



BOARD OF APPEALS
Jesse Geller, Chairman
Jonathan Book
Christopher Hussey

Town of Brookline

Massachusetts

Town Hall, 1st Floor
333 Washington Street
Brookline, MA 02445-6899
(617) 730-2010 Fax (617) 730-2043
Patrick J. Ward, Clerk

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2014-0004
Owner: DENNIS & ELIZABETH DEWITT

Petitioners, Dennis and Elizabeth DeWitt, applied to the Building Commissioner for permission to rebuild and reconfigure an existing garage at the rear of 94 Upland Road. The application was denied and an appeal was taken to this Board.

The Board administratively 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 August 14, 2014, at 7:00 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 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 July 24, 2014, and July 31, 2014, 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:

94 UPLAND RD – REBUILD AND RECONFIGURE EXISTING GARAGE in an S-10, Single-Family, residential district, on August 14, 2014, at 7:00 PM in the 6th Floor Selectmen’s Hearing Room (Petitioner: DEWITT DENNIS J & ELIZABETH R; Owner: DEWITT DENNIS J & ELIZABETH R)

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

1. **Section 5.01; Table of Dimensional Requirements (Footnote 1)**
2. **Section 5.43; Exceptions to Yard and Setback Regulations**
3. **Section 5.60; Side Yard Requirements**
4. **Section 5.63; Accessory Buildings of Structures in the Side Yard**
5. **Section 5.70; Rear Yard Requirements**
6. **Section 5.71; Projections into the Rear Yard (roof at rear door of principal structure closer than 8 feet to accessory structure)**
7. **Section 5.72; Accessory Building or Structure in the Rear Yard**
“Closer than 6 feet to the side yard”
“Closer than 6 feet to the rear yard”
8. **Section 6.04.5.1 and 3; Design of All Off-Street Parking Facilities**
9. **Section 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.

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

Jesse Geller, Chair

Christopher Hussey

Jonathan Book

Publish: July 24, 2014 & July 31, 2014

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 Avi Liss. Attorney

Scott Gladstone, 1244 Boylston St., Suite 200, Chestnut Hill, MA, representing the Petitioner, presented the case.

Mr. Gladstone reviewed the relief requested, as shown in the denial letter for the application, and briefly discussed the property dispute regarding whether or not the petitioner has legal access to Walnut Place. Mr. Gladstone said the issue before the Board of Appeals is whether the proposed application meets the standards for granting a special permit for setback relief as laid out in Section 9.05 of the Zoning By-law. Jesse Geller emphasized that the Board had received and reviewed all of the memoranda relating to this case and the issues regarding access to and from Walnut Place. Mr. Geller noted that issues relating to the property rights dispute are outside the purview of the Zoning Board of Appeals.

Mr. Gladstone said the garage is a pre-existing non-conforming historic structure and would be preserved and extended, with a new garage opening along its Walnut Place façade, which requires special permit relief. Mr. Gladstone said the preservation of the garage, as well as the concealment of the doors, are counterbalancing amenities required under Section 5.43 of the Zoning By-Law.

Jesse Geller asked if the Preservation Commission is requiring the applicant to preserve the garage and conceal the new doors. Mr. Gladstone responded no, the only purview the Preservation Commission had is over a portion of the garage roof because most of the garage is not visible from the public way.

The area of Walnut Place in front of the garage, referred to as the "triangle," was discussed briefly, including its dimensions, use and safety. Mr. Gladstone said there are no safety concerns created by the DeWitts using the triangle for access, and that all of the current uses of the triangle, except for guest parking, could continue.

Mark Zuroff asked if Walnut Place residents would still be able to park in the triangle after the petitioners' use starts. Mr. Gladstone said no. Mr. Zuroff then asked if the petitioners would park in the triangle after the garage is finished. Mr. Gladstone said the DeWitts would not use the triangle for parking; all parking would be in the garage.

Mr. Geller asked Chief Building Inspector Michael Yanovitch if applicants for building permits typically have to indicate they have title to the property to which improvements are proposed and what level of evidence is required. Mr. Yanovitch responded that petitioners need only indicate a legal interest without proof. Mr. Geller asked if the petitioners in this case had provided such information. Mr. Yanovitch said yes. Mr. Geller asked if the Building Department routinely does a title search to confirm the submitted information. Mr. Yanovitch said no, they require a certified plot plan and signature of the owner of record only.

