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CITY OF SALEM, MASSACHUSETTS

BOARD OF APPEALS

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CITY CLERK
SALEM, MASS

December 31, 2019

Decision

City of Salem Board of Appeals

Petition of JOHN S. NICOLAS AND DANIEL J. NICOLAS for a special permit per Sections 3.3.2 *Nonconforming Uses*, 3.3.5 *Nonconforming Single- and Two-Family Residential Structures*, and 9.4 *Special Permits* of the Salem Zoning Ordinance; a variance per Section 4.1.1 *Table of Dimensional Requirements* from minimum lot area per dwelling unit; and a variance per Section 5.1 *Off-Street Parking* to provide less than the required amount of parking to change the existing nonconforming use (two-family dwelling) to another nonconforming use (three-family dwelling) by separating the second and third stories into separate dwelling units at 11 WEST AVENUE (Map 32, Lot 234) (R1 Zoning District).

A public hearing on the above Petition was opened on November 20, 2019 pursuant to M.G.L Ch. 40A, § 11. No testimony was heard during the November 20, 2019 hearing. The petition was continued to December 18, 2019 and closed on that date with the following Salem Board of Appeals members present: Peter Copelas, Mike Duffy (Chair), Carly McClain, Rosa Ordaz, and Jimmy Tsitsinos. Paul Viccica was absent on December 18, 2019. At the November 20, 2019 meeting, only Peter Copelas, Mike Duffy (Chair), and Rosa Ordaz were in attendance, and no testimony was heard; this is discussed in the Statements of Fact below. On November 20, 2019, Rosa Ordaz, Jimmy Tsitsinos, and Paul Viccica were absent; Carly McClain had not yet been confirmed as a Board member.

The petitioner seeks a special permit per Sections 3.3.2 *Nonconforming Uses*, 3.3.5 *Nonconforming Single- and Two-Family Residential Structures*, and 9.4 *Special Permits* of the Salem Zoning Ordinance; a variance per Section 4.1.1 *Table of Dimensional Requirements* from minimum lot area per dwelling unit; and a variance per Section 5.1 *Off-Street Parking* to provide less than the required amount of parking.

Statements of Fact:

1. In the petition date-stamped September 23, 2019, the petitioner requested a special permit per Section 3.3.2 *Nonconforming Uses* and Section 9.4 *Special Permits* of the Salem Zoning Ordinance to change from one nonconforming use (two-family dwelling) to another nonconforming use (three-family dwelling).
2. Attorney William Quinn, representing petitioners John S. Nicolas and Daniel J. Nicolas, submitted the petition.
3. The property is a two-family home in the Residential One-Family (R1) zoning district.
4. Per the "Table of Principal and Accessory Use Regulations" in Section 3.1 *Principal Uses* of the Salem Zoning Ordinance, both "Dwelling, Two-family" and "Dwelling, Multifamily" are not allowed uses in the R1 zoning district.
5. Section 3.3.2 *Nonconforming Uses* of the Salem Zoning Ordinance notes in part that "The Board of Appeals may award a special permit to change a nonconforming use in accordance with this section

only if it determines that such change or extension shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.”

