



**BOARD OF APPEALS**  
Jesse Geller, Chairman  
Christopher Hussey  
Jonathan Book

# *Town of Brookline*

## *Massachusetts*

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**Patrick J. Ward, Clerk**

TOWN OF BROOKLINE  
BOARD OF APPEALS  
CASE NO. 2015-0004  
OWNER: DANIEL SIMKOVITZ & JULIETTE  
LANDESMAN

Petitioners, Daniel Simkovitz and Juliette Landesman, applied to the Building Commissioner for permission to finish the basement area and add an interior elevator for a two-family dwelling at 281 Mason Terrace. The application was denied and appeal was taken to this Board.

The Board administratively determined that the properties affected were those shown on a schedule in accordance with the certification prepared by the Assessors of the Town of Brookline and approved by the Board of Appeals, and fixed April 2, 2015 at 7:15 p.m. in the Selectmen's Hearing Room as the time and place of a hearing for the appeal. Notice of the hearing was mailed to the Petitioner, 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 30, 2015 and May 7, 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:

**281 MASON TERRACE – FINISH BASEMENT AREA AND INSTALL ELEVATOR IN A TWO-FAMILY DWELLING in an S-7, Single-Family residential district, on April 2, 2015, at 7:15 PM in the 6<sup>th</sup> Floor Selectmen’s Hearing Room (Petitioner: SIMKOVITZ M DANIEL & LANDESMAN JULIETTE; Owner: SIMKOVITZ M DANIEL LANDESMAN JULIETTE) *Precinct 11***

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

- 1. Section 5.20: Floor Area Ratio**
- 2. Section 8.02.1; 8.02.2: Alteration or 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](http://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 Sneider**, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone: (617) 730-2328; TDD (617)-730-2327; or email at [rsneider@brooklinema.gov](mailto:rsneider@brooklinema.gov).*

*Jesse Geller, Chair  
Christopher Hussey  
Jonathan Book*

**Publish: March 12, 2015 & March 19, 2015**

At the time and place specified in the notice, this Board held a public hearing. Present at the hearing was Board Chairman Jesse Geller and Board Members Johanna Schneider and Mark Zuroff. The petitioners’ attorney, Robert Allen of the Law Office of Robert L. Allen (300 Washington Street, Brookline, MA), presented project details to the Board.

Attorney Allen waived a reading of public hearing notice for the record and stated that a similar basement conversion proposal with a request for a variance under Massachusetts General Laws Chapter 40A, Section 10 was heard by this Board in November of 2013 but was

subsequently withdrawn without prejudice. Following this withdrawal, the petitioner, in collaboration with neighboring residents, submitted a proposed Zoning By-Law amendment for Town Meeting review intended to re-zone the 281 Mason Terrace property and two adjacent properties from S-7 (Single Family) to T-6 (Two-Family and Attached Single-Family). This proposed Zoning By-Law amendment was not approved by Town Meeting.

Attorney Allen further stated that the two-family dwelling at 281 Mason Terrace was constructed in 1920 and is located within a single-family zoning district. The property slopes down away from Mason Terrace and directly abuts a Two-Family and Attached Single-Family zoning district to the rear. Two similar structures are located directly to the east and west of the property. These abutting structures provide rear interior parking areas while the 281 Mason Terrace structure maintains a large unfinished basement instead. The petitioner is requesting zoning relief from floor area ratio (FAR) requirements in order to convert this unused basement space to living space. This conversion will not alter the building footprint although a retaining wall is required along the western edge of the structure to create a window well in accordance with building codes. Attorney Allen provided letters of support from neighborhood residents to the Board and stated that there is unanimous abutter support for this proposed project as well as the requested zoning relief.

