



BOARD OF APPEALS
Jesse Geller, Chairman
Christopher Hussey
Jonathan Book

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Patrick J. Ward, Clerk

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2016-0027
111 MARION STREET

Petitioner, Janice Ross, Trustee of the Marion 111 Trust, owner; and Nicole Forrest, co-developer, applied to the Building Commissioner for building permit to replace the commercial building at 111 Marion Street with a three family residence. 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 June 23, 2016 at 7:30 p.m., in the Selectmen's Hearing Room as the date, time and place of a hearing for appeal. Notice of the hearing was mailed to the Petitioner, to their attorney 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 June 9, 2016 and June 16, 2016 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:

111 MARION STREET – DEMOLISH EXISTING BUILDING AND CONSTRUCT A FOUR STORY BUILDING WITH THREE RESIDENTIAL UNITS AND PARKING AT THE GROUND LEVEL IN A G-1.75(CC) General Business, zoning district, on June 23, 2016, at 7:30 PM in the 6th Floor Selectmen’s Hearing Room (Petitioner/Owner: ROSS, TRS JANICE) *Precinct 10*

The Board of Appeals will consider variances and/or special permits from the following sections of the Zoning By-Law, and any additional zoning relief the Board deems necessary:

- 1. Section 5.06.4.b: Special District Regulations**
- 2. Section 5.01: Table of Dimensional Requirements, Footnote 1**
- 3. Section 5.07: Dwellings in a Business and Industrial District**
- 4. Section 509.2.a: Design Review**
- 5. Section 5.20: Floor Area Ratio**
- 6. Section 5.43: Exception to Yard and Setback Regulations**
- 7. Section 5.60: Side Yard Requirements**
- 8. Section 5.70: Rear Yard Requirements**
- 9. Section 5.91: Minimum Usable Open Space**
- 10. Section 6.02, Paragraph 1: Table of Off-Street Parking Space Requirements**
- 12. Any additional Relief the Board May Find Necessary**

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 Sneider**, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone: (617) 730-2328; TDD (617)-730-2327; or email at rsneider@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 Mark G. Zuroff, and Board Members Christopher Hussey and Johanna Schneider. The case was presented by Attorney Scott C. Gladstone, 1244

Boylston St., Suite 200, Chestnut Hill, Massachusetts 02467 along with Co-Petitioner Nicole Forrest. Chairman Mark G. Zuroff called the hearing to order at 7:30 p.m.

Attorney Gladstone waived the reading of public notice and presented to the Board a background of the property, stating as follows: 111 Marion Street is Lot "D" on a Plan by Henry F. Bryant, Engineer dated November 5, 1921, which created four parcels that together create a triangle with Beacon Street being the hypotenuse and Marion Street being one of the legs. Lots A (1429-1441 Beacon Street - 6961 sq. ft.), B (1425 Beacon Street - 4309 sq. ft.) and C (105 Marion Street - 3578 sq. ft.) were generously proportioned; but, Lot D (111 Marion Street - 1579 sq. ft., situated between Lots A and C) was relegated the left over filler area and was saddled with very irregular lot lines. Lot A, to the North of Lot D fronts on Beacon Street and these two lots are separated by a 6' wide passageway, the edge of which constitutes Lot D's northerly and westerly lot lines. This Passageway serves as a buffer between Lots A and D. Lot C runs along the entirety of Lot D's easterly lot line.

Lot C (105 Marion St.), which is also in the G 1.75(cc) district, contains a three story structure containing 4815 sq. ft. of living space, which is used as a 14-room lodging house. The rest of the block on that side of Marion Street is an M-2.0 district containing row houses of 3.5 stories. Across the street from the site is a large 8 story rental apartment building run by Chestnut Hill Realty. Lot A contains three commercial spaces totaling 7927 sq. ft. of mixed height (1 to 1.5 stories).

The current use of the Project Site is a one story one room building (currently used as a hairdresser) awkwardly placed on the lot with virtually no setback from the rear lot line. The current user maintains some of the surface area of the lot for parking.

Attorney Gladstone and Ms. Forrest each explained the proposed change as follows: Replace the current structure with three residential units (a studio, a two-bedrooms and a three-bedroom) and parking (four spots -- two sets of tandem) on the first floor of a new four story building as depicted on the Plan. The Proposed height is 41', while 45' is allowed.

