



Board of Appeals
Jesse Geller, Chair

Town of Brookline

Massachusetts

Town Hall, 3rd Floor
333 Washington Street
Brookline, MA 02445-6899
(617) 730-2130 Fax (617) 730-2442

Board of Appeals Virtual Public Hearing Minutes

Thursday, May 13, 2021

7:00 p.m.

Via ZOOM

ZBA DECISIONS can be found at: <https://www.brooklinema.gov/Archive.aspx?AMID=76>

Board Members Present: Chair Jesse Geller, Mark Zuroff, and Johanna Schneider

Staff Present: Polly Selkoe (*Assistant Director for Regulatory Planning*), Jonathan Simpson (*Associate Town Counsel*), Karen Chavez (*Zoning Coordinator/Planner - Regulatory Planning*) and Paul R. Campbell (*Deputy Building Commissioner*)

Chair Jesse Geller opened the meeting.

2020-0067 15 Regent Circle – Construct a roof deck

Attorney Robert Allen, on behalf of the applicant, waived the reading of the public hearing notice and provided an overview of the project.

Mr. Allen stated that the Petitioners received a building permit to construct a by-right deck in November of 2020. He stated that after construction began it was discovered that the building inspector issued the permit in error, and the Schwartz's immediately sought to rectify the issue and applied for the required setback relief.

Mr. Allen stated that the proposal went to the Planning Board on February 11, 2021. He noted that the proposal included screening as a counterbalancing amenity with plantings. Mr. Allen stated that due to concerns from the immediate abutter, the Petitioners agreed to continue the Planning Board meeting to try to work towards a compromise.

Mr. Allen noted that the abutter wanted a setback of 8.5 feet, which exceeded the distance required under the Zoning By-law. Mr. Allen noted that the predecessor in title to the abutter (Case No. 3543 in 1999) at 17 Regent Circle received a variance and a number of special permits to allow for the creation of this additional space in the attic, including the installation of dormers, and the skylights.

Mr. Allen noted that several abutters have provided their support for the proposal.

Mr. Allen stated that a revised deck proposal was presented to the Planning Board on April 22, 2021, with increased setbacks to make about one-third of the deck railings compliant with the required side yard setback.

Mr. Allen stated that an alternate proposal, plan "B", was shared with the Planning Board as an option, and the Planning Board was unanimously supportive of both options. The 17 Regent Circle abutter reviewed each option, and indicated preference for plan "A," which was presented to the Planning Board and presented again to the ZBA.

Mr. Allen stated that a shadow study was conducted and the findings evidence that the proposal should not have a significant impact on the amount of light coming into the abutting unit.

Mr. Allen stated that the proposed counterbalancing amenity consists of perforated screening that would allow sunlight through, and would have minimal-to-no-shadow cast on the skylight. The new perforated screen was modified as a response to concerns heard about the original solid wall that was proposed to provide privacy.

Mr. Allen stated that the proposal more than adequately addresses both the abutters and the Planning Board's concerns over the impact to the privacy and impact to light into the abutting unit. Mr. Allen further stated that the abutter voiced a preference that the faux green foliage have greenery facing 17 Regent Circle, and the Petitioner would accept a condition to that effect.

Mr. Allen stated that the Board may grant the special permit relief pursuant to **Section 5.43** of the Zoning By-law to allow the deck within the side yard setback where 6 feet are required, and stated that the proposal will meet all of the requirements for a special permit under Section 9.05 of the Zoning By-Law.

Upon inquiry from Board Member Zuroff, Attorney Allen responded that the ivy base of the railings is faux and there are planter boxes that will have live plants.

Chair Geller then called for public comments in favor of the proposal.

The abutter at 3 Regent Circle spoke in support of the deck and noted that the Petitioners engaged all the neighbors very early on in their process, and further noted they appreciated the engagement.

Chair Geller then called for public comments in opposition to the proposal. No one spoke.