The conversion of 1,335 square feet of unfinished basement space to living space requires variance relief for the resulting gross floor area, and special permit relief to alter both a pre-existing non-conforming use and a pre-existing non-conforming structure. Attorney Allen stated the statutory requirements for a variance are met in this appeal and submitted several photos of the property to further illustrate the “significant” grade change from the front property line to the rear. Attorney Allen noted that only five two-family dwellings exist within this specific S-7

zoning district, with 281 Mason Terrace being the largest of the five. This basement conversion would be permitted as-of-right if proposed within the abutting T-6 zoning district. This home was also constructed prior to current zoning regulations and therefore never conformed to FAR requirements. Attorney Allen believed that this condition constitutes an immediate hardship because the property is located in an inappropriate zoning district preventing full utilization of the existing structure. Additionally, the unfinished basement space increases home heating costs because the petitioner is prevented from adequately insulating the basement. The property owner also has increasing vision problems that are exacerbated by light and dark conditions. The basement conversion, if permitted, will allow him to utilize an area of the home that produces less light during the day and will provide more living space to replace the lack of outdoor activity that he can experience without assistance.

Attorney Allen concluded his comments by stating that the Zoning By-Law encourages basement and attic conversion rather than exterior additions for one and two-family structures. The proposal before the Board does not alter the exterior of the structure and will allow the property owners to utilize unfinished floor area that would otherwise be wasted.

Board Chairman Geller questioned if the abutting structures referenced by Attorney Allen also present 15 foot tall basement ceilings toward the rear lot line. Mr. Allen confirmed that they do and reiterated that these abutting basement spaces are used for garage parking. Board Chairman Geller also noted, based on testimony previously received, that the petitioner voluntarily created two condominiums within the structure and dictated the layout of these units (and sold the upper floor unit). The underutilization of the structure could be classified as a self-created hardship, in Board Chairman Geller's opinion.

Board Member Zuroff suggested that alternate strategies to improve basement insulation could be incorporated, including dropped ceilings. Board Member Zuroff also stated hesitation to accept the subject property as being unique within the zoning district if two abutting properties present very similar conditions.

Board Chairman Geller called for public comment in favor of, or in opposition to the petitioner's proposal.

Winchester Street resident Joe Geller stated that the 281 Mason Terrace structure is unique for the S-7 district but is very similar to homes along Winchester Street within the T-6 district. Mr. Geller stated that his property has a finished basement, similar to the petitioners' proposal, yet his home remains well within FAR requirements for the zoning district.

281 Mason Terrace resident Susan Shu stated that she owns the second floor condominium above the petitioners and supports all proposed alterations to the structure. The rear of the building currently resembles a multi-family three-story structure and this proposal represents an aesthetic and property value improvement.

145 Mason Terrace resident Joseph Ditkoff stated that he is a Town Meeting Member and a member of the Corey Hill Neighborhood Association. Mr. Ditkoff stated that the neighborhood was cautious about the proposed zoning amendment and potential development threat that may result if adopted, but the conversion of an existing basement is far less of a concern for abutting residents. Mr. Ditkoff confirmed earlier statements that there is unanimous support for this proposed project from neighborhood residents. Mr. Ditkoff further stated that the grade change from Mason Terrace to Winchester Street is nearly ten stories in this particular area.

No members of the public spoke in opposition.

Board Chairman Geller requested that Zoning Coordinator Jay Rosa deliver the findings of the Planning Board and Building Department.

**FINDINGS**

**Section 5.20 – Floor Area Ratio**

<b>Floor Area</b>	<b>Allowed</b>	<b>Existing</b>	<b>Proposed</b>	<b>Finding</b>
<b>Floor Area Ratio (% of allowed)</b>	.35 (100%)	.62 (177%)	.78 (224%)	Variance
<b>Floor Area (s.f.)</b>	2,877	5,107 s.f.	6,442 s.f.	

**Section 8.02.1 and 8.02.2 – Alteration or Extension**

A special permit is required to extend this non-conforming use (two-family in an S-7 zoning district) and alter this non-conforming structure.

Mr. Rosa stated that the Planning Board supported this proposal with a 5-1 vote. The structure has extensive basement-level space that can be finished with relatively little impact on neighboring structures however the retaining wall along the building’s west façade will be close to the property’s side lot line. As a result, the Planning Board did recommend the submission of a landscaping plan to include appropriate visual screening along this western lot line. Planning Board Members did note broad neighborhood support for the petitioners’ proposal.

