



Town of Brookline Massachusetts

BOARD OF APPEALS
Jesse Geller, Chairman
Christopher Hussey
Jonathan Book

Town Hall, 1st Floor
333 Washington Street
Brookline, MA 02445-6899
(617) 730-2010 Fax (617) 730-2043
Patrick J. Ward, Clerk

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JUN 17 2017

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2016-0084
108 NAPLES STREET

Petitioners, Wei Liu, Andrew Gingery and Feng Lui, applied to the Building Commissioner for building permit to add an addition to the second floor of the 108 Naples Road Unit and to finish the basement of the 47 Gibbs Road Unit of a two family structure. 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 December 29, 2016 at 7:15 p.m., in the Selectmen's Hearing Room as the date, time and place of a hearing for appeal. Notice of the hearing was mailed to the Petitioner, to their attorney 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 December 15, 2016 and December 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:

108 Naples Road – Remove roof and construct second story addition in a S-7 (Single Family) Residence District, on December 29, 2016, at 7:15 PM in the 6th Floor Selectmen's Hearing Room (Petitioner/Owner: Andrew Gingery, Wei Lin, Feng Liu Ho) *Precinct 8*

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 5.43: Exception to Yard and Setback Regulations**
- 2. Section 5.70: Rear Yard Requirements**
- 3. Section 5.91: Minimum Usable Open Space**
- 4. Section 8.02.2: Extension or Alteration**
- 5. 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 Christopher Hussey and Lark Palermo. The case was presented by Attorney Scott C. Gladstone, 1244 Boylston St., Suite 200, Chestnut Hill, Massachusetts 02467. Chairman Mark G. Zuroff called the hearing to order at 7:15 p.m.

Attorney Gladstone waived the reading of public notice and presented to the Board a background of the property, stating as follows: 108 Naples Road – 47 Gibbs Street is a three story condominium building containing two residential units. The Petitioners, Wei Liu and

Andrew Gingery, own the residential condominium with an address of 108 Naples Road, which is made up of the second and third floors of the building. Petitioners wish to add a second story addition on top of an existing portion of the first floor in order to expand the living space of the first floor of their two floor unit (second floor of the building). The additional Gross Floor Area requires usable open space relief and setback relief.

Feng Liu, the owner of the unit at 47 Gibbs Street, which is the first floor and basement of the 108 Naples Road – 47 Gibbs Street building, has submitted plans to finish his basement to increase his unit from 1040 square feet to 1769 square feet of living space. Because this is finishing existing space and no F.A.R. is implicated, the only relief required for this unit concerns usable open space.

Attorney Gladstone next discussed the zoning relief required from the Board of Appeals, saying as follows:

Setback: The second floor addition does not expand the footprint of the building; however, the building is pre-existing non-conforming with respect to being within the required setback. Which setback is an interesting question, but only an academic one. The non-rectangular shape of this lot bounded by three streets would seem to exclude the lot line to which the proposed structure is closest from being considered a “rear” lot line as defined in the By-Law. Nevertheless, even if the lot line in question were considered a side lot line, relief would still be needed.

Usable open space: The current structure is also pre-existing non-conforming as to usable open space; thus, by increasing the gross floor area, that nonconformity has been increased, despite the fact that the open space remains unchanged. This is a large lot. Usable open space is currently non-conforming because the owner who created the Condominium took

much of the lot and dedicated it to 19 parking spots, which were sold as separate condominium units (albeit without any living space associated with them).

Special Permit is available under both By-Law §5.43 and under c.40A Section 6 relating to two families: The denial letter refers to By-Law section 8.02.2, which states that pre-existing non-conforming structures may increase the non-conformities if permitted by some section of the By-Law. The By-law permits relief from required yards and setbacks by special permit under Section 5.43. Attorney Gladstone argued, alternatively, the second except clause under G.L. c. 40A, Section 6 states that such intensifications of pre-existing non-conformities may be allowed by special permit for one or two family structures as long as the permit granting authority finds that the increase presents “no substantial detriment” to the neighborhood without the need to comply with any additional special permit requirements of the Town By-Law. See *Deadrick v. Zoning Board of Appeals of Chatham*, 85 Mass. App. Ct. 539, 550 (2014).

The proposed project is not substantially detrimental to the neighborhood as it is a modest addition to a building, which even with the proposed addition, is well below the maximum allowable F.A.R. of 1.0 on this lot of over 10,400 square feet. The proposed addition would bring the current building to only 3922 sq. ft. of habitable space for two units. Also, the proposed addition begins at a point AFTER the end of the common lot line with the nearest neighboring structure, so its impact on that neighbor is minimized.

With respect to §5.43 and counterbalancing amenities, the petitioners presented an improved landscape plan, which will be shared with Planning Department staff for input.

