



Town of Brookline Massachusetts

BOARD OF APPEALS
Jesse Geller, Chairman
Jonathan Book
Christopher Hussey

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TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2015-0057
JASON JEWHRST AND NURIT ZUKER
10 SEARLE AVENUE, BROOKLINE, MA

Petitioners, Jason Jewhurst and Nurit Zuker, applied to the Building Commissioner for permission to remove the roof, and construct a third floor on an existing 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 September 29, 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 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 September 15, 2016 and September 22, 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: 10 SEARLE AVENUE – REMOVE THE ROOF AND CONSTRUCT THIRD FLOOR in an T-5 (Two-Family and Attached Single-Family) Residence District, on SEPTEMBER 29, 2016 at 7:10 PM in the 6th Floor Selectmen's Hearing Room (Petitioner/Owner: JASON JEWHRST and NURIT ZUKER) *Precinct 6*

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 5.09.2.j: Design Review
2. Section 5.20: Floor Area Ratio
3. Section 5.43: Exceptions to Yard and Setback Regulations
4. Section 5.50: Front Yard Requirements
5. Section 5.60: Side Yard Requirements
6. Section 5.70: Rear Yard Requirements
7. Section 5.91: Minimum Usable Open Space
8. Section 8.02.2: Alteration or Extension
9. 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 programs and services of the Town of Brookline are invited to make their needs known to Lloyd Gellineau, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone (617) 730-2328; TDD (617) 730-2327; or e-mail at llgellineau@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 Jonathan Book. 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, and architect, Jason Jewhurst.

Attorney Allen stated that the subject property is located off of Cypress Street and is the second floor unit in a two-story condominium. Mr. Allen stated that the proposal is to convert the roof from a hip roof to a gable roof with an added dormer on the front facade, and to finish 677 square feet of the third floor which will create a total of 1,990 square feet of gross floor area.

Attorney Allen stated that the subject property is located in the T-5 District. Attorney Allen stated that most homes on Searle Avenue have partial or full third stories and do not meet minimum lot size requirement under the Zoning By-law. Attorney Allen stated that it is noteworthy to mention that the lot and height tables created by Planning Staff indicate that this property is undersized, even in comparison to the neighboring undersized lots, that the proposed height of the building will not change, and that the proposal will be consistent with other properties along Searle Avenue.

Mr. Allen stated that the Petitioners have met with neighbors and obtained 15 signatures in support. He stated that the Petitioners have also held a number of meetings with their westerly neighbor, 18-21 Cypress Street, who is not supportive of the proposal. He stated that at the Planning Board meeting on September 8, 2016, the Planning Board suggested that the Petitioners hold an additional meeting with 18-21 Cypress Street and the parties have since met. Attorney Allen stated that the Planning Board acknowledged that the proposed gable roof is the preferred approach to prevent the home from appearing stunted. Further, Attorney Allen stated that there is a parking area and landscaping, including an existing row of tall screening trees located along the property line currently cast a shadow on the abutting property. He stated that 18-21 Cypress Street is about 15 feet away from the shared property line with 10 Searle Avenue, which is twice the required side yard setback in the T-5 District.

Attorney Allen stated that the Planning Board spent a fair amount of time listening to and addressing the concerns of the abutters and opined that the proposal encompasses an appropriate roof design, requires modest relief, and is attractively designed and it remained consistent with the streetscape and voted unanimously in favor of the proposal.

Attorney Allen stated that he received the data supplied by the neighbor at 18-21 Cypress Street regarding FAR and noted that the table does not distinguish between single and two-family buildings.

Mr. Allen stated that a number of the listed homes have at least two dwelling units and therefore the FAR calculations do not accurately represent the properties on Searle Avenue.

Project Architect Jason Jewhurst discussed the existing condition of the property and highlighted how the proposed alterations arose in an effort to capture the needed headspace in the subject home, while maintaining a design that is consistent on Searle Avenue. Mr. Jewhurst stated that he wanted to incorporate the gable style roof into the proposal because it is the dominating roof style on Searle Avenue. Mr. Jewhurst stated that 10 Searle Avenue is one of the lowest homes on the street; therefore, raising the roof 4.5 feet, while remaining below the 35 feet height maximum would maintain a consistent roof line along the street.

Mr. Jewhurst stated that he was cognizant of minimizing impact and developed a design that would maintain the two-story feel of 10 Searle Avenue without creating a three-story frontage. Mr. Jewhurst stated that the incorporation of a continuous eave line and allowing the gable to fall away from the street line were details that captured needed head space, but also provide neighbors with a nonintrusive design to the streetscape.

