



Town of Brookline

Massachusetts

BOARD OF APPEALS
Jesse Geller, Chairman
Jonathan Book
Christopher Hussey

Town Hall, 1st Floor
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Brookline, MA 02445-6899
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Patrick J. Ward, Clerk

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TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2016-0021
ROY CAMPANA AND KERRY O'DONNELL
LOT 08 BRINGTON ROAD, BROOKLINE, MA

Petitioners, Roy Campana and Kerry O'Donnell, applied to the Building Commissioner for permission to construct a new single family dwelling. The application was denied and an appeal was taken to this Board.

The Board administratively determined that the property affected was that shown on a schedule certified by the Board of Assessors of the Town of Brookline and fixed October 27, 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 October 13, 2016 & October 20, 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:

BRINGTON RD – LOT 8 BOA#2016-0021 (PARCEL 190-08-00) – CONSTRUCT A NEW SINGLE-FAMILY DWELLING, in a T-6, Two-Family and Attached Single-Family, residential district, on October 27th at 7:15 PM in the 1st Floor Room 111 in Town Hall, 333 Washington Street (Petitioner/Owner: O'DONNELL KERRY) Precinct 6

The Board of Appeals will consider variances and/or special permits from the following sections of the Zoning By-Law for both subject properties, and any additional zoning relief the Board deems necessary:

1. Section 5.43: Exceptions to Yard and Setback Regulations
2. Section 5.70: Rear Yard Requirements
3. Section 8.02.2: Alteration or Extension
4. 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, the Zoning Board of Appeals held a public hearing. Present at the hearing was Chairman Johanna Schneider and Board Members Jonathan Book and Mark Zuroff. Deputy Building Commissioner Michael Yanovitch and Zoning Coordinator Ashley Clark were also present. 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 were the Petitioners, Roy Campana and Kerry O'Donnell, along with project architect Jennifer Hart, Hart Associate

Architects, Inc., 50 Church Street, Belmont, MA 02478, and landscape architect Katya Podsiadlo, Blair Hines Design Associates, 318 Harvard St # 25, Brookline, MA 02446.

Chairman Schneider called the hearing to order at 7:15 pm. Attorney Allen waived the reading of the public hearing notice.

Attorney Allen stated that Kerry O'Donnell is the owner of the subject lot. Attorney Allen stated that the Petitioners lived at 42 Brington Road for over 20 years. Attorney Allen stated that in 2006, the Building Commissioner, Michael Shepherd informed the Petitioners that their property was a triangular lot with two sides. Attorney Allen presented a letter written by Mr. Shepherd, dated July 18, 2006 expressing that opinion. Attorney Allen stated that the subject lot in the instant case is identical, and, in reliance of the 2006 determination, the Petitioners proposed a house meeting front and side yard requirements and applied for a building permit to construct a single family dwelling on Lot 08 at which time they received a denial letter.

Under the current Building Commissioner's interpretation of **Section 5.70** of the Zoning Bylaw, the subject lot is a curved lot, with two rear lot lines. Consequently, while under the 2006 interpretation, the instant proposal could be built by right, the current interpretation requires special permit relief from **Section 5.70** of the Zoning By-law.

Attorney Allen stated that in Nichols v. Board of Zoning Appeal of Cambridge, 26 Mass. App. Ct. 631 (1998), the court stated that "while the city is not estopped by the action of the first zoning inspector, the board, in considering whether to grant a permit in these circumstances, may take into account the good faith reliance of the plaintiffs on the actions of the city's officials." Id. at 634-635. Attorney Allen stated that with respect to Lot 08, it is fair for this board to take into account the Petitioners' good faith reliance on the 2006 letter from the Town of Brookline's Zoning Enforcement Officer.

Attorney Allen stated that the Petitioners independently met with neighbors on a few occasions and went before the Planning Board on two occasions. He noted that the Planning Board expressed some concern about the size and appearance of the home. Attorney Allen stated that while the Petitioners were not cited for design review, the Planning Board suggested that the Petitioners change the initial design of the home, which the Petitioners have done. Mr. Allen stated that in an effort to address the Planning Board and neighbor concerns, from the Petitioners, changed the initial design of the home, reduced the size of the home, minimized the FAR which is about half of the allowable FAR in the district, and increased the setbacks to the immediate abutters. He stated that significant screening has also been incorporated to further buffer and screen the abutting properties.

Attorney Allen stated that a few neighbors expressed that they are accustomed to seeing Lot 08 open and some expected it to remain an empty lot. He stated that the Petitioners have viewed Lot 08 as a way to age in place while living in Brookline.