The Chairman asked if anyone wished to speak in favor of or in opposition to the proposal.

Attorney Jeffrey Allen, representing a group of the neighbors along Walnut Place, said that the petitioners are proposing to build a driveway across the triangle, and he did not believe the Building Department could issue a permit to construct a driveway on property the petitioners do not own. Mr. Allen questioned why the DeWitts feel they need two driveways, and said that the triangle space is area that belongs to the neighborhood that the petitioners will be taking away with this proposal. Mr. Allen said that although the current garage does not impact the neighborhood, the proposal for the extended garage and new access will have a substantially negative impact on the neighborhood. Mr. Allen noted that the petitioners do not have sufficient frontage along Walnut Place to have safe access, and argued that the petitioners need a variance. Mr. Allen also said that the application before the Board of Appeals should be deferred until the court can determine whether or not the petitioners have the right to pass over the triangle area.

Mr. Allen said that the counterbalancing amenities, such as the garage doors, don't meet the requirements of the Zoning By-Law and are insufficient under Section 5.43 of the Zoning By-Law for the grant of special permit relief because no benefit would accrue to his clients. In particular, Mr. Allen noted that one of the proposed counterbalancing amenities proposed is for the petitioners to stop putting snow on their neighbor's property. Jesse Geller said Mr. Allen's argument was not valid since the counterbalancing amenity provided for under Section 5.43 need only generally offset the non-conformity and have not been interpreted to require benefit to any specific party. Mr. Allen said that the petitioners are not providing any counterbalancing amenities to anyone in the neighborhood. Avi Liss said the counterbalancing amenities do not need to benefit or impact a specific party. Mr. Allen said the amenity has to benefit someone, even the community as a whole, which the proposed counterbalancing amenities do not.

Mr. Allen argued that the petitioners are creating a new front yard, with insufficient frontage, and the proposal therefor requires a variance, which the applicant has not applied for. Jesse Geller asked Mr. Allen if every front yard requires sufficient frontage given that the petitioners do have adequate frontage on Upland Road.

Mark Zuroff asked Mr. Allen if he considered the triangle area to be a part of the "way," and Mr. Allen said it is part of Walnut Place.

Avi Liss asked Mr. Gladstone if any improvements will be provided on the triangle area of Walnut Place. Mr. Gladstone said no. Mr. Gladstone rebutted Mr. Allen's argument that the new driveway would have a detrimental impact on safety.

Mr. Allen said this case creates a new nonconformity.

Charlie Ames, 27 Walnut Place, said that the applicant is looking to take a free ride on the backs of residents of Walnut Place. He said that the Zoning By-Law requirements are meant to protect the community.

David Thorne, 56 Walnut Place, lives next door to the DeWitts. He felt that this proposal will make the corner of Walnut Place a lot more difficult to negotiate. He said that there is currently a snow removal problem. He also pointed out that the DeWitts have never participated on Walnut Place and the upkeep of it. He said that this proposal would negatively affect the residents of Walnut Place.

Kitty Ames, 27 Walnut Place, said she is married to Charlie Ames. She is speaking for the neighbors in opposition to the requested relief. She said that they met with the DeWitts, and they indicated that the neighborhood would not be in favor of this proposal. She thought that this project would decrease the beauty of the road. She thought that the garage would be an unsightly nuisance.

The Chairman called upon Tim Richard, Planner, to deliver the findings of the Planning Board:

FINDINGS

Section 5.01 – Table of Dimensional Requirements (Footnote 1): A garage entrance is required to be 20' from the front property line.

Section 5.43 – Exceptions to Yard and Setback Regulations

Section 5.60 – Side Yard Requirements

Section 5.63 – Accessory Buildings or Structures in the Side Yard

Section 5.70 – Rear Yard Requirements

Section 5.71 – Projections into Rear Yards (roof at rear door of principal structure closer than 8 feet to accessory structure)

Section 5.72 – Accessory Building or Structure in the Rear Yard)

Closer than 6 feet to the side yard.