6. Before being advertised to appear in the October 16, 2019 meeting of the Board of Appeals, it was identified that more relief would be needed than was requested in the application date-stamped September 23, 2019. By increasing the number of dwelling units from two to three, the lot area per dwelling unit would be reduced. A variance from minimum lot area per dwelling unit would be required to allow this. Attorney Quinn agreed to add a request for a variance per Section 4.1.1 *Table of Dimensional requirements* from minimum lot area per dwelling unit. Attorney Quinn also modified the special permit request to include reference to Section 3.3.5 *Nonconforming Single- and Two-Family Residential Structures*.
7. The legal notice that ran in the Salem News on October 2, 2019 and was mailed to abutters for the October 16, 2019 meeting of the Board of Appeals included a request for special permit per Sections 3.3.2 *Nonconforming Uses*, 3.3.5 *Nonconforming Single- and Two-Family Residential Structures*, and 9.4 *Special Permits* and a request for a variance per Section 4.1.1 *Table of Dimensional Requirements* from minimum lot area per dwelling unit.
8. Before the legal notice ran for a second time in the Salem News on October 9, 2019, it was identified that additional relief would be required for off-street parking, as insufficient legal off-street parking would be provided under the proposal. Staff Planner Brennan Corrison, with permission of Attorney Quinn, requested that the original notice not run for a second time (so that no further cost would be incurred for this legal notice, which did not include all the required relief).
9. The agenda posted for the October 16, 2019 included the following notice: “Please note: For the petition at 11 West Avenue, more relief is required than was initially requested and advertised. The petition will not be heard this evening, will be re-advertised and first heard by the Board of Appeals at its November 20, 2019 meeting.”
10. A notice with similar language was mailed to abutters.
11. With three residential units and an off-street parking requirement of one and one-half (1.5) spaces per dwelling unit, five off-street parking spaces would be required. Under the proposal, three legal, off-street parking spaces would be provided adjacent to the property through permanent easement. This is not sufficient parking to meet the requirement of the Salem Zoning Ordinance.
12. Attorney Quinn submitted additional documentation and approved a revised legal notice to be posted in the Salem News (which was also mailed to abutters) requesting an additional variance per Section 5.1 *Off-Street Parking*.
13. The requested relief, if granted, would allow the petitioner to convert the home at 11 West Avenue from a two-family home to a three-family home. No structural changes are proposed.
14. Attorney Quinn filed a copy of a reciprocal easement agreement (along with an easement exhibit) between Robert S. Burr, Trustee of the Robert S. Burr Trust, and 331 Lafayette LLC, granting Robert S. Burr Trust “the perpetual right and easement to use, maintain and repair that portion of the land of 331 Lafayette LLC and any improvements constructed thereon shown as “Easement 2” on the exhibit plan attached hereto for the purpose of constructing improvements to the existing parking area.” Attorney Quinn submitted a plan titled “Zoning Board of Appeals Plan” dated October 7, 2019 showing three off-street parking spaces, for each of which all or part of the space is located within the easement.
15. In addition, Attorney Quinn filed a signed License to Use and Occupy Grantor Premise for Two Parking Spaces dated October 25, 2019 between 331 Lafayette, LLC of 331 Lafayette Street (Grantor)

and John Nicolas and Daniel Nicolas of 11 West Avenue (Grantees). This agreement states in part that "The GRANTOR agrees to allow the GRANTEE and their tenants at the Grantee Premises, as users but not as tenants, to park two (2) registered passenger motor vehicles on the Grantor Premises between the hours of 6:00 PM until 7:30- AM daily, in a location mutually agreeable to the parties." The agreement also notes in part that "This license to use and occupy the PREMISES is revocable at the sole discretion of the GRANTOR, and shall not be deemed to constitute a landlord/tenant relationship between GRANTOR and GRANTEE."