Mr. Jewhurst stated that a comprehensive shadow study was prepared to evaluate the affect of the proposal to the abutters to the west. He stated that the shadow study reviews shadow impact during the four times of the year where the sun is at its most aggressive angles and that he removed the screening trees to focus on the shadow differentials. Mr. Jewhurst stated that the path of the sun changes between twenty to thirty minutes and that when analyzing the magnitude of the potential impact, the overall difference throughout the year ranges from four to ten percent.

Board Member Hussey stated that he is curious to see the existing shadow that 18-21 Cypress Street casts on the subject home.

Board Member Hussey asked whether Mr. Jewhurst considered the option to truncate the gable roof. Mr. Jewhurst stated that he considered the option and found that truncating the roof increased the

angle, creating a high degree of impact with the leading edge, and a greater impact on 18-21 Cypress Street.

Board Member Hussey asked for the height of the trees. Mr. Jewhurst stated that he does not know the exact height of the trees but they currently reach the peak of the existing home.

Attorney Allen stated that all conditions have been met under **Section 5.09.2** of the Zoning Bylaw, the most relevant sections being: a. Preservation of Trees and Landscape: The proposal does not require the removal of any trees or substantial landscaping, as the addition does not extend beyond the footprint of the existing building; b. Relation of Buildings to Environment: The shadow study depicts little impact on neighboring properties; c. Relation of Buildings to the Form of the Streetscape and Neighborhood: The proposed addition has been designed to be consistent with the style of the existing dwelling. In addition, the size of the addition is in proportion to that of the existing home and the scale of the finished space correlates to that of the surrounding homes.

Attorney Allen stated that dimensional requirements under **Sections 5.20, 5.50, 5.60, 5.70, 5.91, 8.02.2** of the Zoning Bylaw may be granted by special permit.

Attorney Allen stated that case law precedent has established that under Massachusetts General Law, Chapter 40A, Section 6, the owner of a nonconforming single-family or two-family house needs a variance for any reconstruction that creates a new nonconformity. Attorney Allen stated that case law (Deadrick v. Board of Appeals of Chatham, 85 Mass.App Ct. 539) has further established that an owner can however expand an existing nonconformity via a special permit granted under Chapter 40 A, Section 6, provided there is a finding that such expansion causes no substantial detriment. Attorney Allen stated dimensional relief under **Sections 5.20, 5.50, 5.60, 5.70, 5.91, 8.02.2** are a result of pre-existing nonconforming conditions. Attorney Allen stated that the relief requested will increase an existing nonconformity, without creating any new non-conformities, and will not create any substantial detriment to the neighborhood.

Attorney Allen then reviewed the requirements under Section 9.05 of the Zoning Bylaw arguing: (1) the specific site is an appropriate location for such use because like the proposed structure, a number of the homes along Searle Avenue have partial to full third floors. The revised roof shape will improve the look of the home, is more consistent with the surrounding neighborhood, and is screened by a tall row of trees; (2) the use will not adversely affect the neighborhood because the home will remain a three story and will continue to maintain a height that is consistent with the street. Furthermore, the Petitioners have reviewed the plans with the neighborhood and have garnered signatures from 15 neighbors; (3) there will be no nuisance or serious hazard to vehicles or pedestrians as there will be no change in the occupancy of the unit; (4) adequate and appropriate facilities will be provided for the proper operation and proposed use; (5) there will be no effect on the supply on housing available for low and moderate income people.

Chairman Geller asked whether the Petitioner had the support of owners of 10 Searle Avenue, Unit 1. Attorney Allen confirmed that they have expressed their support.

Chairman Geller called for public comment in favor of, or in opposition to the Petitioners' proposal. Gioia Perugini 30 Cypress Street stated that 10 Searle, Avenue is located on a densely populated street. She stated that she has reviewed the plans and considered the change to the streetscape and found that the proposal is in line with the design of this street.

Attorney Scott Gladstone, 1244 Boylston Street, Chestnut Hill, MA 02467, stated that he represents the owners at 18-20 Cypress Street which abuts the subject property. Mr. Gladstone stated that the trees serving as a barrier to the two properties belong to the owners of 18-20 Cypress Street. Mr. Gladstone stated that the subject property which would otherwise need a variance for the requested relief, is preexisting nonconforming as a result of the FAR increase in the basement of 10 Searle Avenue, Unit 1. Therefore, he stated that he would address the "substantial detrimental" standard under

Chapter 40A, Section 6 and Maria Bellalta, Director Boston Architectural College, 320 Newbury Street, Boston, MA 02115 will review the standard as it relates to her house.