Attorney Gladstone and Ms. Forrest explained that a prior proposal included 6 parking spaces with a roof deck and stair house on top of the fourth floor of the proposed building; but, after taking input from the Planning Board, the petitioner submitted a revised plan, which reduced the parking to four spots, eliminated one of two garage bays, pulled the remaining garage bay 2' 6" away from the front lot line, and recessed the living space on the fourth floor to accommodate a larger roof deck as part of the fourth floor of the building.

Attorney Gladstone next discussed the zoning relief required from the Board of Appeals, saying as follows:

Usable Open Space Requirement:

§5.07 requires dwellings in a business district to comply with the usable open space requirement of the M-2.0 District (§5.07 does not mention landscaped open space and none is required in a G district), which would mean that 10% of the gross floor area of the residential space would need to be usable open space. The proposed project contains 224 sq. ft. of qualified usable open space. The residential gross floor area is 4499 sq. ft., 10% of which is 450 square feet. So, if the requirement is 10%, the current usable open space is at 4.98% of the residential gross floor area.

The 224 sq. ft. is all that is considered "usable" by the By Law, but in reality it consists of a small ground floor patio (triangle shaped and without dimensions large enough to be counted

as usable open space¹) and 448 square feet of roof deck. If all of this open space of the deck were counted under the zoning by-law as usable (as opposed to just 50% of the roof deck), then the Project would only be two square feet short of the 10% requirement.

Special permit relief is available pursuant to §5.07 for a dwelling in a business district “to promote reasonable development of the site compatible with adjacent buildings and the surrounding area” OR pursuant to §5.43 with the provision of an element that counterbalances the reduction in open space. With respect to §5.07 relief, given the odd shape of this lot, other than the rear area (and the roof deck), there is no other reasonable place for open space if there is to be a reasonable development on this site. It is significant to note that there is a dearth of open space associated with all of the nearby row houses, so it would seem unreasonable to treat this site differently. Also, the proposed massing is consistent with or even smaller than all of the other housing structures on Marion Street. With respect to §5.43 relief, the proposed building is 4 feet lower than the maximum allowed height and it includes well apportioned roof deck space, the rear alley easement will be cleaned up and beautified, and petitioner will work with the utilities to put utility wires underground.

Rear setback - §5.70, §5.07 (dwellings in business district) and §5.43:

§5.07 requires dwellings in a business district to comply with the rear yard setback requirement of the M-2.0 District. The required rear setback under the applicable formula for the M-2.0 district would be 19.1’ and the proposed rear setback ranges from 0’ to more than 14”.

Special permits pursuant to § 5.07 and § 5.43 should be granted for the same reason as stated above with respect to open space. In addition, the existing building already has virtually

¹ In an earlier design, prior to the re-design driven by suggestions from the Planning Board, the triangle patio was large enough to count as usable open space, but the rear elevation was pushed into that patio area in order to accommodate additional setback from the street lot line for the parking area.

no setback from the rear lot line and there is a 6' wide buffer separating the rear lot line from the abutting property.

Front setback - §5.01 footnote #1 and §5.43:

Footnote #1 to the dimensional chart states in pertinent part that "If the entrance to a garage ... faces towards the street to which its driveway has access, said entrance shall be at least 20 feet from the street lot line." The proposed Project has and single garage bay facing the street², which as compared to the original design has been pulled back 2'6" from the street lot line. There is currently open air parking on the site that acts much the same way the proposed parking will, except that currently the cars are in view of Marion Street. Relief is available from the front setback condition by special permit under §5.43.

Side setback - §5.60, §5.07 (dwellings in business district) and §5.43:

§5.07 requires dwellings in a business district to comply with the side yard setback of the M-2.0 District, which require in the case of the proposed Project setbacks of 11.1 feet and 13.46 feet respectively from each side. The Proposed project provides no side yard setbacks. Special permit relief is available pursuant to §5.07 and §5.43. The odd shape of this lot and the need to provide parking spaces, no reasonable development of this location could be made in compliance with a side yard setback requirement. It is significant to note that there are abutting commercial properties and nearby row houses which also have no side setbacks. It would seem unreasonable to treat this site differently, especially where it has the benefit of the 6' easement buffer in the back and along the side.

