



BOARD OF APPEALS
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Jonathan Book
Christopher Hussey

Town of Brookline Massachusetts

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TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2015-0054
CONGREGATION KEHILLATH ISRAEL
384 HARVARD STREET, BROOKLINE, MA

Petitioner, Congregation Kehillath Israel, applied to the Building Commissioner for permission to construct an 11,910 s.f. addition on the existing temple. 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 7:30 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:

384 HARVARD STREET– CONSTRUCT AN ADDITION AT THE SIDE OF THE EXISTING TEMPLE, in an M-1.0, Apartment House, residential district, on January 21, 2016, at 7:30 PM in 6th Floor Selectmen's Hearing Room (Petitioner/Owner: Congregation Kehillath Israel) *Precinct 9*

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 5.08.1 and 2: Exceptions to Dimensional Requirements for Uses 9 and 10**
- 2. Section 5.09.2.a and i: Design Review**
- 3. Section 5.10: Minimum Lot Size (See 5.08)**
- 4. Section 5.20: Floor Area Ratio (See 5.08)**
- 5. Section 5.60: Side Yard Requirements**
- 6. M.G.L. c. 40A §§ 3**
- 7. 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 project architect John Garrahan and landscape architect Joe Geller.

Chairman Zuroff called the hearing to order at 8:00 p.m. Mr. Zuroff stated that the proposal before the Board requires limited zoning relief for dimensional requirements and is before the Board primarily for design review. For this reason, Mr. Zuroff requested that the Petitioner focus details of the presentation on these matters specifically.

Attorney Allen stated that Congregation Kehillath Israel was organized on February 16, 1917 and is approaching the centennial anniversary. Attorney Allen stated that the Congregation has made an effort to restore this structure and provide necessary modernization and repair. He stated that the

Petitioner requests that the Board make a specific finding pursuant to M.G.L c. 40A, Section 3, that the Dover Amendment as well as its federal counterpart the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 USC 2000cc, et. seq. apply. Attorney Allen confirmed that if the Board makes a finding under the Dover Amendment, no special permit relief is required to proceed.

Joe Geller, Stantec Inc., 226 Causeway Street, Boston, MA 02113, reviewed project goals including the creation of a “multi-generational campus”, improved site accessibility and circulation, overall structural renovation, improved interior functionality, and improved site security. Mr. Geller stated that the new wing (north) will be curved in order to complement a restored memorial garden. Mr. Geller confirmed that several “declining” trees will be removed and new plantings will be installed. He concluded his comments by reviewing compliance with all setback and floor area requirements. Mr. Geller reiterated that zoning relief is only required for design review because proposed alterations/addition will be visible from Harvard Street.

John Garrahan, Handlin, Garrahan & Associates, 104 Mount Auburn Street, Cambridge, MA 02138, commended the Petitioner for engaging in a “noble” and “challenging” project. Mr. Garrahan stated that a clear effort was made to create an efficient and accessible campus that also restores the grandeur of the property. He stated that the primary structure was built in the 1920’s and therefore presents various grade changes and ADA compliance issues. Mr. Garrahan confirmed that the Petitioner has filed requests with the Architectural Access Board to gain relief for some aspects of the project that cannot comply with modern requirements, including the sanctuary balcony. He stated that new and reconfigured floor area will be used to house administration services, childcare/education activities, and a catering kitchen. Mr. Garrahan confirmed that existing meeting and sanctuary space will be restored as part of the overall renovation. He stated that the proposed addition will be constructed of glass cast stone to match the existing structure and glass. Mr. Garrahan stated that various plantings will also be installed along the Harvard Street lot line and the Petitioner will continue to work with the Town of Brookline to rework the effectiveness of the new front entry.

Attorney Allen reiterated to the Board that he believes this proposal can be accomplished “by-right.” Attorney Allen stated that case law exists to support his request to apply zoning protection under the Dover Amendment. Attorney Allen stated that RLUIPA provisions also protect this religious and educational facility from local land use regulations. Attorney Allen stated that M.G.L. c. 40A, Section 3 provides:

No zoning ordinance or by-law shall ... regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned ... by a religious sect or denomination; ... however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

Attorney Allen stated that applicable local regulations include bulk and massing, with which this proposal before the Board complies. Attorney Allen stated that relevant case law defines unreasonable regulations as those that, if applied, applicable local regulations include bulk and massing, with which this proposal complies. Attorney Allen stated that relevant case law defines unreasonable regulations as those that, if applied, would substantially diminish or detract from the usefulness of the proposed structure or there is an excessive cost for compliance without significantly advancing the municipalities concerns relating to safety, traffic, etc.

