

**CITY OF NEWTON
LAW DEPARTMENT
MEMORANDUM**

DATE: February 2, 2018

TO: Councilor Gregory R. Schwartz , Chairman, Land Use Committee

CC: Councilor Richard A. Lipof , Vice-Chairman, Council President Marc C. Laredo, Councilor Jacob D. Auchincloss, Councilor Deborah J. Crossley, Councilor Maria Scibelli Greenberg, Councilor Andrea W. Kelley, Councilor Christopher J. Markiewicz, Committee Clerk, Nadia Khan, Acting City Solicitor, Ouida Young, Chief Planner, Jennifer Caira, Senior Planner, Neil Cronin, Senior Planner, Michael Gleba, Associate Planner, Valerie Birmingham

FROM: Robert J. Waddick, Assistant City Solicitor 

RE: Special Permit Order #24-18 – 4-6 Middle Street and
Special Permit Order #26-18 – 20 Dale Street

Dear Chairman Schwartz:

At the Land Use Committee meeting on January 23, 2018, questions arose regarding the above-referenced matters which are addressed below.

Special Permit Order #24-18 – 4-6 Middle Street

This petition is a request to extend a nonconforming three-family use to allow four units. A question arose with respect to the applicability of the 2016 amendment to Section 7 of Chapter 40A of the General Laws, which applies to structures, to the request to extend the nonconforming use.

The 2016 amendment allows for a determination that a noncompliant structure in existence for ten years without an enforcement action taken by the city is a valid nonconforming structure. In the instant case, the structural noncompliance that may be addressed under the 2016 amendment is the noncompliant lot area per unit. The 11,281 square foot lot is large enough to meet the 3,000 square foot lot area per unit requirement for the nonconforming three-family structure, but falls short of the 12,000 square feet that would be needed to satisfy the lot area per unit requirement for four units in the MR2 zone.

Absent the applicability of the 2016 amendment, the petitioner would need to obtain a variance to allow a reduction in the lot area per unit requirement. The 2016 amendment allows the Council to deem the four unit structure with less than the required lot area per unit, a legal nonconforming structure.

However, the amendment does not extend to uses. The Council's authority to extend the valid non-conforming three-family use to four units comes from Section 6 of Chapter 40A of the General Laws¹ and Section 7.8.2.C.2 of the Newton Zoning Ordinance ("NZO"). Section 7.8.2.C.2 provides in pertinent part:

"A nonconforming building or structure may be structurally altered or reconstructed or may be enlarged to permit the extension of a nonconforming use, and a nonconforming use may be extended in an existing building or structure or enlargement thereof...and a nonconforming use may be changed to another nonconforming use; provided that a special permit is obtained."

Thus, the nonconforming three-family use, may be extended or changed to a nonconforming four unit use, in the nonconforming structure, by special permit, pursuant to the provisions of Section 6 of Chapter 40A and the above-referenced provision of the NZO. The decision, however, is discretionary and must be based on the statutory criteria that the extension or alteration is not substantially more detrimental than the existing three-family use to the surrounding neighborhood.

Special Permit Order #26-18 – 20 Dale Street

This petition requests a special permit to allow the construction of an addition to a single-family structure to create two attached single-family dwelling units in an MR1 zone on a 5,968 square foot lot. A number of waivers to dimensional requirements are also requested by the petitioner. The Committee asked whether or not the requested special permit relief may be granted under the provisions of the NZO.

A special permit is required to construct a single-family attached dwelling in the MR1 zone pursuant to § 3.4.1 of the NZO. The dimensional requirements for a single-family attached dwelling are set forth under § 3.2.4. This section also allows the Council to grant exceptions to the dimensional requirements.

The applicable definition of a single family attached building which is set forth under § 1.5.1.C.2 of the NZO, is "a building or structure that... [c]ontains 2 dwelling units and is not a two-family detached dwelling [emphasis added]." The definition of a two-family detached dwelling is set forth under § 1.5.1.B and is as follows:

"A building or structure that contains two dwelling units and is either divided vertically so that the dwelling units are side by

¹M.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."

side but separated by a shared wall extending the entire height of one or both units, or is divided horizontally so that one unit is above the other.”

The single-family attached structure that is proposed in the instant case is a building or structure that contains two dwelling units and does not appear to meet the definition of a two-family detached dwelling because of its design. Attached as Exhibit A is a copy of the floor plan submitted by the petitioner which shows how the units are separated. Because of the jog in the shared wall at the attic floor level, the units do not appear to be “side by side separated by a shared wall extending the entire height of one or both units.” The attic area of Unit A is over the second floor area of Unit B and the second floor area of Unit B is under the attic area of Unit A. Thus, the structure has been designed in such a way that it can be considered a single-family attached structure and not a two-family detached structure under the definitions set forth in the NZO.

The issue raised by the Vice-Chairman of Committee at the January 23 meeting with respect to whether or not single-family attached dwellings must be on separate lots relates to how the term is defined in the NZO versus how the term may be used and understood in the real estate industry. There are no doubt properties that are single-family dwellings that share a common wall but are on separate lots. For instance, brownstones in urban areas such as those on Beacon Hill, and Back Bay in Boston are examples of such properties and there are undoubtedly other examples. These kinds of properties may very well be viewed and defined as single-family attached dwellings in real estate circles. However, the NZO does not define single-family attached dwellings such that they must be on separate lots, and it is the definition in the NZO that is applicable to the petition before the Committee.

Based on the applicable provisions of the NZO, the special permit relief that is requested by the petitioner may be granted by the City Council. However, as stated above, the decision to grant a special permit is discretionary and must be based on the criteria set forth in the NZO.

EXHIBIT A

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