



Town of Brookline

Massachusetts

BOARD OF APPEALS
Jesse Geller, Chairman
Mark Zaroff
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. 2018-0024
JESSI DIMOCK AND JONATHAN BAKER
128 DAVIS AVENUE #C, BROOKLINE, MA

Petitioners, Jessi Dimock and Jonathan Baker, applied to the Building Commissioner for permission to finish the attic space at the fourth floor and add two dormers to create additional habitable space. 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 June 7, 2018 at 7:00 PM., 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 May 24, 2018 and May 31, 2018 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:

128 DAVIS AVENUE, #C, BROOKLINE, MA 02445 - conversion of unfinished attic to finished space, including two new small dormers in a(n) T-5 TWO-FAMILY & ATTACHED SINGLE-

**FAMILY on 06/7/2018 at 7:00PM in the 6th Floor Select Board's Hearing Room
(Petitioner/Owner: Philip Kramer) 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:

§5.20 - FLOOR AREA RATIO

§5.30 - MAXIMUM HEIGHT OF BUILDINGS

§5.43 - EXCEPTIONS TO YARD AND SETBACK REGULATIONS

§5.70 - REAR YARD REQUIREMENTS

§8.02.2 – ALTERATION AND EXTENSION

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 in its programs or activities on the basis of disability or handicap or any other characteristic protected under applicable federal, state or local law. Individuals who are in need of auxiliary aids for effective communication in Town programs or activities may make their needs known by contacting the Town's ADA Compliance Officer. Assistive Listening Devices are available at the Public Safety Building for public use at Town of Brookline meetings and events. Those who need effective communication services should dial 711 and ask the operator to dial the Town's ADA Compliance Officer.

If you have any questions regarding this Notice or the Assistive Listening Device, please contact Caitlin Haynes at 617-730-2345 or at chaynes@brooklinema.gov.

*Jesse Geller, Chair
Christopher Hussey
Mark Zuroff*

Publish: 05/24/2018 & 05/31/2018

At the time and place specified in the notice, this Board held a public hearing. Present at the hearing were Chairman Jesse Geller and Board Members Kate Poverman and Randolph Meiklejohn. Also

present at the hearing were Zoning Coordinator and Planner, Ashley Clark and Deputy Building Commissioner, Michael Yanovitch.

The case was presented by 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 Petitioner, Jonathan Baker and the architect for the project, Phil Kramer.

Chairman Geller called the hearing to order at 7:00 p.m. Attorney Allen waived the reading of the public notice.

Mr. Allen then described the proposal stating that the Petitioner proposes to finish the attic space at the fourth floor and add two dormers to create additional habitable space. He stated that the building is a three unit condominium and that the unit owned by the Petitioners is granted the right to the fourth floor. Mr. Allen then explained that both dormers are on the facade of the building facing away from the street. He continued that the finished fourth floor would contain a master bedroom, a sitting area, bath, laundry, and walk in closets with 751 s.f. of additional finished living space, noting that the condominium unit currently has 1,920 s.f. of finished living area and the additional living area will allow for the home to comfortably fit the five family members. Attorney Allen noted that the entire structure currently contains 5,760 s.f. of living area and under the proposal would have 6,511 s.f. of finished living area. He added that the Petitioners have support from the other unit owners at 128 Davis Ave and owners of the abutting property at 124 Davis Ave, and the Planning Board unanimously supported these plans.

Attorney Allen then stated that the Petitioner seeks a variance for relief from **Section 5.20** of the Zoning By-Law for floor area ratio and from **Section 5.30** for maximum height, which is a pre-existing non-conforming condition, and a special permit for relief from **Section 5.70** under **Section 5.43** for a pre-existing non-conforming rear yard setback and finally from **Section 8.02.2** pursuant to **Section 9.05** to alter or extend a nonconforming use or structure.

Attorney Allen described the standards under **Section 9.05** of the Zoning By-Law stating: the location is appropriate for the proposed additional square footage; the building will continue to be used as three condominium units and the use will not adversely affect the neighborhood; there will be no nuisance or serious hazard to vehicles or pedestrians because the property's on-site circulation will not change; adequate and appropriate facilities will be provided for the proper operation of a three unit condominium building; and there will be no effect on the supply of housing available for low and moderate income people. Attorney Allen added that allowing the dormers and the increase in FAR would financially allow for this family to stay in a home in Brookline.