Karen Chavez, Planner & Zoning Coordinator, provided the Planning Board Report. The Planning Board supported the project after revisions were resubmitted to the Board.

Paul Campbell, Deputy Building Commissioner, stated that the Building Department had no objections to the proposal, and would work with the Petitioner to ensure compliance with the Board's decision and all state building codes. Mr. Campbell recommended that the Board amend the Planning Board condition

to require the Petitioner to submit as-built floor plans and elevations, stamped and signed by a registered professional engineer or design professional, and a final site plan, stamped and signed by a registered engineer or land surveyor prior to the issuance of a Certificate of Occupancy to demonstrate conformance with the Board's decision since building permits have already been issued to construct the deck.

Board Member Schneider stated that she appreciated the revisions that were made to address the concerns raised by the abutter.

Board Member Zuroff concurred and stated that Attorney Allen has indicated that a condition requiring a year-round ivy type screen would be acceptable.

Chair Geller agreed with Board Members Schneider and Zuroff, and noted that the counterbalancing amenity proposed offsets the setback violation. He stated that the proposal meets the requirements under Section 9.05 of the Zoning By-Law. Chair Geller commented that neither the roof deck nor the neighboring skylights were part of the original building and noted that the proposal represented a reasonable compromise.

The Board unanimously granted the request for special permit.

2021-0010 99 Fairmount Street – Construct additions including garage and deck expansion

Attorney Robert Allen, on behalf of the applicant, waived the reading of the public hearing notice and provided an overview of the project. Also in attendance was Steve Sousa, the project architect.

Mr. Allen stated that the Petitioners are seeking to make minor changes to their existing single-family home including increasing the size of the existing single-car garage so that a second car can park, and constructing a small addition that is approximately 439 square feet, which would increase the total size of the house to approximately 4,200 square feet.

Mr. Allen stated that special permit relief was granted in 2003 to increase the FAR, and noted that in 2017 the manner in which FAR is calculated changed. He stated that this change now requires the Petitioners to include the existing basement space, thereby making the single-family home preexisting non-conforming as to the FAR.

Mr. Allen stated that a lot size in the S-15 district is required to have 15,000 square feet, and 99 Fairmount lot is just under half that amount at 7,228 square feet. Mr. Allen also stated that the lot has no side yard, as defined by the Zoning By-Law. Mr. Allen stated that 99 Fairmount has two rear yard lot lines and one front yard lot line. He stated that the house was built as far back on the property as possible.

Mr. Allen opined that not only is this lot the smallest in the neighborhood, but due to the restrictive setbacks because of the lot shape, it may also have the smallest allowable building footprint.

Mr. Allen stated that the Petitioners are working with the Preservation Commission to lift the stay of demolition early. He noted that at the Preservation Commission hearing, the commissioners were supportive and thought the proposal was well designed and in keeping with the scale of the home.

Mr. Allen added that the Planning Board also provided unanimous support.

Mr. Allen stated that the existing FAR is .52, where a FAR of .25 is allowed. The proposal will increase the FAR to .58. Mr. Allen stated that the FAR number increases as much as it does due to the small lot size, and reiterated that the actual size of the addition is only 439 square feet.

Mr. Allen stated that landscaping will be provided to counterbalance the impact of the proposal on the neighbors.

Mr. Allen stated that the most impacted neighbors have both been supportive and have stated that because of the topography, the proposal will not have any negative impact on their home.

Mr. Allen stated that the proposal will not result in a detrimental impact on the neighborhood and will meet all of the requirements for a special permit under Section 9.05 of the Zoning By-Law.

Karen Chavez, Planner & Zoning Coordinator, provided the Planning Board Report. The Planning Board is supportive of the project, while the Planning Department is not supportive of the proposal.

Paul Campbell, Deputy Building Commissioner, stated that the Building Department had no objections to the proposal, and would work with the Petitioner to ensure compliance with the Board's decision and all state building codes.

Chair Geller then called for public comments in favor of the proposal.