Closer than 6 feet to the rear yard.

Section 6.04.5.c.1 – Design of All Off-street Parking Facilities

Section 6.04.5.c.3 – Design of All Off-street Parking Facilities

Dimensional Requirements	Allowed	Existing	Proposed	Finding
Side Yard Setback	6'	0.9'	0.9'	Special Permit*
Rear Yard Setback	6'	1.2'	1.2'	Special Permit*
Parking Area Setback (Front)	20'	8'	8'	Special Permit*
Parking Area Setback (Side)	5'	0.9'	0.9'	Special Permit*
Parking Area Setback (Rear)	5'	1.2'	1.2'	Special Permit*

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

Section 8.02.2 – Alteration or Extension: Alteration or extension of a non-conforming condition, requires a special permit.

Tim Richard said the Planning Board is supportive of this proposal to rehabilitate and expand the garage. The petitioners have modified the proposed design in order to retain the historic look and feel in response to suggestions by the Preservation Commission. Some of these suggestions were not mandatory as much of the garage is not visible from a public way. The Board feels that the retention of the historic appearance of the garage and the added landscaping serve as counterbalancing amenities. It is the Planning Board's opinion that the right to use Walnut Place is a private legal matter; however, the Planning Board did not believe the use of Walnut Place by two more cars would present an unsafe condition.

Therefore, the Planning Board recommended approval of the site plan by J.F. Hennessy Co., dated 9/17/13, and the floor plans and elevations by James Beasley, dated 3/4/14, subject to the following conditions:

1. Prior to issuance of a building permit, a final landscaping plan indicating all counterbalancing amenities, shall be submitted to the Assistant Director for Regulatory Planning for review and approval.
2. Prior to issuance of a building permit, final building elevations, and garage materials, shall be submitted to the Preservation Commission for review and approval, with a copy of the approved plans submitted to the Planning Division.
3. Prior to issuance of a building permit, the applicant shall submit to the Building Commissioner to ensure conformance to the Board of Appeals decision: 1) a final site plan, stamped and signed by a registered land surveyor or engineer; 2) final building elevations, stamped and signed by a registered architect; 3) a final landscaping plan, stamped and signed by a registered landscape architect; and 4) evidence the Board of Appeals decision has been recorded at the Registry of Deeds.

The Chairman called upon Michael Yanovitch, Chief Building Inspector, to deliver the comments of the Building Department. Mr. Yanovitch clarified that the property line along Walnut Place has always been a front yard, and that status is not changing with this proposal. He questioned whether the proposal meets the requirements for a special permit under **Section 9.05** of the Zoning By-Law. Mr. Yanovitch said that if the Board finds the proposal meets the requirements of **Section 9.05**, the Building Department will work with the petitioners to ensure compliance with the Building Code as well as any conditions of the special permit.

Attorney Scott Gladstone clarified that the petitioners wanted this proposal because the existing 100-foot-long driveway had become a hardship for them, and the existing garage only has parking for one car. Mr. Gladstone said the proposal would be a great benefit to them, especially in the Winter.

Dennis DeWitt, petitioner, said the process had been disappointing, and he would not have preferred it to go the way it did.

Chairman Jesse Geller said there is a major question of property rights associated with this proposal, but that question must be decided in another venue and would not play into any decision by the Board of Appeals. Mr. Geller pointed out that the petitioners are proposing to restore an historic structure and install landscaping as counterbalancing amenities. Mr. Geller said he also thought that Walnut Place has always been a front yard for the property. Mr. Geller said he thought a site visit would be particularly helpful with this case to better enable the Board to consider whether the standards required for granting a special permit under **Section 9.05** of the Zoning By-Law are satisfied. Mark Zuroff agreed that a site visit would be useful.

Mark Zuroff asked if the petitioners would be willing to participate in the association that manages Walnut Place. Dennis Dewitt said that they would certainly like to be a part of the neighborhood association.

The Board agreed to continue the case to the September 4, 2014, at 7:00 pm following the site visit that morning.

