



BOARD OF APPEALS
Jesse Geller, Chairman
Jonathan Book
Christopher Hussey

Town of Brookline

Massachusetts

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TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2015-0023
MICHAEL & ROXANNE MARTINEZ
89 BEACONSFIELD ROAD, BROOKLINE, MA

Petitioners, Michael and Roxanne Martinez, applied to the Building Commissioner for permission to demolish the existing single-family dwelling and construct a new single-family dwelling. The application was denied and an appeal was taken to this Board.

The Board administratively determined that the properties affected were those shown on a schedule certified by the Board of Assessors of the Town of Brookline and fixed May 7, 2015 at 7:15 p.m. in the Selectmen's Hearing Room as the date, time and place of a hearing for the appeal. Notice of the hearing was mailed to the Petitioner, to their attorney (if any) of record, to the owners of the properties deemed by the Board to be affected as they appeared on the most recent local tax list, to the Planning Board and to all others required by law. Notice of the hearing was published on April 23, 2015 and April 30, 2015 in the Brookline Tab, a newspaper published in Brookline. A copy of said notice is as follows:

NOTICE OF HEARING

Pursuant to M.G.L., C. 40A, the Board of Appeals will conduct a public hearing at Town Hall, 333 Washington Street, Brookline, on a proposal at:

89 BEACONSFIELD RD – DEMOLISH EXISTING SINGLE-FAMILY DWELLING AND CONSTRUCT NEW-SINGLE FAMILY WITH AN ATTACHED TWO-CAR GARAGE in a T-6, Two-Family and Attached Single-Family, residential district, on May 7, 2015, at 7:15 PM in the 6th Floor Selectmen’s Hearing Room (Petitioner: MARTINEZ MICHAEL S & ROXANNE E; Owner: MARTINEZ MICHAEL S & ROXANNE E) Precinct 12

The Board of Appeals will consider variances and/or special permits from the following sections of the Zoning By-Law:

- 1. Section 5.10: Minimum Lot Size**
- 2. Section 5.13: Lot Width**
- 3. Section 5.43: Exceptions to Yard and Setback Regulations**
- 4. Section 5.50: Front Yard Requirements**
- 5. Section 5.52: Fences and Terraces in Front Yard**
- 6. Section 5.60: Side Yard Requirements**
- 7. Section 5.62: Fences and Terraces in the Side Yard**
- 8. Section 5.70: Rear Yard Requirements**
- 9. Section 5.74: Fences and Terraces in Rear Yard**
- 10. Section 5.91: Usable Open Space**
- 11. Section 8.02.2: Alteration of Extension**

Hearings may be continued by the Chair to a date/time certain, with no further notice to abutters or in the TAB. Questions about hearing schedules may be directed to the Planning and Community Development Department at 617-730-2130, or by checking the Town meeting calendar at: www.brooklinema.gov.

*The Town of Brookline does not discriminate on the basis of disability in admission to, access to, or operations of its programs, services or activities. Individuals who need auxiliary aids for effective communication in Town programs and services may make their needs known to **Robert Sneirson, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone: (617) 730-2328; TDD (617)-730-2327; or email at rsneirson@brooklinema.gov.***

*Jesse Geller, Chair
Christopher Hussey
Jonathan Book*

At the time and place specified in the notice, this Board held a public hearing. Present at the hearing was Chairman Jonathan Book and Board Members Johanna Schneider and Avi Liss. The case was presented by the attorney for the Petitioners, Robert L. Allen, Jr., Law Office of Robert L. Allen, Jr. LLP, 300 Washington Street, Second Floor, Brookline, Massachusetts 02445. Also in attendance were

Petitioners, Michael and Roxanne Martinez, and the Petitioners' architect, Ryan Noone, Embarc Studio Architecture and Design, 60 K Street, 3rd Floor, Boston, MA 02127.

Chairman Book called the hearing to order at 7:15 p.m. Attorney Allen stated that the Petitioners propose to demolish the existing single-family dwelling and construct a new single-family dwelling with an attached two-car garage.

