



# *Town of Brookline*

## *Massachusetts*

BOARD OF APPEALS  
Jesse Geller, Chairman  
Mark Zuroff  
Christopher Hussey

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Patrick J. Ward, Clerk

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TOWN OF BROOKLINE  
BOARD OF APPEALS  
CASE NO. 2016-0027  
ROSS, TRS JANICE  
111 MARION STREET

Petitioner, Janice Ross, Trustee of the Marion 111 Trust, owner; and Nicole Forrest, co-developer, applied to the Building Commissioner for building permit to replace the commercial building at 111 Marion Street with a three-family residence. 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 14, 2018 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 May 3, 2018 and May 10, 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:

111 MARION STREET — Plans to demolish existing structure and construct the proposed 4,481 square foot, 3-dwelling unit (ground, second, third, fourth floor) building, with additional square footage at ground floor for mechanical equipment and storage. There is a 536 square foot two-car garage at the ground floor. The building is 4-stories tall, set on a 1.579 square foot lot. Zoning District G-1.75 (per 5.07: dwellings in business districts to use M-2.0) in a(n) G-1.75 (CC) General Business on 5/17/2018 at 7:10PM in the 6th Floor Selectmen's Hearing Room (Petitioner/Owner: Kent Duckham) Precinct 10

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 5.01: Table of Dimensional Requirements, Footnote 1
2. Section 5.07: Dwellings in a Business and Industrial District
3. Section 5.09.2.a: Design Review
4. Section 5.20: Floor Area Ratio
5. Section 5.43: Exception to Yard and Setback Regulations
6. Section 5.60: Side Yard Requirements
7. Section 5.70: Rear Yard Requirements
8. Section 5.91: Minimum Usable Open Space
9. Section 6.02, Paragraph 1: Table of Off-Street Parking Space Requirements
10. 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](http://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) 7302328; TDD (617)-730-2327; or email at [rsneirson@brooklinema.gov](mailto:rsneirson@brooklinema.gov).*

*Jesse Geller, Chair*

*Christopher Hussey*

*Mark Zuroff*

At the time and place specified in the notice, this Board held a public hearing.

The originally scheduled date was continued to June 14, 2018 at 7:15PM by request of the applicant.

Present at the hearing was Chairman Mark G. Zuroff, and Board Members Christopher Hussey and Jesse Geller. The case was presented by Attorney Scott C. Gladstone, 822 Boylston Street, Suite 300, Chestnut Hill, Massachusetts 02467 along with Co-Petitioner Nicole Forrest. Chairman Mark G. Zuroff called the hearing to order at 8:15 p.m.

Attorney Gladstone waived the reading of public notice and explained that the same proposal had been granted the necessary special permits and variances in case No. 2016-0027, but that because of a series of unanticipated events the project was not substantially begun prior to the expiration of the variance, including a previously granted extension. Consequently, the parties have refiled the same project for de novo review seeking the same special permits and variances that were granted in the prior 2016 case.

Petitioner Nicolle Forrest presented to the Board a background of the property, stating as follows: 111 Marion Street is Lot "D" on a Plan by Henry F. Bryant, Engineer dated November 5, 1921, which created four parcels that together create a triangle with Beacon Street being the hypotenuse and Marion Street being one of the legs. Lots A (1429-1441 Beacon Street - 6961 sq. ft.), B (1425 Beacon Street - 4309 sq. ft.) and C (105 Marion Street - 3578 sq. ft.) were generously proportioned; but, Lot D (111 Marion Street - 1579 sq. ft., situated between Lots A and C) was relegated the left-over filler area and was saddled with very irregular lot lines. Lot A, to the North of Lot D fronts on Beacon Street and these two lots are separated by a 6' wide passageway, the edge of which constitutes Lot D's northerly and westerly lot lines. Ms. Forrest noted that this Passageway serves as a buffer between Lots A and D. Lot C runs along the entirety of Lot D's easterly lot line.