F.A.R. - §5.07 (dwellings in business district):

² The design prior to the Planning Board recommended re-design contained two garage bay doors, which would have required relief from the snout nose garage by-law (6.04.14).

§5.07 requires dwellings in a business district to comply with the F.A.R. requirement of the M-2.0 District, which in this case would mean a maximum gross floor area of 3158 sq. ft. Since the proposal is for a building of 5299 sq. ft. (which includes a garage area of 800 sq. ft.), relief is required. Attorney Gladstone argued that a special permits is available for F.A.R. relief pursuant to § 5.07. Alternatively, Attorney Gladstone argued that the proposed project meets the requirements for a variance

Parking - §6.01.2: The original proposal contained a compliant six proposed spaces, but the re-design urged and approved by the Planning Board contains only four proposed parking spaces. No special permit is available for parking relief so a variance would be required. Attorney Gladstone argued that the elements for a variance had been met, and that a parking reduction is particularly appropriate for such a transit rich area, steps from the C Line.

Attorney Gladstone argued in favor of granting variances as follows:

The ZBA has the power to approve the Petitioner's proposal by granting a variance from the F.A.R and parking requirements of the Zoning By-Law if it finds that, due to circumstances relating to the soil conditions, *shape* or topography of the land or structures, and especially affecting the land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or bylaw would involve substantial hardship, financial or otherwise, to the Petitioner, and that relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the By-Law. See G.L. c. 40A §10.

- Condition #1 for a variance is met. Condition #1 requires in relevant part that "circumstances relating to the ... shape ... of the land ..., and especially affecting the land ... but not affecting generally the zoning district in which it is located." There is no question but that the site in question is a bizarre and irregular shape with a slanting rear line and non-uniform sides (see *Paulding v. Bruins*, 18 Mass.App.Ct. 707, 710 (1984)),

which is unique in the zoning district, and that the challenges of development are a consequence of this odd shape.

- Condition #2 for a variance is met. Condition #2 requires in relevant part that “a literal enforcement of the provisions of the ordinance or bylaw would involve substantial hardship, financial or otherwise, to the Petitioner.” Hardship is “not being able *reasonably* to use property for the purposes, or in the manner, allowed by the municipal zoning requirements.” Healy, *Massachusetts Zoning Manual* at 9-13 (1989). Substantial hardship, financial or otherwise, is found only where under the unique circumstances it is “not economically feasible or likely that the locus would be developed in the future for a use permitted by the zoning ordinance or by-law.” *Cavanaugh v. DiFlumera*, 9 Mass.App.Ct. 396, 402, 401 N.E.2d 867 (1980). If the Board does not grant a variance relief from being requested for F.A.R. and the parking, which relates directly to F.A.R. in this G 1.75(cc) district, there is nothing that can reasonably be built on this piece of Property.
 - As currently written, with the constraints of this lot, the Zoning By-Law does not permit any residential development of this property for fewer than three units. Four units or more are allowed, but those would require that commercial space occupy 60% of the first floor, all of which would drive a much larger development. Making the entire building commercial was attempted in 2007, but that proposal received stiff opposition from neighbors due to the potential parking and traffic issues and the Planning Board voted against that proposal. Only Use #4A, the proposed three family is an allowed use, which would reasonably and seamlessly fit into the neighborhood.
 - This strangely shaped lot contains 1579 square feet and allowed F.A.R. of 2.0, which must include the parking area (see §5.06.4.b.3), can only be 3158 feet. Since the proposal is for a building of 5299 sq. ft. (which includes a garage area of 800 sq. ft.), relief is required. Assuming a parking area for six cars (required) or four cars (proposed), the F.A.R. allowed as of right would limit the structure to two stories, which is far below the predominant scale of the rest of Marion Street and is dwarfed by the multi-story buildings on the other side of Marion Street.
 - Attorney Gladstone and Ms. Forrest described the applicable hardship, including why no economically viable and practical development of an allowed use can be done at this site without exceeding the 3158 square foot F.A.R. limit imposed under the current by-law, especially where the parking area must be counted towards the F.A.R. calculation.
- Condition #3 for the variance is met. Condition #3 requires in relevant part that “relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the By-Law.” This bizarrely shaped parcel, positioned on the edge of the zoning district, is unique; so, any special treatment will be understandable without derogating from the intent and purpose of the By-Law. In fact, the relief being requested will facilitate a development in keeping with

the scale of the immediate neighborhood. The current use of the site is both a missing tooth in the streetscape and, in some ways, a sick tooth since the existing structure is unattractive and it maintains open air parking in view of the street day and night. Accordingly, the proposed development will be a huge improvement for the block, and, therefore, would in no way be a substantial detriment to the public good.