Attorney Allen presented to the Board a background of the Petitioners and the property, stating the following: 89 Beaconsfield Road was constructed in 1889 and served as a dormitory for the employees of Beaconsfield Terrace. Mr. Allen stated that according to the Town of Brookline Zoning By-Law, the 3,816s.f. lot has two front yards, two rear yards, and one side yard. He described Beaconsfield Road and stated that the property bookends a right of way leading up to Regent Circle and a drainage easement. Mr. Allen noted that the Petitioners purchased the two-and-a-half story, single-family home in 1998. In 2013, the Preservation Commission imposed a 12-month stay of demolition that was lifted October 8, 2014. Mr. Allen stated that over the winter, the property sustained significant water damage and the Petitioners were forced to move into temporary housing due to mold infestation.

Ryan Noone, 60 K Street, 3rd Floor, Boston, MA 02127, stated that the current structure is in close proximity to the Beaconsfield Road lot line and overall setback requirements result in a limited as-of-right buildable area on the lot. Mr. Noone noted that the proposed structure will be moved off the Beaconsfield Road lot line, various setbacks will be reconfigured (reduced along the south east and north east – increased along the south and west), and new useable open space will be located in the traditional front yard setback.

Chairman Book requested additional detail regarding the current rear-yard. Mr. Noone stated that there is a sunken rear patio, surface parking, a shed, and the remnants of a structural foundation. Mr. Martinez clarified that the old foundation indicates that an additional dorm was located on the site but he

did not know when it was demolished and/or if these dormitories were connected. Mr. Book questioned ownership of the angled right-of-way along the western property line. Mr. Allen stated that that it is owned by the Regent Circle condominiums.

Board Member Johanna Schneider questioned why existing open space is not currently interpreted as useable open space. Mr. Allen stated that existing yard areas comply with open space dimensional requirements, but significant grade changes preclude all current space from meeting the definition of useable open space according to the Zoning By-Law.

Mr. Allen noted that **Section 2.12.8** of the Zoning By-Law states that the rear alley way is considered a street, thus 89 Beaconsfield Road has two front yards, two rear yards, and one side yard. He continued that the Petitioners request special permit relief pursuant to Town of Brookline Zoning By-Law **Section 5.50** because the required front yard setback is 15 feet and the proposed front yard setback along the passageway will be 9.8 feet, **Section 5.60** because the required side yard setback is 7.5 feet and the proposed side yard setback is 2.2 feet, **Section 5.70** because the required rear yard setback is 30 feet and the proposed rear yard setback along the alley way behind the property is 9.6 feet and the rear yard setback along the immediate abutter's yard is 3 feet, and **Section 8.02.2** to alter the pre-existing non-conforming front and rear yard setbacks.

Attorney Allen discussed special permit relief under **Section 9.05** of the Zoning By-Law arguing: (1) the specific site is an appropriate location where the surrounding properties are residential and vary in type and style, including attached single-family, two-family and multi-family residential dwellings, and the proposal improves visibility and a more conforming streetscape; (2) there will be no adverse effect on the neighborhood where the use will remain the same and will not result in additional traffic or other negative impacts on the immediate neighborhood; (3) no nuisance or serious hazard to vehicles or pedestrians will be created because the proposal does not depart from the current parking

scheme where the vehicles enter and exit onto a private way, the curb cut will stay where it is, and the covered garage will hide vehicles from the view of passersby on Beaconsfield; (4) adequate and appropriate facilities will be provided for the proper operation and proposed use; and (5) development will not have a significant adverse effect on the supply on housing available for low and moderate income people.

Mr. Allen discussed zoning relief under Section 5.43 of the Zoning By-Law, where the Board of Appeals may waive the front, side, and rear yard setback requirements if a counterbalancing amenity is provided. Attorney Allen stated that the Petitioners submitted a landscape plan by Blair Hines Design Associates dated May 6, 2015, which includes bamboo transplants, a 5 foot wooden fence, and new plantings in the front, rear, and side yards.