Chairman Schneider stated that she has reviewed all letters that were received in support of and in opposition to the proposal. Mrs. Schneider stated that a few letters indicated that the lot was designated as "unbuildable" on the Assessor's Database. Mrs. Schneider asked Attorney Allen whether he had any indication of why it was designated as such. Attorney Allen stated that the Assessors database is a reference source but not a legal indicator of a lot's buildability. Deputy Building Commissioner Yanovitch stated that the Assessor's Database is sometimes inconsistent with zoning. He indicated that the Assessor's Database currently designates fifty lots in Brookline as unbuildable because they do not meet current zoning guidelines when in fact, they meet the criteria for a buildable lot under Massachusetts General Law, Chapter 40A.

Jen Hart, architect for the Petitioners, then chronicled the changes made from inception to the present proposal. Ms. Hart stated that there were challenges of working within the confines of a triangular lot. Ms. Hart stated that the FAR for Lot 08 is .39 which is well under the Maximum Allowable FAR of .75, and is comparable to the FAR of neighboring homes on Brington Road. She stated that the proposed plan meets lot size, lot width, building height and FAR requirements in the T-6 District. Ms. Hart highlighted the buildable area and showed a site plan depicting the location of the proposed new house on lot 8 and with two rear lot line setbacks of 30 ft. each, and the proposed new house with two side lot line setbacks of 7.5 ft. and a radius of 30' setback from the rear lot point furthest from the front lot line.

Ms. Hart then discussed the design of the proposal. She stated that the proposed house will sit between 26 Brington Road and 42 Brington Road. The scale of the proposed new home will be in keeping with the scale of homes in the neighborhood. She stated that the Petitioners originally proposed a simple flat front façade and a hipped roof. She stated that with input from neighbors and the Planning Board, she reduced the size of the house by 150 square feet, lowered the roof, and changed the roof from a hipped roof to a gabled roofline. She noted that a gabled front is a common feature on Brington Road and that the shingles, brackets, porches, and windows are in keeping with the style and detailing of the neighboring homes. Ms. Hart reviewed the floor plans showing a 2,122 s. ft. home with two bedrooms and 2 ½ baths. She stated that the Petitioners are not intending to finish the attic or basement, but for a more clear understanding of the maximum allowable FAR, the Planning Board asked for a calculation with all area finished. Ms. Hart stated with the aforementioned conditions, the maximum FAR is 0.63, which is still below the 0.75 allowable FAR in the T-6 District. She stated that relief under **Section 5.70** of the Zoning Bylaw is the only zoning issue.

Katya Podsiadlo of Blair Hines Design reviewed the proposed landscape plan. Ms. Podsiadlo stated that there is an existing curb cut on Lot 08. The existing two car parking area is located within the front yard setback and the proposed landscaping plan was designed to minimize light impact on abutting properties and to add to the public streetscape. She stated that the proposal will incorporate the removal of two trees that are in the center of the lot. She stated that existing street trees will be maintained. She stated that the landscaping plan also maintains all the well-established trees along the neighboring 26 Brington Road to maintain a buffer between the two properties. She stated that the rear yard will also include a butterfly garden with ornamental shrubs, flowering, and evergreen shrubs.

Board Member Zuroff asked if there was any thought given to putting the parking on the easterly side closest to 26 Brington Road to increase safety. Attorney Allen stated that the option was considered and the Petitioners maintained the existing parking arrangement and kept the parking away from 26 Brington Road who expressed concern with parking being close to his property. More importantly, Mr. Allen stated, he and the Petitioners felt it was a safer option for both pedestrians and vehicles, to keep the existing curb cut in the location with which the community is familiar.

Chairman Schneider inquired about the typical setback and distances between houses on Brington Road. Ms. Hart stated that generally homes along Brington Road, are within a 7.5 ft. setback.

Attorney Allen reiterated that the question before the Board is the two closest points which under the current interpretation would require a special permit under **Section 5.70** of the Zoning Bylaw. He stated that under **Section 5.43** of the Zoning By-law, the Board may waive,

by special permit, setback requirements where counterbalancing amenities are provided. Attorney Allen discussed special permit relief under Section 9.05 of the Zoning By-Law arguing: (1) the specific site is an appropriate location where the lot meets the size requirements for the district, the proposal is for a single family at half the allowable FAR, and the property is screened to provide a buffer between neighboring properties; (2) there will be no adverse effect on the neighborhood where there are a number of similar homes both in kind and in design, the neighborhood has a FAR range of .20 to .56. and the proposal has a FAR of .39; (3) no nuisance or serious hazard to vehicles or pedestrians will be created because there has always been a curb cut associated with this property and it will maintain its location, thus ensuring safe pedestrian and vehicular access; (4) adequate and appropriate facilities will be provided for the proper operation and proposed use; (5) development will not have any effect on the supply on housing available for low and moderate income people.

