



Town of Brookline Massachusetts

BOARD OF APPEALS
Jesse Geller, Chairman
Jonathan Book
Christopher Hussey

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Patrick J. Ward, Clerk

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TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2016-0015
LINDSEY BADEN
201 SUMMIT AVENUE, BROOKLINE, MA

Petitioner, Lindsey Baden, applied to the Building Commissioner for permission to expand the second story of an existing single-family dwelling. 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 July 21, 2016 at 7:15 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 June 7, 2016 and June 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:

201 SUMMIT AVE – CONSTRUCT A SECOND STORY ADDITION in an S-7, Single Family, residential district, on July 21, 2016, at 7:15 PM in the 6th Floor Selectmen’s Hearing Room (Petitioner/Owner: BADEN LINDSAY R) *Precinct 11*

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 5.09.2.j: Design Review
3. Section 8.02.2: Alteration or Extension
4. Any Additional Relief the Board Deems 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 Jonathan Book and Board Members Christopher Hussey and Stephen Chiumentì. 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. Deputy Building Commissioner Michael Yanovich and Zoning Coordinator Ashley Clark were also present. Also in attendance was the Petitioner Lindsey Baden, and the project designer Tom Robinson.

Chairman Book called the hearing to order at 7:15 p.m. Attorney Allen waived the reading of the public hearing notice.

Attorney Allen stated that the subject property is located in the S-7 (Single-Family) District. Attorney Allen stated that the majority of single-family dwellings located in the surrounding Corey Hill neighborhood are two-story structures with multi-family residential structures. Mr. Allen noted that located immediately to the west of the subject property is a condominium building, The Grand (227 Summit Avenue) and the Summit Hill Condos (216 Summit Avenue).

Attorney Allen stated that the Petitioner proposes to expand the second story in order to improve the

functionality of the second floor. Attorney Allen stated that the allowable FAR in the S-7 District is .35. He stated that a neighborhood analysis was conducted which produced residential floor area ratios generally ranging from .28 to .46. He stated that the subject property is currently over the allowable .35, with a FAR of .36.

Attorney Allen stated that The Preservation Commission made a determination of significance and voted to uphold a demolition delay for one year. He indicated that the imposed demolition delay expired in June of 2015; therefore, the existing roof may be demolished.

Attorney Allen stated that the Petitioner proposes to add 928 square feet of livable area. Mr. Allen argued that because the house is currently over the allowable FAR, relief may be granted by special permit under M.G.L c. 40A, Section 6.

Attorney Allen stated that the Petitioner seeks relief pursuant to **Section 5.20** to increase the existing non-conforming floor area and **8.02.2** to alter a pre-existing nonconforming structure or use. 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 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).

Attorney Allen then yielded the floor to Mr. Robinson. Mr. Robinson reviewed the proposed plans with the Board. He noted that the subject property is on a sloped site and the basement is below grade. Mr. Robinson stated that raising the roof would capture master bedroom headspace. He stated that the proposal would maintain the brick and clapboard material used on many homes in the streetscape. Mr. Robinson stated that while the subject home is similar to two neighboring ranches, in stylistic

continuity, because the home slopes away from the street, the height of the home is actually more in line with the neighboring homes. He stated that the proposed addition will make the subject home even more consistent with the streetscape which is primarily comprised of two story homes.

Attorney Allen stated that the Petitioner seeks relief from the provisions of Section 5.20 of the Zoning By-law. Mr. Allen stated that FAR totals were confirmed with the Building Department to determine what should be counted as existing habitable space. He stated that the allowable maximum FAR in the S-7 District is .35, and the subject property is nonconforming with a FAR of .36, or 104%. Mr. Allen stated that while the Planning Board initially indicated that the proposal triggered a variance, case law has established that under like circumstances, relief may be granted by special permit. Attorney Allen stated that alterations and extensions to preexisting, single and two-family dwellings were analyzed by the Commonwealth in Gale v. Zoning Bd. Of Appeals of Gloucester, 80 Mass. App. Ct. 331 (2011). In that case, the court stipulated that only a special permit was required for the extension of a pre-existing non-conforming residential structure. He indicated that the special permit in Gale was granted following a determination by the ZBA, pursuant to the second sentence of the Chapter 40A, Section 6 which reads in relevant part:

“Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.”