Furthermore, Mr. Allen stated that the Petitioners' variance request is "two-fold." He stated that the Petitioners request variance relief pursuant to Zoning By-Law Section 5.10 for minimum lot size and Section 5.91 for usable open space. Mr. Allen noted that the useable open space is a pre-existing non-conformity that will be improved. He also stated that the unique topography of the lot precludes additional yard area from contributing to the total useable open space. Mr. Allen argued that a literal enforcement of the minimum lot size requirements would render the lot unbuildable because the Zoning By-Law permits single and two-family dwellings as of right in the T-6 District and if the current home is demolished, no new home can be constructed without variance relief. He stated that the Petitioners are proposing the most appropriate use of the lot and, if approved, the structure will preserve the character and value of the property.

Mr. Allen believed that the statutory requirements for variance relief were met because the shape of the lot and the slope of the lot towards Beaconsfield Road prevents the Petitioners from meeting the requirement for usable open space. Mr. Allen stated that the entire parcel is sloped down towards

Beaconsfield Road and due to the grade, retaining walls were needed both in the front and rear yard to create a flat 15' x 15' area. Mr. Allen noted that there was not enough depth to create compliant usable open space. Mr. Allen noted that the topography of the lot is directly related to open space non-compliance and that the only buildable portion of the lot is a small triangular patch of land as shown on Plan A012 by the Petitioner's architect). Mr. Allen stated that the uniqueness of the lot supported variance relief with respect to minimum lot size.

Chairman Book was not satisfied that a clear relationship between lot uniqueness and the requested minimum lot size relief was established where non-compliance with the minimum lot size requirement does not make the property unique. Chairman Book and Board Members Johanna Schneider and Avi Liss agreed that the standard for a variance for minimum useable open space was satisfied, but the standard for a variance for minimum lot size remains unclear. In the alternative, the Board considered the appropriateness of special permit relief under **Section 8.03** of the Zoning By-Law (rebuilding after a catastrophe), and M.G.L c. 40A Section 6 (alteration or extension of a pre-existing nonconforming structure) to remove the need for the minimum lot size variance relief.

Zoning Board of Appeals Chairman Book asked if there was anyone present who wished to speak in favor of this application. No one spoke in favor of the application.

Zoning Board of Appeals Chairman Book asked if there was anyone present who wished to speak in opposition to the application. No one spoke in opposition to the application.

Jay Rosa, Zoning Coordinator for the Town of Brookline, delivered the findings of the Planning Board and the Building Department:

FINDINGS:

1. **Section 5.10 – Minimum Lot Size**
2. **Section 5.13 – Lot Width – Comply**
3. **Section 5.43 – Exceptions to Yard and Setback Regulations**
4. **Section 5.50 – Front Yard Setback**

5. Section 5.52 – Fences and Terraces in the Front Yard – Comply
6. Section 5.60 – Side Yard Setback
7. Section 5.62 – Fences and Terraces in the Side Yard – Comply
8. Section 5.70 – Rear Yard Setback
9. Section 5.74 – Fences and Terraces in Rear Yard – Comply
10. Section 5.91 – Usable Open Space

Dimensional Requirements	Required	Existing Dwelling	Proposed Dwelling	Relief
Minimum Lot Size	5,000 s.f.	3,816 s.f.	3,816 s.f.	Variance
Minimum Lot Width	45'	56'3"	56'3"	Complies*
Front Yard Setback	15'	Beaconsfield: 6' ROW: 6.5' (est.)	Beaconsfield: 19'4" ROW: 9'8"	Complies Special Permit**
Side Yard Setback (attached garage)	7.5'	33' (est.)	2'2"	Special Permit**
Rear Yard Setback	30'	Southeast: 2'1" East: 42' (est.)	Southeast: 9'6" East: 3'	Special Permit**
Usable Open Space	854 s.f. (30% of g.f.a.)	N/A	303 s.f. (11% of g.f.a.)	Variance

* Lot width is difficult to measure in this instance, as the property appears to only have one side yard. "Lot Width" is defined in the Zoning By-law as the horizontal distance between side lot lines measured perpendicular to the mean direction of the side lot lines.

