



TOWN OF NEEDHAM
MASSACHUSETTS
BOARD OF APPEALS

Appeal of a Building Inspector Decision
DENIED

Nick Kozlov and Megan Waldvogel, Appellants
Driftwood Landing LLC, Owner
378 Manning Street
Map 48, Parcel 123

January 29, 2025

Nick Kozlov and Megan Waldvogel, (the “Appellants”), applied to the Board of Appeals for an Appeal of a Building Inspector Decision (the “ABID”) of Building Permit #BC-24-11071 (the “Building Permit”) issued to Arthur Elzon (the “Owner”) dated November 19, 2024, for the reconstruction of a two-family dwelling at 378 Manning Street (the “Premises”). The ABID asserts that the Building Permit plans on file do not comply with the requirements of Section 1.4.7.4 of the Zoning By-Law (the “By-Law”) that the building as reconstructed have a footprint no greater in area than that of the original non-conforming building. The property is located at 378 Manning Street, Needham, MA in the Single-Residence B (SRB) District. A public hearing was held in the Charles River Room, Public Services Administration Building, 500 Dedham Avenue on Wednesday, January 29, 2025 at 7:45 p.m. and continued on Thursday, February 27, 2025 at 7:30.

Documents of Record:

- Application for Hearing dated December 18, 2024, Clerk stamped December 18, 2024.
- Letter from George Giunta, Jr., dated December 18, 2024.
- Memorandum in Support prepared by George Giunta, Jr. dated December 26, 2024.
 - Exhibit A – Assessor Residential Card Summary, Page 1-2
 - Exhibit B – Building Permit No. BR-11071
 - Exhibit C – Demolition Plan and Proposed Plan, A. Matthew Belski, Jr. Professional Land Surveyor prepared, stamped, and dated October 29, 2024.
 - Exhibit D – Assessor Sketch and Overhang Calculation.
- 378 Manning Occupancy Summary – 1993-2025

- Supplemental Memorandum of Support prepared by George Giunta, Jr. dated January 29, 2025.
- Opposition to Appeal prepared by Jeffery D. Ugino, Gelerman and Cabral, LLC dated January 27, 2025.
 - Exhibit A -Proposed Plot Plan, prepared by A. Matthew Belski, Jr. Professional Land Surveyor prepared, stamped, and dated January 23, 2025,
 - Exhibit B – Existing Garage and Overhang Around Garage, and Existing House and Overhangs stamped by A. Matthew Belski, Jr. Professional Land Surveyor, and Richard A. Volkin, Professional Engineer, dated January 23, 2025.
 - Exhibit C – 378 Manning Street Real Property Card 1929-1981.
- Opposition to Appeal prepared by Jeffery D. Ugino, Gelerman and Cabral, LLC dated February 18, 2025.
 - Exhibit 1 – Deed July 25, 1973; Deed July 23, 2015; Deed September 5, 2024.
 - Exhibit 2 – Letter from Clinton J. Kohlback and Susan F. Kohlback, February 13, 2025.
 - Exhibit 3 – Occupancy Summary 2003-2024.
 - Exhibit A – Lease Christina Allegrezza, dated March 30, 2010; Lease Thomas Stanley and Lauren Foley, June 25, 2011; Lease Lisa and Sven Myrburg, June 16, 2014,
 - Exhibit D – Voter Registration Elizabeth Darcy and Paul Joseph Curtis.
 - Exhibit F – Lease Ashley Morgenthal and Ashley Zapert, June 1, 2023.
 - Exhibit G – Lease Edye Caine, July 14, 2023.
 - Exhibit H – Voter Registration 378 Manning Street, 2012-2024.
- Opposition to Appeal prepared by Jeffery D. Ugino, Gelerman and Cabral, LLC dated February 27, 2025.
 - Exhibit 1 – Occupancy Summary – 2003-2004 (updated)
 - Exhibit A-Exhibit H (Ibid February 18, 2025 above)
 - Exhibit I-Advance Background Checks: Talia R. Piver Duda & Richard P. Duda
- Letter from Joe Prondak, Building Commissioner, January 21, 2025.
- Letter from Lee Newman, Director of Planning and Community Development, January 21, 2025.
- Letter from Thomas Ryder, Town Engineer, January 21, 2025.
- Email from Tara Gurge, Assistant Public Health Director, January 17, 2025.
- Email from John Schlittler, Chief of Police, Police Department, December 31, 2024.
- Email from Thomas M. Conroy, Fire Chief, Fire Department, January 3, 2025.
- Email from Chris Kostopoulos, January 27, 2025.
- Email from Greg Giokas, January 27, 2025.
- Letter from Abbe Klein, undated.
- Email from John and Lynn Judge, January 29, 2025.
- Email from John Judge, February 25, 2025.

- Letter from David and Courtney Willett, February 25, 2025.
- Email from Jeanie and Brooks Goddard, February 26, 2025.

The Public Hearing

January 29, 2025

The Board included Jonathan Tamkin, Chair; Howard S. Goldman, Vice-Chair; and Peter Friedenberg, Associate Member. Mr. Tamkin opened the hearing at 8:47 p.m. by reading the public notice.

George Giunta, the attorney representing the Appellants, and Megan Waldvogel were in attendance.