Attorney Gladstone went on to explain that the proposal satisfied all of the Special Permit standards under Section 9.05 of the Zoning By-Law as follows:

a. The site is an appropriate location for such a use, structure, or condition: The proposed Project is consistent with massing and use of the adjacent residential spaces. The proposed building does not in any way negatively impact the adjacent commercial space fronting on Beacon St. Single family and two family uses are not an allowed use in the G district. An all-commercial building would require more variance for parking and, in any case, past proposals for a larger commercial building on this site have attracted opposition because of on-street parking concerns. The current proposal for a three family is the only economically viable alternative use for this oddly shaped lot.

b. For the reasons set forth above, the proposed use will not adversely affect the neighborhood.

c. There will be no nuisance or serious hazard to vehicles or pedestrians since there is already parking on the site accessed from Marion Street and the proposed use will be less intense than the current hairdresser use.

d. Adequate and appropriate facilities will be provided for the proper operation of the proposed use. See all of the above.

e. The development as proposed will not have a significant adverse effect on the supply of housing available for low and moderate income people as the proposal does not take away any current housing.

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

Zoning Board of Appeals Chairman Zuroff asked if there was anyone present who wished to speak in opposition to this application. Linda Shore, of 88 Marion Street, expressed concern about landscaping for the site. Attorney Gladstone explained that the current use covers the entire lot with concrete and that the petitioner intends to improve the appearance of rear easement, provide landscaping on the roof deck and work with the relevant utilities to put utility wires underground. Ms. Shore also expressed concern over cars backing out of the garage onto

Marion Street. Attorney Gladstone responded that the current use already has tandem parking for four cars, which must back out onto the street in the same position as they will when the parking is placed out of view within a garage.

Jonathan Davis, of 125 Park Street and Town Meeting Member from Precinct 10, expressed the opinion that it was a large building for such a small lot and he expressed the desire that parking not be reduced since the need for rental parking spaces is so great. Mr. Davis also asked why there could not be a variance granted to allow a two-family, which would permit the building to become smaller. Attorney Gladstone responded that unnecessary additional parking would not necessarily be available for rental to the public and he further explained that state law and the Town Zoning By-law, section 9.09, adds many more requirements to use variances, which make such a variance unavailable in this case.

Attorney Jacob Walter, representing the out-of-state owner of the abutting commercial lots facing Beacon Street expressed concern that the 6' easement, which serves as an egress for a child care center in his building, not be blocked and he also commented on his client's work to improve drainage in the area. Ms. Forrest responded that the current owner of the site, Ms. Ross, had been the one working to improve the draining in the passage area. Attorney Gladstone also explained that the construction management plan would need to address how to keep the passageway open and safe for use during construction and that the easement area would be made safer, cleaner and more beautiful as a result of the project.

Zoning Board of Appeals Chairman Zuroff asked if the Board had any questions. Board Member Johanna Schneider asked if a hardship could be shown for zoning purposes if the current use could be maintained. Ms. Forrest and Attorney Gladstone responded by elaborating on their earlier arguments concerning the required showing of hardship. Board Member Johanna

Schneider also asked if the three units could be fit within three floors. Ms. Forrest explained that no economically or practically reasonable three family could be fit into two floors on this site.

