



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. 2015-0058
EDOUARD & RENATA ANDROSENKO
160 BELLINGHAM ROAD, BROOKLINE, MA

Petitioner, Edouard Androsenko, applied to the Building Commissioner for permission to convert remove and replace roof, finish attic, and renovate first floor. 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 21, 2016 at 7:10 p.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 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 January 7, 2016 and January 14, 2016 in the Brookline Tab, a newspaper published in Brookline. A copy of said notice is as follows:

NOTICE OF HEARING

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

160 BELLINGHAM ROAD– RECONSTRUCT SECOND STORY AND EXPAND LIVING SPACE, in an S-10, Single-Family, residential district, on January 21, 2016, at 7:10 PM in 6th Floor Selectmen's Hearing Room (Petitioner/Owner: Edouard Androsenko) Precinct 16

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

1. Section 5.20: Floor Area Ratio Regulations

- 2. Section 5.43: Exceptions to Yard and Setback Regulations**
- 3. Section 5.60: Side Yard Requirements**
- 4. Section 8.02.2: Alteration or Extension**
- 5. Any Additional Relief the Board May Find Necessary**

Hearings may be continued by the Chair to a date/time certain, with no further notice to abutters or in the TAB. Questions about hearing schedules may be directed to the Planning and Community Development Department at 617-730-2130, or by checking the Town meeting calendar at: www.brooklinema.gov.

*The Town of Brookline does not discriminate on the basis of disability in admission to, access to, or operations of its programs, services or activities. Individuals who need auxiliary aids for effective communication in Town programs and services may make their needs known to **Robert 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*

At the time and place specified in the notice, this Board held a public hearing. Present at the hearing was Chairman Mark G. Zuroff and Board Members Avi Liss and Kate Poverman. The case was presented by the attorney for the Petitioners, Robert L. Allen, Jr., Law Office of Robert L. Allen, Jr. LLP, 300 Washington Street, Second Floor, Brookline, Massachusetts 02445. Also in attendance was the Petitioner Edouard Androsenko.

Chairman Zuroff called the hearing to order at 7:35 p.m. Attorney Allen stated that the subject property is located in the S-10 (Single-Family) District. Attorney Allen stated that the Petitioner purchased the home knowing that the roof condition was poor due to winter storm damage. He stated that upon purchasing the property, the Petitioner hired an engineer to certify that the roof was structurally unsafe. Attorney Allen confirmed that the Petitioner removed the roof and that a letter from the engineer was submitted to Planning Staff.

Attorney Allen stated that the Petitioner proposes to reconstruct the second story and increase the overall height in order to improve the functionality of the second floor. Attorney Allen stated that the Building Department does not consider the proposal to be an attic conversion under **Section 5.22.2** of the Zoning By-Law because the attic was demolished. Instead, he stated that the Building Department

interprets this proposal to be an exterior addition, thereby eliminating the 150% by-right option under **Section 5.22.2.b** of the Zoning By-Law.

Attorney Allen stated that the Planning Board unanimously supported the proposal. He noted the widespread neighborhood support for the project and stated that the small two story design is consistent with the streetscape. Mr. Allen stated that the resulting gross floor area does not “overwhelm” the lot.

Attorney Allen stated that the Petitioner seeks relief pursuant to **Section 5.20** to increase the existing non-conforming floor area and **Section 5.60** and **8.02.2** for the existing, non-conforming side yard setback. Attorney Allen stated that the Petitioner requests to expand the floor area ratio (FAR) in a manner that does not alter the existing footprint of the structure.

Attorney Allen stated that alterations to a pre-existing, non-conforming single-family dwelling were analogous to the Commonwealth in Gale v. Zoning Bd. Of Appeals of Gloucester, where the court determined that only a special permit pursuant to M.G.L. c. 40A, Section 6 was required to “change, extend, or alter” a pre-existing non-conforming residential structure as long as it was not “substantially more detrimental to the character of the neighborhood than the original structure of use.” 80 Mass. App. Ct. 331-333 (2011). He stated that in Deadrick v. Zoning Bd. Of Appeals of Chatham, the Court narrowed the legal construction of Gale, by stipulating that “intensifying” existing non-conformities may trigger special permit review upon a finding of no substantial detriment, while the “creation of new nonconformities requires a variance.” 85 Mass. App. Ct. 539, 549 (2014).