Mr. Giunta reported that Building Permit #BC-24-11071 was issued to Arthur Elzon on November 19, 2024 for the reconstruction of a pre-existing non-conforming two-family structure in the SRB district which is a single-family zone district. The property is located on 378 Manning Street on the corner of Manning and Otis Streets. The property contains 10,414 square feet with 135.71 feet of frontage on Otis Street, and 70.71 feet of frontage on Manning Street. The property was previously occupied by a two and one-half story two-family structure with a detached garage. The structure contained 2,402 square feet of living area, with 10 rooms, including 4 bedrooms and 2 bathrooms.

On or about November 27, 2024 the existing structure and garage were demolished.

Mr. Giunta provided a brief overview of the Board's history with the Premises. He noted that on September 18, 2024 Driftwood Landing, LLC submitted an application for a Special Permit to demolish and reconstruct a two-family structure pursuant to Section 1.4.7.4 of the By-Law. That application was withdrawn without prejudice on November 20, 2024 to pursue as-of-right two-family replacement, one day after the Building Permit was issued.

Mr. Giunta reported that based on calculations from the original plan submitted with the application for the Building Permit, the existing house and detached garage, together with their roof overhangs contained 2,228 square feet resulting in a lot coverage of 21.4%. Based on Section 1.4.7.4, a two-family dwelling may be reconstructed by-right provided that either 1) the structure is rebuilt in the same footprint and in the same location as that prior structure; or 2) if the structure is to be reconstructed in a different location, then the footprint of the new structure cannot exceed the footprint of the existing structure, essentially limiting the replacement structure to the same size regardless of its location.

The Appellants noted that the footprint of the proposed two-family dwelling shown on the filed plans appeared to be larger than that of the original structure in violation of Section 1.4.7.4. When reviewed, it was discovered that the plans included the footage of an unenclosed porch in the calculations which they alleged were not allowed under the By-Law. All the parties concurred that the inclusion of the area of the porch was an error, and a new smaller footprint number was determined based on the exclusion of the unenclosed porch. However, the

calculation of the permitted footprint of the proposed new structure continues to include the footage of the former detached garage, which the Appellants argue should not be included under Section 1.4.7.4.

The Appellants have two remaining questions:

- 1) Is it proper to include the square footage of the former detached garage in the footprint calculations for purposes of the “by right” provision of Section 1.4.7.4 of the By-Law?
- 2) Does the property qualify as a lawful pre-existing non-conforming two-family?

Mr. Giunta argued that based on the definition of “*footprint*” in Section 1.4.7.4 of the By-Law, which expressly includes the area of an attached garage in the footprint calculations, detached garages are excluded from the calculation of footprint. He noted, in contrast, that the Building Commissioner and the Owner are including the square footage of the *detached* garage as an “*accessory annex*.” Though there is no definition in the By-Law for “accessory annexes,” Mr. Giunta reasoned that if detached garages were meant to be included within the calculation of footprint under that Section as “accessory annexes”, there would have been no point in including “attached garages” in the plain language in the By-Law definition of “footprint”.

Mr. Giunta reasoned under the maxim “*exclusio unius est exclusio alterius*” that the explicit mention of attached garages excludes the inclusion of detached garages. Furthermore, if the term “accessory annexes” includes detached garages, then the use of “attached” garages in that Section of the By-Law becomes superfluous. Based on case law, none of the words of a By-Law are to be regarded as superfluous and “attached” must be given its proper weight.

In addition, Mr. Giunta asserted that there is a policy reason not to include detached garages in the calculation of “footprint.” Section 1.4.7.4 (c) of the By-Law sets guidelines and limitations on the issuance of a special permit for reconstruction of pre-existing, lawful, non-conforming two-family structures, of lots that have adequate area and frontage, to a maximum lot coverage of 18% or 2,500 square feet, whichever is more restrictive. Accordingly, if the 18% coverage limit is applied to the Premises (which has a lot area of 10,414 square feet), the footprint of the proposed two-family could not be any larger than 1,874.52 square feet, which is 72.48 square feet smaller than what would be allowed by-right under this interpretation of Section 1.4.7.4. This result would be contrary to the principles of zoning, which allow greater density by special permit than by right.

Based on Section 1.4.7.4 of the By-Law which reads in part as follows: “the building as reconstructed has a footprint no greater in area than that of the original non-conforming building”. Mr. Giunta notes that the language refers to a singular building and nothing in the By-Law implies or suggests that anything other than the footprint of a singular non-conforming building should be included in the calculation of the permissible by right footprint . Based on statutory construction, he concluded that what makes the most logical and legal sense is that for purposes of Section 1.4.7.4, the term “footprint” does not include detached separate structures or garages.

Mr. Giunta also argued that the Owner failed to establish the lawful pre-existing non-conforming use of the property for two-family use. The only record provided in support of this by the Owner

in connection with the withdrawn Special Permit application included an Assessing Department Property Record Card from the 1940s. These cards are only a snapshot in time and a record of the physical status of the house. There is evidence of two-family use. However, when researching the occupancy records over the past 20 years, Mr. Giunta found several periods when there were gaps in the two-family use. Mr. Giunta questioned whether the two-family use was abandoned during the 2010-2024 period. Furthermore, observations by neighbors collaborate the gaps in occupancy. Mr. Friedenberg asked about the source of the records. Mr. Giunta said they were street lists based on Town Census.

Mr. Giunta asked that the Board 1) overturn the Building Inspectors' determination not to revoke the Building Permit and that the Building Permit be revoked; or 2) continue the Hearing to allow the Owner to provide a revised Plot Plan based on the footprint calculations of the house without the detached garage included.

Mr. Goldman inquired about the status of the lot. Mr. Giunta responded that the structures had been demolished, and the lot is currently empty. Mr. Giunta was concerned that without the former structures in place it is hard to determine with accuracy the overhangs which are part of the footprint calculation.