Attorney Gladstone went on to explain that the proposal satisfied all of the Special Permit standards under Section 9.05 of the Zoning By-Law as follows:

a. The site is an appropriate location for such a use, structure, or condition: This is a continuation of an allowed use that is vastly smaller than the lot size would permit given the available F.A.R. Moreover the proposed addition is far from the nearest abutting structure.

b. For the reason set forth above, the proposed use will not adversely affect the neighborhood.

c. There will be no nuisance or serious hazard to vehicles or pedestrians since the existing driveway and parking will not change.

d. Adequate and appropriate facilities will be provided for the proper operation of the proposed use. See all of the above.

e. The development as proposed will not have a significant adverse effect on the supply of housing available for low and moderate income people as the proposal does not take away any current housing.

Thus, Attorney Gladstone argued, the Board could grant the requested relief either under §5.43 and §8.02.2 OR under c. 40A, §6.

Zoning Board of Appeals Chairman Zuroff asked if there was anyone present who wished to speak in favor of the application. No one spoke in favor of the application.

Zoning Board of Appeals Chairman Zuroff asked if there was anyone present who wished to speak in opposition to this application. No one spoke in opposition to the application.

Zoning Board of Appeals Chairman Zuroff asked if the Board had any questions. Board Member Lark Palermo asked if the condominium documents needed to be revised in order to accommodate the changes to the common areas. Attorney Gladstone stated that he or another attorney would look at the condominium documents to address any required changes. Attorney Gladstone noted that both residential condominium owners were Petitioners and they made all of the decisions for the residential condominium. Chairman Zuroff noted that the condominium issue was not within the Board's purview.

Chairman Zuroff called upon Karen Martin, Planner, for the Town of Brookline, to deliver the findings of the Planning Board.

FINDINGS

Section 5.43 – Exceptions to Yard and Setback Regulations

Section 5.70 – Rear Yard Setback

Section 5.91 – Usable Open Space

Dimensional Requirements	Required	Existing	Proposed	Relief
Rear Yard Setback	30'	3.2'	3.2'	Special Permit*
Usable Open Space	30% 864 sq. ft.	19.3% 555 sq. ft.	19.3% 555 sq. ft.	Special Permit**

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

** Under **Deadrick**, the Board of Appeals may allow an extension of an existing non-conformity if it finds there is no substantial detriment to the neighborhood.

Section 8.02.2 – Alteration or Extension

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

Ms. Martin stated that the Planning Board was supportive of the proposal and that, although yard setback relief was needed, the second floor addition did not expand the footprint of the dwelling and the request was fairly modest. Ms. Martin noted, one member of the Planning Board expressed concern about the 19 privately owned parking condominium spaces on the lot and its effect on the F.A.R. calculation. Attorney Gladstone pointed out that the entire 10,400 sq. ft. lot was covered by a single master deed but that even if the lot were divided into two 5200 sq. ft. lots (the minimum lot size for the district is 5000 sq. ft.) the resulting F.A.R. for the proposed projects would still be well below the F.A.R. limit of 1.0.

Ms. Martin concluded that the Planning Board recommended that the requested relief be granted, subject to subject to the following conditions:

1. Prior to the issuance of a building permit, the applicant shall submit a final site plan, floor plans and elevations, 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 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 an 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.

The Chairman then called upon acting Deputy Building Commissioner, Michael Yanovitch, to deliver the comments of the Building Department. Mr. Yanovitch stated that the requests for relief were modest and the Building Department supported granting the required relief. Mr. Yanovitch indicated that the Relief was available under §8.02.2, so there was no need to apply the “not substantially more detrimental” test of c.40A, §6 and the *Deadrick* and *Gale* cases. Attorney Gladstone expressed the opinion that c.40A, §6 was to be applied in lieu of the relief set forth in the Town By-Law, but expressed the belief that, in this case, the Town By-Law was no more onerous than the statutory standard so there was no need for the Board to decide which standard to apply and to simply find that the petition met either standard. Chairman Zuroff expressed the opinion that, if Special Permit relief is available under the By-Law for expansion of a pre-existing non-conforming aspect of a structure, then the By-Law special permit standard should apply.

After a brief discussion, all members of the Board expressed support for the proposal.

The Board of Appeals then determined by unanimous vote that the requirements for a Special Permits for Sections **5.43**, **5.70**, **5.91** and **8.02.2** have been met. The Board made the following specific findings pursuant to said **Section 9.05**:

- a. The specific site in 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.

Accordingly, the Board of Appeals voted unanimously to grant the requested relief and approved the site plan by Michael Clancy dated 8/31/2016 and the architectural plans by Lidia Bril, architectural designer, dated 6/9/2016, subject to the following conditions:

1. Prior to the issuance of a building permit, the applicant shall submit a final site plan, floor plans and elevations, 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 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 an 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.

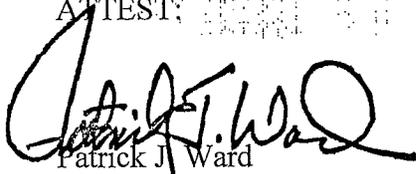
Unanimous Decision of
The Board of Appeals

Filing Date: 1/17/17


Mark G. Zuroff, Chairman

A True Copy

ATTEST:


Patrick J. Ward
Clerk, Board of Appeals