The immediate abutters at 112 Dudley Street, Chris Reuning and Ming Jung Kim, spoke in support of the proposal.

Chair Geller then called for public comments in opposition to the proposal. No one spoke.

Board Member Zuroff stated that the request is minimal, and the project was attractively designed.

Board Member Schneider concurred with Board Member Zuroff.

Chair Geller stated that 40A Section 6 special permit relief could be granted as requested without substantial detriment to the neighborhood and meets the requirements under Section 9.05 of the Zoning By-Law.

The Board unanimously granted the request for special permit.

292 Warren Street – Remand of 292 Warren Street ZBA Case Number 2017-0029 regarding fence height within side yard setback to Board of Appeals by Norfolk Superior Court in Edward J. Bartlett, as Trustees for the Kargman Family Brookline Residence Trust, v. The Town of Brookline Board of Appeals

Attorney Wayne Dennison, on behalf of the applicant, waived the reading of the public hearing notice and provided an overview of the project.

Chair Geller stated that this is a remand of the appeal of the decision. The court determined that the board had not based its decision on the appropriate questions and therefore it was remanded to the Board to review what the court felt was the appropriate standards under the relevant by-law section.

Chair Geller stated that the critical language is the phrase “other detrimental impact,” and that the charge of the Board is to make a determination about whether the nature of the fence that exceeds the by-law requirement correlates with that standard under the appropriate section, 5.62 of the By-Law.

Chair Geller asked Board Member Johanna Schneider if she had a clear sense of testimony that was offered.

Board Member Schneider recalls that it is two large lots, and there is approximately 130 feet between the two porches in questions. The issue was raised by the property owner who put up the fence that he was concerned about being able to make eye contact from his porch across the 130-foot separation with the occupants on the porch of the abutting property. She recalls that at the time there was Building Department testimony that in the instances when the Board has granted fence height relief it has been for commercial use properties or for properties bounded by railroad tracks. She further added that this language can be found in Section 5.62 of the Zoning By-Law.

Mr. Dennison stated that the underlying issue is a question of detrimental impact, and stated that this is a question of privacy interest.

Mr. Dennison stated that when the applicant went to the Board to legalize the fence, the Board did not unanimously approve the project, and it was therefore denied. The applicant, after multiple efforts to confirm an appointment with the Building Department, cut the fence down without a Building Department representative present. The submission that was subsequently made specifically talks about the significant reduction in total area in excess of 8 feet that has now occurred as a result of the fence being cut down.

Most neighbors were in support of the proposed fence, with the exception of one abutter who stated that he wanted a compliant fence.

Mr. Dennison mentioned that there is a Special Permit process to obtain a taller fence that is in excess of 7 feet, and if there is a detriment then the case can be considered. He stated that the applicant has been trying to bring the fence into compliance pursuant to the Special Permit process.

Mr. Dennison shared the site plan and demonstrated the locations where the fence has a height of 8.3 feet and 8.6 feet. He opined that given the existence of the patios makes the fence just adequate for its purpose, to screen one property from another. He added that the structure is approximately 5 feet from the lot line. He added that most of the fence is in compliance with the height requirement, and only approximately 80 feet in length of the fence exceed 7 feet.

Chair Geller inquired whether Mr. Dennison wanted to speak specifically to “other detrimental impact.”

Mr. Dennison affirmed that he did, and in particular the privacy interest of the petitioner. He added that there was a significant change of condition when the new abutters moved in and removed a significant amount of vegetation, and constructed an elevated rear deck. Since this minimized the privacy of the petitioner, a fence and plantings were installed.

Chair Geller asked whether the loss of privacy was the other detrimental impact, and to clarify the meaning of “privacy” – whether it was absolute privacy or expected privacy.

Mr. Dennison stated that he did not know what absolute privacy means and noted that the property was previously secluded, but due to changes from the abutter, privacy was reduced.

Board Member Schneider asked how much separation was between the two patios.

Mr. Dennison stated that there is approximately an 80-foot separation between the abutter’s patio and the petitioner’s structure.