Mr. Giunta was uncertain if a revised plot plan has been formally submitted since the Building Permit was issued in November. Based on the plot plan submitted in November, Mr. Giunta supports submission of a new plot plan calculated on the exclusion of the detached garage square footage.

Mr. Goldman asked if a larger single-family house could be built instead of the proposed two-family structure. Mr. Giunta said a larger single-family building could be built. However, a large single-family has a different impact on a neighborhood than a large two-family.

Mr. Tamkin asked that Mr. Giunta specify the relief sought. Mr. Giunta stated that the relief sought was the revocation of the Building Permit and to direct the Building Commissioner to revoke the Building Permit.

Megan Waldvogel, the Appellant, reported that she and her husband Nick Kozlov, are appealing the Building Commissioner's refusal to revoke the Building Permit. They recently purchased their home because of the location and the privacy and quiet of the neighborhood. She noted that all the homes are similar in size. Her property abuts two single-family four-bedroom homes. The former structure at 378 Manning Street was 46 feet from their property line. She is concerned with the introduction of an 8 bedroom, 10 bathroom, taller structure, 17 feet from her property line. Currently there are only 3 homes on her side of Otis Street, and the proposal will add two new entrances. She was concerned about the added traffic to the quiet street and the massing of the new structure blocking the sunlight.

When she and the neighbors received notification about the October Public Hearing for a Special Permit at the Premises, they looked forward to the opportunity to raise their concerns before the Board. A letter was sent to the Board from 27 members of the neighborhood asking to work with the Owner to address their concerns. However, the Owner withdrew the application and

continued the project as-of-right without neighborhood involvement. She questioned the Owner's fair play. She appreciated the Board providing the opportunity for the neighborhood to be heard.

Mr. Tamkin asked if it was understood that the Owner could build a larger single-family house. Ms. Waldvogel understood. He asked if there was a concern about the two-family. Ms. Waldvogel said a two-family would introduce more people, two-entrances, and two-driveways. She noted that each unit has larger square footage than her single-family home. She felt that the proposal would be incongruent with the neighborhood.

Mr. Goldman asked if she was aware that the Premises was a two-family when she purchased their home. She responded that she just moved in August and the only activity she observed was when the previous owner was clearing out the garage. Essentially, it has been vacant. Mr. Giunta added that the previous structure had a single entrance on Manning Street and the garage driveway was on Otis Street.

Mr. Tamkin opened the meeting for public comments.

Megan Coons, 384 Manning Street, has been a neighbor for the past five years. She has observed long vacancies at the Premises. Because there has been little or no activity at the site it's easy to forget it is a two-family. She met the previous owners once who told her that they lived in Maine and Florida. They were rarely at the Premises. She recalls one tenant for a period of a year, and last year there was a tenant for under a year. According to Ms. Coons the property has been unoccupied. Mr. Tamkin asked if her testimony was that the property was unoccupied regularly or if she observed the Premises not being used as a two-family. She responded that the Premises have not been used as a two-family.

Jeff Ugino, the attorney representing the Owner, and Arthur Elzon, the Owner, were in attendance. Mr. Ugino reported that an updated plot plan stamped and dated January 23, 2025 has been submitted to the Board on January 27, 2025.

Mr. Tamkin asked that Mr. Ugino address the porch, the statutory construction of the garage and the status of the two-family use.

Mr. Ugino noted that Section 1.4.7.4 of the By-Law defines "footprint" as *"the area of the lot which is within the perimeter created by the vertical extension to the ground of the exterior walls of all fully enclosed portions of a building, including attached garages, porches, solariums and similar fully enclosed extensions, attachments and accessory annexes, plus eaves and roof overhangs. Not included in the footprint are unenclosed portions or extensions of buildings, including, but not limited to, unenclosed carports, decks, and porches."*

Mr. Ugino understands "accessory annexes" to be out buildings. Though the By-Law does not define "accessory annexes", it does define "accessory building" in Section 1.3 of the By-Law as *"a building devoted exclusively to a use subordinate to and customarily incidental to the principal use."*

Mr. Ugino argued that a garage would be understood as an accessory building under the definition. Furthermore, the Building Commissioner concurred that a detached enclosed garage is incidental to the principal use and that the area may be included in the footprint calculation of the new two-family building under Section 1.4.7.4.

Mr. Ugino noted that a single-family structure would be allowed with a bigger footprint of 2,500 square feet as of-right. The proposed two-family is 400 feet smaller than an allowable single-family building. In addition, the proposed project meets all the dimensional and height requirements of the By-Law.

Mr. Ugino maintained that the definition of “accessory building” in the By-Law and deference to the Building Commissioner’s interpretation made statutory construction consideration unnecessary.

Mr. Tamkin asked Mr. Ugino to address the historic two-family use at the Premises.

Mr. Ugino referred to the Assessor Property Card (048-123) which indicated that the Premises was built in 1909 as two-family. He noted that the Building Commissioner concurred that the building was a two-family. Mr. Ugino argued that Town Census information was unreliable and not strong evidence of tenancy when compared to an Assessor Property Card.

Mr. Tamkin stated that the Board requires applicants seeking relief for construction or reconstruction of a two-family to demonstrate continuous two-family use. He urged the Owner to provide evidence of two-family use as the Appellants are indicating significant gaps in tenancy. Since the Building Commissioner is asking for a continuance, he is recommending that the Owner use the time to research the issue further.