Mr. Allen stated that Gale and cases since, including Rockwood v. Snow Inn Corp., 409 Mass. 361, 362, 370 (1991), Bransford, Bjorklund and most recently Deadrick have established that M.G.L c. 40A, Section 6, is meant to give special protection to single and two-family residences. He indicated that the Appeals Court determined in Deadrick v. Zoning Board of Appeals of Chatham, that a Petitioner's request to increase their pre-existing nonconforming FAR may be authorized by a special permit and a

Section 6 finding. He argued that while Deadrick, established that the owner of a nonconforming single- or two-family house needs a variance for any reconstruction that creates new nonconformities, where existing nonconformities are not exacerbated in a manner that is substantially detrimental to the neighborhood, relief may be granted by special permit.

Attorney Allen then 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-7 District because the additional floor area is not unique to the neighborhood and the reconstruction will make the roof more consistent with the surrounding homes; (2) there will be no adverse effect on the neighborhood where a forty-two (42) unit condominium complex directly abuts the single family home and the proposed FAR falls within the residential floor area ratios which ranges from .28 to .46; (3) there will be no nuisance or serious hazard to vehicles or pedestrians; (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 on housing available for low and moderate income people and will improve the supply of affordable housing within the Town.

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

Mr. Laurence Rothman, 188 Summit Avenue, spoke in favor of the application. He stated that there are a number of homes that he did not find the proposed height to be inconsistent with the height of neighboring homes in the neighborhood. Mr. Rothman stated that he reviewed the plans and that he believed it is an appropriate addition to the neighborhood.

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

FINDINGS

Section 5.20 – Floor Area Ratio

Dimensional Requirements	Permitted	Existing	Proposed	Relief Required
Gross Floor Area	3,794 s.f.	3,971 s.f.	4,899 s.f.	Variance*
FAR	.35	.36	.45	
% of Allowed Floor Area	100%	104%	129%	

* The proposed floor area increase of 928 square feet results in a gross floor area that is greater than 120% of the allowed for the S-7 district. Therefore no special permit relief is applicable for this exterior addition under By-Law Section 5.22.

Note: The Building Department confirms that unheated basement space (game room and laundry room) detailed on floor plans (sheet A3) should be included in both existing and proposed gross floor area calculations.

Section 5.09 – Design Review: Any exterior addition for which a special permit is required pursuant to §5.22 is subject to design review standards listed under Section 5.09.4 (a-m). The proposed exterior addition is not permitted by special permit; however, the Planning Board typically addresses design review standards when a proposed floor area increase requires zoning relief in the form of a variance. The most relevant design review sections are described below:

a. Preservation of Trees and Landscape – No tree removal is required in order to construct the second-story addition. Existing mature hedges and plantings to the front and side of the structure would be maintained and the submitted site plan indicates preservation of four existing large caliper trees. No additional landscaping is currently proposed and existing open space will not be altered in any way.

b. Relation of Buildings to Environment – The second story addition would not alter the existing footprint of the structure although the additional building height would increase the impact of shadows, particularly on the adjacent property at 195 Summit Avenue.

c. Relation of Buildings to the Form of the Streetscape and Neighborhood – The proposed addition is clearly visible from Summit Avenue and incorporates wood clapboard material as opposed to the existing brick veneer. Although 2+ story residential structures are prominent in the immediate neighborhood, the adjacent ranch structures at 195 and 189 Summit Avenue produce a consistent streetscape. These three ranch structures were clearly constructed in a manner that is harmonious and complementary. The proposed second-story addition deviates from the common style and building heights currently displayed by these three structures. The proposed second story addition does, however, incorporate 30 degree roof slopes to match existing portions of the structure (garage).

e. Circulation – The current driveway and garage will not be altered by this proposal resulting in identical vehicular circulation on the property.