On September 4, 2014, at 7:00 p.m. the Board reconvened the Hearing. Chairman Jesse Geller called the meeting to order and noted that the Board had concluded all testimony on August 14th, and that the purpose of the continued Hearing was to allow the Board to complete its deliberations and make a decision.

Mr. Liss said the proposed garage improvements comply with all relevant conditions for approval under **Section 9.05** of the Zoning By-Law, and there is no foreseeable negative impact on the neighborhood. Additionally, Mr. Liss indicated that during the site visit, two cars were parked on Walnut Place at the location of the proposed new access point triangle, and vehicles were able to pass on Walnut Place with minimal difficulty. Lastly, Mr. Liss encouraged the petitioner and abutters to work together moving forward in order to achieve mutually beneficial use of Walnut Place.

Mark Zuroff commented that the petitioners retain the right to improve the garage and construct a driveway on their own property. Mr. Zuroff agreed that relevant portions of **Section 9.05** are adequately met, although the proposal is weak on counterbalancing amenities provided by the proposed project, aside from the rehab of the garage structure itself, which is currently in poor condition. The morning site visit indicated that safe vehicle and pedestrian use of Walnut Place will remain if this project does occur.

Mr. Zuroff also discussed the issue of seasonal use of the secondary access point on Walnut Place by highlighting that the proposal will only result in two new vehicles utilizing Walnut Place, and this use may often only occur during the winter season and during times of inclement weather. Additionally, the site visit indicated that few young children currently live in the neighborhood and utilize the triangle as a recreation space, although neighborhood populations do change. Mr. Zuroff noted that the petitioners have also offered to contribute to the maintenance of the private way, through the Walnut Place Neighborhood Association, in acknowledgment of this new vehicular use of Walnut Place. Lastly, Mr. Zuroff stated that very few persuasive arguments against the proposal have been raised, and that the intent of Brookline

zoning regulations is to allow residents to maximize property use while maintaining a safe environment for surrounding residents.

Chairman Jesse Geller said that although there is a dispute whether the petitioners have legal access to Walnut Place, that issue remains outside the scope of this hearing. Mr. Geller said that while he acknowledged the issues presented concerning the title dispute, resolution is not required in order to reach a decision for the requested zoning relief. Mr. Geller dismissed Mr. Allen's argument that 94 Upland Road lacks adequate frontage along Walnut Place and that a variance is required because the property's frontage requirements are already met on Upland Road.

Mr. Geller said that the proposal meets the requirements of **Section 5.43** of the Zoning By-Law because the applicant is providing measures to offset the relief from side and rear yard setback requirements, in particular, retaining the existing structure and landscaping. Mr. Geller said the largest challenge for the petitioners is to meet the conditions for granting a special permit as established by **Section 9.05**. Mr. Geller said that in his opinion the proposal presents no adverse effect on the Walnut Place neighborhood; his concern regarding a possible blind curve was alleviated by the site visit. Mr. Geller said there is no adverse impact on vehicular/pedestrian use, no more than what may already exists, and the proposal represents an appropriate use of the property; the garage already exists and is only being improved – wisteria may be kept as an aesthetic/screening measure. Mr. Geller said increased use of Walnut Place may not be ideal, but it certainly does not increase the public safety risk. Mr. Geller concluded that the 94 Upland Road proposal meets the standards required for the relief requested, and reiterated Mr. Liss' suggestion that the petitioners and the neighborhood work together to attain a mutually satisfactory agreement, rather than resorting to legal action.

The Board deliberated on the merits of special permit relief as requested. The Board voted unanimously that the requirements have been met for the issuance of a special permit under Sections 5.43, 8.02.2 and 9.05 of the Zoning By-Law. The Board made the following specific findings pursuant to said Section 9.05:

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

The Board then proceeded to discuss appropriate conditions for the requested relief. Mark Zuroff suggested a number of possible conditions for consideration: the petitioner may not park on the triangle area of Walnut Place; the petitioners' vehicles will never block vehicular mobility along Walnut Place; the petitioner will contribute to the Walnut Place Neighborhood Association, both financially and otherwise, at the same level as other members if invited to join the association; the petitioner will not interfere with the use of Walnut Place during periods of snow removal from the triangle.