Mr. Goldman asked for the Owner’s response to the neighbors’ assertions that the building was vacant. Mr. Ugino said he would gather better evidence and was amenable to a continuance.

Mr. Elzon hopes to rebuild a two-family at the location that would add to the affordable mix in Needham. He plans to build a smaller two-family than the allowable single-family home. He believes the two-family will attract two new families who could not afford a Needham single-family home. He was surprised by the opposition.

Mr. Goldman urged the Owner to meet and talk with the neighbors and address their concerns and arrive at a consensus.

Mr. Tamkin noted that new two-family reconstructions expanding beyond the limits of the previous structure create problems. Arguing that the proposal is not as large as a larger single family apparently does not resonate with the neighbors. Generally successful developers work with the neighbors on siting and massing. He found the evidence of abandonment of the two-family use provided by the Appellants to be compelling. He recommended that the Owner do further research and provide leases, and affidavits establishing continuous tenancy and work with the neighbors, and the Building Commissioner, on an alternative proposal.

Jeannie Goodard, 59 Otis Street, reported that there has been no communication between the neighbors and the Owner. She has no issues with the two-family use, but she did have concerns about the lack of communication with the neighbors, and with the proximity, the massing and height of the structure. She added that no one has lived at the Premises for a long time. She disagreed with the detached garage being part of the footprint calculations.

Rod Tickin, 369 Manning Street, thought a single-family would allow more flexibility to design a structure more consistent with the character of the neighborhood. He thought a two-family is about maximizing the square footage on the lot. He disagreed that the units were affordable when they are likely to sell for \$1.9 million each. In contrast a new single family would likely sell for \$3 to \$4 million. Over ten years he has seen the previous owner three times and has never seen or met any tenants. He believed no one lived in the downstairs unit. He had issues with the lack of communication between the Owner and the neighbors, and the abrupt withdrawal of the Special Permit, which aborted the opportunity for neighborhood input. He thought the By-Law was clear that only attached garages are to be included in footprint calculations.

Danny Klein, 35 Otis Street, had issues with the lack of communication between the Owner and the neighborhood. In fact, he received the required demolition notification letter hours after the structure was demolished. He lives directly across from the driveway of the Premises and has never seen a car or any activity in the driveway in the ten years he has resided at 35 Otis Street. He was concerned with the siting and massing of the proposal. The previous structure had a single entrance on Manning Street. The proposal will have two separate entrances, two curb cuts, and two driveways on Otis Street, increasing the traffic and congestion on Otis Street.

Mr. Tamkin recommended that the Public Hearing be continued, and he encouraged the Owner to meet with the Appellants, Building Commissioner and neighbors to seek consensus regarding the scale and scope of the proposal and to allow further research on the two-family use.

Mr. Tamkin announced that public comments will be allowed at the next meeting and limited to one minute. The Board is receptive to receiving any comments submitted from the public. The public hearing will be held on Zoom to allow remote participation.

Mr. Goldman moved to continue the Public Hearing to February 27, 2025 at 7:30 p.m. Mr. Friedenberg seconded the motion. The motion was unanimously approved.

The meeting adjourned at 9:53 p.m.

February 27, 2025

The Board included Jonathan D. Tamkin, Chair; Howard S. Goldman, Vice-Chair; and Peter Friedenberg, Associate Member. Mr. Tamkin opened the hearing at 7:30 p.m. by reading the public notice.

Mr. Giunta, the attorney representing the Appellants, and Megan Waldvogel and Nick Kozlov were in attendance. Mr. Giunta noted that the Owner had been tasked to determine if the

property was a lawful pre-existing non-conforming two-family and whether the use had been discontinued for two or more years which would result in an abandonment under the By-Law

Mr. Giunta reported that the Appellants have submitted an Occupancy Summary from 2003 – 2024 based on street, poll tax and census records which found substantial gaps. He acknowledged that the Owner had submitted leases which filled in some of the gaps. However, gaps remain in 2007-2008 and 2011- 2024 where only one of the units was occupied. In addition, Mr. Giunta conducted further research going back to 1993-2024 which identified two additional gaps in 2000 and 2001.

Mr. Giunta objected to the occupancy documentation provided by the Owner. He found the following deficiencies: 1) the on-line people/address search does not identify the years of residence at the address; and 2) the statement from Clinton J. Kohlback and Susan F. Kohlback (the “Kohlbacks”), the prior owners, is not under oath, and there are contradictions between what is stated and the records. Based on the deficient documentation and the testimony of the neighbors, he concluded that the Owner failed to establish the lawful non-conforming two-family use at the Premises.

Mr. Giunta maintained that the footprint calculation should not include the area of the detached garage. Highlighting Section 1.4.7.4 of the By-Law, *“footprint” shall be defined as the area of the lot which is within the perimeter created by the vertical extension to the ground of the exterior walls of all fully enclosed portions of a building including attached garages, porches, solariums and similar fully enclosed extensions, attachments and accessory annexes, plus eaves and roof overhangs. Not included in the footprint are unenclosed portions or extensions of buildings, including, but not limited to, unenclosed carports, decks, and porches*, Mr. Giunta claimed that everything after the comma (shaded above), is modifying enclosed portions of a building. He reasoned that since the detached garage is not a portion of the building it should not be included in the calculation of footprint.

Mr. Ugino argued that the source records used by the Appellants establishing the chronology of tenancy were unreliable. Renters are more transitory than property owners and often do not vote or participate in the Town Census. As a result, tenants may not appear in voter rolls or Town Census records. Their absence from those records should not be the basis for determining that the unit was vacant.

