

AGENDA

MODERATOR'S COMMITTEE ON ZONING FAR

Monday, August 15, 2016 – 6:00 PM

Room 408 – Town Hall, 333 Washington Street, Brookline, MA

1. Approval of minutes of April 1, 2016
2. Public comment, discussion and vote on potential warrant article submission to Fall 2016 Town Meeting addressing issues raised by Fall 2015 Town Meeting Article 12, including FAR issues
3. Old business
4. New business

ARTICLE XX

Submitted by: Department of Planning and Economic Development on behalf of the Moderator's Committee on Zoning FAR

To see if the Town will amend the Brookline Zoning By-Law as follows (additions appear as underlined text; deletions appear with strike-throughs):

A. To amend Section 5.09.2 (Design Review, Scope) as follows:

2. Scope.

In the following categories all new structures and outdoor uses, exterior alterations, exterior additions, and exterior **modifications or** changes, including exterior demolitions, which require a building permit from the building department under the Building Code, shall require a special permit subject to the community and environmental impact and design review procedures and standards hereinafter specified. Exterior alterations, exterior additions and exterior changes (**except as provided below**), including fences, walls, and driveways, to residential uses permitted by right in S, SC, T, and F districts; signs as regulated in §§ 7.02, and 7.03; and regulated facade alterations as defined and regulated in §7.06 shall be exempt from the requirements of this section.

....

j. any exterior addition **or exterior modification** for which a special permit is requested pursuant to §5.22

....

n. any construction of space, whether or not habitable, finished or built out, where such space substantially satisfies the requirements for habitability under the State Building Code or could without significant alterations to the exterior of the building be modified to substantially meet such State Building Code requirements for habitability, and which space if finished or built out or converted to habitable space would result in the total Gross Floor Area of the structure being greater than the permitted Gross Floor Area in Table 5.01. The addition of windows or doors to comply with the State Building Code shall not be deemed significant exterior alterations for the purposes of this subparagraph. In determining whether to approve such special permit, the Board of Appeals, in addition to the requirements of §5.09 and §9.05, shall ensure that the massing, scale footprint, and height of the building are not substantially greater than, and that the setbacks of the building are not substantially less than, those of abutting structures and of other structures on similarly sized lots in the neighborhood. In granting a special permit for construction of such non-habitable space, the Board of Appeals shall set forth as a condition of the special permit the extent to which such space may or may not be converted to habitable space in the future pursuant to Section 5.22 or otherwise.

B. To amend Section 5.09.3.c.4 (Procedure, Photographs) as follows:

4. Photographs – Photographs show the proposed building site and surrounding properties, and of the model (if required). Applications for alterations, **modifications** and additions shall include photographs showing existing structure or sign to be altered and its relationship to adjacent properties.

C. To amend Section 5.09.4.c (Design Review Standards, Relation to Streetscape) as follows:

c. Relation of Buildings to the Form of the Streetscape and Neighborhood—Proposed development shall be consistent with the use, scale, **massing, height, footprint, siting,** yard setbacks and architecture of existing buildings and the overall streetscape of the surrounding area. The Board of Appeals may require modification in massing, **scale, height, footprint, siting, setbacks** or design so as to make the proposed building more consistent with the form of **abutting buildings, buildings on lots of similar size in the neighborhood and** the existing streetscape, and may rely upon data gathered that documents the character of the existing streetscape in making such a determination. Examples of changes that may be required include addition of bays or roof types consistent with those nearby; alteration of the **massing, scale, siting, footprint, setbacks and** height of the building to more closely match existing buildings that conform to the zoning by-law, or changes to the fenestration. The street level of a commercial building should be designed for occupancy and not for parking. Unenclosed street level parking along the frontage of any major street as listed in paragraph 2., subparagraph a. of this section is strongly discouraged. Otherwise, street level parking should be enclosed or screened from view.