Zoning Board of Appeals Chairman Zuroff called upon Polly Selkoe, Assistant Director of Regulatory Planning for the Town of Brookline, to deliver the findings of the Planning Board. Ms. Selkoe responded that the Planning Board was supportive of granting the Petitioner's requests and believed that the standard for variances had been met and that the standards for special permit had been met. Ms. Selkoe explained that, over the years, many proposals had been made to develop this plot, but none had been as appropriate as the current proposal. Ms. Selkoe explained why it would not be possible to issue a use variance, in compliance with the Town Zoning By-law, in order to reduce the size of the project. Ms. Selkoe noted that the Planning Board recommended reductions in massing of the fourth floor and reductions in parking, and that the Petitioner had accepted both suggestions and modified their plans accordingly. She noted that a construction management plan was recommended because this is such a tight site. Consequently, the Planning Board unanimously recommended that the requested relief be granted, subject to subject to the following conditions:

1. Prior to the issuance of a building permit, the applicant shall submit a final site plan, floor plans and elevations, with materials indicated, 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 a final landscaping plan, 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 construction management plan, subject to the review and approval of the Building Commissioner, with a copy to the Planning Department.
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 an engineer or land surveyor, 2)

final building elevations and floor plans stamped and signed by a registered architect; and 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

The Chairman then called upon acting Deputy Building Commissioner, Michael Yanovitch, to deliver the comments of the Building Department. Mr. Yanovitch echoed Ms. Selkoe's explanation as to why a use variance was not available for this project. Mr. Yanovitch reported that the Building Department was supportive of the proposal.

In deliberations, Board Member Johanna Schneider commented that she did not believe that special permit relief under Section 5.07 was available for F.A.R., to which comment Chairman Zuroff agreed. Board Member Johanna Schneider also expressed concerns over the four cars parked in tandem backing out onto Marion Street. Board Member Hussey also expressed concern over this potential safety issue. All three board members expressed the preference that the parking be further reduced to two spaces. Board Member Hussey then suggested that, if the parking were to be reduced to two spaces, that the garage entrance should be moved an additional ten feet away from the lot line. Board Chairman Zuroff expressed the concern that people would then be tempted to park in front of the garage and hang over the sidewalk. Attorney Gladstone suggested that it could be a condition that a visible alert be used whenever a car is leaving the garage to alert pedestrians. Board Member Schneider expressed that the Planning Board has already done a thorough design review and that the Board should not be suggesting exterior design changes at this stage. Board Member Hussey agreed that if the parking were reduced to two cars and there were safety measures put into place to warn pedestrians when a car was leaving the garage, that he would be fine. Ms. Forrest expressed her agreement to the condition that the parking be restricted to two vehicles. Chairman Zuroff recognized that there were people in the Town who believe, as Mr. Davis expressed, that the

parking requirements should remain high in order to provide available rental spaces; but, he also noted that the trend in the Town was more inclined towards reducing the parking requirements in high transit areas, like the locus, so as to reduce the number of cars contributing to traffic congestion.

The Board of Appeals then determined by unanimous vote that the requirements for a Special Permits for Sections **5.06.4.b, 5.01 Footnote 1, 5.07, 5.09.2.a, 5.43, 5.60, 5.70, 5.91** have been met. The Board made the following specific findings pursuant to said **Section 9.05**:

- a. The specific site in 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.

The Board of Appeals also determined by unanimous vote that the requirement for a variance had been met for Sections **5.20 and 6.02, Paragraph 1**.

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

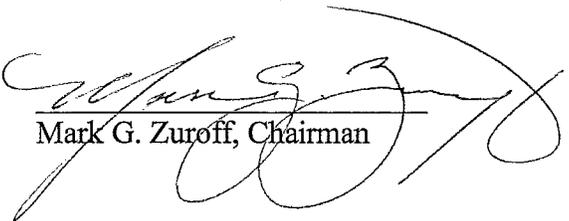
1. Prior to the issuance of a building permit, the applicant shall submit a final site plan, floor plans and elevations, with materials indicated, subject to the review and approval of the Assistant Director of Regulatory Planning.
2. Prior to the issuance of a building permit, the applicant shall submit a final landscaping plan, 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 construction management plan, subject to the review and approval of the Building Commissioner, with a copy to the Planning Department.
4. Prior to issuance of a certificate of occupancy, the applicant shall submit a plan to enhance pedestrian safety in front of the garage, such as a visible alert when cars are

backing out of the garage, subject to the review and approval of the Engineering/Transportation Director.

5. Parking shall be reduced to maximum of two spaces, not tandem.
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 an engineer or land surveyor, 2) final building elevations and floor plans stamped and signed by a registered architect; and 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Unanimous Decision of
The Board of Appeals

Filing Date: _____



Mark G. Zuroff, Chairman

A True Copy

ATTEST:

Patrick J. Ward
Clerk, Board of Appeals