Mr. Ugino claimed that the Kohlbacks’ statement of rental income from 1973-2023 and the Assessors and Building Department records identifying the Premises as a two-family are evidence that the Premises is a two-family. Furthermore, the Owner provided the lease for Mr. Duda and Ms. Piver Duda for 2016-2017, satisfying a gap period identified by the Appellant.

Joe Prondak, Building Commissioner, recounted that the Owner initially applied for a Special Permit under Section 1.4.7.4 (c) of the By-Law. The proposed project had a lot coverage of 24%. However, the By-Law limits lot coverage to no more than 18%. The Owner withdrew that application to pursue an as-of-right proposal. The Owner filed an application accepted by Erik Tardiff, the former Assistant Building Commissioner. The neighbors followed up and raised concerns about the size of the footprint. Mr. Prondak thought that the calculations appeared off

and asked the Owner to hold off to allow him time to review the submission. Mr. Prondak reviewed Mr. Tardiff's determination to understand his rationale. Mr. Tardiff had included the open porch because he considered the roof as an overhang and the detached garage under "accessory annexes".

Mr. Prondak determined that the unenclosed porch could not be counted. However, given that the term "annex" is not defined, he relied on the standard definition of the word. One such definition states "a subsidiary building or an addition to a building." Given this broad definition, he determined that the detached garage and its overhangs fell under the definition of annex and could be counted toward the footprint. The Owner has reduced the size of the proposed two-family to exclude the area of the former porch and its overhangs and corrected a sidewall violation. Mr. Prondak said that the revised plan dated January 20, 2025 complies with the as-of-right Section 1.4.7.4 of the By-Law and that the Building Permit should be upheld.

Mr. Tamkin asked Mr. Prondak for his opinion on the abandonment of the two-family use. Mr. Prondak responded that a property's building permit history is the standard in the state and used by the Building Department in determining a building's use. The building permit history allowed him to conclude that the former structure was a pre-existing, non-conforming two-family and that a Building Permit should be issued.

Mr. Tamkin responded that when an Appellant or Applicant seeks relief for a two-family use it is their obligation to provide evidence substantiating the use and for the Board to verify there has been no abandonment of the use. Mr. Tamkin invited Mr. Prondak to weigh in on the two-family evidence. Mr. Prondak opined that neither voter registrations nor census information were reliable. Mr. Tamkin noted that the Board has in the past relied on that information in arriving at their decisions.

Mr. Goldman asked Mr. Prondak if he found anything irregular or inappropriate in the plans. Mr. Prondak found no irregularities in the reviewed plans.

Mr. Ugino explained his understanding of the definition of "footprint" under Section 1.4.7.4 of the By-law. Mr. Ugino broke down the definition into two sections hinging on 1) what is enclosed, and 2) not enclosed.

1) The allowed section has three parts: a) everything that is attached to the main building, b) everything that is an enclosed annex: out buildings such as sheds, garages; pool houses, and c) eaves and roof overhangs.

2) The not allowed section includes unenclosed portions or extension of buildings, such as open carports, open decks and open porches.

Based on his reasoning, Mr. Ugino asked that the Board consider the enclosed detached garage and its overhangs as allowed under Section 1.4.7.4 of the By-Law.

Mr. Goldman agreed with the Owner's interpretation and the commas in the paragraph were key to his understanding. He also concurred with the Building Commissioner.

Mr. Goldman found the statement of declared rental income by the Kohlbacks to be important. He asked if the former owners lived at the Premises. Mr. Ugino said the Kohlbacks bought the Premises in 1973 and lived in Unit 1 for two years before they bought and moved into 15 Otis Street. They rented both units for 35 years. When they sold 15 Otis Street they moved into Unit 2 for 15 years and continued to rent Unit 1. This was further collaborated by a phone text read by Mr. Elzon. Mr. Elzon and Michael Yankovski, a business partner, found voting rolls and town census data to be unreliable for establishing occupancy.

Mr. Yankovski said that the garage was not used as a garage. It was full of tools and could be considered a shed.

Abbe Kline, 35 Otis Street, has lived at her home since 2013 and has never seen or talked to the owner. In her opinion the unit was not occupied by the owner. She backs out of her driveway multiple times a day directly in line with the Premises' driveway and has never seen any activity.

She felt the By-Law is inconsistently applied. She noted that 15 years ago when 354 Manning Street was reconstructed it did not include the detached garage in its footprint calculations. Mr. Tamkin responded that the difference may be attributed to different Commissioners, changes in By-Law, different uses, and different interpretations over the years.

Joe Cargile, 25 Otis Street, reported he has lived at his home for 14 years and has never met the previous owners. He occasionally saw a tenant. He urged the Board to make a determination on the two-family use. He felt the Kohlbacks' statement was inconclusive about the two-family use as there is no information if one or both units provide rental income. He opposed the garage area being included in the footprint calculation as the By-Law is explicit on a garage being attached and silent on the definition of annexes.

Mr. Friedenbergl asked when did the Kohlbacks live at the Premises. Mr. Elzon said in 2010.

Mr. Goldman and Mr. Tamkin were troubled by the Kohlbacks' statement. It is not clear who resided at the units; and it is not an affidavit. There is no information if the owners lived at the Premises.

Danny Klein, 35 Otis Street, reported that he never saw any activity or cars at the Premises.

Mike Fando, 22 Donna Road, was supportive of the proposal and two-family structures in Needham. He is interested in buying a unit for his family.