D. To amend Sections 5.22.1.a, 5.22.1.b and 5.22.1.c (Exceptions to Maximum Floor Area Ratio (FAR) Regulations for Residential Units, General Provisions) as follows:

a. Any expanded unit (individual residential units subject to an increase in gross floor area as per this Section) shall not be eligible to be **concurrently or** subsequently divided into multiple units.

b. Insofar as practicable, the additional floor area allowed pursuant to this Section shall be located and designed so as to minimize the adverse impact on abutting properties and ways, and interior conversions shall be considered preferable to exterior additions. **Any exterior additions or modifications shall comply with Section 5.09, including Section 5.09.4.c.**

c. Additional floor area shall be allowed pursuant to this Section only if the Certificate of Occupancy for the original construction was granted at least ten years prior to the date of the application for additional gross floor area under this section or if there is other evidence of lawful occupancy at least ten years prior to the date of such application. **In the case of demolition of a structure or of an increase in the number of units, the time period prior to such demolition or unit increase shall not be counted toward the required ten-year waiting period, and the ten-year waiting period shall be deemed to commence with the grant of a Certificate of Occupancy after such demolition or unit increase. [[As used in this paragraph 1, subparagraph c, “demolition” shall have the meaning set forth in Section 5.3.2(h) of the General By-Laws]] OR [[As used in this paragraph 1, subparagraph c, “demolition” shall mean the act of pulling down, destroying, removing or razing a structure or a significant portion thereof, by removing one side of the structure, or removing the roof, or removing 25% of the structure.]]** If the limitation set forth in this paragraph 1, subparagraph c should be found to be invalid, § 5.22 shall be deemed null and void in its entirety, and no increase in gross floor area shall be allowed pursuant to § 5.22.

E. To amend Section 5.22.2 (Exceptions to Maximum Floor Area Ratio (FAR) Regulations for Residential Units, Conversion of Attic or Basement Space) as follows:

Conversion of Attic or Basement Space in Single-Family and Two-Family Residential Dwellings.

Conversions of attics or basements to habitable space for use as part of an existing single- or two-family dwelling, not as a separate dwelling unit, and effectively increasing the gross floor area of the dwelling, shall be allowed ~~as of right~~ **by special permit in S and SC Districts** provided the following conditions are met in addition to the conditions set forth in paragraph 1 of this Section:

a. Any exterior modifications that are made to the structure to accommodate the conversion shall be subject to **the procedures, limitations, and conditions specified in §5.09, §9.05, and this Section.** ~~the façade and sign design review process as provided in §7.06, paragraph 1 of the Zoning Bylaw.~~ No exterior modifications made under the provisions of this subparagraph may project above the ridge of the roof nor project beyond the eaves.

b. Any increase in gross floor area through such basement or attic conversion shall be limited such that the total resulting gross floor area of the building(s) after such conversion is no more than ~~[[150%]]~~ **OR** ~~[[130% 150%]]~~ of the total permitted in Table 5.01 (the “permitted gross floor area”).

F. To delete Section 5.22.3.b.2 as follows:

~~In all T, F, M 0.5, M 1.0, and M 1.5 Districts, a special permit may be granted for an increase in floor area that is less than or equal to 20% of the permitted gross floor area, whether it be for an exterior addition, interior conversion, or a combination of the two. The total increase in floor area granted by special permit for all applications made under this paragraph 3, subparagraph (b)(2), or any prior version of Section 5.22, shall not exceed 20% of the permitted gross floor area.~~

G. To delete Section 7.06.1.c as follows:

~~Conversion of attic or basement space in Single Family and Two Family Residential Dwellings where exterior modifications beyond that required by the State building code are made.~~

~~Or act on anything relative thereto.~~

PETITIONERS’ WARRANT EXPLANATION

Introduction. This article is submitted on behalf of the Moderator’s Committee on Zoning FAR. The Committee had the following charge:

The Moderator’s Committee on Zoning-FAR was created in response to Warrant Article 12 at the November 2015 Town Meeting. Article 12 sought to modify the definition of “habitable space” in the Zoning By-Law to restrict the construction of out-sized homes. The potential impact of the proposed change on existing homes was noted and alternative approaches were suggested. Town Meeting voted that “the subject matter of Article 12 be referred to a Moderator’s Committee with the request that a preliminary report be presented at [the] Spring 2016 Town Meeting with the goal that a new Warrant Article be presented to the Fall 2016 Town Meeting.”