16. On the morning of November 20, 2019, Staff Planner Brennan Corrison informed petitioners that only four members would be in attendance at the meeting that evening (at the time, it was understood that four members would be attending), and that petitioners had the opportunity to request to continue the hearing for their petition to the next regularly scheduled meeting when five members might be in attendance. Attorney Quinn responded with a signed request to continue the hearing for 11 West Avenue to the December 18, 2019 meeting. This request was duly filed with the City Clerk.
17. At the November 20, 2019 meeting of the Board of Appeals, only three Board members were in attendance: Peter Copelas, Mike Duffy (Chair), and Rosa Ordaz. Having three members in attendance out of the five-member Board constitutes a quorum (enough members to hold a meeting). However, per the Zoning Board of Appeals' Rules and Regulations, "[t]he concurring vote of at least four (4) members of the Zoning Board of Appeals shall be necessary in any action taken by the Board." As such, the Board could not vote to approve any petitions in the November 20 meeting, and all petitions were continued to the next regularly scheduled meeting. In the meeting, the Board voted three (3) in favor (Peter Copelas, Mike Duffy (Chair), and Rosa Ordaz) and none (0) opposed to approve the motion to continue to the next regularly scheduled meeting, December 18, 2019.
18. Prior to the December 18, 2019 meeting, Attorney Quinn filed by email to Brennan Corrison a petition of non-opposition to the proposal signed by eleven (11) neighbors.
19. At the December 18, 2019 meeting of the Board of Appeals, Attorney Quinn discussed the proposal. He explained the property's location next to a large development [331 Lafayette Street], which has access to the rear of 11 West Avenue by easement. 11 West Avenue now has access to a portion of 331 Lafayette Street by easement for parking. Attorney Quinn noted that no change to the footprint is proposed. He noted that the proposal is consistent with the community need for new housing. Regarding parking, Attorney Quinn explained the presence of off-street parking both through permanent easement (3 spots) and revocable license (2 spots at night, as discussed above). He noted that there is sticker resident parking on the street as well.
20. At the December 18, 2019 meeting of the Board of Appeals, Board member Peter Copelas asked about whether the rear of this long, narrow lot would have had adequate parking for three units before it was granted by easement to the abutter. Attorney Quinn explained that no, an existing exterior staircase would have needed to move in order to have access to the rear of the property for parking. He stated that as far as he knew, it was never used for parking.
21. At the December 18 meeting, Attorney Quinn noted that the current owners did not own the property when the easement for the rear of 11 West Avenue was granted.
22. At the December 18 meeting, Attorney Quinn explained that further parking through easement was not received in part because of the other property's (331 Lafayette Street) approvals, which relied on the amount of parking there was.
23. At the December 18 meeting, Attorney Quinn noted that they revised the previous plan for five off-street parking spaces within the easement (which would not have been legal, conforming spaces) to three spaces that met the requirements, and try to satisfy the Board that between this, the resident

street parking, and the arrangement with the neighbor, they have done all that can be done to ensure there will not be cars on the street in winter evenings in particular.

24. At the December 18 meeting, one of the property owners and petitioners, John Nicolas, explained that prior to their owning it, it was a college rental with maybe nine students in the building; now, there are five people living there. He stated that he believes they have developed the property in a way that is more acceptable to the neighborhood.
25. At the December 18, 2019 public hearing, no (0) members of the public spoke in favor of or in opposition to the petition. Chair Duffy read an email the Board received from Judith Reilly stating that she and her husband Rory O'Brien are the owners of 20 West Avenue Unit 3 and are writing in support of the application. Chair Duffy also acknowledged that he received a copy of the petition signed by eleven people.
26. At the December 18 meeting, the Board discussed hardship. Attorney Quinn stated that the shape of lot and the location of the house on the lot dictate that it cannot meet parking requirements under the modern code. He stated that it was developed before zoning went into effect as to the lot area requirements in the neighborhood, so even though it is not unusual, there is no legal way to comply without tearing down the house and buying a couple of adjacent lots. He noted that these are basically dimensional variance requests. He stated that decisions have allowed zoning boards to grant variances based on scant or minimal showings of hardship, and he is asking the Board to do so. Attorney Quinn Chair Duffy asked about easements 1 and 2. He noted that the grant of easement 1 enabled a developer to develop an adjacent property, and asked about easement 2. Attorney Quinn explained that easement 2 assumed five spaces but did not include room for cars to maneuver and back out. Chair Duffy raised the issue of the narrow width of the lot prior to the easement exchange. Attorney Quinn noted that the lot line is only about eight feet from the building, and there are only about four or five feet between the exterior stairway and the lot line. Chair Duffy noted that the placement of the house on the lot would have made it impractical or impossible to reach the back section. Chair Duffy noted that there maybe would have been tight tandem parking for two cars prior to the granting of easements. Chair Duffy stated that there may have already been an untenable parking situation prior to the requested variance, and by way of the reciprocal agreement, some of that predicament has been alleviated. Peter Copelas noted that the spaces are much better parking spaces. Peter Copelas noted that he sees the benefits of the project both to the petitioner and to the City.

The Salem Board of Appeals, after careful consideration of the evidence presented at the public hearings, and after thorough review of the petition, including the application narrative and plans, and the Petitioner's presentation and public testimony, makes the following **findings**:

Special Permit Findings:

The Board finds that the proposed nonconforming use is not substantially more detrimental than the existing nonconforming use to the neighborhood.