Therefore, should the Board of Appeals find that the proposal meets the statutory requirements for a variance, the Planning Board recommended approval of the plans by Innovative Collaborations, Inc., dated 10/13/14, and the site plan by Peter Nolan & Associates, dated 11/26/13, subject to the following conditions:

1. Prior to the issuance of a building permit, a final site plan and final floor plan shall be submitted subject to the review and approval of the Assistant Director of Regulatory Planning.
2. Prior to the issuance of a building permit, final elevations shall be submitted subject to the review and approval of the Assistant Director of Regulatory Planning.

3. Prior to the issuance of a building permit, a final landscaping plan showing the installation of screening landscaping along the new retaining wall shall be submitted 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 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. Geller asked for comments from the Building Department.

Mr. Rosa on behalf of the Building Department stated that the Building Department also has no objection to the relief as requested. Although the proposed FAR significantly exceeds the allowable, all additional floor area is contained within the existing building footprint. If the Board finds that the statutory requirements for a variance are met, the Building Department will work with the petitioner to ensure compliance with all imposed conditions and building codes.

The Board deliberated on the merits of variance and special permit relief as requested. Board Chairman Geller was satisfied that the proposed basement conversion is worthy of special permit relief in accordance with Zoning By-Law Section 9.05. Board Chairman Geller stated that he has no issue with the basement conversion itself and is sympathetic to the needs of residents who wish to age in place. Board Chairman Geller was not satisfied that the hardship and uniqueness threshold required for variance relief in accordance with Massachusetts General Law, Chapter, 40A, Section 10 (M.G.L. c.40A, §10) has been established. Board Chairman Geller stated that the presented structural uniqueness claim is intriguing, but the stated hardship is largely self-created. Additionally, both the 281 Mason Terrace structure and lot do not appear to be unique within this S-7 zoning district. Board Chairman Geller noted that neighborhood support for a project has no bearing on the M.G.L c.40A, §10 finding before the Board.

Board Member Schneider expressed concern regarding inconsistent testimony pertaining to structure and lot uniqueness. Neighboring properties within the zoning district face similar grade change and FAR non-compliance issues. Board Member Schneider did agree that the most compelling argument in an attempt to establish both uniqueness and hardship center around the pre-zoning nature of the structure which renders it as an oversized structure within the district even though no significant modifications have ever occurred.

Board Member Zuroff supported the proposal on merit and acknowledged that the notion of improper zoning of the lot is a valid concern however, the current hardship argument before the Board does not meet the statutory requirements for a variance. Additionally, the proposed gross floor area significantly exceeds what is allowed within the zoning district (224% above allowed) so variance relief is the only mechanism available to apply necessary zoning relief. Board Member Zuroff did state that the Board does have the ability to step outside of the local zoning statute if Members are maintaining the intent of Zoning By-Law.

Board Members agreed that the petitioners' proposal is appropriate and minimally impactful but the statutory requirements for a variance have not been met.

Attorney Allen reiterated the fact that the topography of the lot is unique within the district, albeit shared with two abutting properties. The structure is also unique because it is the only of these three that maintains unused basement space.

Board Members agreed that lot uniqueness can be established but the hardship that results from that uniqueness remains unclear. Board Members considered the appropriateness of a site visit to further observe property details, but ultimately determined that this will not further develop the petitioners' claim of hardship that is required the grant of a variance.

Attorney Allen requested to continue the case before the Board in order to draft and submit a more detailed memorandum outlining direct hardship to the petitioner.

The Board voted unanimously to grant this request for continuance to May 21, 2015 at 7:00 p.m.

At the time and place specified by the Board for continuance, this Board re-opened the public hearing. Present at the hearing was Board Chairman Jesse Geller and Board Members Johanna Schneider and Mark Zuroff. Board Chairman Geller stated that the purpose of this continued hearing is to hear additional discussion regarding compliance with statutory requirements for a variance and Board deliberation on the merits of the zoning relief as request.