Attorney Gladstone stated that five buildings are smaller and six buildings are bigger than the subject property on Searle Avenue. He stated that as proposed, the subject property would therefore be twenty percent larger than the average. Attorney Gladstone stated that the average FAR on Searle Avenue is .72 and the subject building has a FAR of 1.14, which is the highest on the street. Mr. Gladstone stated that the proposal will increase the existing FAR of the subject property to 1.38. Attorney Gladstone stated that the proposed FAR is nearly double the average. Mr. Gladstone questioned the parameters of a Section 6 finding. He stated that the Petitioners removed walls on the second floor necessitating the height to achieve structural support. Attorney Gladstone stated that the proposal is substantially detrimental. He stated that while the Brookline Zoning Board of Appeals has stated that height alone is not a measuring factor of substantial detriment; In this case, dimensional relief is being expanded and driving the proposed height.

Mr. Gladstone distributed conditions should the Board grant a special permit under this proposal.

Mrs. Bellalta stated that she purchased her property in 2001. Mrs. Bellalta stated that the sunlight provides added warmth to her home in the winter. She stated that the proposal will diminish the access of sunlight to her home.

Aidan Ackerman, Director of Design Computing, Boston Architectural College, 320 Newbury Street, Boston, MA 02115, stated that he will review simulations of existing and proposed with an argument that a new shadow can potentially be impactful on 18-21 Cypress Street. Mr. Ackerman stated that he will only review the dark winter months. Mr. Ackerman stated that the sun travels a low light path during the winter months and is less aggressive in the mornings. Mr. Ackerman noted that on January 1st the sun would cast a new shadow on the roof. Mr. Ackerman stated that with the proposed

conditions, at 9:05a.m .on January 1st, there would be a twenty minute differential from when the sun accesses the property at 18-21 Cypress Street.

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

FINDINGS

Section 5.09.2.j – Design Review: Any exterior addition for which a special permit is requested pursuant to *Section 5.22 (Exceptions to Maximum Floor Area Ratio Regulations)* requires a special permit subject to the design review standards listed under *Section 5.09.4(a-l)*. All the conditions have been met, and the most relevant sections of the design review standards are described below:

- a. Preservation of Trees and Landscape – The proposal does not require the removal of any trees or substantial landscaping, as the addition does not extend significantly away from the existing building.
- b. Relation of Buildings to Environment – The proposed addition is not expected to have shadow impacts on neighboring properties.
- c. Relation of Buildings to the Form of the Streetscape and Neighborhood – The proposed addition has been designed to be consistent with the style of the existing dwelling. In addition, the size of the addition is in proportion to that of the existing home and the scale of the finished space correlates to that of the surrounding homes.

Section 5.20 – Floor Area Ratio

Floor Area	Allowed	Existing	Proposed	Finding
Floor Area Ratio (% of allowed)	1.0 100%	1.14 114%	1.38 138%	Variance*
Floor Area (s.f.)	2,773	3,174	3,851	

*The proposed addition does not qualify for a special permit under Section 5.22.3.b.1.b because the size of the addition is greater than 120% of the permitted gross floor area.

Section 5.43 – Exceptions to Yard and Setback Regulation

Section 5.50 – Front Yard Requirements

Section 5.60 – Side Yard Requirements

Section 5.70 – Rear Yard Requirements

Dimensional Requirements	Required/Allowed	Existing	Proposed	Relief
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Front Yard Setback	15'	7.9	7.9	Special Permit*
Side Yard Setback	10'	5.3	5.3	
Rear Yard Setback	30'	10.8	10.8	

* Under Section 5.43, the Board of Appeals may waive setback requirements if a counterbalancing amenity is provided.

Section 5.91 – Minimum Usable Open Space Where a minimum usable open space is required in addition to landscaped open space, there shall be included in every lot used in whole or in part for dwelling units intended for family occupancy an area of usable open space provided at the rate specified in Table 5.01.

Dimensional Requirements	Required/Allowed	Existing	Proposed	Relief
Usable Open Space	203 sq.ft. 30%*	0 sq. ft.** 0%	0 sq. ft. 0%	Variance

* The 30% calculation is based on the difference between the existing GFA and the proposed GFA (677 sq. ft)

** The existing open space on the lot does not fit the criteria for usable open space under 5.91 because one dimension of the space is less than 15 feet.

Section 8.02.2 – Alteration or Extension

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

Ms. Clark stated that the Planning Board recognized the Petitioners’ interest in gaining more living space in this small, three bedroom unit. They stated that the lot size is nearly half of the minimum required lot size for this T-5 zoning district; therefore, there is no open space on the lot that can be counted towards usable open space. She stated that the Planning Board would like to see proposed landscaping changes that would show how the minimal open space on the lot can be utilized for the benefit of the residents.