1. Social, economic and community needs are served by the proposal: Adding another residential unit is serving the community need of housing in the City of Salem.
2. Traffic flow and safety, including parking and loading: Off-street parking is provided through permanent easement and revocable license. More off-street parking is now being provided than was available before. In addition to the off-street parking, on-street parking is allowed for residents.
3. Adequacy of utilities and other public services: There appear to be adequate utilities.
4. Impacts on the natural environment, including drainage: No such impacts are anticipated as no change to the exterior of the building is proposed.

5. Neighborhood character: The approval would be consistent with uses and buildings in the neighborhood and with the neighborhood character.
6. Potential fiscal impact, including impact on City tax base and employment: Positive fiscal impact is anticipated as a result of bringing on another residential unit.

On the basis of the above statements of fact and findings, the Salem Board of Appeals voted five (5) in favor (Peter Copelas, Mike Duffy (Chair), Rosa Ordaz, Jimmy Tsitsinos, and Carly McClain) and none (0) opposed to grant the requested special permit per Sections 3.3.2 *Nonconforming Uses*, 3.3.5 *Nonconforming Single- and Two-Family Residential Structures*, and 9.4 *Special Permits* of the Salem Zoning Ordinance to change the existing nonconforming use (two-family dwelling) to another nonconforming use (three-family dwelling) by separating the second and third stories into separate dwelling units at **11 WEST AVENUE**, subject to the following **terms, conditions, and safeguards** [noted below variance findings and vote].

Variance Findings:

1. Special conditions and circumstances especially affect the land, building, or structure involved, generally not affecting other lands, buildings, and structures in the same district: The narrow shape of the lot and the location of the structure on the lot are such that the rear of the lot could not be used for parking.
2. Literal enforcement of the provisions of the Ordinance would involve substantial hardship to the applicant.
3. Desirable relief may be granted without substantial detriment to the public good, and without nullifying or substantially derogating from the intent of the district or the purpose of the ordinance. The use will remain residential, though the number of dwelling units will increase. Off-street parking is being provided both through easement and revocable license.

On the basis of the above statements of fact and findings, the Salem Board of Appeals voted five (5) in favor (Carly McClain, Jimmy Tsitsinos, Rosa Ordaz, Mike Duffy (Chair), and Peter Copelas) and none (0) opposed to grant the requested variance per Section 4.1.1 *Table of Dimensional Requirements* from minimum lot area per dwelling unit and the requested variance per Section 5.1 *Off-Street Parking* to provide less than the required amount of parking to change the existing nonconforming use (two-family dwelling) to another nonconforming use (three-family dwelling) by separating the second and third stories into separate dwelling units at **11 WEST AVENUE**, subject to the following **terms, conditions, and safeguards**:

Standard Conditions:

1. Petitioner shall comply with all city and state statutes, ordinances, codes and regulations.
2. All construction shall be done as per the plans and dimensions submitted to and approved by the Building Commissioner.
3. All requirements of the Salem Fire Department relative to smoke and fire safety shall be strictly adhered to.
4. Petitioner shall obtain a building permit prior to beginning any construction.
5. A Certificate of Occupancy is to be obtained
6. A Certificate of Inspection is to be obtained.
7. Petitioner is to obtain approval from any City Board or Commission having jurisdiction including, but not limited to, the Planning Board.
8. All construction shall be done per the plans and dimensions submitted to and approved by this Board. No change, extension, material corrections, additions, substitutions, alterations, and/or modification to an approval by this Board shall be permitted without the approval of this Board, unless such

change has been deemed a minor field change by the Building Commissioner in consultation with the Chair of the Board of Appeals.

Mike Duffy /BTC
Mike Duffy, Chair
Board of Appeals

A COPY OF THIS DECISION HAS BEEN FILED WITH THE PLANNING BOARD AND THE CITY CLERK.

Appeal from this decision, if any, shall be made pursuant to Section 17 of the Massachusetts General Laws Chapter 40A, and shall be filed within 20 days of filing of this decision in the office of the City Clerk. Pursuant to the Massachusetts General Laws Chapter 40A, Section 11, the Variance or Special Permit granted herein shall not take effect until a copy of the decision bearing the certificate of the City Clerk has been filed with the Essex South Registry of Deeds.