Board Member Schneider asked for further clarification on the distance between the patios, given the argument made by Mr. Dennison.

Mr. Dennison stated that his estimate was closer to 100 feet.

Board Member Schneider asked Jonathan Simpson, Town Counsel, whether the Board was limited to information previously presented to the Board alone, or whether they were supposed to consider information that was adduced at trial.

Mr. Simpson stated that the Board has the option of taking evidence in addition to its record. He further added that the Board’s record consists of the minutes and the decision letter, as well as any information that they took pursuant to the hearings. The trial transcript would be in addition to the records, and the Board has the option of considering it.

Board Member Zuroff stated that something that is missing from the record is a site plan that shows what the petitioner is claiming to be compromised, and notes that it is not even in the court record. If the issue is truly privacy, having a site view and/or pictures would be beneficial to the Board to understand the nature of the detrimental impact. He further added that there are homes in Brookline that are closer to each other than the subject case, and expressed concern about maintaining the standard if the Board compromises the By-Laws.

Mr. Dennison invited the Board to take a site visit to the property, and stated that the fence is at the minimum height necessary for the property owner and abutter to enjoy their patios without seeing each other.

Board Member Schneider asked whether Mr. Dennison had photographs.

Mr. Dennison stated that the photographs were included in the submission of August 30, 2018, as well as multiple photographs in the record with the Superior Court.

Chair Geller stated that it was an excellent suggestion to have a site visit, and that Mr. Dennison has an opportunity to put together a relatively concise package that supports the argument. He stated that both would be helpful to the Board.

Mr. Simpson made the Board aware that they have 60 days, pursuant to Court order, from April 20, 2021 to submit a written decision on this matter following the remand.

Board Member Schneider asked Mr. Simpson whether there was any material available that could be shared in order to understand the property better.

Mr. Simpson stated that there was not.

Chair Geller noted that the Court order was dated April 15, 2021 and the 60-day deadline was June 14, 2021.

The Board agreed to schedule a site visit on May 26, 2021 at 8:30am at 292 Warren Street.

The Board unanimously granted a continuance to June 3, 2021.

2020-0068 14 Green Street – Convert a one-story commercial building into a four-story mixed use building, with five residential dwelling units and commercial on the ground floor

Attorney Robert Allen, on behalf of the applicant, waived the reading of the public hearing notice and provided an overview of the project. Project architect, Steve Sousa, provided an overview of the design.

Mr. Allen stated that the existing building has been underutilized and has served several businesses, including a nightclub, a temple and most recently the Osaka restaurant. Mr. Allen stated that the proposal is to demolish the existing single-story structure and construct a four-story mixed-use building with five residential units and a ground-floor commercial.

Mr. Allen noted that the Preservation Division of the Planning Department issued a Certificate of Non-significance in October of 2020.

Mr. Allen noted that the Petitioner went before the Planning Board on March 11, 2021, and the Board recommended the applicant study the functionality of the commercial space due to its size, and research fossil-free programming for the building.

Mr. Allen stated that at the second Planning Board meeting on April 22, 2021, a revised proposal with a more robust fossil-fuel-free plan was presented, and the Board provided their unanimous support of the project, subject to their final design review.

Mr. Allen stated that, contrary to the Planning Board report, the relief is indeed requested under Section 5.07 and noted that this section permits the Zoning Board to waive setbacks if it is demonstrated that such a waiver would promote reasonable development of the site that is compatible with adjacent buildings and the surrounding area. Mr. Allen opined that the standard to apply is not the standard prescribed under Section 5.43 for counterbalancing amenities, but the standard under Section 5.07, a standard of reasonable development.

Mr. Allen opined that the fossil fuel-free elements taken, at the direction of the Planning Board, together with a positive Planning Board recommendation support a finding that that the project provides reasonable and compatible development on the site. Mr. Allen opined that the provision of these fossil-fuel-free features is more than what is required under the Zoning By-Law, and noted that these features represent a substantial financial commitment.