Ms. Clark stated that the Planning Board opined that a third story on the home would help improve the appearance of the façade and noted that most homes on the block currently have a partial or full third stories so the addition of a third floor to 10 Searle would not be out of character for the neighborhood.

Therefore should the Board of Appeals find that the statutory requirements for a variance are met, the Planning Board recommended approval of the floor plans and elevations dated 6/10/16, subject to the following conditions:

1. Prior to issuance of a building permit, final elevations indicating all exterior alterations and proposed materials and floor plans shall be submitted to the Assistant Director of Regulatory Planning for review and approval.
2. Prior to the issuance of a building permit, the applicant shall submit a final site plan and final landscaping plan, indicating all counterbalancing amenities, subject to the review and approval of the Assistant Director of 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 building 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 delivered the findings of the Building Department and stated that the “substantially more detrimental” standard under Chapter 40 A, Section 6 requires an applicant to prove that the proposal fits within the neighborhood. Mr. Yanovitch stated that case precedent has established that the substantially detrimental standard under Chapter 40A, Section 6 relates to detriment to the neighborhood overall, and not to an individual neighbor or street. Mr. Yanovitch noted that 10 Searle has one of the smallest lots which lends to the FAR issue. Mr. Yanovitch addressed Mr. Gladstone’s inquiry regarding the parameters of Chapter 40 A, Section 6. He stated that **Sections 8.02.2** and **9.05** of the Zoning By-law place limitations on structures that are granted under a Chapter 40A, Section 6 finding. Mr. Yanovitch noted that the focal point of Chapter 40A, Section 6 is to consider the impact of a proposal on the streetscape, not the density of a proposal. Mr. Yanovitch stated that he found the requested relief to be minimal. Mr. Yanovitch then stated that if the Board finds in favor of the requested relief, the Building Department will work with the Petitioners to ensure compliance.

During deliberation, Chairman Geller revisited the discussion surrounding the parameters of Chapter

40A, Section 6. He stated that the substantially detrimental standard under Chapter 40A, Section 6 is examined and limited by the application of Section 9.05 of the Zoning By-law.

Board Member Book stated that the substantially detrimental standard under Chapter 40A, Section 6 applies to substantial detrimental to the neighborhood overall and not to individual abutters. Mr. Book stated that the request is modest and he felt that the Petitioners have demonstrated that the proposed change in the structure fits in with the neighborhood and is not out of character.

Board Member Hussey stated that there is impact on the immediate neighbor, but the impact does not extend to the neighborhood. Board Member Book stated that he would encourage the neighbors to agree on conditions.

Mr. Allen and Mr. Gladstone then discussed and determined agreed upon conditions.

The Board then determined, by unanimous vote that the requirements for a special permit for Sections 5.20, 5.50, 5.60, 5.70, 5.91 of the Zoning By-Law pursuant to, 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 not have any effect on the supply of housing available for low and moderate income people.

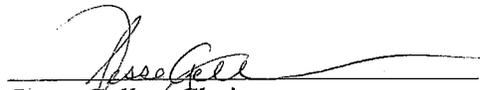
Accordingly, the Board voted unanimously to grant the requested relief subject to the following revised conditions:

1. Prior to issuance of a building permit, final elevations indicating all exterior alterations and proposed materials and floor plans shall be submitted to the Assistant Director of Regulatory Planning for review and approval.

2. Prior to the issuance of a building permit, the applicant shall submit a final site plan and final landscaping plan, indicating all counterbalancing amenities. This plan shall include the relocation of the existing garbage and recycling bins, and should include any new air conditioning units, compressors or other mechanicals for the entire building, away from the side yard adjacent to 18-20 Cypress Street. This plan shall consider reducing the noise from the existing air conditioner unit. The existing mechanical compressor shall be screened with an enclosure. The final plans are subject to the review and approval of the Assistant Director of 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 building 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.
4. Construction schedules shall be coordinated to limit detriment to 18-20 Cypress Street.

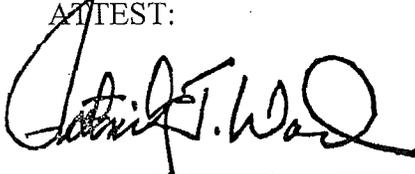
Unanimous Decision of
The Board of Appeals

Filing Date: 11/3/16



Jesse Geller, Chairman

A True Copy
ATTEST:



Patrick J. Ward
Clerk, Board of Appeals