



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

# *Town of Brookline*

## *Massachusetts*

Town Hall, 1<sup>st</sup> 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. 2014-0077  
SAMUEL & SONIA SCHNEIDER  
260 BEVERLY ROAD, BROOKLINE, MA

Petitioners, Samuel and Sonia Schneider applied to the Building Commissioner for permission to legalize a side-yard setback and approve floor area relief to create a buildable adjacent rear lot. 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 January 29, 2015 at 7:00p.m., in the Selectmen's Hearing Room as the date, time and place of a hearing for the appeal. Notice of the hearing was mailed to the Petitioners, 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 January 8, 2015 and January 15, 2015 in the Brookline Tab, a newspaper published in Brookline. A copy of said notice is as follows:

### **NOTICE OF HEARING**

Pursuant to M.G.L., C. 40A, the Board of Appeals will conduct a public hearing at Town Hall, 333 Washington Street, Brookline, on a proposal at:

**260 BEVERLY RD – LEGALIZE SIDE-YARD SETBACK AND PROSPECTIVELY APPROVE FLOOR AREA RATIO (FAR) RELIEF in an S-7, Single-Family residential district, on January 29, 2015, at 7:00 PM in the 6<sup>th</sup> Floor Selectmen’s Hearing Room (Petitioners: SCHNEIDER SAMUEL M & SONIA P; Owner: SCHNEIDER SAMUEL M & SONIA P) *Precinct 16***

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

- 1. Section 5.43: Exceptions to Yard and Setback Regulations**
- 2. Section 5.09.2.j: Design Review**
- 3. Section 5.22.3.b.1.b: Exceptions to Gross Floor Area (FAR) for Residential Units**
- 4. Section 5.60: Side-yard Requirements**
- 5. 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](http://www.brooklinema.gov).*

*The Town of Brookline does not discriminate on the basis of disability in admission to, access to, or operations of its programs, services or activities. Individuals who need auxiliary aids for effective communication in Town programs and services may make their needs known to **Robert Sneirson, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone: (617) 730-2328; TDD (617)-730-2327; or email at [rsneirson@brooklinema.gov](mailto:rsneirson@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 Jesse Geller and Board Members Johanna Schneider and Avi Liss. The case was presented by Bailey C. Gaffney, Law Office of Robert L. Allen, Jr. LLP, 300 Washington Street, Second Floor, Brookline, Massachusetts 02445. Ms. Gaffney requested that the Board continue the hearing to March 26, 2015. The Board granted Ms. Gaffney’s request for a continuance.

The hearing was continued to March 26, 2015. Present at the continued hearing was Chairman Jesse Geller and Board Members Jonathan Book and Mark Zuroff. At the continued hearing Chairman Geller motioned to re-open the hearing. The motion was adopted and the hearing re-opened.

The case was presented by Robert L. Allen Jr., Law Office of Robert L. Allen, Jr. LLP, 300 Washington Street, Second Floor, Brookline, Massachusetts 02445. Also in attendance was Samuel Schneider, a Petitioner for the property located at 260 Beverly Road.

Chairman Geller called the hearing to order at 7:30 p.m. Attorney Allen stated that the Petitioners propose to legalize a side-yard setback created by an addition built with a building permit in 2003 and approve relief to create a buildable adjacent rear lot at 0 Wallis Road.

Mr. Allen presented to the Board a background of the Petitioners and the property, stating that Mr. Schneider purchased 260 Beverly Road and 0 Wallis Road in 2002. Mr. Allen stated that the property is considered a through lot because the contiguous lots front on Beverly Road and Wallis Road. Mr. Allen noted that 260 Beverly Road has a separate deed recorded at the Norfolk Registry of Deeds and the Town of Brookline Assessor's Office taxes 0 Wallis Road as a separate buildable lot that meets the minimum lot size requirements for the S-7 District (7,000 square feet). He stated that in 2003, Mr. Schneider submitted an application to the Building Department with the intent to increase the livable floor area for 260 Beverly Road and the Building Department issued a by-right building permit. Mr. Allen noted that the permit was issued in error because both lots were included in the floor area ratio calculation. He stated that the increase in floor area without the grant of a special permit resulted in the merger of 260 Beverly Road and 0 Wallis Road, which rendered 0 Wallis Road un-buildable for a single-family home.

Mr. Allen stipulated that the 2003 alterations were worthy of special permit relief at the time the building permit was issued. Mr. Allen stated that 260 Beverly Road and 0 Wallis Road have always been viewed as separate lots, and the applicant wishes to maintain a buildable lot at 0 Wallis Road (Parcel ID: 393-21-00).

