



Town of Brookline

Massachusetts

BOARD OF APPEALS
Jesse Geller, Chairman
Jonathan Book
Christopher Hussey

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Patrick J. Ward, Clerk

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2015-0061
SUMEET SABHARWAL
172 DEAN ROAD, BROOKLINE, MA

Petitioner, Sumeet Sabharwal, applied to the Building Commissioner for permission to convert the attic and basement into livable space. 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 28, 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 14, 2016 and January 21, 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:

172 DEAN RD – CONVERT ATTIC AND BASEMENT TO HABITABLE SPACE in an S-25, Single-Family, residential district, on

January 28, 2016, at 7:10 PM in 6th Floor Selectmen's Hearing Room (Petitioner/Owner: Sumeet Sabharwal) Precinct 14

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 deems necessary:

- 1. Section 5.20: Floor Area Ratio**
- 2. 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*

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 Christopher Hussey and Johanna Schneider. The case was presented by the attorney for the Petitioner, 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's wife Vishakha Sabharwal and the Petitioner's architect, Stephen Sousa, Sousa Design Architects, 81 Boylston St, Brookline, MA 02445.

Chairman Geller called the hearing to order at 7:35 p.m. Attorney Allen stated that the Petitioner purchased the 2 ½ story single-family dwelling in 2015. He stated that the structure is over 100 years old and requires interior renovation. Mr. Allen stated that the Petitioner wishes to convert the basement and attic area to living space and construct an exterior second-story addition atop the existing sun room on the side of the home facing 164 Dean Road. Attorney Allen stated that the Planning Board did not review the proposed exterior addition, but the modification does not trigger any additional zoning relief

beyond **Section 5.20** of the Zoning By-Law. For this reason, Attorney Allen agreed that this proposal should go back before the Planning Board for final design review if approved by the Board of Appeals.

Project Architect Stephen Sousa, Sousa Design Architects, reviewed project details with the Board. Mr. Sousa stated that the Petitioner intends to utilize basement and attic space to expand the living area provided by the home and recapture the second floor above the existing single-story sunroom, specifically to extend the master bathroom area. Mr. Sousa stated that the proposed exterior addition will create 255 s.f. of new living space and the basement/attic conversion will capture 1,371 s.f. of living space. Mr. Sousa stated that the floor area increase does not alter the structural footprint and the majority of new floor area is located within the existing interior of the structure.

Chairman Geller questioned if and how the proposed shed dormer at the front contributes to the floor area calculation. Mr. Sousa stated that the shed dormer increases the gross floor area by 50 square feet. Mr. Sousa confirmed that the total proposed gross floor area of 5,905 s.f. will generate a floor area ratio of .41, which is 204% of the allowed floor area for this property (rather than .39 and 195% noted in his Zoning Legend).

Board Member Hussey requested additional detail regarding the increase in total bedrooms resulting from the revised proposal. Mr. Sousa stated that the reconfigured interior space includes 3 additional bedrooms for a total of 7 bedrooms.

Attorney Allen stated that alterations to a pre-existing, non-conforming single-family dwelling were analyzed by 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 172 Dean Road is a single-family dwelling, located in the S-25 Single-Family District. Mr. Allen confirmed that the allowable FAR is 0.2, the existing FAR is 0.296, and the proposed is 0.39. 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 and no new zoning nonconformities will be triggered. He further noted the majority of the neighborhood is supportive of this application.

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-25 District where the footprint remains the same and the exterior modifications are in keeping with many homes in the neighborhood; (2) there will be no adverse effect on the neighborhood where at least three immediate abutters have been supportive of the initial and revised proposals and the use will remain a single-family dwelling; (3) there will be no nuisance and/or serious hazard to vehicles and pedestrians from the alterations or during the period of construction; (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.

For these reasons, Attorney Allen stated that the Petitioner’s proposal can be characterized as an extension of the pre-existing nonconforming floor area ratio. He re-iterated that no additional zoning non-conformities arise from proposed exterior modifications and all floor area increases are contained within the existing footprint. Mr. Allen argues that the proposal may be granted through a special permit, rather than a variance, following a M.G.L c. 40A, Section 6 finding by the Board of Appeals that no new zoning nonconformity arises and the project does not result in substantial detriment to the surrounding neighborhood.

The Board had no further questions and Chairman Geller called for public comment in favor of, or in opposition to, the Petitioner’s proposal. No members of the public commented.

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

FINDINGS:

1. Section 5.20– Floor Area Ratio

	<u>Allowed</u>	<u>Existing</u>	<u>Allowed for Basemt/Attic Conversion</u>	<u>Proposed</u>	<u>Finding</u>
Floor Area Ratio (% of allowed)	.2 100%	.296 148%	.3 150%	.39 195%	SP*/Variance
Floor Area (s.f.)	2,890	4,279	4,335	5,650	

2. Section 8.02.1.a – Alteration or Extension: A special permit is required to alter and enlarge this non-conforming building.