Attorney Allen then stated that a variance should be granted from application of **Section 5.20** and **Section 5.30** arguing that the requirements under **M.G.L. Chapter 40A, Section 10** were met. Attorney Allen contended that the uniqueness of the structure, including that it takes up the whole lot and is built in a curved shape with the lot, prevents any ability to expand in compliance with the existing zoning regulations. He further contended that a literal enforcement of the By-Law would involve substantial hardship to the Petitioners, who are committed to using period appropriate materials to ensure consistency with the existing structure. He continued that allowing the two dormers would make the attic, which currently lacks necessary head height, useable. He noted that the dormers have been designed to not go beyond the existing height of the structure to further maintain the structure's character. Attorney Allen argued that the existence of other potential options, such as keeping the ceiling height as it is, does not render a variance impermissible where in this case, it would be economically impractical and infeasible to build out any other way, as a result of the unique conditions affecting locus. Furthermore, Attorney Allen stated that the additional FAR requiring the variance is already existing, easily convertible, and adding the two dormers allows space to be used to its fullest. He summarized that as the Petitioners' three children continue to grow, the inability to utilize the attic space will cause a

financial burden on the Petitioners since it may require them to relocate to a home with enough space for their family. Attorney Allen argued in conclusion that relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the by-law. He noted that the proposal will not change then number of units and there will be no increased on-site circulation. Additionally, by locating the dormers at the back of the structure the applicants have attempted to hide the additions from street view; and the changes required to make attic space habitable are minor. Finally, there are nine houses on Davis Avenue with a height over the 35 feet and the two dormers would not stand out above heights of the structures in the T-5 District.

Chairman Geller then asked whether anyone was present to speak in favor of the proposal. No one spoke in favor of the proposal.

Chairman Geller then asked whether anyone was present to speak in opposition to the proposal. No one spoke in opposition to the proposal.

Chairman Geller then called upon Ashley Clark, Zoning Planner & Coordinator, to deliver the findings of the Planning Board. Ms. Clark noted the following:

FINDINGS

Section 5.20 – Exceptions to Maximum FAR Regulations For Residential Units

Floor Area	Allowed	Existing	Proposed	Finding
Floor Area Ratio (% of allowed)	1.0 (100%)	1.4 (140%)	1.59 (159%)	Special Permit/ Variance*
Floor Area (s.f.)	4,103	5,760	6,511 (751 extra)	

** No special permits are available for this three-family structure. A variance is required for FAR.*

Section 5.30 – Maximum Height of Buildings

Dimensional Requirements	Required	Existing	Proposed	Finding
Building Height	35 feet	44.3 feet	44.3 feet	Variance

Section 5.43 – Exceptions to Yard and Setback Requirements:

Section 5.70 – Rear Yard Requirements

Setback Requirements	Required	Existing	Proposed	Finding
Rear Yard	40 feet	4.3 feet	4.3 feet	Special Permit*

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

Section 8.02.2 – Alteration or Extension

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

PLANNING STAFF COMMENTS

The Planning staff is not opposed to the proposed design changes at the roof of 128 Davis Avenue. The two proposed dormers are at the rear of the home and do not face either Elm Street or Davis Avenue. Due to the configuration of the home on the lot, the dormers are not close to any abutters. The staff does feel that the added space in the attic seems overly large and that doubling the size of the existing condo unit is excessive. The building is already at 140% of the allowable FAR and requires a variance for any additional FAR because three-family homes do not qualify for protection under Deadrick. The staff understands the owner's need to expand their living space and acknowledges that the exterior changes and impact on the neighborhood are negligible but questions whether this property meets the requirements for a variance.

PLANNING BOARD RECOMMENDATION

The Planning Board fully supported this proposal. Due to the location of the dormers and the shape of the lot, the Board felt that the proposed dormers will have no impact on the neighborhood and that the finished fourth story is reasonable in size.