The Committee members are Richard Benka (former Selectman, former chair Selectmen’s Zoning By-Law Committee (“ZBLC”)), chair; Jesse Geller (Chair, Zoning Board of Appeals; ZBLC); Linda Hamlin (Chair, Planning Board; ZBLC); Marian Lazar (Conservation Commission; ZBLC); M.K.

Merelice (TMM Pct. 6; ZBLC); and Lee Selwyn (TMM Pct. 13 and the Article 12 petitioner). The Committee has received particularly useful assistance from Michael Yanovitch, Deputy Building Commissioner; Gary McCabe, Chief Assessor; Jed Fehrenbach, GIS Administrator/Developer; and Lara Curtis Hayes, former Senior Planner.

The By-Law amendments recommended by the Committee in this warrant article are designed to address potential abuses of the Zoning By-Law identified by Article 12 in November, 2015, without creating zoning non-conformities for existing homes.

The Problem Being Addressed. As explained more fully in the Committee’s report to the Spring 2016 Town Meeting, one of the tools used in the Brookline Zoning By-Law to control the bulk of structures is “**Floor Area Ratio**” or “**FAR.**” The permissible Floor Area Ratio of a structure is essentially defined as the “**Gross Floor Area**” or “**GFA**” (in square feet) of a building divided by the square footage of a lot.

Under Brookline’s Zoning By-Law, **Gross Floor Area** excludes spaces in “cellars, basements, attics, [and] penthouses,” if they are “not habitable.” “**Habitable Space,**” in turn, is currently defined as “[s]pace in a structure for living, sleeping, eating, or cooking; otherwise used for human occupancy; **or finished or built out** and meeting the State Building Code requirements for height, light, ventilation and egress for human habitation or occupancy.”

As a result of this series of definitions, “**unfinished**” **basement or attic space (unlike first or second floor space) has not been counted when calculating GFA, even if it meets all State Building Code requirements for habitability and adds substantially to the bulk of a building.**

In Section 5.22.3, the Zoning By-Law contains exemptions that allow residences in certain zoning districts to exceed the otherwise-allowable FAR by up to 20% or 30% through exterior additions or interior conversions. These exemptions, designed to “allow a limited increase in floor area in order to accommodate families who need additional space in an existing dwelling unit or house” and thus “promot[e] the stabilization of residential neighborhoods in the Town,” all require a **special permit** and thus require **both notice to abutters and approval by the Zoning Board of Appeals.** Among other provisions, the special permit process requires that “the impact ... on abutting properties” be considered, that additional GFA be “located and designed so as to minimize the adverse impact on abutting properties and ways,” and that the ZBA find that the “specific site is an appropriate location for such a ... structure” and that the “use as developed will not adversely affect the neighborhood.” See Zoning By-Law §§ 5.22, 9.05.

However, Section 5.22.2 (added in 2002) currently allows **basement and attic space** for single- and two-family homes to be converted “**as-of-right,**” that is, **without a special permit** and thus without **notice to abutters** or **findings of no adverse impact on the neighborhood.** Moreover, the provision allows the otherwise allowable FAR to be exceeded by **50%,** rather than just 20% or 30%.

The potential impact of Section 5.22.2 is exacerbated by the fact that a “basement” under the Brookline Zoning By-Law is defined as any “portion of a building which is partly or completely below grade.” Zoning By-Law, § 2.02.1. Thus, even if the vast majority of the “basement” is well above grade with windows and ground level access, it is still considered a “basement.”¹ In addition, there is

¹ In contrast, the state Building Code states that a basement is considered a “story above grade plane” if, for example, the floor above the “basement” is more than 6 feet above “grade plane” (basically, the average finished ground level adjoining the

no limit on the bulk of an “attic,” which is simply defined as the “[s]pace between the ceiling beams, or similar structural elements, of the top story of a building and the roof rafters.” *Id.* § 2.01.3. Thus, an “attic” or “basement” under the Zoning By-Law could have such elements as eight-foot ceiling heights, full windows, full stairway access, and, in the case of a “basement,” ground level access.

