



BOARD OF APPEALS  
Enid Starr, Co-Chair  
Jesse Geller, Co-Chair  
Christopher Hussey

RECEIVED  
TOWN OF BROOKLINE  
*Town of Brookline*  
Massachusetts

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Patrick J. Ward, Clerk

TOWN OF BROOKLINE  
BOARD OF APPEALS  
CASE NO. 2012-0018

Petitioners, Jerry and Patricia Navarette, applied to the Building Commissioner for permission to construct new dormers and create an upper family room as well as increase the headroom of unit number 3, at 29 Harvard Avenue. The application was denied and an appeal was taken to this Board.

On March 15, 2012 the Board met and 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 June 14, 2012 at 7:30 p.m. in the Selectmen's hearing room as the time and place of a hearing on 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 May 24 and May 31, 2012 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. 39, sections 23A & 23B, the Board of Appeals will conduct a public hearing to discuss the following case:**

Petitioner: NAVARETTE JERRY O & PATRICIA J  
Owner: NAVARETTE JERRY O & PATRICIA J

Location of Premises: **29 HARVARD AVE 3**  
Date of Hearing: **June 14, 2012**  
Time of Hearing: **7:30 p.m.**  
Place of Hearing: **Selectmen's Hearing Room, 6<sup>th</sup> Floor**

A public hearing will be held for a variance and/or special permit to:

1. **5.09.2j; Design Review, special permit required.**
2. **5.09.2k; Design Review, special permit required.**
3. **5.20; Floor Area Ratio, variance required.**
4. **5.30; Maximum Height of Buildings, variance required.**
5. **5.40; Walls Not Parallel to Lot Lines; variance required.**
6. **5.43; Exceptions to Yard and Setback Regulations, special permit required.**
7. **5.50; Front Yard Requirements, variance required.**
8. **5.60; Side Yard Requirements, variance required.**
9. **5.70; Rear Yard Requirements, variance required.**
10. **8.02.2; Alteration and Extension, special permit required.**

Of the Zoning By-Law to Construct new dormers in order to create an upper floor family room as well as increase the headroom in Unit #3

At **29 HARVARD AVE 3**

Said premise located in a **M-1 (Apartment house) Residential district.**

*Hearings, once opened, may be continued by the Chair to a date and time certain. No further notice will be mailed to abutters or advertised in the TAB. Questions regarding whether a hearing has been continued, or the date and time of any hearing may be directed to the Zoning Administrator at 617-734-2134 or check meeting calendar at: <http://calendars.town.brookline.ma.us/MasterTownCalendar/?FormID=158>.*

*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 programs and services of the Town of Brookline are invited to make their needs known to the ADA Coordinator, Stephen Bressler, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone: (617) 730-2330; TDD (617) 730-2327.*

**Enid Starr  
Jesse Geller  
Christopher Hussey**

At the time and place specified in the notice, this Board held a public hearing. Present at the hearing was Chairman, Jesse Geller, and Board Members, Mark Zuroff and Lisa Serafin. The case was

presented by Robert Allen, attorney for the petitioner, whose business address is 300 Washington Street, Brookline, MA. Mr. Allen waived reading of the published notice.

Attorney Allen described the property as a three-family dwelling located across from the Pierce School Playground. The two-and-a-half story dwelling has a gable roof with dormers on both sides, a front porch with deck above, and a fire escape at the rear for secondary egress. There is no parking on site. The immediate neighborhood is quite densely developed with two- and three-family dwellings and two courtyard-style developments across the street.

Attorney Allen said present with him were Jerry and Trish Navarette, petitioners, and the Architect for the petitioners, Walter Jacob. Mr. Allen said he thinks it is important for the Board to see a presentation because he believes that the proposal has benefitted from the Planning Board process. He said the owners bought the unit because of its location. Attorney Allen confirmed that the unit is Unit Number 3 of a three unit condominium. Mr. Allen went on to say Unit 3 is approximately 1500 Square feet of existing living space with a stairway to a little over 100 square feet on the fourth floor. This top floor space was used as a reading room and play area and has a very low ceiling. Mr. Allen said his clients had to make a decision to accommodate their growing family and did not want to move out of Brookline.