** Under **Section 5.43**, the Board of Appeals may waive yard and setback requirements if a counterbalancing amenity is provided.

11. Section 8.02.2 – Alteration or Extension – A special permit is required to alter a pre-existing non-conforming structure or use.

Mr. Rosa stated that the Planning Board supported the proposed single-family dwelling. He stated that the Planning Board recommended that the rear-yard setback facing the drainage easement be no less than 3 feet in order to provide adequate access to that side of the structure. Mr. Rosa stated that the Petitioners revised plans to observe the 3 foot minimum. He continued that the Planning Board members noted that the complex roof design may present future maintenance issues and the multi-story stone bay at the front is counter-productive to other design strategies intended to reduce the overall verticality of the structure. Finally, Mr. Rosa stated that should the Board of Appeals find that the statutory requirements for a variance have been met, the Planning Board recommends approval of plans

submitted by Embarc Studio Architecture and Design, dated 04/21/2015, subject to the following conditions:

1. Prior to the issuance of a building permit, the applicant shall submit a final site plan showing the setback facing the easement increased to a minimum of 3 feet, all building dimensions, locations of utilities and HVAC equipment, and locations and heights of walls, if any, subject to the review and approval of the Assistant Director of Regulatory Planning.
2. Prior to the issuance of a building permit, the applicant shall submit final floor plans and elevations subject to the review and approval of the Assistant Director of Regulatory Planning.
3. Prior to the issuance of a building permit, the applicant shall submit a final landscaping plan indicating all counterbalancing amenities and hardscape materials subject to the review and approval of the Assistant Director of Regulatory Planning.
4. Prior to the issuance of a building permit, the applicant shall submit a complete drainage plan for the site subject to the review and approval of the Director of Engineering/Transportation or his designee.
5. Prior to the issuance of a building permit, the applicant shall submit a construction management plan, including but not limited to parking locations for construction vehicles, locations of dumpsters and portable toilets, and rodent control measures, subject to the review and approval of the Director of Engineering/Transportation and the Building Commissioner, or their designees.
6. Prior to the issuance of a building permit, the applicant shall submit to the Building Commissioner for review and approval for conformance to the Board of Appeals decision: 1) a final site plan stamped and signed by a registered engineer or land surveyor; 2) final building elevations stamped and signed by a registered architect; and 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Mr. Rosa next delivered the findings of Michael Yanovitch, Interim Chief Building Inspector. He stated that the Building Department had no objection to the requested relief. He noted that the minimum lot size, front, side, and rear yard setbacks are pre-existing non-conformities, which trigger variance relief because the proposal is new construction. Mr. Rosa stated that the applicant has done a good job fitting the layout of the structure into this corner lot, particularly by setting it back from Beaconsfield Road and incorporating the angled driveway into the layout. Finally, he stated that if the Board of Appeals finds that the standards for special permit relief under **Section 9.05** of the Zoning By-Law have

been met and the standard for a variance under MGL c. 40A, Section 10, the Building Department will work with the Petitioners to ensure compliance with all building codes.

In deliberation, Zoning Board of Appeals Members expressed support for the Petitioners' proposal, but were unconvinced that the variance standards were clearly met with respect to minimum lot size. Board Member Liss suggested that special permit relief under **Section 8.03** of the Zoning By-Law is a viable alternative to variance relief for minimum lot size. He stated that the Petitioners filed damage claims and are proposing to increase existing nonconformities in a manner that is not detrimental to the neighborhood. Mr. Liss conceded that this is not an ideal precedent and public notice did not address this potential special permit relief option. Additionally, the Petitioners applied for demolition approval prior to any property damages.