Section 8.02.2 – Alteration or Extension

A special permit is required to alter a pre-existing nonconforming structure or use.

Ms. Clark stated that the Planning Board is not opposed to the 928 square foot second story addition. Although, the resulting maximum height of 32.2 feet is inconsistent with the adjacent ranch structures, the Planning Board felt that the proposed height is not uncommon within the wider Corey Hill neighborhood. The Planning Board appreciated the design of the addition and its maximization of natural light and views, particularly at the rear of the structure, and the increased floor area which they believed would improve the interior functionality of the home. Ms. Clark stated that the Planning Board indicated some concern regarding the design deviation from “duplicate” ranches located at 195 and 189 Summit Avenue; however, the Planning Board did not feel that the resulting FAR of .45 is significantly out of character with the surrounding S-7 district. Ms. Clark stated that Planning Board Members recommended that the Petitioner work with the Building Department to determine the most appropriate beam size and material to best support rear decks and patios detailed on the proposed north elevation (sheet A10).

Ms. Clark stated that the Planning Board opined that, the proposed gross floor area increase represents an extension of the pre-existing nonconforming floor area that may be permitted following a M.G.L. c. 40A, Section 6 finding by the Board of Appeals. The Planning Board did not find the proposed exterior addition to be substantially more detrimental to the surrounding neighborhood and therefore supports a potential Section 6 finding.

Therefore, Should the Board of Appeals find that the statutory requirements for a Section 6 finding, or a variance, are satisfied, the Planning Board recommended approval of the site plan submitted by Brice Bradford, dated 5/12/14, and the architectural plans by Linda Hamlin, dated 1/27/2016, subject to the following conditions:

1. Prior to the issuance of a building permit, the applicant shall submit a final site plan, floor plans including existing and proposed gross floor area calculations, and elevations, 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 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; and 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Michael Yanovitch, Deputy 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 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 proposal. 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, Mr. Hussey inquired about the parameters of special permit relief under M.G.L. c. 40A, Section 6. Mr. Yanovich stated that Section 6, allows relief, via special permit, to any pre-existing nonconforming dimensional requirement. Chairman Book 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. Board Member Chiumenti indicated his support of the proposal. He stated that the proposal does not appear to be substantially more detrimental to the overall neighborhood.

The Board then determined, by unanimous vote, that the requirements for special permit relief for **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**:

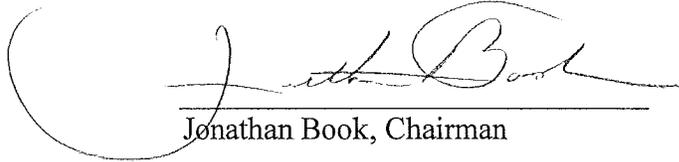
- a. The specific site is an appropriate location for such a use, structure, or condition.
- b. The use as developed will not adversely affect the neighborhood.

- 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, floor plans including existing and proposed gross floor area calculations, and elevations, 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 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; and 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

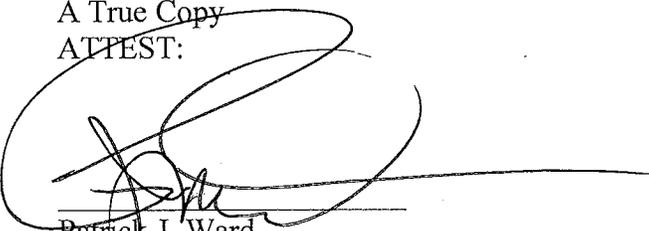
Unanimous Decision of
The Board of Appeals



Jonathan Book, Chairman

Filing Date: 8/15/16

A True Copy
ATTEST:



Patrick J. Ward
Clerk Board of Appeals