Attorney Allen stated that this entire proposal is aimed to enhance the religious use and functionality of the structure. Attorney Allen characterized the Petitioner’s design review process with the Planning Board and later the Preservation Commission as voluntary based on Dover Amendment provisions. Attorney Allen stated that the United States District Court of Massachusetts recognized RLUIPA provisions in Mintz v. Roman Catholic Bishop of Springfield, 424 F. Supp 2d 309, 317 (D. Mass. 2006) where the Court held that no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that

person, assembly, or institution is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

Attorney Allen stated that the local Building Commissioner has the authority to determine if Dover Amendment regulations are applicable but this determination is often sent to the Board of Appeals in Brookline for the sake of transparency and thorough public review. Attorney Allen concluded his comments by again requesting that the Board find that no special permit zoning relief is required based on applicable Dover Amendment provisions.

Board Member Kate Poverman questioned how a Board finding regarding the applicability of the Dover Amendment may impact future property alterations beyond this proposal. Attorney Allen stated that a finding by this Board will not necessarily carry over to future proposals for the subject property. Attorney Allen confirmed that the Petitioner has considered future residential development. He stated that if a proposal comes before this Board at a later time, the Petitioner would be required to establish a clear connection between residential and religious/educational uses in order for the Board to make another finding regarding the applicability of the Dover Amendment.

The Board had no further questions and Chairman Zuroff called for public comment in favor of, or in opposition to the Petitioner's proposal.

Jesse Geller stated that he is the Chairman of the Zoning Board of Appeals. Mr. Geller stated that he wished to speak in favor of the proposal and confirmed with Town Counsel that this position does not constitute a conflict of interest due to his position on the Board. Mr. Geller stated that his son attends school at the Temple and this proposal contributes to the viability of the property as a whole. Mr. Geller agreed that the current condition and configuration of the structure is not adequate and the proposal before the Board represents a vast improvement. Mr. Geller also stated that the Temple is an anchor for the community and he requested that the Board of Appeals support the Petitioner's proposal.

Norman Levinson stated that he has been a member of Congregation Kehillath Israel since the 1950's and he supports Mr. Geller's comments. Mr. Levinson stated that his family is involved in the

Congregation and he believes the proposed improvements will be an upgrade to the structure and the “fiber of the Jewish community”. Mr. Levinson also believed that proposed renovations will bring the Temple into the next century and will improve the Coolidge Corner/JFK Crossing area.

David Williams stated that he is a member of the Congregation Kehillath Israel Board and has been a member of the Congregation for the past 15 years. Mr. Williams stated support for the proposal and commended the Petitioner for designing a project that is conscious of the historic nature of the Temple and the neighborhood.

Dan Friedman, 24 Blake Road, stated that his family has participated in educational services provided by the Congregation and he believes that the current condition of the property does not represent the warmth of the community. Mr. Friedman urged the Board to support these necessary property improvements.

Polly Selkoe, Assistant Director of Regulatory Planning for the Town of Brookline, delivered the findings of the Planning Board and the Building Department:

FINDINGS:

1. Section 5.10: Minimum Lot Size (see 5.08)
2. Section 5.20: Floor Area Ratio (see 5.08)
3. Section 5.43: Exceptions to Yard and Setback Regulations (see 5.08)
4. Section 5.60: Side Yard Requirements (see 5.08)
5. Section 5.08.1 and 2: Exceptions to Dimensional Requirements for Uses 9 and 10
Except for pre-existing non-conformities of the front, side and rear yard setbacks of the existing buildings, no dimensional, nor setback relief, is required for the proposed addition. Therefore, relief under this section is not needed.
6. Section 5.09.2.a&i – Design Review
Because the Temple is located on Harvard Street, a special permit is required for design review under Section 5.09. However, since this religious use is protected under MGL c.40A, Sec. 3, any design review that had the effect of prohibiting the addition would not be legal. The design review standards listed under Section 5.09.4(a-1) are analyzed below and all have been met. The most relevant sections of the design review standards are described below:
 - a. Preservation of Trees and Landscape - Tree and soil removal outside the building footprint will be minimized although certain trees will have to be removed for the addition. Trees and other landscape features abutting the retail stores along Harvard Street will be preserved as much as possible. There will be no impact on trees in the public right of way or the Fuller Street parking lot. Additional landscaping is proposed in the garden and playground area as shown on the site plan.