Nick Kozlov, Appellant, was concerned that the new structure is significantly bigger than the previous structure. He purchased his home knowing there was a two-family residence 50 feet away from their property. He was troubled that a modest single-car garage built in 1909 provides a third of the square footage for the proposed two-family, where one unit is bigger than their single-family 15 feet away from their property. He urged that the intent of the By-Law as well as its impact be considered.

Mr. Friedenberghighlighted that if the ABID is upheld, a single-family structure will be the likely alternative, much larger and closer than the proposed two-family.

Ms. Waldvogel was focused on the proposal's occupancy and its impact. Previously the two-family had four bedrooms. The replacement will have eight bedrooms. She felt it will have a much larger impact on the neighborhood than a single-family home.

David Rosato, 14 Otis Street, thought there was something wrong in the By-Law when two lawyers have such different interpretation on whether the square footage of a detached garage could be included in the calculation of footprint. He thought it was bad policy to let the Building Commissioner make the determination. Mr. Tamkin informed Mr. Rosato that the Building Commissioner is entrusted with interpreting the Zoning By-Law by statute and case law. Mr. Tamkin agreed that the By-Law should be clear and when an ambiguity is raised and identified it may need to be addressed by the Planning Board and Town Meeting. The Board gives deference to the Building Commissioner's interpretation.

Mr. Friedenbergh noted that an as-of-right two-family reconstruction is rare, and the garage area is relevant only in the footprint calculation of an as-of-right two-family. The calculation is not applicable to single-family structures.

Chris Kostopoulos, 11 Bradford Street, supports the two-family proposal. He thought Mr. Prondak's interpretation was more conservative as the outcome is not as large as it could be. He thought the proposal would provide more affordable options and increase the housing stock in Needham.

Krista Brasseaux, 377 Manning Street, has lived at her home since 2023. She lives directly across from the Premises and has seen little to no activity. She was troubled that a small two-family could be replaced by such a large one with more cars and people. She found it ironic that the as-of-right proposal is bigger than what a Special Permit for a two-family would allow.

Kelly Partridge, 394 Manning Street, reported that she has lived at her home for 20 years. For decades, she has walked multiple times a day by the property and has never seen anyone at the Premises. She noted the sidewalk was not shoveled in the winter and the vegetation was not maintained making it hard for her to maneuver a stroller. The Premises always appeared empty. She was surprised to hear the owners and tenants had lived at the property.

Comments received:

- The Building Commissioner (see page 9 Building Commissioner's presentation)
- The Fire Department approved.
- The Police Department noted that on-site parking for two-family use must be provided.
- The Health Department had no comments.
- The Engineering Department requires that a minimum volumetric capacity of 1 inch over the impervious area and the infiltration system be sized to contain a minimum of 1" of the total impervious area; and the final location of storm drainage field should be reviewed for approval prior to field installation.
- The Planning Board had no comment.

- John Judge was opposed to the project. He had issues with the lack of communication by the Owner.
- Chris Kostopoulos supports the proposal.
- Greg Giokas supports the proposal.
- Abbe Klein has not observed continuous use as a two-family use. She was concerned about the massing and size of the proposal; safety; and lack of communication from the Owner.
- David and Courtney Willet had issue with the increased parking and congestion; size and massing and incongruency with the neighborhood.
- Jeanie and Brooks Goddard were troubled by the lack of communication from the Owner and by the size, height and design of the proposal.

Sara Solomon, 21 Otis Street, has lived at her home since 2020. She reported that she has never met the prior owners and there was no indication that they lived at the Premises. She thought it inconsistent that the garage's area was not included in FAR calculations when she built her home, yet it is included in the footprint calculations for a new two-family. She thought the long and narrow design of the proposal was awkward and not in keeping with the neighborhood.

Mr. Giunta added that detached garages are not included in FAR calculations. Furthermore, detached garages are not included in FAR calculations for Special Permits under Section 1.4.7.4 of the By-Law either. Including the area of detached garages for the purpose of calculating the footprint for a two-family is at odds with how it is treated in two other sections of the By-Law.

Mr. Elzon responded that footprint and FAR are different, and the proposal is based on the footprint calculation. Mr. Giunta agreed that footprint and FAR are different but they have areas of overlap.

Mr. Ugino challenged the comments by neighbors that that the Premises had no tenants. He thought the leases provided and the Kohlbacks' statement, though not a formal affidavit, were evidence. Mr. Tamkin found the statement unclear and lacking specificity whether the source of rental income was from one or both units.

Rob Ticktin, 369 Maning Street, asked how long the prior owner needs to occupy the unit to prove residence. Mr. Tamkin explained that occupancy is based on the demonstrable facts. Mr. Friedenberg added that there are no specific benchmarks. Mr. Ticktin said that the entire neighborhood does not have a record of witnessing the prior owners living at the Premises. In contrast, all the neighbors are able to confirm their neighbors' existence.

Mr. Friedenberg asked if either party investigated the intent of the "footprint" provision in Section 1.4.7.4 of the By-Law. Mr. Giunta said he spoke to the Planning Director, who was involved in its crafting. She said that detached garages were not meant to be included. However, he researched the record file which did not provide further information. Mr. Giunta, who has a portfolio of representing two-family structures, believes this is the first time a by-right two-family has been pursued under this provision. The provision has been in the By-Law for a long time without being applied and the institutional memory of its intent is missing.