Mr. Allen said the proposal before the Board comes with unanimous support from the Planning Board as well as unanimous support from the other unit owners, unit 1 and 2, and the direct abutters. Attorney Allen introduced the architect for the petitioner, Walter Jacob, whose business address is 3 Pleasant St. Marblehead, Massachusetts. Mr. Jacob said the original plan was to just modify the existing space in the attic. He said the plan changed to add more useable floor space. Mr. Jacob presented a series of existing and proposed plans. He said the project went through a number of changes due to the recommendations of the Planning Board. Mr. Jacob said the petitioner finally settled on a mezzanine

space for more useable space because the Planning Board was not happy with the “dormer on top of dormer’ look. He said what was being presented is the mezzanine with the balustrade removed. Mr. Jacob said the proposal shows the mass of the structure being pulled back from the street which minimizes the visibility of the addition. Board Member Zuroff asked if the building will be the highest building in the area. Attorney Allen said that it is higher than the building next to it, and higher than the buildings to the left. Mr. Jacob said the overall height will go up to 37 feet and the additional height is at the midpoint of the building not at the street. Mr. Jacob provided a streetscape plan showing the height as compared to the abutting structures. Chairman Geller asked what was driving the additional height requirement. Mr. Jacob said it met building code requirements, which Mike Yanovitch, Chief Building Inspector said in a three-family structure is 7 feet 6 inches. Attorney Allen said the additional height came out of discussion with the Planning Board and the Building Code requirement for habitable space.

Board Member Serafin asked if the open space in the back yard was assigned to another condominium owner. Attorney Allen said the rear yard is common area for all three condominiums. Mr. Allen said he wanted to summarize what the architect had presented. He said the family after long deliberation and extensive revisions to the proposals, as well as consultations with financial advisors, had arrived at the design and proposal before the Board. Attorney Allen said the shed dormer idea was changed to now reflect the mezzanine instead of attic level dormers. The prior proposal was a 2 feet 2 inch setback; the new design increases the setback. The new proposal has the bulk of the addition 17 feet away from the street. He said the down side is that by moving the addition back the proposal picks up roughly 200 square feet of Floor Area Ratio that is not actually livable space because of the Zoning By-Law requirement of calculating Floor Area Ratio when a ceiling height in excess of twelve feet exists. Attorney Allen said as far as the FAR was concerned, the ceiling had a very steep pitch. He said, of the 1500 square feet in the attic area, only 1100 square feet is useable space. He went on to summarize the

relief needed and said the petitioner was cited under Zoning By-Law Section 5.09 (Design Review) and, although the Planning Board did not feel that it was necessary, it did make recommendations for the exterior of the structure. He said front, side, and rear setbacks are all pre-existing non-conforming conditions that will not be increased. Attorney Allen said the front yard goes back to 8.4 feet where it is currently 1.8 feet. He said the relief could be granted through Zoning By-Law Section 5.43 if counterbalancing amenities are provided. Board Member Zuroff asked how the front yard is increasing. Attorney Allen presented graphics detailing the proposed counterbalancing amenities, which were entered into the hearing record as Exhibits "A", "B", and "C". Mr. Allen said with respect to the requested Special Permit relief, there is no adverse affect to the neighborhood, there will be very little impact on the streetscape, numerous abutters are in support, the request will not create a nuisance or hazard to pedestrian or vehicular traffic, there continues to be appropriate and adequate facilities for the proper operation and will have no affect on affordable housing. Chairman Geller asked if the non-conformance would be increased as it pertains to the height of the structure. Attorney Allen confirmed that it would be.

Mr. Allen reviewed the provisions of Massachusetts General Laws Chapter 40A, Section 10 with the Board. He presented a photograph of the zoning district in which the subject structure is located to show the uniqueness of the structure within the zoning district. Mr. Allen said the structure is the only three-family in the zoning district that has a pitched roof. He said the research that he conducted revealed that the structure was converted into a three-family and eight years ago converted into condominiums. He said it is the narrowest building in the zoning district. He said it is one of a kind in the district. Attorney Allen said it is an odd zoning district and the structure fits the definition of unique. Mr. Allen then provided a summary of other Brookline Zoning hearings supporting his argument for grant of a variance, including: 22 Borland Street in which a variance was granted due to the narrowness of the lot, which the

Board viewed as a hardship ; 3-5 Mulford Street involving determination of a financial hardship as well as uniqueness within the zoning district; and 124 Davis Street, allowing the applicant to combine the fourth floor attic space into living space.

Mr. Allen stated that based on the foregoing he believes the applicant meets the standard for granting a variance. Mr. Allen presented a streetscape photo to illustrate the fact that the addition will not be seen from the street and said that there are not a lot of options for the petitioners to be able to stay in this house.

Board Member Zuroff inquired about the timeline of the conversion of the structure to a three-family. Attorney Allen was not sure of the exact date. Chairman Geller asked if the two-family structure next door had a pitched roof. Attorney Allen replied in the affirmative. The Chairman said then he assumes the structure is equally as narrow and goes similarly back towards the rear of the lot. Attorney Allen said that the neighboring structure itself is wider. Chairman Geller asked what the total square footage was that the petitioner is asking for. Attorney Allen said the existing is 1536 square feet, of which, the area under seven feet is 154 square feet and the area under five feet is 140 square feet, for a total of 1200 functional square feet. The proposal provides for 1620 square feet on the third floor and an additional 590 square feet at the mezzanine level. Board Member Serafin asked for a clarification of the numbers. Attorney Allen said the total functional square footage is 1242. Chairman Geller asked what the functional square footage would be if they were granted the variance. Attorney Allen said 2200 square feet. Board Member Zuroff asked if the basement was common area. Attorney Allen said yes. Chairman Geller commented that if the Board granted the variance the possibilities of future expansion would be restricted.