The petitioners' attorney, Robert Allen, again presented project details to the Board. Attorney Allen confirmed that the Board received a memorandum outlining compliance with statutory requirements for the grant of a variance. Attorney Allen noted that it is common for variance arguments to focus too heavily on minor project elements as opposed to the overall intent and quality of the project. Attorney Allen requested that Board Members consider the fact that Massachusetts General Law, Chapter 40A, Section 6 (M.G.L. c.40A, §6) provides specific protection for single and two-family dwellings that present pre-existing non-conforming conditions. In this instance, the petitioner is requesting to expand the pre-existing non-conforming gross floor area in a manner that requires no exterior alteration and results in no substantial detriment to the surrounding neighborhood. Section 6 specifically allows for this action if the standards for special permit relief are met and no new zoning non-conformities result from proposed property alterations. Attorney Allen noted relevant Massachusetts case law including: Gale v. Zoning Board of Appeals of Gloucester, 80 Mass. App. Ct. 331 (2011), Deadrick v. Zoning Board of Appeals of Chatham, 85 Mass. App. Ct. 539 (2014), Rockwood v.

The Snow Inn Corp., 409 Mass. 361 (1991), and Bjorklund v. Zoning Board of Appeals of Norwell, 450 Mass. 357 (2008) to further support this position. In Attorney Allen's opinion, Massachusetts legal precedent continues to progress in support of the alteration of pre-existing non-conformities via special permit relief, rather than variance relief, if no new zoning non-conformities are triggered as a result of proposed property alterations.

Attorney Allen reiterated that the petitioners' proposed basement conversion creates no new zoning non-conformity and will not even alter the exterior of the home beyond minor window alterations.

The Board deliberated on the appropriateness of a Section 6 finding and the merit of special permit relief as requested. Board Chairman Geller stated that if this interpretation is applied, then the proposed alteration may only increase the pre-existing floor area non-conformity, but may not result in substantial detriment to abutting residents. Essentially, the standards for special permit relief under Zoning By-Law §9.05 may serve to guide the Board's evaluation of this proposal in the current instance. Board Chairman Geller was satisfied that standards for special permit relief could be met, but remained uncertain regarding Attorney Allen's interpretation of the application of Section 6 regulations.

Board Member Schneider questioned if any public hearing notice issues arise if the Board does agree that special permit relief under Section 6 is applicable rather than variance relief under By-Law §5.20. Board Members agreed that current public hearing notice is sufficient.

Board Members supported Attorney Allen's theory to apply a Section 6 evaluation for this proposal, but acknowledged that it is a new theory that was not adequately addressed in the memorandum provided to the Board prior to this hearing. Board Member Zuroff specifically

supported this interpretation because the building footprint will be unchanged and there is no anticipated adverse impact on abutting residents.

Board Members suggested that Attorney Allen provide an additional memorandum outlining the applicability of a M.G.L. c. 40A, §6 finding in this instance and subsequent compliance with special permit standards.

Accordingly, Mr. Allen requested to continue this hearing to June 25, 2015 at 7:00 p.m. Board Members voted unanimously to grant this request for continuance.

At the time and place specified by the Board for continuance, this Board re-opened the public hearing. Present at the hearing was Board Chairman Jesse Geller and Board Members Johanna Schneider and Mark Zuroff. Board Chairman Geller stated that the sole purpose of this hearing is to review a submitted memorandum detailing the appropriateness of a M.G.L. c. 40A, §6 finding for the petitioners' request to expand the gross floor area of the two-family dwelling at 281 Mason Terrace from 5,107square feet to 6,442 square feet for a floor area ratio of .78. The Board expressed hesitation to grant variance relief for this floor area increase at prior hearings but recent Massachusetts case law indicates that special permit relief could be applied to this proposal if a M.G.L c. 40A, §6 finding is made by the Board.