- b. Relation of Buildings to Environment - The proposed addition is designed to transition the grade from the garden to the existing sanctuary building and to allow for the preservation of a significant portion of the existing garden.
- c. Relation of Buildings to the Form of the Streetscape and Neighborhood – The proposed development is consistent with the use, scale, setbacks and architecture of the existing buildings and the surrounding area. The cast stone façade on Harvard Street will be matched and existing colors from the copper domes and terra-cotta tiles will be used for the social hall addition in the garden.
- d. Open Space - The location and configuration of usable open space will include a garden area and pathway to the Fuller Street parking lot that will provide accessibility to the site. The building is designed to encourage social interaction, maximize its utility, and facilitate maintenance. All landscaped open space will be continuously maintained.
- e. Circulation— Pedestrian circulation will include ramps and walkways at several locations and access points to the Temple.
- f. Storm Water Drainage - Storm water will continue to be removed from all roofs, canopies and paved areas and carried away in an underground drainage system designed to meet the Town’s stormwater regulations.
- g. Safety and Security - The building will meet all code requirements for safety and security. With respect to personal safety, all open and enclosed spaces will be designed to facilitate building evacuation and maximize accessibility by fire, police, and other emergency personnel and equipment.
- h. Heritage - There will be no disruption to the historic or traditional uses of this structure. The project is designed to preserve a major historic element in the Community and to insure its continuous use for coming generations.
- i. Energy Efficiency – The building will be upgraded with new insulation, energy efficient lighting, heating and cooling systems and will seek to maximize energy-efficient technology.

Ms. Selkoe stated that the Planning Board supported the design and layout of the proposed addition. Ms. Selkoe confirmed that case law prevents a municipality from utilizing design review to prevent a religious use. Ms. Selkoe noted that the Temple structure is a National Register eligible property and therefore must review proposed alterations, specifically the removal of character defining features, with the Preservation Commission. Ms. Selkoe confirmed that this Preservation Commission review has not occurred and therefore she recommended minor modification of proposed special permit conditions. Ms. Selkoe stated that the Planning Board recommended approval of the architectural plans and site plan by Handlin, Garrahan, & Associates, registered architects, dated July 16, 2015, subject to the following revised conditions:

1. Prior to the issuance of a building permit, the applicant shall submit a final site plan including landscaping, floor plans and elevations stamped and signed by a registered architect, subject to the review and approval of the Assistant Director for Regulatory Planning and the Preservation Commission.

2. Prior to the 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 including landscaping, floor plans and elevations stamped and signed by a registered architect; 2) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Mr. Zuroff requested that Deputy Building Commissioner Michael Yanovitch review the findings of the Building Department. Mr. Yanovitch stated that the Building Department also has no objection to the relief as requested. Mr. Yanovitch believed that the applicability of Dover Amendment protection is compelling and agreed that religious institution design features cannot be dictated by a municipality. Mr. Yanovitch based his comment on the Court's reasoning in Martin v. The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141 (2001) where the Belmont Board of Appeals approval of a steeple spire height was upheld. Mr. Yanovitch also stated that it is common for zoning and preservation review to proceed concurrently if that is the desire of the property owner. Mr. Yanovitch also believed that RLUIPA may preclude the Preservation Commission from enforcing any design related modifications to the proposal. Mr. Yanovitch ensured that if the Board supports the Petitioner's proposal, the Building Department will work with the Petitioner to ensure compliance with building codes and any imposed conditions.

Attorney Allen reiterated that the Petitioner is requesting that the Board apply Dover Amendment standards thus eliminating the need for zoning relief and any subsequent conditions. Attorney Allen stated that the Petitioner is committed to working with the Preservation Commission, but they do not wish for conditions be placed on the project.

In deliberation, Board Member Avi Liss stated that he could opine on the significance and appropriateness of the proposed renovations but he believed that these issues were adequately addressed by the project team and members of the public. Mr. Liss believed that the proposal clearly falls under the guidelines of the Dover Amendment because all proposed modifications are directly related to religious use. For this reason, Mr. Liss did not believe that special permit relief is required and therefore conditions for the grant of a building permit may not be enforced. Mr. Liss reiterated that the Petitioner

intends to work with the Preservation Commission moving forward, particularly on the front stone façade portion of the addition that attaches the existing temple to the curved glass addition at the side.

Board Member Poverman also stated support for the project and noted that she is a former member of the congregation. Ms. Poverman stated that she would have preferred for the Preservation Commission to opine on the appropriateness of the proposed addition prior to this hearing, but acknowledged that it is the Petitioner's right to proceed through zoning and preservation review processes in the best manner that they see fit. Ms. Poverman stated that renovation work and the proposed addition are marvelous for the area and well designed for the needs of the congregation.

Chairman Zuroff stated that the proposed addition clearly falls under the protection of the Dover Amendment. Mr. Zuroff commended the Petitioner for an appropriate and effective design and noted public support for the project. Mr. Zuroff also agreed that the Board does not have the authority to impose conditions in accordance with Dover Amendment regulations.

The Board then determined, by unanimous vote, that the proposed improvements to Temple Kehillath Israel are protected under the provisions of the Dover Amendment and therefore do not require zoning relief.

Unanimous Decision of
The Board of Appeals

Filing Date: _____



Mark G. Zuroff, Chairman

A True Copy
ATTEST:

Patrick J. Ward
Clerk, Board of Appeals