Mr. Allen stated that in response to the Planning Board, the Petitioner revised the proposal to be an all-electric building with an exception for cooking and gas fireplaces. To address the outstanding components that will not automatically be electric, the Petitioner will offer the buyer an option to opt-out of gas and select the installation of an induction oven. Mr. Allen stated that the roof will be solar panel-ready with a goal of installing solar panels to power the common areas of the building, and noted that the Petitioner is committed to providing two electric carport stations, and all parking spaces will be designed to be electric vehicle-ready.

Mr. Allen then described the proposed Small Business Incubator Program. Mr. Allen stated that in consultation with the chair of the Economic Development Advisory Board (EDAB) as well as the Economic Development Director, the idea of offering as a condition a restriction that would support a small business with an affordable commercial program was developed. Mr. Allen opined that the condition stays within the purview of the Zoning Board of Appeals.

Mr. Sousa described the existing conditions, including the site plan and the proposed floor plans and elevations. He described the elevated parking system and electric vehicle charging station and noted that the proposal will maintain the existing curb cut. Mr. Sousa identified where the proposed building will be setback further from the existing on Green Street and described the residential entry. Mr. Sousa then reviewed the café study done to demonstrate that the size and layout can support the intended café use. Mr. Sousa described the bike storage area, storage and trash and recycling areas. He described the automated parking system and noted that a service provided by the lift company includes 24-hour customer service and monitoring of the parking.

Mr. Allen then addressed two zoning questions raised by the Planning Board, which were FAR and parking.

Mr. Allen stated that as a residential project in a commercial district, G-1.75 the by-law permits an Applicant to utilize the standards in the M-2.0 Zoning District, including the FAR. Mr. Allen stated that the Building Commissioner and Deputy Building Commissioner concur that the open garage should not count towards the FAR in this Coolidge Corner Overlay District.

Upon inquiry from Board Member Schneider, Mr. Campbell stated that he conferred with the Building Commissioner Bennett and referenced Section 5.06.4.b.3 of the Zoning By-law. He stated that the Building Department's interpretation is that only the enclosed areas would be included in the GFA and therefore the proposed open garage would not impact the FAR. Mr. Campbell stated that based on Section 5.07 of the Zoning By-law, there must be walls for an area to be counted in the GFA. Mr. Campbell concluded that the Building Department's position is that the language is clear, and the Building Department has no objections to the Petitioner's request, and noted that the Zoning By-Law does not address mixed-use buildings, and this is a mixed-use building.

Mr. Allen stated that the best way to look at reasonable development is by looking to the town's planning and economic development reports and goals.

Mr. Allen stated that with the combination of the offer of a small business incubator commercial unit, the fossil-fuel-free commitment, and the unanimously supportive Planning Board, the Board may find that the proposed development is a reasonable development of the site and is compatible with adjacent buildings and the surrounding area. Mr. Allen opined that the proposal will meet all the requirements for a special permit under Section 9.05 of the Zoning By-Law.

Mr. Allen stated that this Board should consider striking the third condition in the Planning Board recommendation, and modify the first condition to include that the floor plans for the commercial unit shall show a build-out for a café space. Mr. Allen stated that the Petitioner would agree to a condition that required a tenant subsidy equivalent to a minimal value of \$100,000, which amount shall minimally cover a complete build-out of the space, including utility hookups, but excluding furniture, fixtures and equipment, and an additional waiver of one year rent inclusive of taxes, insurance and common area maintenance fees.

Upon inquiry from Chair Geller, Mr. Allen stated that in speaking with the Town there was a preference that the benefit be provided upfront to minimize concerns regarding future enforcement.

The Board expressed a desire that the lease agreement with the tenant explore how to protect the value invested into the unit for the subsequent tenants, in a situation where a tenant is unable to achieve a sustainable business model.

Mr. Allen stated that a condition will be worked out to protect the unit from being transferred in a way that is consistent with the goals of the condition.