Attorney Allen stated that a Section 6 finding is provided by Massachusetts State law as protection for pre-existing non-conforming single and two-family dwellings. This statute, further supported by Deadrick v. Zoning Board of Appeals of Chatham (2014) referenced above, allows for the extension and/or expansion of a pre-existing non-conforming condition if no new zoning non-conformities are triggered by proposed property alterations, and there is no substantial detriment to the surrounding neighborhood as a result of proposed property

alterations. If these provisions are met, the Board may evaluate the petitioners' proposal based on local special permit standards rather than state statutory requirements for a variance.

Attorney Allen further stated that the 281 Mason Terrace proposal before the Board represents an expansion of a pre-existing non-conformity (FAR) that does not otherwise trigger the need for any additional special permit relief. The basement conversion does not alter the building footprint and only requires minimal rear facing exterior alterations. This work has no substantial detriment to the surrounding neighborhood and meets the standards for special permit relief under Zoning By-Law Section 9.05.

Board Member Schneider commended the petitioner for providing clear documentation outlining the appropriateness of a Section 6 finding. Board Member Schneider agreed that recent case law supports the expansion of pre-existing non-conforming conditions if there is no substantial detriment and the standard for special permit relief is met. The floor area expansion proposal before the Board falls within the stated Section 6 parameters therefore the Board is constrained by recent case law. For these reasons, Board Member Schneider believed that special permit relief is applicable, rather than a variance, and the proposal before the Board should be evaluated as such.

Board Member Zuroff concurred with Board Member Schneider's comments and further added that no substantial detriment arises because the building footprint will not be expanded.

Board Chairman Geller agreed with Attorney Allen's interpretation and subsequent application of the Deadrick v. Zoning Board of Appeals of Chatham precedent. This proposal satisfies the conditions for a Section 6 finding but Mr. Geller expressed slight concern that aspects of the Section 6 evaluation, specifically the creation of new non-conformities, remains less definitive. Board Chairman Geller noted that the Board and abutting residents never took

issue with the project proposal itself supporting the argument that no substantial detriment will occur and supporting a finding for special permit relief as outlined in Zoning By-Law Section 9.05.

The Board unanimously supported a M.G.L. c. 40A, §6 finding and voted unanimously that the requirements have been met for the issuance of a special permit under Section 9.05 of the Zoning By-Law, granting relief from the application of the provisions of Sections 5.20, 8.02.1, and 8.02.2 of the Zoning By-Law. The Board made the following specific findings pursuant to Section 9.05 of the Zoning By-Law:

- The specific site is an appropriate location for such a use, structure, or condition.
- The use as developed will not adversely affect the neighborhood.
- There will be no nuisance or serious hazard to vehicles or pedestrians.
- Adequate and appropriate facilities will be provided for the proper operation of the proposed use.

Accordingly, the Board Voted unanimously to grant the requested special permit relief, subject to the following conditions:

1. Prior to the issuance of a building permit, a final site plan and final floor plan shall be submitted subject to the review and approval of the Assistant Director of Regulatory Planning.
2. Prior to the issuance of a building permit, final elevations shall be submitted subject to the review and approval of the Assistant Director of Regulatory Planning.
3. Prior to the issuance of a building permit, a final landscaping plan showing the installation of screening landscaping along the new retaining wall shall be submitted 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 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.

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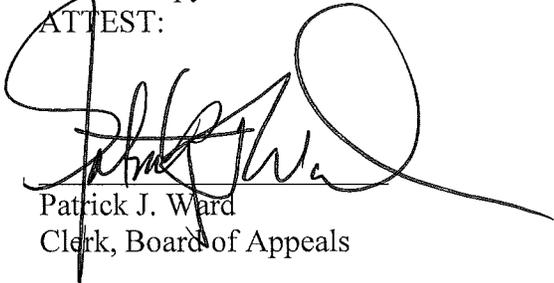
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Unanimous decision of the  
Board of Appeals

Filing Date: 09/09/15

  
Jesse Geller, Chairman

A True Copy  
ATTEST:

  
Patrick J. Ward  
Clerk, Board of Appeals