The Chairman then asked if anyone wished to speak in favor of the request. Mary Gioisa who resides in the second floor unit of the subject property spoke in favor. Anna Kutz who resides in the first floor unit of the subject property spoke in favor.

The Chairman asked if anyone would like to speak in opposition of the request. No one rose to speak.

The Chairman called upon Lara Curtis Hayes, Senior Planner, to deliver the comments of the Planning Board:

**Section 5.09.2.j and k – Design Review:** Any exterior addition for which a special permit is requested pursuant to *Section 5.22 (Exceptions to Maximum Floor Area Ratio Regulations)*, or for which a use variance is requested pursuant to *Section 9.09.1*, requires a special permit subject to the design review standards listed under *Section 5.09.4(a-l)*. This proposal does not fall into these categories because it needs a variance, not a special permit, for the increase in FAR, nor does it require a use variance. After discussing the denial letter with the Building Commissioner, he indicated the alterations to the building were so substantial that he thought design review would be warranted. Although *Section 5.09* does not apply to this proposal, the Planning Board may recommend conditions that modify the exterior features or appearance of the structure per *Section 9.05.2.c*.

**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</b>	1.0	1.56	1.78	Variance
<b>(% of allowed)</b>	100%	156%	178%	
<b>Floor Area (s.f.)</b>	3,056	4,776	5,454	

**Section 5.30 – Maximum Height of Buildings**

**Section 5.40 – Walls Not Parallel to Lot Lines**

**Section 5.43 – Exceptions to Yard and Setback Regulations**

**Section 5.50 – Front Yard Requirements**

**Section 5.60 – Side Yard Requirements**

**Section 5.70 – Rear Yard Requirements**

<b>Setbacks &amp; Height</b>	<b>Required</b>	<b>Existing</b>	<b>Proposed</b>	<b>Relief</b>
<b>Height</b>	40'	42.12'	43.43'	Variance
<b>Front Yard Setback</b>	15'	1.8' (porch)	8.4'	Special Permit*
<b>Side Yard Setback</b>	15.5' (10+L/10)	3.7'-4.0'	3.7'-4.0'	Special Permit*
<b>Rear Yard Setback</b>	30'	17.2'	17.2'	Special Permit*

\* Under **Section 5.43**, the Board of Appeals may waive by special permit yard and setback requirements if a counterbalancing amenity is provided. The applicant is considering fencing in the front yard on both sides of the building (to shield trash containers and provide privacy) and additional landscaping in the front yard as counterbalancing amenities.

**Section 8.02.2 – Alteration or Extension**

A special permit is required to alter a pre-existing non-conforming structure or use.

Ms. Hayes said the Planning Board is supportive of the proposed dormer and mezzanine for this three-family dwelling. The lot is quite small and the revised proposal allows for a reasonable expansion of the home without removing valuable open space, infringing on the privacy of neighboring homes, and significantly impacting the streetscape. The applicants have revised the proposal at the request of the Planning Board so that the third-floor dormer is at least three feet back from the front gable, and the mezzanine is set significantly back from the front façade. The Planning Board is satisfied with the redesign but suggest the applicants make minor modifications to the design including: selecting different

windows for the third floor that are more consistent with the windows on the first and second floor of the building, eliminating the balustrade on top of the dormer, and widening the cornice. The Planning Board notes the overall square footage is less than originally proposed, even when including the additional floor area required for the extra ceiling height on the third floor and also that the deck in the rear will provide new open space for the unit's occupants. The applicants have worked with their neighbors to develop counterbalancing amenities that are appropriate and desirable.

**Therefore, if the Board of Appeals finds that the statutory requirements for a variance are met, the Planning Board recommends approval of the plans and elevations prepared by Walter Jacob Architect dated 5/21/12, subject to the following conditions:**

1. Prior to the issuance of a building permit, the applicant shall submit final plans and elevations, indicating the new dormer set back at least 3' from the face of the gable, the removal of the rooftop balustrade, the installation of wider cornice, and all salient dimensions and materials, 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 indicating all counterbalancing amenities, including plantings and fencing, 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 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.

The Chairman then called upon Michael Yanovitch, Chief Building Inspector, to deliver the comments of the Building Department. He said the Building Department agrees with the Planning Boards recommendations. Mr. Yanovitch said the Building Department has no issue with the request for relief. Mr. Yanovitch said the use of the Mezzanine is very creative and the project overall is very well designed. He said if the Board grants relief, the Building Department will ensure compliance with the Building Code and any conditions the Board may impose.