Therefore, should the Board of Appeals find that the statutory requirements for a variance are met, the Planning Board recommends approval of the site plan by Dennis O'Brien dated 1/8/17 and floor plans and elevations by Philip Kramer dated 6/7/2018, 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 for Regulatory Planning.
2. Prior to the issuance of a building permit, the applicant shall submit a landscape 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 elevations stamped and signed by a registered architect 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Chairman Geller then called upon Michael Yanovitch, Deputy Building Commissioner, to deliver the comments of the Building Department. Mr. Yanovitch stated that previously dormers would not have counted as creating space towards FAR. He added that the existing height of the structure is still there and the applicants are not creating a new non-conformity, as the dormers will not be taller than the existing structure. He concluded that the Building Department has no objection to this request and noted that there is no change to the footprint. He added that should relief be granted, the Building Department will work with the Petitioner to ensure compliance with the Building Code.

Chairman Geller and Board Members Poverman and Meiklejohn questioned the need for the additional space within the dormers and beyond what is already available in the attic. Mr. Micklejohn reviewed with the applicant the specifics of the proposed dormer serving the planned master bedroom ("Dormer A") and commented that the master bedroom would be sufficient without this dormer and without creation of any real hardship. Mr. Allen represented to the Board that the Petitioners would agree to remove Dormer A from the project.

A discussion then ensued concerning the need for the dormer serving the proposed bathroom. Mr. Allen noted that this bathroom was located to align with the plumbing stack from below and also to maximize access from the central corridor on the fourth floor. Mr. Geller commented that the bathroom could be located in the planned sitting area without need for a dormer. Mr. Micklejohn responded that the location of the bathroom along the central corridor and aligned with the plumbing stack was important for functionality and expense reasons. Chairman Geller asked what the counterbalancing amenity would be under **Section 5.43** of the Zoning By-Law. Attorney Allen stated that the applicant would improve the landscape in the rear and architecturally match the period materials for the windows that they are proposing to change.

Board Member Poverman asked for further explanation regarding the financial hardship. Attorney Allen explained his argument that the Petitioners could have finished the attic at the time the property was purchased and are currently unable to utilize that space without this relief. Board Member Meiklejohn asked clarifying questions of Attorney Allen and the Board regarding variances.

Chairman Geller opined that he agreed that a hardship was created when the Petitioners were no longer permitted to finish their attic under the Zoning By-Law.

In reliance on the above referenced plans, and subject to the Petitioners' elimination of Dormer A from the project, the Board then determined, by unanimous vote that the requirements for a variance under M.G.L. Chapter 40A, Section 10 from **Section 5.20** for floor area ratio and from **Section 5.30** for height and the requirements for a special permit from **Section 5.70** under **Section 5.43** for rear yard setback and from **Section 8.02.2** pursuant to **Section 9.05** of the Zoning By-Law, respectively, were met, finding specifically under 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.

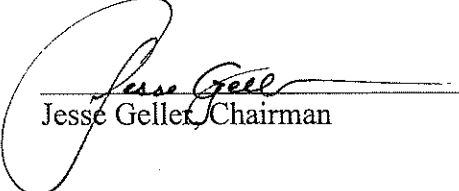
- c. There will be no nuisance or serious hazard to vehicles or pedestrians.
- d. Adequate and appropriate facilities will be provided for the proper operation of the proposed use.
- e. Development will have no effect on the supply of housing available for low and moderate income people.

Accordingly, the Board voted unanimously to grant the requested special permit relief subject to removal of Dormer A and the following conditions:

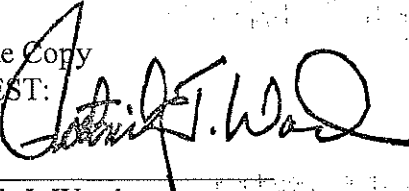
1. Prior to the issuance of a building permit, the applicant shall submit a final site plan, elevations, and floor plans (indicating, in part, removal of Dormer A) subject to the review and approval of the Assistant Director for Regulatory Planning.
2. Prior to the issuance of a building permit, the applicant shall submit a landscape 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 elevations stamped and signed by a registered architect 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: 7/12/2018


Jesse Geller, Chairman

A True Copy
ATTEST:



Patrick J. Ward
Clerk, Board of Appeals