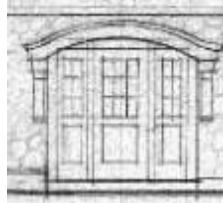
The addition of Section 5.22.2 in 2002 opened the door to “gaming” of the Zoning By-Law. Because unfinished basement and attic spaces are excluded from the calculation of GFA, new single- and two-family residences could be constructed as-of-right with no limit on the bulk of such unfinished spaces. They could then be “finished,” again as-of-right, under Section 5.22.2 with no notice to abutters or review by the Board of Appeals. This would, in essence, permit the construction of houses 50% larger than otherwise allowed under the By-Law.

In an effort to deal with this potential “McMansion loophole,” Section 5.22 as originally adopted in 2002 originally included language that limited the basement-and-attic exemption to existing properties. That language was, unfortunately, struck down by the Attorney General as impermissibly distinguishing between new and existing structures. In 2005, Town Meeting responded by adding a provision allowing FAR exemptions only when ten years had elapsed since the issuance of the original Certificate of Occupancy for a property. It was thought that if attic or basement space exceeding the allowable FAR had to be left vacant for ten years, there would be no incentive for developers of new homes to overbuild additional space.

Unfortunately, **the 10-year waiting period has not proven to be the disincentive that was intended.** It has failed to close the “McMansion loophole” or otherwise achieve its stated goals of preventing the demolition of smaller homes or the building of new out-of-scale homes that are ready for build outs. “Square footage sells,” and the Deputy Building Commissioner estimates that about 90% of new one- and two-family homes are therefore built with “attic” and/or “basement” spaces that could take advantage of the 50% basement/attic expansion, either legally after 10 years or illegally prior to that time. Because the space is shown on plans as “unfinished” and thus excluded from the calculation of GFA, abutters are not able to challenge the inclusion of the space or the resulting bulk of the building, or, indeed, **even notified** of the plans at the time of initial construction.

A number of new houses were identified that were advertised with square footage exceeding the allowable FAR, including one where the developer told Town Meeting Members looking at the property that he would “finish” the attic immediately after the house was sold, and another where a new house was originally designed with “unfinished” space in the “basement” identified as “storage” space, despite the fact that it was largely above grade, had a formal doorway exiting to grade (see illustration), a fireplace, and full-height double windows, and where there was an 1800 square foot “unfinished” “attic” with eleven full-height double windows and 8-foot ceiling clearance.

building’s exterior walls), more than 12 feet above the finished ground level at any point, or more than 6 feet above the finished ground level for more than 50% of the building perimeter. See International Building Code Sec. 202; 780 CMR 202 (“Story Above Grade Plane”). The broad “basement” definition in Brookline’s Zoning By-Law follows an outdated definition of “basement” and has not been updated to conform to changes in the International Building Code or the state Building Code.



The Committee's Recommendation. The Committee was thus faced with the task of finding a path that satisfied several goals: precluding “gaming” of the Zoning By-Law; discouraging construction of “McMansions” that are out-of-scale with the existing neighborhood fabric; preserving more affordable and modest existing structures that are consistent with the scale of our neighborhoods; avoiding the creation of zoning non-conformities for existing buildings; continuing to facilitate the ability of residents to remain in their homes by allowing the conversion of non-habitable space within existing structures into habitable space; and, finally, complying with state law provisions potentially precluding distinctions between existing and new structures within a zoning district.

The problem of out-of-scale “McManions” could theoretically be addressed bluntly by limiting the definition of “basement” to conform to state law and to include only spaces that were truly below-ground, and by broadening the definition of “habitable space” to include even space that was unfinished. This would, however, create zoning non-conformities for existing homes that are legal under the existing By-Law. Moreover, the Committee has noted that there can be cases where larger homes are not out-of-scale with abutting properties or the neighborhood.

The Committee thus recommends amending Section 5.22.2 so that it is consistent with the rest of Section 5.22 and requiring a special permit for basement and attic conversions just as a special permit is required for other interior conversions. This will result in abutter notice and Board of Appeals review. Members of the Committee could not see the justification for requiring special permits for some interior conversions but not others. [[The Committee also recommends limiting the exemption for basement and attic conversions under Section 5.22.2 to 30% of allowable FAR, to conform to the 30% allowed for other interior conversions under Section 5.22.3.]]