Mr. Tamkin asked the Owner if they considered any action to mitigate the opposition of the neighbors. Mr. Yankovski reported that a Zoom meeting was convened after the January public hearing to discuss the project. There were 30 attendees. He said there are opportunities for modifications such as the location of driveways and windows, mechanicals, shape and sizes. No issues were raised at the Zoom meeting. Another Zoom meeting was convened on Tuesday, February 25, 2025 with five attendees. He stated that the two-family option is not negotiable, but they are open to working with the neighbors and modifying the proposal pre- and during construction.

Mr. Prondak offered that under Section 1.4.5 (a) and (b) – Abandonment - of the By-Law both intent to abandon; and a two year discontinued use was necessary to consider the use abandoned. He did not think the intent to discontinue the use under Section 1.4.5 (a) of the By-Law was met here.

Mr. Giunta said that the Appellants are open to working with the Owner to review design aspects. Their preference is a single-family design. They are willing to discuss the two-family design.

Mr. Tamkin addressed the Appellants, noting that the two-family option is not on the table and if they wish to work with the Owner on changes and modifications to the plans to accommodate their concerns they can request a continuance; or do they want the Board to decide on the ABID.

Ms. Waldvogel asked for clarification. Mr. Giunta counselled the Appellants that there are two options forward: 1) ask the Board to make a decision on the ABID; or 2) work with the Owner on design and scale modifications and presumably withdraw the ABID. The Appellants wished to move forward on the decision with the opportunity to discuss modifications with the Owner.

Mr. Tamkin ask the Owner if they wished to continue the public hearing. Mr. Elzon requested a decision and offered to work with the Appellants.

The public hearing was closed.

Board Deliberation

Mr. Goldman respected the determination of the Building Commissioner and agreed with the Owner's counsel. He thought that the detached garage, as described in Section 1.4.7.4 of the By-Law, clarified further by the location of the "comma", is included under the definition of "accessory annexes". He also finds the area of the detached garage can be included in the calculation of the footprint of the proposed structure.

Mr. Goldman thought the statement submitted by the former owners was indication that an intent to abandon use was not intended and Section 1.4.5 (a) – Abandonment of the By-Law determination was not met. Mr. Goldman also found the Kohlbacks' statement evidence that the owners had occupied, in some capacity, the unit, and that the use was not discontinued for twenty-four consecutive months per Section 1.4.5 (b) of the By-Law. Mr. Goldman agreed that voter rolls, and Town census records are inconclusive as evidence of vacancy.

Mr. Friedenbergr found the decision difficult. He found the updated Occupancy Summary much improved by the documentation provided by the Owner. He was unimpressed by the Kohlbacks' statement. He found the statement to be unclear about the continuous use as a two-family and the information provided concerning the history of occupancy at the Premises confusing. He did not find the potential function of the structure as a two-family (two-kitchens, and two meters) to be germane to determining actual occupancy and use. He found it difficult to believe that no one lived there and there was evidence presented that someone was living at the Premises most the time.

Mr. Friedenbergr disagreed with the Building Commissioner on the matter of the footprint calculation. He disagreed with making determinations based on punctuation. He did not think that detached garages should be included in the definition of "footprint". His reasoning was based on the following:

- 1) the By-Law specifically refers to *attached garages* as opposed to garages;
- 2) his reading and understanding of Section 1.4.7.4 – *footprint* of the By-Law would include only attached to the principal building. Those attached items are garages, porches, solariums, similar enclosed extensions, attachments and accessory annexes as listed in the By-Law.

Mr. Tamkin thought the Owner did a good job filling in the occupancy gaps presented by the Appellants.

While he initially found the abandonment argument presented by the Appellants to be compelling, he found the Owner's response and additional backup documentation equally compelling. He agreed that tenants do not operate like property owners hence voting rolls and Town Census do not prove vacancy. Based on the Owner's rebuttal, he does not believe a finding of abandonment was supported and did not meet the standards under Section 1.4.5 – Abandonment of the By-Law.

Mr. Tamkin, however, disagreed with the Building Commissioner on the matter of footprint calculation. Mr. Tamkin concurred with Mr. Friedenbergr's understanding of Section 1.4.7.4 – *footprint* that an "annex" must be attached to the principal building. He reasoned furthermore that annexes were not listed in the next section of "not included" items of Section 1.4.7.4 of the By-Law.

Mr. Friedenbergr moved to grant the Appeal of the Building Inspector Decision Appeal of Building Permit #BC-24-11071 issued to Arthur Elzon dated November 19, 2024, for the reconstruction of a two-family at 378 Manning Street and the Building Permit should be revoked. Mr. Goldman seconded the motion. Mr. Tamkin called the vote.

Mr. Tamkin – Yes; Mr. Friedenbergr – Yes; Mr. Goldman – No

Under MGL c.40A, Section 15, an Appeal of a Building Inspector Decision requires the unanimous vote of the Board to overturn the Building Commissioner's decision. The motion failed to achieve a unanimous vote in favor and the appeal fails and is therefore denied.

