 5/15/17.
 - b. Architectural Floor Plan, 69-71 Cherry Street, signed and stamped by Steven J. Meyers, Registered Architect, dated May 15, 2017.
2. No building permit shall be issued pursuant to this Special Permit/Site Plan Approval until the petitioner has:
 - a. Recorded a certified copy of this board order for the approved Special Permit/Site plan with the Registry of Deeds for the Southern District of Middlesex County.
 - b. Filed a copy of such recorded board order with the City Clerk, the Department of Inspectional Services, and the Department of Planning and Development.
 - c. Obtained a written statement from the Planning Department that confirms the building permit plans are consistent with plans approved in Condition #1.
3. No Final Inspection/Occupancy Permit for the use covered by this special permit/site plan approval shall be issued until the petitioner has:
 - a. Filed with the Director of Planning and Development evidence that structure meets all applicable building, fire and life, safety codes.