Board Member Schneider clarified that the current home is not condemned due to damage sustained and non-compliance with setback requirements will be expanded purely based on the fact that the proposed structure is larger than the existing structure. Mr. Book and Ms. Schneider acknowledged that various non-compliant conditions will be altered, extended, or improved but, in totality, the Petitioners' proposal is an improved use of the lot that will have minimal impact on surrounding abutters. Ms. Schneider added that the lot will be rendered unbuildable without variance relief, which constitutes a hardship. Mr. Allen added that the Petitioners' proposal complies with floor area ratio requirements despite the undersized lot.

Ms. Schneider questioned if any abutter feedback was provided. Petitioner Roxanne Martinez confirmed that no formal support letters were provided, but the neighbors were contacted about the proposal and it was met with no opposition and/or verbal support from abutters.

Board Members agreed that special permit relief under **Section 8.03** of the Zoning By-Law was not appropriate in this scenario and Attorney Allen's variance argument concerning minimum lot size

non-compliance does not directly establish the lot uniqueness standard. However, the Board was confident that M.G.L c. 40A Section 6 relief could apply where pre-existing non-conformities are not increased when evaluated in their totality, and there is no substantial detriment to the neighborhood. Mr. Allen confirmed that he preferred a grant of relief pursuant to M.G.L c. 40A Section 6 over **Section 8.03** of the Zoning By-Law.

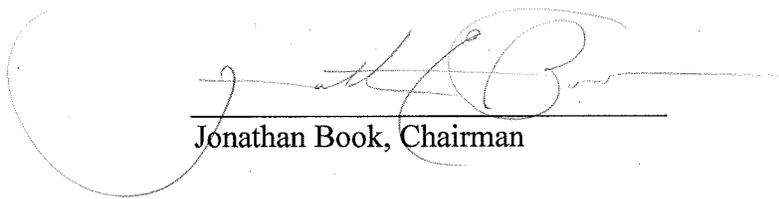
Finally, Mr. Book stated that the proposal was worthy of relief stating that the proposed counterbalancing amenities pursuant to **Section 5.43** were sufficient and that standards for special permit relief are met in accordance with under **Section 9.05** of the Zoning By-Law (yard setbacks), the standards for variance relief have been met (minimum useable open space), and M.G.L c. 40A Section 6 provides the Zoning Board of Appeals with the authority to grant special permit relief for the extension or alteration of a pre-existing nonconforming structure (minimum lot size). Zoning Board Members Schneider and Liss concurred with these findings.

The Board then determined, by unanimous vote that the requirements for a variance for **Section 5.91** and a special permit for **Sections 5.10, 5.50, 5.60, 5.70, and Section 8.02.2** of the Zoning By-Law pursuant to **Section 5.43** of the Zoning By-Law were met. The Board made the following specific findings pursuant to said **Section 9.05**:

- a. The specific site is an appropriate location for such a use, structure, or condition.
- b. The use as developed will not adversely affect the neighborhood.
- c. There will be no nuisance or serious hazard to vehicles or pedestrians.
- d. Adequate and appropriate facilities will be provided for the proper operation of the proposed use.
- e. Development will not have any effect on the supply of housing available for low and moderate income people.

Accordingly, the Board voted unanimously to grant the requested relief subject to the following revised conditions:

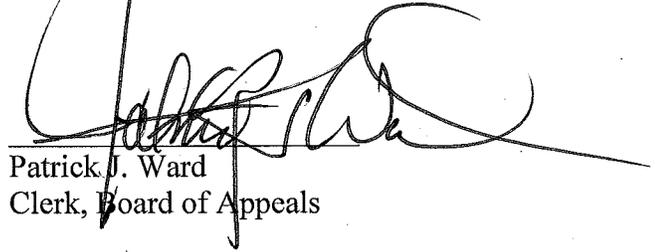
Unanimous Decision of
The Board of Appeals



Jonathan Book, Chairman

Filing Date: 7/1/15

A True Copy
ATTEST



Patrick J. Ward
Clerk, Board of Appeals

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