Chairman Schneider asked whether any neighbors were present to speak in favor of the proposal. Virginia LaPlante, 58 Welland Road, stated that she is in support of the proposal and that she felt that the Petitioners have made a number of concessions. Ms. LaPlante noted that the Petitioners changed from a blunt design to front facing gables, provided a sizeable setback from the neighbors, reduced the size of the house by almost seven percent, and reduced the height by one foot. Jerry Davidson, 49 Cypress Street noted the Petitioners' effort to accommodate the concerns of the neighbors. Hidde Ploegh, 1 Toxeth Street, stated that he believes that compromise is important and that the Petitioners have presented a reasonable proposal. Ann Berman, 76 Perry Street, stated she is an architect, and at times it is hard for neighbors to recognize that change happens, but she is supportive of the proposal.

Eric Speed, Bernkopf Goodman LLP, Two Seaport Boulevard, Boston, MA 02210, stated that he represents Matthew and Zamira Oudens, 26 Brington Road. He stated that **Section 5.43** of the Zoning Bylaw requires that counterbalancing amenities be provided to offset the requested setback. He stated that the Petitioner needs special permit relief for two rear yard setbacks and noted that the front yard setback is built right up to the requirement. Consequently, he stated, the landscaping plan is insufficient and does not provide any additional buffering. Attorney Speed stated that the proposal does not meet the standards for a special permit under **Section 9.05** of the Zoning By-law because it has an adverse impact on the neighborhood. He stated that he put together an informal map indicating the neighbors who are most affected by the proposal. Mr. Speed also stated that the lot has been deemed unbuildable for a number of years and that it will take away from the greenspace on Brington Road.

Chairman Schneider referred to the map and asked Mr. Speed to specify his clients' grievances in light of the proposal. Attorney Speed indicated that the proposal will interfere with his clients' access to light, wind, and air. Additionally, he stated, construction will have a significant impact on his clients' current open space. Mr. Speed stated that the proposal does not reach the threshold of **Section 5.43** of the Zoning Bylaw which allows for a lessening of zoning standards where counterbalancing amenities are provided. Ms. Schneider asked if Mr. Speed believes that the subject lot has sufficient lot area to be a buildable lot. Mr. Speed replied in the affirmative but added that it is categorized as unbuildable because due to the very small area.

Chairman Schneider asked whether anyone was present to speak in opposition to the proposal. Valerie Morhaime, 21 Brington Road, stated that this is a 2 ½ story home that will harm the community. She stated that the proposed home is too big and too tall and that she did not feel that the Petitioners have listened to the recommendations of the neighbors and the

Planning Board. She stated that she is worried about the impact on abutting properties. Mrs. Morhaim stated that she loved to see the open space and to use it as gathering space. John Dempsey, 43 Brington Road, stated that it is not a developable lot. Mr. Dempsey stated that the proposal will significantly impact the abutting property and that he is against permitting this proposal. Cami Brothers, 42 Brington Road, stated that approval of the proposal will cause an impossible parking situation on her lot. She stated that her parking location will be on a blind curve. Chairman Schneider asked if Mrs. Brothers purchased parking on the vacant lot. Ms. Brothers stated that she is currently parking on the subject lot. Board Member Zuroff asked if she was aware of the need to provide parking on her own lot. Ms. Brothers stated that she was aware, but was not aware of zoning restrictions. Mr. Zuroff stated that notwithstanding the determination, the lots are separated and although she may park on Lot 08 for a designated period, her right to park on Lot 08 terminates and she will need to find parking. Janet Sanders, 64 Brington Road, stated that this is substantial zoning relief being requested. She stated that setback requirements are intended to prevent a very large building on a small lot. She stated that she anticipates the attic and basement being finished and that she believes the subject lot is undevelopable. She stated that she was not aware of Michael Shepherd's 2006 letter.

Attorney Allen stated that a number of letters have also been sent to the Planning Board in support of the proposal. He stated that there are parking suggestions for 42 Brington Road which he is willing to discuss with Mrs. Brothers. Attorney Allen stated that the 2006 letter was in the Town of Brookline Building Jacket which is accessible to the public.

Attorney Allen stated that the Town has traditionally looked at landscaping plans as a sufficient counterbalancing amenity, but the Petitioners are willing to revisit landscaping options and implement a fence if one is favorable.

Ms. Clark then delivered the findings for the Planning Board:

LOT 08 (PARCEL 190-08-00)

FINDINGS

Section 5.43 – Exceptions to yard and Setback Regulations

Section 5.70 – Rear Yard Requirements

Dimensional Requirements	Required	Existing	Proposed	Relief Required
Rear-Yard Setback (southwest)	30 feet	N/A	12'-11"*** Revised from 11.3 feet	Special Permit*
Rear-Yard Setback (southeast)	30 feet	N/A	8'-10" Revised from 8.3 feet	Special Permit*

** Under Section 5.43, the Board of Appeals may waive by special permit yard and/or setback requirements if counterbalancing amenity is provided.*

Ms. Clark stated that the Planning Board is opposed to the construction of a new single-family dwelling at Brington Road lot 08. Although revised plans were presented to the Planning Board that took into account comments made at the original presentation of this project, the Board felt that the proposed structure was too large for the lot and the relief requested was too extreme. She stated that the Planning Board noted that some neighbors present at the Planning Board meeting did not feel that their suggestions were implemented. Therefore, the Planning Board recommended denial of the site plan by George C. Collins, dated 4/20/16, floor plans and elevations by Hart Associates Inc., dated 6/29/16, and the landscape plan by Blair Hines Design, dated 4/3/16.