Avi Liss suggested the petitioners consider permeable pavers or heating elements, which could be relatively affordable considering the small size of the triangle area.

Jesse Geller said if the petitioners have the right to access their property from Walnut Place then he has the right to park on Walnut Place as much as any other resident along the private way; however, if the petitioner voluntarily agrees to the condition, then a condition to that effect may be appropriate.

Attorney Jeffrey Allen, acknowledging the Board's decision asked the Board to clearly indicate for the record that the Board is not making a determination of whether or not the petitioner has legal access to Walnut Place or has the right to make improvements to the triangle area of Walnut Place. Mr. Geller asked if any other neighbor along Walnut Place has the general right to make improvements to the private way. Mr. Allen said only the Neighborhood Association has that authority. Mr. Geller then responded that the Board was not making any determination with respect to title or access rights nor as to the petitioners' right to make any improvements within the triangle of the public way.

Mr. Allen argued that the no parking condition may be appropriate in this case since the petitioner requires a special permit to construct the access from Walnut Place unlike all of the other residents of Walnut Place. Mr. Allen said that a condition allowing use of the garage and Walnut Place access only during the winter months is excellent, noting it would reduce traffic along Walnut Place. Mr. Allen also noted that eight children do live on Walnut Place. Mr. Allen then said that no discussion has occurred regarding the possibility of granting a special permit subject to a court-indicated right to Walnut Place access and neighborhood association membership. This scenario would allow for the petitioner to begin and complete construction that may ultimately be unusable based on future court findings. Jesse Geller responded that any risk associated with such a scenario is placed on the petitioners.

Jesse Geller asked Attorney Scott Gladstone if he had any response to the proposed conditions. Mr. Gladstone said the petitioners would agree to not park on the triangle, and suggested accordingly that no other resident of Walnut Place be allowed to park on the triangle as it would block the petitioners' driveway access. Mr. Geller stated that the proposed condition

would be applicable to the petitioners only, and applicable law and the parties' relative property rights would govern whether other residents of Walnut Place may park within the triangle.

Mr. Gladstone said the petitioners do not agree with the condition limiting the use of the garage only during the winter months, since the shorter garage access represents a significant life improvement to them throughout the year. Finally, Mr. Gladstone said the petitioners agree to a condition indicating that no improvements will be made by the petitioners within the triangle area.

Jesse Geller and Michael Yanovitch both expressed concern that the Building Department might have difficulty enforcing a condition requiring membership in and contributions to the Walnut Place Neighborhood Association. Jeffrey Allen said that the Walnut Place Neighborhood Association could notify the Building Department of non-compliance in writing.

Jesse Geller said that a proposed condition limiting use of the garage to the winter months is impractical, is not agreed to by the petitioner, and should not be added.

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

- 1. Prior to issuance of a building permit, a final landscaping plan indicating all counterbalancing amenities, shall be submitted to the Assistant Director for Regulatory Planning for review and approval. The applicant is encouraged to retain the wisteria/vines along the garage to provide screening.**

2. Prior to issuance of a building permit, final building elevations, and garage materials, shall be submitted to the Preservation Commission for review and approval, with a copy of the approved plans submitted to the Planning Division.
3. Under no circumstances shall the applicant park vehicles in the “triangle” area of Walnut Place, immediately adjacent to the garage’s rear access.
4. If allowed by the Association, the applicant shall contribute, as required, to the Walnut Place Association, and abide by all commonly enforced rules and regulations applicable to all members. The applicant shall make accommodations for snow removal so that accumulation of snow and ice doesn’t interfere with the use of the private way.
5. Prior to issuance of a building permit, the applicant shall submit to the Building Commissioner to ensure conformance to the Board of Appeals decision: 1) a final site plan, stamped and signed by a registered land surveyor or engineer; 2) final building elevations, stamped and signed by a registered architect; 3) a final landscaping plan, stamped and signed by a registered landscape architect; and 4) evidence the Board of Appeals decision has been recorded at the Registry of Deeds.

Unanimous decision of the
Board of Appeals

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TOWN OF BROOKLINE
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2014 OCT 30 P 4:09


Jesse Geller, Chairman

Filing Date: 10/30/14
Pat Ward, Town Clerk