Moreover, given the reality of illegal conversions of basements and attics prior to the expiration of the 10-year waiting period, the Committee believes it is necessary to “catch” oversized unfinished “basements” and “attics” at the time they are constructed. Ironically, the Zoning By-Law now requires some design review for any exterior modification involved in converting an existing attic to habitable space, but requires **no design review at all** for the construction of an entire new home with an oversized attic or for the addition of an entire oversized attic to an existing home, as long as the attic is “unfinished.” The Committee thus recommends that a special permit be required for the construction of unfinished basement and attic space that, if finished or converted to habitable space, would substantially meet the State Building Code standards for habitability and would cause the space to exceed the otherwise permissible FAR for the building. The proposed test of whether the State Building Code would “substantially” be met is designed to preclude, for example, the ploy used in the past of constructing attic or basement spaces which, though able to be used for occupancy, are 6 feet 11 inches in height rather than 7 feet as set forth in the Building Code. There would necessarily have to be some judgment exercised by the Building Department, Planning Board and Board of Appeals.

These special permit requirements would not make such construction of unfinished space illegal, nor would it include unfinished space within the calculation of FAR and thus create zoning non-conformities for existing homes (which would have been the effect of modifying the definition of

“Habitable Space”). Because oversized space can be out-of-scale with the neighborhood even if unfinished, the proposed special permit would require that abutters be notified and have the opportunity to comment, and that the proposed construction be consistent with the scale, siting, setbacks and design of existing homes in the neighborhood. In conformity with state law, these requirements would be applicable to both new (e.g., the construction of a new house with an oversized “attic”) and existing (e.g., the addition of an oversized “attic”) buildings. Finally, the proposal would not add significantly to the workload of Town boards, since only about 25 new single-family homes are constructed each year; since rarely, if ever, are basements or attics added to existing homes (as opposed to, for example, the addition of expanded kitchens); and since 5.22.2 already requires design review of exterior modifications needed to convert basements or attics of existing homes.

The Committee’s report to the Spring 2016 Town Meeting also noted particular problems in the Zoning By-Law identified by the Building Department. One problem was the small 7.5 foot side-yard setbacks in S-7 Districts, and the resulting potential impact of oversized houses on abutting properties. The Committee’s proposal would address this issue, in part, by the fact that setbacks are to be reviewed within the special permit process, described above, in the case of construction that could exceed the FAR limitations of Table 5.01, whether a new structure or expansion of an existing building.² This would apply in all zoning districts, including S-7 Districts.

The second issue noted in the Committee’s report was the potential for substantial increased density in T districts in the Town, particularly when the potential for further expansion under 5.22 is included. This is addressed by making 5.22.2 (basement-attic conversions for single- and two-family homes) applicable only in S and SC districts, and in eliminating 5.22.3.b.2, which allows 20% expansions of the permitted Gross Floor Area (up to a resulting 130%) in T, F, and certain M districts.

The warrant article also includes a provision clarifying existing language and explicitly incorporating Building Department policies, precluding the use of the exemptions in Section 5.22 to increase the number of units in a structure, and making clear that the exemptions of Section 5.22 do not immediately apply where a preexisting building has been substantially demolished or the number of units increased, with the 10-year waiting period running from the time of such demolition or unit increase. The proposed provision incorporates a definition of “demolition” currently contained in the Town’s Demolition Delay By-Law, Section 5.3.2(h) of the General By-Laws, and therefore would not require any additional calculations by the Building Department to determine whether the provision applies.

The goal of these recommended zoning amendments is to close loopholes and anomalies that have emerged in our Zoning By-Law, primarily by requiring a further level of review before the construction of oversized, though unfinished, basement and attic spaces that could be converted to habitable space, either legally or illegally. The Committee recognizes that in some cases these spaces may not have an adverse impact on, or be out-of-scale with, abutting properties or the neighborhood fabric, in which case a special permit would be appropriate. In other cases the converse would be the case and it would be necessary for the Town boards to act to prevent circumvention of the letter and spirit of the Zoning By-Law, either by denying a special permit or by imposing conditions to protect abutters and the neighborhood.

² It is recognized that such review would not be required if a structure, including unfinished space, fell within the FAR limits of Table 5.01. A general expansion of design review to all new construction or additions, or modifications to the setbacks set forth in Table 5.01, is beyond the Committee’s charge.