Attorney Allen stated that 160 Bellingham Road is a single-family dwelling, located in the S-10 Single-Family District. Mr. Allen confirmed that the allowable FAR is 0.3, the existing FAR is 0.41, and the proposed is 0.45. He stated that the FAR is a pre-existing, non-conforming condition that will be intensified by the additional floor area. He stated that although the use will be intensified, there will be no substantial detriment under the second sentence of M.G.L. c. 40A, Section 6 where no new zoning nonconformities will be triggered and the majority of the neighborhood is supportive.

Attorney Allen discussed special permit relief under Section 9.05 of the Zoning By-Law arguing: (1) the specific site is an appropriate location in the S-10 District, the additional floor area is minimal and the reconstruction will make the roof more consistent with the surrounding homes; (2) there will be no adverse effect on the neighborhood where the neighbors have been supportive of the conversion and the use will remain a single-family home; (3) the condition that created the nuisance and/or serious hazard to vehicles and pedestrians will be improved by constructing a roof that is structurally sound; (4) adequate and appropriate facilities will be provided for the proper operation and proposed use; and (5) development will not have a significant adverse effect on the supply of housing available for low and moderate income people and will improve the supply of affordable housing within the Town. Finally, Attorney Allen stated that the improved structure will enhance the taxable asset and preserve a structure that is relatively affordable.

Chairman Zuroff requested that Michael Yanovitch opine on the Petitioners request for the applicability of the Section 6 finding.

Mr. Yanovitch stated that similar FAR requests will continue to arise. Mr. Yanovitch stated that the Town could attempt to codify language in the Zoning By-Law to mirror the Section 6 intent but currently the Town is reliant upon the state statute and case law on this matter. Mr. Yanovitch confirmed that generally accepted case law is clear that protection is provided to single and two-family dwellings to expand pre-existing non-conformities through a special permit evaluation rather than a variance if no new zoning non-conformities arise from the proposed alterations.

Zoning Board of Appeals Chairman Zuroff asked if there was anyone present who wished to speak in favor of this application. Stanley Robinowitz stated that he is a Town Meeting Member. Mr. Robinowitz stated that the proposed reconstruction is beneficial to both the property owner and the neighborhood. Mr. Robinowitz believed the Section 6 finding to be appropriate in this instance and stated his appreciation for the Board's review of this proposal.

Chairman Zuroff asked if there was anyone present who wished to speak in opposition to the application.

Saralynn Allaire stated that she is a Precinct 16 Town Meeting Member and a direct abutter to 160 Bellingham Road. Ms. Allaire expressed concern that large homes have been constructed in the neighborhood and asked the Board to consider the impact that the proposed increase in height may have on abutting residents

Jay Rosa, Zoning Coordinator for the Town of Brookline, delivered the findings of the Planning Board and the Building Department:

FINDINGS:

1. **Section 5.20 – Floor Area Ratio**
2. **Section 5.43 – Exceptions to Yard and Setbacks Requirements**

S-10 ZONING	Required / Allowed	Existing	Proposed	Finding
Floor Area Ratio	0.30 2,323 sf	0.41 3,168 sf (before attic demo)	0.46 3581 sf	Variance
		0.32 2,436 sf (after attic demo)		

3. **Section 5.60 – Side Yard Requirements**

S-10 ZONING	Required / Allowed	Existing	Proposed	Finding
Side Yard Setbacks	10 ft	8.9 ft	8.9 ft	Special Permit*/ Variance

*Section 5.43 – The BOA may waive yard and setback requirements if counterbalancing amenities are provided.

4. **Section 8.02.2 – Alteration or Extension** – A special permit is required for alterations to a dimensionally nonconforming structure.

Mr. Rosa stated that the Planning Board unanimously supported this proposed expansion of the second story. He stated that the Planning Board Members compared the proposal to an attic conversion even though the attic was demolished for structural reasons. He stated that the Planning Board noted that the subject property is undersized for the S-10 district. Mr. Rosa stated that the Board Members felt the

roof design could be modified to further reduce the gross floor area, but conceded that this strategy would not eliminate the need for variance relief.