Mr. Yanovitch stated that Massachusetts General Laws deem a lot that is 5,000 s. ft. as developable. He confirmed that Michael Shepherd made the determination for 42 Brington Road. He stated that the current Building Department applies a stringent interpretation of **Section 5.70**

where in the case of a curved lot line any opposite lot line becomes a rear lot line. He stated that if the Board finds that the proposal meets the requirements for a special permit, the Building Department will work with the Petitioners to ensure compliance.

The Board deliberated on the merits of the special permit relief as requested. Board Member Zuroff stated the fact that there is an open lot does not give neighbors the expectation to its use, light or air. He noted that most of the houses on Brington Road are nonconforming. He stated that zoning is an adapting concept. Mr. Zuroff stated that more landscaping can be added to the proposal. Mr. Zuroff stated that Lot 08 is a fairly sizeable lot and the home does not appear to be too large.

Board Member Book stated that this is a buildable lot and that he does not believe that the proposed home is too large for the lot. He suggested that the home could be pulled back from the lot line to address concerns about the home being imposing on the neighbors.

Chairman Schneider echoed Board Member Zuroff's comments that Lot 08 is not open space for the neighborhood. She stated that notwithstanding the lot being buildable, there is a setback issue driven by the shape of the lot and not by the size of the proposed home. She stated that the placement and size of the house does not seem inconsistent with the other homes on Brington Road. Mrs. Schneider noted that maintenance of mature trees is a counterbalancing amenity, but that there is room for more landscaping and buffering on the property.

Mr. Zuroff stated that the conditions on Lot 08 are drastic and the purpose of Section 5.43 of the Zoning Bylaw, is appropriate in circumstances where as here, the proposal is a reasonable development and counterbalancing amenities are provided. He noted that the instant proposal resembled a number of homes on Brington Road.

Mrs. Podsiadlo stated that the landscaping plan includes the preservation of trees, and that the trees that will be removed will be replaced with a river birch tree and a dogwood tree which are the same as the trees that will be removed. Mrs. Podsiadlo suggested the incorporation of a fence if it is agreeable to the abutter at 26 Brington Road.

Board Member Book stated his concern for the 12 foot setback. Attorney Allen stated that the proposed setback is sensitive to adding adequate setback to both 42 Brington Road and 26 Brington Road. Mr. Book suggested that the Petitioners discuss additional buffering measures with the neighbor at 26 Brington Road.

The Board of Appeals voted to approve the site plan dated by Boston Surveyor dated, 10/25/2016, floor plans and elevations by Hart Associates, Inc., dated 9/8/2016, and the landscape plan by Blair Hines Design Associates, dated 10/24/2016.

The Board then determined, by unanimous vote that the requirements for a special permit for **Section 5.70** of the Zoning By-Law pursuant to **Sections 5.43** and **9.05** of the Zoning By-Law were met. The Board made the following specific findings pursuant to said **Section 9.05**:

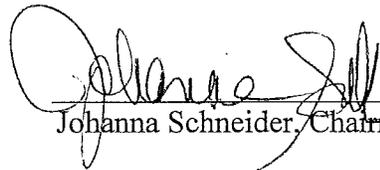
- a. The specific site is an appropriate location for such a use, structure, or condition.
- b. The use as developed will no adversely affect the neighborhood.
- c. There will be no nuisance or serious hazard to vehicles or pedestrians.
- d. Adequate and appropriate facilities will be provided for the 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.

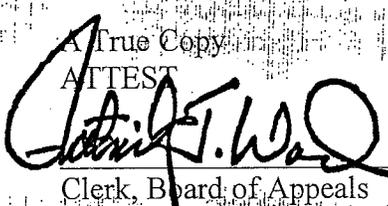
Accordingly, the Board voted unanimously to grant the requested relief subject to the following conditions:

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 of Regulatory Planning.
2. Prior to the issuance of a building permit the Applicant shall submit a final landscaping plan indicating all counterbalancing amenities including additional screening and buffering in consultation with neighbors 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 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.

Unanimous Decision of
The Board of Appeals

Filing Date: 11/25/2015


Johanna Schneider, Chairman

A True Copy
ATTEST

Patrick J. Ward
Clerk, Board of Appeals