Ms. Forrest stated that the deed to Lot D (Book 207319, Page 9 recorded at the Norfolk

County Registry of Deeds) states that "Said premises are conveyed subject to and together with the usual and general rights in and to the passageway shown on said Plan," wherein the referenced plan is the Plan by Henry F. Bryant, Engineer dated November 5, 1921. She noted that the Plan indicates there is a six-foot wide passageway running over Lot A, along the rear lot and side lot lines of Lot D, from the edge of Lot B to Marion Street.

Ms. Forrest stated that Lot C (105 Marion St.), which is also in the G 1.75(cc) district, contains a three-story structure containing 4815 sq. ft. of living space, which is used as a 14-room lodging house; the rest of the block on that side of Marion Street is an M-2.0 district containing row houses of 3.5 stories. Further, Ms. Forrest noted that across the street from the site is a large 8 story rental apartment building run by Chestnut Hill Realty. Lot A contains three commercial spaces totaling 7927 sq. ft. of mixed height (1 to 1.5 stories). The current use of the Project Site is a one story one room building (currently used as a hairdresser) awkwardly placed on the lot with virtually no setback from the rear lot line. The current user maintains some of the surface area of the lot for parking.

Attorney Gladstone and Ms. Forrest each explained the proposed change as follows: Replace the current structure with three residential units (a studio, a two-bedrooms and a three-bedroom) and two parking spaces on the first floor of a new four story building as depicted on the Plan. The Proposed height is 41', while 45' is allowed.

Attorney Gladstone and Ms. Forrest explained that a prior proposal included six parking spaces with a roof deck and stair house on top of the fourth floor of the proposed building; but, after taking input from the Planning Board, the petitioner submitted a revised plan, which

reduced the parking to four spots, eliminated one of two garage bays, pulled the remaining garage bay 2' 6" away from the front lot line, and recessed the living space on the fourth floor to accommodate a larger roof deck as part of the fourth floor of the building. Mr. Gladstone noted that the ZBA, in the 2016 case, further conditioned that the interior parking be reduced from four spaces down to two spaces, which is reflected in the current design under review.

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

Usable Open Space Requirement:

Section 5.07 requires dwellings in a business district to comply with the usable open space requirement in the M-2.0 District (§5.07 does not mention landscaped open space and none is required in a G district), which would mean that 10% of the gross floor area of the residential space would need to be usable open space. The proposed project contains 224 sq. ft. of qualified usable open space. The residential gross floor area is 4499 sq. ft., 10% of which is 450 square feet. So, if the requirement is 10%, the current usable open space is at 4.98% of the residential gross floor area. The 224 sq. ft. is all that is considered "usable" by the Zoning By Law, but it actually consists of a small ground floor patio (triangle shaped and without dimensions large enough to be counted as usable open space) and 448 square feet of roof deck. If all of this open space of the deck were counted under the zoning by-law as usable (as opposed to just 50% of the roof deck), then the Project would only be two square feet short of the 10% requirement.

Special permit relief is available pursuant to Section 5.07 for a dwelling in a business district "to promote reasonable development of the site compatible with adjacent buildings and the surrounding area" OR pursuant to Section 5.43 with the provision of an element that

counterbalances the reduction in open space. With respect to **Section 5.07** relief, given the odd shape of this lot, other than the rear area (and the roof deck), there is no other reasonable place for open space if there is to be a reasonable development on this site. It is significant to note that there is a dearth of open space associated with all of the nearby row houses, so it would seem unreasonable to treat this site differently. Also, the proposed massing is consistent with or even smaller than all of the other housing structures on Marion Street. With respect to **Section 5.43** relief, the proposed building is 4 feet lower than the maximum allowed height and it includes well apportioned roof deck space, the rear alley easement will be cleaned up and beautified if permission will be forthcoming from the owner of the right of way.

Rear setback - §5.70, §5.07 (dwellings in business district) and §5.43:

**Section 5.07** requires dwellings in a business district to comply with the rear yard setback requirement of the M-2.0 District. The required rear setback under the applicable formula for the M-2.0 district would be 30' and the proposed rear setback ranges from 0' to just a few feet. Special permits pursuant to **Sections 5.07** and 5.43 should be granted for the same reason as stated above with respect to open space. In addition, the existing building already has virtually no setback from the rear lot line and there is a 6' wide buffer separating the rear lot line from the abutting property.