6. On November 27, 2024 the building and detached garage were demolished.
7. Nick Kozlov and neighbors to the Premises contacted the Building Commissioner with concerns with the size of the footprint of the proposed new structure and the issuance of the Building Permit. Mr. Prondak reviewed the action of the Assistant Commissioner and determined that more information was needed. He contacted the Owner to postpone starting construction.
8. On December 18, 2025, Nick Kozlov and Megan Waldvogel, Appellants, filed an Appeal of a Building Inspector Decision (the “ABID”) of the issuance of the Building Permit pursuant to the Rules of the Board, Section 7.5.1 of the By-Law, and MGL 40A, Section 3 and 15.
9. The Appellants’ ABID included a Memorandum of Support and a Supplemental Memorandum from counsel George Giunta, Jr. detailing the grounds of which the Appellants’ assert the Permit should be revoked.
10. The Appellants asserted: 1) the inclusion of an unenclosed porch and a detached garage are in the calculation of footprint was an error and the plans need to be revised; and 2) there are insufficient grounds to establish continuous use of the Premises as a legally non-conforming two-family dwelling.
11. Pursuant to the definition of ‘footprint’ in Section 1.4.7.4 paragraph two of the By-Law unenclosed porches are “not included in the footprint.” The Building Commissioner found that the calculations of footprint submitted by the Owner included the area of a roof over an unenclosed porch, which was an error. The Building Commissioner determined that the unenclosed porch could not be included in the area footprint calculation and the plans must be revised.
12. The Owner provided a revised Existing Plan and Proposed Plot Plan prepared by A. Matthew Belski, Jr. dated January 23, 2025 which eliminated the unenclosed porch footage. The Existing Plan calculates a footprint as the sum of the area of the existing building, a detached garage and overhangs at 2,067.9 square feet. The Proposed Plan indicates a proposed building with attached garages totaling 2,068 square feet with a lot coverage of 19.9%.

The Board makes the following rulings on the issues presented:

13. **The Status of the Pre-existing Non-Conforming Two-Family Use.** The Appellants argue that in order to establish lawful, preexisting non-conforming two-family use, the Owner must demonstrate that the property was used and occupied for two-family purposes from 1925 through the current day. Pursuant to Section 1.4.5(b) Abandonment of the By-Law, a non-conforming use shall be considered abandoned when the use has been discontinued for twenty-four consecutive months. The Appellant provided a 1993 – 2025 Occupancy Summary based on Town Census and Voter Rolls records indicating gaps in the occupancy. They argued that the Town Assessor Property Cards and Building Permits may indicate a two-family for tax purposes and building type, respectively, but are inconclusive to establish continuous occupancy.

The Owner countered by providing signed leases and a signed statement from the former owners that they claimed filled in the gaps in occupancy and refuted any intent to discontinue use under Section 1.4.5 (a) of the By-Law. In addition, they argued that tenants are less likely to participate in elections and Town Census and their absence from the records did not indicate vacancy. In addition, the Building Commissioner found the building permit history, a standard used by Building Inspectors throughout the Commonwealth, as evidence to conclude that the Premises enjoys pre-existing non-conforming status.

The Board found the two-family use not to be abandoned, such that the Premises continues to enjoy its pre-existing, non-conforming status and found no basis to revoke the Building Permit on those grounds.

14. **Detached Garage Incorrectly Included in Total Footprint Area.** The Appellants argue that detached garages are not to be included in the calculation of “footprint”, as Section 1.4.7.4 of the By-Law specifically includes “attached garages” in this calculation while there is no mention of detached garages. They argued if detached garages were intended to be included in the calculation of “footprint” the paragraph would have been written differently. Furthermore, the Appellant argued that under the current zoning, one would be allowed to build more by Special Permit than by right. Under a Special Permit for the reconstruction of a two-family at the Premises would limit the footprint to 18% of the lot area or 1,874.52 feet. Contrary to zoning norms, the proposed as-of-right 1,947 square foot house (without overhangs) is 74 feet larger than what would be allowed by Special Permit.

The Building Commissioner determined that detached garages are allowed as “accessory annexes.” Since the term “annex” is not defined in the By-Law, he relied on a dictionary (Dictionary.com) definition which defines an annex as “a subsidiary building or an addition to a building.” Based on the definition of “annex,” the Building Commissioner determined that the detached garage and its overhangs could be counted in determining allowable footprint on which a building may be constructed. The Owner agreed with this conclusion and, in addition, noted that detached garages are not expressly excluded from the footprint calculation pursuant to the definition of “footprint” found in Section 1.4.7.4.

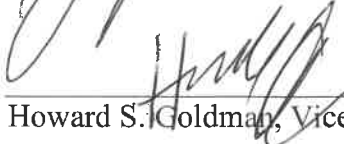
The Board was not unanimous on the matter of a finding that the detached garage could be included in the total footprint for the new structure. Without unanimous agreement by the Board, there is no basis to revoke the Building Permit.

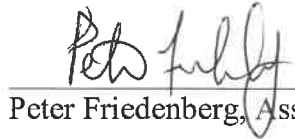
Decision:

On the basis of the foregoing findings, following due and open deliberation, upon motion duly made and seconded, two Board members voted in favor and one Board member voted to oppose its motion to grant the Appeal of the Building Inspector Decision of the Building Permit #BC-24-11071. Since the Board failed to reach unanimity, therefore, per Massachusetts General Laws, Chapter 40A, §15, the Appeal failed and the Building Commissioner’s ruling is upheld and Building Permit #BC-24-11071 remains in full force and effect.

Signatures


Jonathan D. Tamkin, Chair


Howard S. Goldman, Vice-Chair


Peter Friedenberg, Associate Member

Appeals from this Decision, if any, shall be made pursuant to Massachusetts General Laws, Chapter 40A, §17, and shall be filed within twenty days after the date of filing of this Decision in the Office of the Town Clerk.

Twenty-Day Appeal Certification

I certify that the 20-day statutory appeal period for this Decision by the Needham Zoning Board of Appeals has passed,

☐ *and there have been no appeals filed in the Office of the Needham Town Clerk or*

☐ *there has been an appeal filed.*

Date

Louise Miller, Town Clerk