Therefore, the Planning Board recommends approval of the plans by Professional Engineer Richard Volkin of RAV Design dated 6/12/2015 and revised 11/23/15, and the site plan by Professional Land Surveyor George C. Collins of Boston Survey Inc., dated 12/18/15, as submitted. The Planning Board supports the requested side yard setback relief and, should the Board of Appeals find that the project meets the criteria for granting a variance, the Planning Board would support an increase in the FAR, subject to the following conditions:

1. Prior to the issuance of a building permit, the applicant shall submit a final site plan, elevations, and floor plans subject to the review and approval of the Assistant Director for Regulatory Planning.
2. Prior to the issuance of a building permit, the applicant shall submit a final landscaping plan, screening the left side yard, subject to the review and approval of the Assistant Director for 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 floor plans and elevations stamped and signed by a registered architect; 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Mr. Rosa noted that he referenced side-yard setback relief that also represents a pre-existing non-conformity that will not be altered but rather extend in height. Attorney Allen confirmed that the Petitioner has agreed to landscaping improvements based on the Planning Board recommendation.

Michael Yanovitch, Chief Building Inspector, reviewed the findings of the Building Department. Mr. Yanovitch stated that the Building Department has no objection to the relief as requested. Mr. Yanovitch believed that the proposal warrants consideration by the Board for the M.G.L. c. 40A Section 6 finding. Mr. Yanovitch confirmed that prior roof demolition defines this project as an exterior addition rather than an attic conversion and therefore precludes the Petitioner from expanding the floor area to 150% of the allowed for this single-family district. Mr. Yanovitch noted that the Board is often

sympathetic to proposals that include an expansion of pre-existing non-conforming FAR if proposed alterations do not alter the footprint of the structure, which is the case for this property. Mr. Yanovitch confirmed that if the Board finds that the standard for special permit relief or the statutory requirements for a variance are met, the Building Department will work with the Petitioner to ensure compliance with imposed conditions and building codes.

In deliberation, Chairman Zuroff believed that the referenced case law applies in this matter leaving the Board with the determination of “substantial detriment” rather than the standards of a variance pursuant to M.G.L. c. 40A, Section 10. Mr. Zuroff believed that the Petitioner’s argument is sufficient, but cautioned the Petitioner to complete zoning due diligence prior to demolishing any structural elements.

Board Member Kate Poverman believed that the Deadrick precedent is applicable because the Petitioner proposes to expand existing non-conforming FAR that does not trigger new zoning non-conformities. Ms. Poverman agreed that the prior demolition creates a wrinkle in this interpretation, but ultimately believed the project was worthy of a M.G.L. c. 40A, Section 6 finding.

Board Member Liss concurred with both Mr. Zuroff’s and Ms. Poverman’s comments. Mr. Liss also agreed that the second story, as proposed, will not result in any substantial detriment to abutting residents. Mr. Liss stated that the massing of the proposed structure is consistent with other single-family homes in the area.

The Board then determined, by unanimous vote, that the requirements for special permit relief for Sections 5.60 and Section 8.02.2 of the Zoning By-Law pursuant to Section 5.43 of the Zoning By-Law and special permit relief for Section 5.20 of the Zoning By-Law pursuant to M.G.L. c. 40A, Section 6 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 not have any 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. Prior to the issuance of a building permit, the applicant shall submit a final site plan, elevations, and floor plans subject to the review and approval of the Assistant Director for Regulatory Planning.
2. Prior to the issuance of a building permit, the applicant shall submit a final landscaping plan, screening the left side yard, subject to the review and approval of the Assistant Director for 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 floor plans and elevations stamped and signed by a registered architect; 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Unanimous Decision of
The Board of Appeals

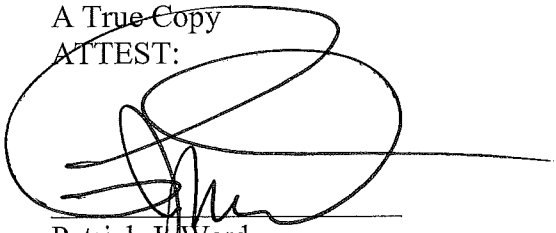
Filing Date:

2/17/16



Mark G. Zuroff, Chairman

A True Copy
ATTEST:



Patrick J. Ward
Clerk, Board of Appeals

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