

## MINUTES

### MODERATOR'S COMMITTEE ON ZONING FAR

January 6, 2016

Brookline Town Hall – Room 408

In attendance: Members: Richard Benka (chair), Jesse Geller, Linda Hamlin, Marian Lazar, M K Merelice, Lee Selwyn. Also: Michael Yanovitch, Deputy Building Commissioner.

1. The meeting was called to order by the chair at 7:10 PM.
2. The minutes of December 15, 2015 were unanimously approved.
3. Mr. Yanovitch identified, and the Committee discussed, issues from the perspective of the Building Department:
  - There are problems not just with the 150% provision in Section 5.22, but with 5.22 as a whole and with the use of FAR as a whole.
  - The 10-year rule in 5.22.1.c has not limited the use of 5.22.2 to existing houses and has not been a deterrent to the size of new construction: virtually every new house, with the possible exception of a few buildings in S-7 zones, are built with finished areas amounting to 100% of allowable FAR and basements and full attics amounting to 50% of allowable FAR to take advantage of 5.22.2, whether the space is legally finished after 10 years or illegally finished prior to the 10-year period. Developers also come back and excavate basements. There are about 25 new single-family homes per year.
  - The Building Department has reservations about the idea of being responsible for spot checking on violations of the 10-year rule.
  - The Building Department has taken the position that if more than 50% of the exterior is demolished, or if a building is converted from 1 unit to 2 units in an SC or T district, the clock for the 10-year waiting period is reset.
  - The question is whether FAR is the best mechanism for regulating “McMansionization” and building size in relation to neighboring existing buildings, or whether we should be looking at lot coverage, floors, stories, half-stories, and so on. For example, consider allowing only a half-story above first two floors.
  - T Districts have been a “nightmare” the last 4 years (FAR of 1.0 in T-5 and 0.75 in T-6) with two new NCDs in response recently.
  - Consider revisions by district.
  - Another issue is setbacks and the application of exceptions for projections such as bays, balconies, and so on.

- It is necessary to consider the impact of the initial proposal in Article 12 (Nov. 2015 Town Meeting) to count all unfinished attic and basement space. If a building were now at 95% of FAR and the change in definition made the building non-conforming, would it allow even greater expansion, including exterior expansions, under Gale v. Zoning Bd. of Appeals of Gloucester, 80 Mass. App. Ct. 331 (2011), Deadrick v. Zoning Bd. of Appeals of Chatham, 85 Mass. App. Ct. 539 (2014), and G.L. c.40A, sec. 6? There was discussion of providing guidelines in the Zoning By-Law for the application of the “substantially more detrimental” standard of Section 6.
- Consider Bjorklund v. Board of Appeals of Norwell, 450 Mass. 357 (2008) (0.8 acre lot non-conforming under current zoning-by-law; replacement of pre-existing small house with substantially larger house not permitted under ch. 40A, sec. 6, despite fact that proposed house would comply with all current by-law requirements other than lot size; improvements to existing house such as addition of dormer, addition of porch or sunroom, two-car garage, or storage sheds would be permitted, or construction of replacement house in keeping with existing footprint and living area, would be permitted; more substantial improvements or proposed larger house would “increase the nonconforming nature of the structure” and not be permitted if substantially more detrimental to the neighborhood).
- Consider possibly reducing 50% allowance of 5.22.2 to, for example, 30%. How many existing houses would be affected? It was suggested that the Assessor’s database be used to determine the extent to which existing houses are nonconforming as to FAR or would be made nonconforming by proposed zoning changes. There are different definitions of floor area for purposes of zoning, assessing and the Building Code, but the Assessor’s database may be instructive as to zoning nonconformity. It was also asked whether FAR nonconformity could be identified by zoning district. Mr. Selwyn will determine whether the Assessor’s database includes zoning district information.
- If most existing houses are non-conforming or were made non-conforming as to FAR, they could utilize Gale and Deadrick.
- Deal with conflicting sections of Section 5.22. Any exterior changes, e.g., dormers go through façade review. Consider special permit rather than as-of-right for 5.22.2.
- Consider the impact of time limitations on enforcement actions: 6 years for construction done with a building permit, 10 years for construction done without a building permit.
- Consider Mauri v. Zoning Bd. of Appeals of Newton, 83 Mass. App. Ct. 336 (2013) (Chapter 40A, § 6, does not provide protection from increases in lot dimension and area requirements to a nonconforming lot held in common ownership with adjoining land which could be used to eliminate or reduce the nonconformity)
- Mr. Yanovitch mentioned buildings at One Somerset and Sargent Beechwood.

The meeting was adjourned.