Mr. Rosa stated that the Planning Board unanimously supported the proposed attic and basement conversion with the expanded front dormer. He noted that the Planning Board did not see or review the proposed side addition that is currently before the Board. Planning Board Members considered various design options for the front dormer, but ultimately agreed that the architect’s solution was the least impactful and fit with the existing character of the neighborhood. Therefore, the Planning Board recommended approval of the site plan by George C. Collins dated 8/25/15 and plans by Sousa Design, dated 10/8/15, subject to the following conditions:

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

Mr. Rosa suggested that condition #1 be modified to require Planning Board approval should the Board of Appeals grant the requested zoning relief.

Board Chairman Geller requested that Michael Yanovitch review the findings of the Building Department. Mr. Yanovitch stated that the Building Department does not object to the relief as requested. Mr. Yanovitch stated that the Board has increasingly heard requests for Section 6 findings, particularly related to the floor area. Mr. Yanovitch believed that case law on this matter is applicable and that it is worth noting that the proposed alteration to the non-conforming floor area is entirely contained within the existing footprint. Mr. Yanovitch confirmed that the Building Department will work with the Petitioner to ensure compliance with all imposed conditions and building codes if the Board grants relief.

Board Member Hussey stated that the proposed exterior addition above the sunroom provides a more generous living area but he did not see this floor area increase as a necessity from both an architectural and/or design standpoint. Mr. Hussey also stated that a reduction of finished basement or attic space would serve to decrease the level of overall non-conformity without limiting the interior functionality of the structure.

Board Chairman Geller stated that he is comfortable applying the Section 6 analysis to the proposed interior floor area expansion but the exterior addition creates difficulty in terms of considering what constitutes a substantial detriment, however, he is troubled by a proposed gross floor area that is greater than 200% of that which is allowed for this Zoning District. Mr. Geller commented that cited case law does not establish a cap in terms of how far a property owner may expand a particular pre-existing nonconformity. Mr. Geller also questioned the meaning of the term "reconstruct" under M.G.L. c.40A, Section 6 and the Zoning By-Law, respectively. Mr. Geller noted that the determination of substantial detriment should not be based simply on third-party testimony, abutter support letters in this

instance. Mr. Geller acknowledged that the footprint of the structure will not be altered despite the floor area increase and stated that the scale of the proposed exterior addition is not significant when considering the visual impact on a lot of this size.

Board Member Schneider agreed that current case law on this matter does not establish upper limits for nonconformity nor does it clearly define substantial detriment. Ms. Schneider believed that the Board is left with the current case law established by Deadrick, regardless of how precedent or refined limitations may evolve in the future. With this in mind, Ms. Schneider believed that this proposal before the Board aligns with the Deadrick precedent. Ms. Schneider also noted that the alteration of the pre-existing nonconforming floor area is not required to remain within the structural footprint. For these reasons, Ms. Schneider supported the request for a so-called Section 6 finding and believed that the project appropriately satisfies standards for the grant of a special permit in accordance with **Section 9.05** of the Zoning By-Law.

Board Chairman Geller and Board Member Hussey again expressed concern regarding the resulting floor area that is 200% of allowed for the District. However, Mr. Geller believed that the 200% is an arbitrary number that may or may not be relevant. Mr. Geller stated that this line of thinking really leaves the Board with a **Section 9.05** evaluation for the grant of a special permit when evaluating substantial detriment associated with the Section 6 finding.

Board Chairman Geller and Board Member Hussey agreed that the proposed interior conversion and the exterior addition satisfy the standards for the grant of a special permit under **Section 9.05** of the Zoning By-Law.

The Board then determined, by unanimous vote that the requirements for a special permit relief from application of **Section 5.20** of the Zoning By-Law pursuant to Sections **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.

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- 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.

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

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

Board Chairman Geller reminded the Petitioner that the proposal must come back before the Board of Appeals if the Planning Board does not support final elevations/floor plans, or if the proposal is substantially modified.

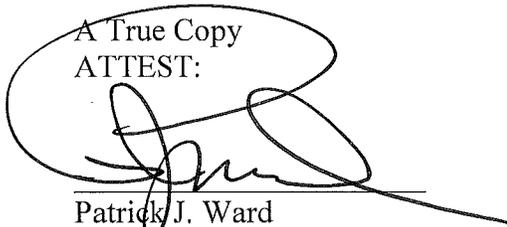
Unanimous Decision of
The Board of Appeals

Filing Date: 3/30/16



Jesse Geller, Chairman

A True Copy
ATTEST:



Patrick J. Ward
Clerk, Board of Appeal