Front setback - §5.01 footnote #1 and §5.43:

Footnote #1 to the dimensional chart states in pertinent part that "If the entrance to a garage ... faces towards the street to which its driveway has access, said entrance shall be at least 20 feet from the street lot line." The proposed Project has a single garage bay facing the street (the original design had two garage bays), which as compared to the original design has been pulled

back 2'6" from the street lot line. There is currently open-air parking on the site that acts much the same way the proposed parking will, except that currently the cars are in view of Marion Street and there are currently more cars than there will be with the two-car garage area being proposed for the first floor of the building. Relief is available from the front setback condition by special permit under **Section 5.43**.

Side setback - §5.60, §5.07 (dwellings in business district) and §5.43:

**Section 5.07** requires dwellings in a business district to comply with the side yard setback of the M-2.0 District, which require in the case of the proposed Project setbacks of 11.1 feet and 13.46 feet respectively from each side. The Proposed project provides no side yard setbacks. Special permit relief is available pursuant to **Sections 5.07** and **5.43**. The odd shape of this lot and the need to provide parking spaces, no reasonable development of this location could be made in compliance with a side yard setback requirement. It is significant to note that there are abutting commercial properties and nearby row houses which also have no side setbacks. It would seem unreasonable to treat this site differently, especially where it has the benefit of the 6' easement buffer in the back and along the side.

F.A.R. - §5.07 (dwellings in business district):

**Section 5.07** requires dwellings in a business district to comply with the F.A.R. requirement of the M-2.0 District, which in this case would mean a maximum gross floor area of 3158 sq. ft. Since the proposal is for a building of 5,299 sq. ft. (which includes a garage area of 536 sq. ft.), relief is required. Attorney Gladstone argued that a special permit is available for F.A.R. relief pursuant to **Section 5.07**. Alternatively, Attorney Gladstone argued that the proposed project meets the requirements for a variance

Parking - §6.01.2: The original proposal contained a compliant six proposed spaces, but the re-design urged and approved by the Planning Board contains only two proposed parking spaces. No special permit is available for parking relief so a variance would be required. Attorney Gladstone argued that the elements for a variance had been met, and that a parking reduction is particularly appropriate for such a transit rich area, steps from the C Line.

Attorney Gladstone argued in favor of granting variances as follows:

The ZBA has the power to approve the Petitioner's proposal by granting a variance from the F.A.R and parking requirements of the Zoning By-Law if it finds that, due to circumstances relating to the soil conditions, *shape* or topography of the land or structures, and especially affecting the land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or bylaw would involve substantial hardship, financial or otherwise, to the Petitioner, and 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 Zoning By-Law. See G.L. c. 40A §10.

- Condition #1 for a variance is met. Condition #1 requires in relevant part that "circumstances relating to the ... shape ... of the land ..., and especially affecting the land ... but not affecting generally the zoning district in which it is located." There is no question but that the site in question is a bizarre and irregular shape with a slanting rear line and non-uniform sides (see *Paulding v. Bruins*, 18 Mass.App.Ct. 707, 710 (1984)), which is unique in the zoning district, and that the challenges of development are a consequence of this odd shape.
- Condition #2 for a variance is met. Condition #2 requires in relevant part that "a literal enforcement of the provisions of the ordinance or bylaw would involve substantial hardship, financial or otherwise, to the Petitioner." Hardship is "not being able *reasonably* to use property for the purposes, or in the manner, allowed by the municipal zoning requirements." Healy, *Massachusetts Zoning Manual* at 9-13 (1989). Substantial hardship, financial or otherwise, is found only where under the unique circumstances it is "not economically feasible or likely that the locus would be developed in the future for a use permitted by the zoning ordinance or by-law." *Cavanaugh v. DiFlumera*, 9 Mass.App.Ct.



396, 402, 401 N.E.2d 867 (1980). If the Board does not grant a variance relief from being requested for F.A.R. and the parking, which relates directly to F.A.R. in this G 1.75(cc) district, there is nothing that can reasonably be built on this piece of Property.