During deliberations, Board Member Serafin said she agrees with the comments regarding the design and appreciates that the petitioners have support of their neighbors. She said she is still trying to work through the uniqueness. Board Member Zuroff said in general the standards for a variance are a lot tougher but he applauds the efforts of the petitioner. He said he is troubled by the fact they may be setting a precedent by granting a variance in this case and that, although there is some uniqueness to the structure, he is not sure it meets the criteria for a variance. Chairman Geller said he believes that Attorney Allen made a compelling argument for the requested Special Permit relief but he has reservations about whether the requirements necessary for a variance have been met. Chairman Geller said he knows affordability is an existing hardship but does not know that general affordability in a town constitutes a hardship as contemplated by Massachusetts General Laws Chapter 40A, Section 10. Attorney Allen said the hardship is the applicants' inability to maximize the use of the structure. Attorney Allen said that that precedent has already been set by the Board in previous cases. Board Member Zuroff said it is not just expanding the usable space in the attic, but it is also adding the additional space in the Mezzanine above that which troubles him. Chairman Geller asked what the total gross floor area is that results from application of the multiplier. Attorney Allen said 209 square feet.

Chairman Geller said he would view this as part of the hardship. At Attorney Allen's request, the hearing was continued until June 28<sup>th</sup> at 7:30 in order to allow Mr. Allen to prepare a memorandum in support of his argument for a variance. The Chairman said testimony is closed other than consideration of Attorney Allen's memorandum and then the Board would complete discussion and issue a decision.

June 28<sup>th</sup> 2012- Continuance from June 14, 2012

Chairman Geller opened the continued hearing and noted that testimony is closed except for Attorney Allen's memorandum. Attorney Allen said he will rely on his memorandum which was previously circulated to the Board. Chairman Geller asked if the Board had any questions for Mr. Allen. Attorney Allen said in response to a question from Board Member Zuroff, that the house was originally built as a two-family structure. The Chairman said Mr. Allen's argument is that the uniqueness of the structure derives from its use as a three-family. The Chairman said use is not one of the criteria for granting a variance. Chairman Geller asked whether the shape of the lot or of the structure, is in and of itself unique to the zoning district. Attorney Allen said the Mulford street case is spot on. He said he believes the Chairman is making too fine of a distinction when he speaks about use. Attorney Allen said there are two other lots in the zoning district that are similar. Board Member Serafin asked Mr. Allen to explain how much of the proposal is affected by usability. Mr. Allen presented a drawing that illustrated where usable space was being created. Board Member Zuroff asked if it was fair to say the proposal is creating useable space from non-useable space. Attorney Allen said he does not believe they are creating more useable but they in fact are creating more functional space. Board Member Zuroff said said Massachusetts General Laws Chapter 40A, Section 10 provides that a variance may be granted only if it is "without substantial detriment to the public good or/and without nullifying or derogating from the intended purpose of such ordinance or By-Law". Board Member Zuroff said he believes that granting a

variance in this instance would be circumventing or going beyond what the By-Law allows and would derogate from the intended purpose of the Town Zoning By-Law and was against the public good.

Board Member Zuroff asked if it was Attorney Allen's contention that the proposal is that the applicants are taking existing floor space and making it habitable and they are not expanding the FAR. Attorney Allen said yes.

Attorney Allen said that the structure was built as a two- family structure and in 1958 was converted to a three-family structure. The Town taxed the property as a three-family structure but in the 1970's the Town determined it not a legal three-family due to lack of a legal secondary means of egress. Attorney Allen said a second means of egress was added all because of the Town and it was the Town therefore that created the hardship. He said for twenty years the Town allowed the house to be used as a three family structure and reaped the benefits of collecting the taxes. Mr. Allen said granting a variance and allowing the petitioner to construct the mezzanine area, does not derogate from the Town's Zoning By-Law. He said he believes the derogation goes away because the Town created the hardship. He said the Town benefited and the occupant loses. Board Member Zuroff said he understands the economic hardship, he accepts that fact. He accepts the fact that the previous Building Commissioner arbitrarily called the structure a three-family. Board Member Zuroff and Board Member Serafin stated that they did not believe that the petitioners met the requirements for a variance under Massachusetts General Laws Chapter 40A, Section 10 for the reasons discussed and, in particular, that a variance can be granted in this case without nullifying or substantially derogating from the intended purpose of the Zoning By-Law.

The Board, having deliberated on this matter and having considered the foregoing testimony, concluded that the requested relief is denied.

Unanimous Decision of  
The Board of Appeals

  
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Jesse Geller, Chairman

RECEIVED  
CLERK OF BROOKLINE  
TOWN CLERK  
Date: August 10, 2012

2012 AUG 10 A 8:30  
ATTEST:  


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Patrick J. Ward  
Clerk, Board of Appeals