Chair Geller noted the retail environment is difficult and that he would like space to be available and accessible to a small business, as described, longer than one tenant.

Chair Geller then called upon Town Counsel, Attorney Simpson.

Attorney Simpson stated that the condition, as presented, front-loads the benefit and stated that it is an advisable approach compared to a condition in perpetuity as it limits the enforceability problems since it presents a concern with monitoring the program in perpetuity. He noted that the condition should address the extent to which the zoning relief is sought, and noted that Section 5.07 of the Zoning By-Law provides flexibility to the Board. Attorney Simpson stated that whether the proposed condition fits within the greater planning rubric, he noted that it is an innovation and that it does break new ground. He stated that he could easily argue in support of it in terms of it being a valid condition based on the currently proposed condition.

Chair Geller then called for public comments in favor of the proposal. No comments were submitted.

Chair Geller then called for public comments in opposition to the proposal.

Linda Olson Pelkhe, Town Meeting Member Precinct 2, spoke in opposition to the proposal and noted concerns about the size of the building and it not aligning with town goals.

Upon inquiry from Chair Geller, Mr. Campbell stated that he was satisfied with how the Petitioner calculated the FAR and noted that plans stamped by a registered architect will be required prior to the issuance of a permit to ensure compliance.

Chair Geller then called upon Polly Selkoe, Assistant Director of Regulatory Planning, to deliver the reports of the Planning Department and Board. The Planning Board was supportive after revised plans were resubmitted. Ms. Selkoe noted that a construction management plan should be required as the site is small and noted typically a project of this size would require a CMP which should also be submitted to the Planning Department. Ms. Selkoe also noted that the fossil-fuel-free discussion for some of the electricity should be included in the conditions.

Mr. Allen stated a CMP was agreeable as well as note that the architect will include the sustainability measures in the plans submitted for a building permit.

Mr. Sousa noted that when the MEP drawings are submitted, they will show the proposed fossil-fuel-free measures.

Mr. Campbell stated that an affidavit will be required at the close of the project.

Paul Campbell, Deputy Building Commissioner, stated that the Building Department had no objections to the proposal, and would work with the Petitioner to ensure compliance with the Board's decision and all state building codes.

Board Member Zuroff was supportive of the proposed condition as presented by the Petitioner, to be included as a condition. He stated that the project was attractive and noted that the existing Osaka restaurant was isolated, and the proposed building is attractive and well designed. He noted that he did not have an issue with how the FAR was calculated and would vote to grant the relief as requested.

Board Member Schneider relied on the Building Department's interpretations as provided regarding the FAR of 2.0 being allowed in the G1.75 and that the garage area should not be included in the FAR. She

noted that a more robust commercial area down that street would be great but noted that it is not the existing condition, and activating the site appropriately has been difficult. She cited a revolving door of tenants that have occupied the space and stated that this is an innovative approach at providing a diverse option of retail and the proposed condition is a good way to support that. Board Member Schneider was in support of granting the relief.

Chair Geller stated that parking on the ground floor that results in a larger building and reduction of the functionality is not ideal, noting the small size of the retail space, and the building is in part the size that it is because if the stackers were underground it would minimize the impact at the ground level which would thereby result in a smaller and or a more functional building. Chair Geller stated that he would have preferred to have seen subsidizing of the commercial space and an assurance that the subsidy is multigenerational. Chair Geller stated that this is a project which is in a transitional district and a lot of the particulars of this project make it function. He noted that what has been presented is a better use of the site than the existing and with respect to the various sections of the Zoning By-Law which relief is sought, those standards are met for the reasons cited in the record by Mr. Allen. Chair Geller stated that he is in support of the business condition as revised to address Town Counsel's concerns. Chair Geller voted in favor of granting relief subject to the conditions as modified.

The Board unanimously granted the request for special permit.

Minutes

The Board unanimously approved the Minutes for 02/04/21, 02/11/21 and 02/18/21.

The meeting was adjourned.