- As currently written, with the constraints of this lot, the Zoning By-Law does not permit any residential development of this property for fewer than three units. Four units or more are allowed, but those would require that commercial space occupy 60% of the first floor, all of which would drive a much larger development. Making the entire building commercial was attempted in 2007, but that proposal received stiff opposition from neighbors due to the potential parking and traffic issues and the Planning Board voted against that proposal. Only Use #4A, the proposed three family is an allowed use, which would reasonably and seamlessly fit into the neighborhood.
  - This strangely shaped lot contains 1579 square feet and allowed F.A.R. of 2.0, which must include the parking area (see §5.06.4.b.3), can only be 3158 feet. Since the proposal is for a building of 5299 sq. ft. (which includes a garage area of 536 sq. ft.), relief is required. Assuming a parking area for six cars (required) or four cars (proposed), the F.A.R. allowed as of right would limit the structure to two stories, which is far below the predominant scale of the rest of Marion Street and is dwarfed by the multi-story buildings on the other side of Marion Street.
  - Attorney Gladstone and Ms. Forrest described the applicable hardship, including why no economically viable and practical development of an allowed use can be done at this site without exceeding the 3158 square foot F.A.R. limit imposed under the current by-law, especially where the parking area must be counted towards the F.A.R. calculation.
- Condition #3 for the variance is met. Condition #3 requires in relevant part 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." This bizarrely shaped parcel, positioned on the edge of the zoning district, is unique; so, any special treatment will be understandable without derogating from the intent and purpose of the By-Law. In fact, the relief being requested will facilitate a development in keeping with the scale of the immediate neighborhood. The current use of the site is both a missing tooth in the streetscape and, in some ways, a sick tooth since the existing structure is unattractive and it maintains open air parking in view of the street day and night. Accordingly, the proposed development will be a huge improvement for the block, and, therefore, would in no way be a substantial detriment to the public good.

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: The proposed Project is consistent with massing and use of the adjacent residential spaces. The proposed building does not in any way negatively impact the adjacent commercial space fronting on Beacon St. Single family and two-family uses are not an allowed use in the G district. An all-commercial building would require more variance for parking and, in any case, past proposals for a larger commercial building on this site have attracted opposition because of on-street parking concerns. The current proposal for a three family is the only economically viable alternative use for this oddly shaped lot.

b. For the reasons 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 there is already parking on the site accessed from Marion Street and the proposed use will be less intense than the current hairdresser use.

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.

Zoning Board of Appeals Chairman Zuroff invited the Board members to ask questions. Board Member Jesse Geller asked about the grounds for a variance and the height of the mechanical installation to be on the roof. Mr. Gladstone explained that no smaller residential use was possible because the site would not qualify for a use variance due to the additional requirements for use variances found in **Section 9.09** of the Zoning By-Law. Architect Kent Duckham explained that the roof mechanicals would have a low profile, behind screening and set in the middle of the roof to reduce or eliminate its visual impact from the street. Chairman Mark Zuroff asked about counter-balancing amenities. Mr. Gladstone responded that in those areas where **Section 5.43** was needed for relief, as opposed to **Section 5.07**, that the design of the building being less than the maximum height, the provision of a generous roof deck to reduce massing and the use of interesting architectural features such as the Juliette balconies satisfied the counterbalancing amenities requirement.

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. John Roberg who runs a business at 1415 Beacon Street complained about the lack of off-street parking for his employees and worried that the reduction in parking for the building was a concern. John Randall, co-owner of the Brookline Ballet School at 1431 Beacon Street said that he appreciated that it was a good project but expressed concern over the fact that as a tenant he had not received prior notice of the project and he worried about his second means of egress out the back of his property, which abuts the Project. He also expressed concern over drainage issues because of flooding in the basement of his tenancy. Michael Yanovitch, speaking for the Building Department, responded that the Water Department has already been working with the applicant to drain the storm water into the areas underneath the garage and out to the street. He also indicated that he had already inspected the construction scaffolding already in place to protect the walkway that provides the second form of egress for the Beacon Street storefronts to Marion Street. Mr. Yanovitch noted that the users of the Beacon Street properties had inappropriately put a doubly cylinder latch on the gate leading to Marion Street and had otherwise obstructed the passage and the owner of the Beacon Street parcel had been given a citation for those conditions, but that counsel for the owner of the Beacon Street property indicated that those issues would be addressed.