Board Member Jonathan Book questioned how this request is unique from 81 Spooner Road, LLC v. Zoning Bd. Of Appeals of Brookline, 461 Mass. 692, 964 N.E.2d 318 (2012), a controversial Board of Appeals case dealing with the doctrine of merger, subdivision, and floor area ratio. Mr. Allen stated that the Petitioners are seeking special permit relief, as opposed to a variance, and both of these lots in question meet the lot size requirement. The Petitioners are not creating a non-conforming lot, but rather seeking to maintain two separate conforming lots. Mr. Book questioned why the Petitioners are seeking this relief more than 10 years later. Mr. Allen stated that the Petitioners recently submitted plans to complete a driveway improvement, at which time the Building Department identified the 2003 error. Mr. Allen stated that the Petitioners wish to legalize the 0 Wallis Road lot and clean the chain of title.

Chairman Geller questioned how the two lots are currently taxed. Mr. Allen stated that they are taxed separately and 0 Wallis Road lot is taxed as a buildable lot. Mr. Geller suggested that the requested special permit relief is neither retroactive nor prospective; instead, the Petitioners are requesting to legalize 260 Beverly Road lot because it does not currently conform to floor area ratio or side-yard setback requirements. Mr. Zuroff agreed and stated that the 2003 renovation meets the standards for a special permit. He stated further that the merger doctrine is not of significant concern in this instance.

Attorney Allen stated that the Petitioners request special permit relief pursuant to Town of Brookline Zoning By-Law Sections 5.09.2.j for design review of an exterior addition, 5.22.3.b.1.b for an increase in floor area up to 108%, 5.60 for a non-conforming side-yard-setback, and 8.02.2.

Attorney Allen discussed special permit relief under Section 9.05 of the Zoning By-Law arguing: (1) the specific site is an appropriate location for such use where single-family use will remain the same and will maintain the value of the 7.035s.f. Wallis Road lot and the lot meets the minimum lot size requirement; (2) there will be no adverse effect on the neighborhood where 29 abutters have signed

a petition supporting the legalization of the side-yard setback, and without relief the Petitioners would be unable to sell 0 Wallis Road; (3) there will be no nuisance or serious hazard to vehicles or pedestrians where the proposal does not depart from the parking scheme approved by the Building Department in 2003; (4) adequate and appropriate facilities will be provided for the proper operation and proposed use; and (5) the development will have no effect on the supply of housing available for low and moderate income people, but will allow a family that is entrenched in the community to remain in this neighborhood with their family.

Mr. Allen discussed zoning relief under **Section 5.43** of the Zoning By-Law, where the Board of Appeals may waive the side-yard setback requirement if a counterbalancing amenity is provided. Attorney Allen stated that landscaping features were installed in 2003, which should serve as the counterbalancing amenities for dimensional relief requested.

Zoning Board of Appeals Chairman Geller asked if anyone wished to speak in favor of the application. Stephen Sousa, 27 Wolcott Road, commented that the home is well designed and fits the character of the neighborhood. Mr. Schneider has been a great neighbor and many residents in the area perceived the property as two separate lots.

Zoning Board of Appeals Chairman Geller asked if anyone wished to speak in opposition to the application. No one spoke in opposition to the proposal.

John Rosa, Zoning Coordinator for the Town of Brookline, delivered the findings of the Planning Board:

1. **Section 5.09.2.j – Design Review:** Any exterior addition for which a special permit is requested pursuant to Section 5.22 requires a special permit subject to the design review standards listed under Section 5.09.4 (a-1). The Planning Board recognized the uniqueness of design review for this application because non-compliant construction has already been completed.
  - A. **Relation of Buildings to Environment:** The single-story rear addition is the only increase in useable floor area that altered the existing building footprint. Completed alterations did not

result in the loss of trees and generated minimal increase in terms of shading and runoff. The natural terrain of the lot was not altered and a concrete foundation for the rear addition effectively mitigates soil erosion.

B. Relation of Buildings to the Form of the Streetscape and Neighborhood: The entirety of the structure remains below 35 feet, as required within the S-7 district. Design elements were included to maintain architectural consistency with the existing structure and neighborhood. These design elements were also incorporated in an effort to reduce the overall visual impact of additional massing.

C. Open Space: Useable open and landscape space is unchanged aside from the single-story rear addition and the installation of a rear deck that required no zoning relief.

2. Section 5.22.3.b.1.b – Exceptions to Gross Floor Area (FAR) for Residential Units
3. Section 5.43 – Exceptions to Yard and Setback Regulations
4. Section 5.60 – Side Yard Requirements

	Required	Prior to Renovation	Existing	Finding
<b>Floor Area Ratio***</b>	.35	.39	.37	Special Permit*
<b>Floor Area</b>	2,662 s.f.	3,033 s.f.	2,877 s.f.	
<b>FAR Percentage***</b>	100%	114%	108%	
<b>Side-Yard Setback</b>	7.5'	6.7'	6.7'	Special Permit**

Under Section 5.22.3.b.1.b, the Board of Appeals may grant a special permit for an exterior addition that is less than or equal to 20% of the permitted gross floor area.

\*\* Under Section 5.43, the Board of Appeals may waive dimensional requirements in lieu of other dimensions if the applicant provides counterbalancing amenities.

\*\*\* FAR calculations include 7,606 Beverly Road lot only

**Section 8.02.2 – Alteration or Extension** – A special permit is required to alter this pre-existing non-conforming structure.

Mr. Rosa stated that the Planning Board unanimously supported the request. He stated the as-built structure is consistent with surrounding homes in terms of design and massing. He noted that the abutter support underscores the fact that there is no negative impact on the neighborhood and the floor area ratio is below 120% of allowed as required for special permit relief. Therefore, the Planning Board recommended legalization of the non-conforming side-yard condition, and approval of setback and floor

area ratio conditions, per the site plans submitted by John R. Hamel, dated 4/23/04, and building plans submitted by Design Associates Inc., dated 11/17/03, subject to the following condition:

1. 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) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Mr. Allen suggested that the submission of a site plan is unnecessary because both the Planning and Building Departments have certified site plans on record.

Mr. Rosa delivered the findings for Mike Yanovitch, Interim Chief Building Inspector. He stated that the Building Department had no objection to the requested relief. He stated that the Building Department erred in issuing the 2003 permit without citing design review, side-yard setback, and floor area relief. This resulted in the lots merging, which threatens future construction at 0 Wallis Road. Finally, he stated that if the Board of Appeals finds that the standards for special permit relief under **Section 9.05** of the Zoning By-Law have been met, this will serve to rectify the prior error.

In deliberation, Board Member Jonathan Book expressed apprehension due to comparisons with 81 Spooner Road, LLC v. Zoning Bd. Of Appeals of Brookline, 461 Mass. 692, 964 N.E.2d 318 (2012) and the merger of these lots into one large lot.

Chairman Geller cautioned that it is difficult to determine intent in cases such as this and it is fair to be cautious whenever the merger doctrine or infectious invalidity is considered. Mr. Geller noted that the Petitioners' intent was transparent from the outset and the Building Department acknowledged the prior error.

Mr. Zuroff distinguished 81 Spooner Road, LLC v. Zoning Bd. Of Appeals of Brookline and stated that the requested special permit relief is minimal. Mr. Book concurred.

Mr. Geller stated that the requirements under Section 9.05 of the Zoning By-Law are satisfied as stated by Mr. Allen. Mr. Geller also noted that there has been no neighborhood opposition. Mr. Book and Mr. Zuroff concurred with this statement.

The Board then determined, by unanimous vote that the requirements for relief by special permit from the application of the provisions of 5.09, 5.20, and 5.60 of the Zoning By-Law pursuant to 5.09.2.i, 5.22.3.b.1.b, 5.43, 8.02.2, and 9.05 of the Zoning By-Law were met. 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.
- e. Development will have no effect on the supply of housing available for low and moderate income people.

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

- 1. The applicant shall submit to the Building Commissioner for review and approval for conformance to the Board of Appeals decision: 1) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Unanimous Decision of  
The Board of Appeals

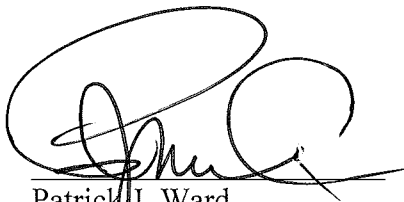
Filing Date: 6/29/15

  
\_\_\_\_\_  
Jesse Geller, Chairman

RECEIVED  
TOWN OF BROOKLINE  
TOWN CLERK  
2015 JUN 29 P 2:23

A True Copy  
ATTEST:



A handwritten signature in black ink, appearing to read 'Patrick J. Ward', written over a horizontal line.

Patrick J. Ward  
Clerk, Board of Appeals