Zoning Board of Appeals Chairman Zuroff called upon Ashley Clark, Planner for the Town of Brookline, to deliver the findings of the Planning Board. Ms. Clark responded that the Planning Board was supportive of granting the Petitioner's requests to construct this proposal since the

applicant has significantly revised the proposed plans at their guidance. She noted that the Planning Board found that the site has many development constraints: its triangular shape, its small size, the G-1.75 zoning, which requires that parking at the ground level be counted toward the FAR. It was further stated that although the off-street parking requirement of six spaces for the three proposed dwelling units is not met, the Planning Board strongly believes that with rapid transit a half a block away and the Coolidge Corner Business District adjacent, relief for parking is appropriate, especially given the safety aspects of cars backing out onto a well-travelled sidewalk. She indicated that the Planning Board felt the building has been designed attractively and should have less traffic impact than the existing hairdresser or another commercial use. Further, Ms. Clark noted that the apartment building across the street is eight stories tall and so the size of this building is not out of scale to this area.

- 1) Prior to the issuance of a building permit, the applicant shall submit a final site plan, floor plans and elevations, with materials indicated, 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, 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 a construction management plan, subject to the review and approval of the Building Commissioner, with a copy to the Planning Department.
- 4) Prior to 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 and floor plans stamped and signed by a registered architect; and 3) evidence the 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 provided explanation as to why a use variance was not available for this project. Mr. Yanovitch reported that the Building Department was supportive of the proposal.

In deliberations, Board Member Jesse Geller commented that he did not believe that special permit relief under **Section 5.07** was available for F.A.R., to which comment Chairman Zuroff agreed. Board Member Jesse Geller also expressed that, although he is often reticent to reduce parking requirements because of the need for off-street parking spaces in Town, even with the T nearby, that the requested reduction was appropriate in this case due to the proximity of the building to the busy intersection of Marion and Beacon, which is subject to traffic congestion. Mr. Geller also agreed that the lot was sufficiently unique in its irregular shape in addition to the changes in elevation along Marion Street.

Board Chairman Zuroff expressed his agreement with Board Member Geller, stating further that he believed that sufficient counterbalancing amenities as described by Mr. Gladstone have been provided. Board Member Christopher Hussey concurred.

The Board of Appeals then determined by unanimous vote that the requirements for a Special Permits for **Sections 5.06.4.b, 5.01 Footnote 1, 5.07, 5.09.2.a, 5.43, 5.60, 5.70, 5.91** 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.

The Board of Appeals also determined by unanimous vote that the requirement for a variance had been met for **Sections 5.20** and **6.02, Paragraph 1**.

Accordingly, the Board of Appeals voted unanimously to grant the requested relief for the plans of Duckham Architecture & Interiors dated August 11, 2017 and the Site Plan of Everett M. Brooks Co. dated July 17, 2017 subject to the following conditions:

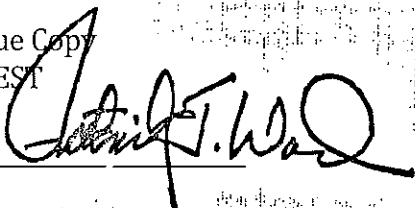
1. Prior to the issuance of a building permit, the applicant shall submit a final site plan, floor plans and elevations, with materials indicated, subject to the review and approval of the Assistant Director of Regulatory Planning who will confirmed plans submitted match the design approved by the Planning Board on 6/2/2016.
2. Prior to the issuance of a building permit, the applicant shall submit a final landscaping plan, 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 a construction management plan, subject to the review and approval of the Building Commissioner, with a copy to the Planning Department.
4. Prior to issuance of a certificate of occupancy, the applicant shall submit a plan to enhance pedestrian safety in front of the garage, such as a visible alert when cars are backing out of the garage, subject to the review and approval of the Engineering/Transportation Director.
5. 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 and floor plans 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: 7/12/2018

  
Mark G. Zurhoff, Chairman

A True Copy  
ATTEST



Patrick J. Ward, Clerk, Board of Appeals