



# Town of Brookline

## Massachusetts

BOARD OF APPEALS  
Jesse Geller, Chairman  
Mark G. Zurroff  
Christopher Hussey

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TOWN OF BROOKLINE  
BOARD OF APPEALS  
CASE NO. 2018-0087  
BROOKLINE RESIDENCES, LLC

Petitioner, Brookline Residences, LLC, applied to the Building Commissioner for permission to construct a new single-family home at 217 Wolcott Road. 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 February 28, 2019 at 7:05 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 February 14, 2019 and February 21, 2019 in the Brookline Tab, a newspaper published in Brookline, Massachusetts. 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:

**217 WOLCOTT ROAD, BROOKLINE, MA 02467 - Construct New Single Family House in a(n) S-10 SINGLE-FAMILY on February 28, 2019 at 7:00 pm in the 6th Floor Select Board's Hearing Room (Petitioner/Owner: Dmitry Deych) Precinct 15**

The Board of Appeals will consider variances and/or special permits from the following sections of the Zoning By-Law:

**§5.09.2.N – DESIGN REVIEW**

**§5.13 - LOT WIDTH**

**§5.20 - FLOOR AREA RATIO**

**§5.30 - MAXIMUM HEIGHT OF BUILDINGS**

**§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](http://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](mailto:chaynes@brooklinema.gov).*

*Jesse Geller, Chair*

*Mark Zuroff*

*Christopher Hussey*

At the time and place specified in the notice, the Zoning Board of Appeals held a public hearing.

Present at the hearing was Chairman Mark G. Zuroff and Board Members Lark Palermo and Johanna Schneider.

The case was presented by Adam R. Barnosky, Esq., Ruberto, Israel, & Weiner, P.C., 255 State Street, 7<sup>th</sup> Floor, Boston, MA 02109. Also in attendance was Dmitry Deych, manager of the Petitioner, Brookline Residences, LLC.

Chairman Mark G. Zuroff called the hearing to order at 7:30 p.m. Attorney Barnosky stated that the Petitioner proposes to construct a new single-family home at 217 Wolcott Road.

Attorney Barnosky presented to the Board a background of the property, stating the following: The subject property is located mid-way between LaGrange Street and Shaw Road, on a rectangular lot on the northern portion of Wolcott Road, south of the Putterham Meadow Golf Course. The property is situated within the Single-Family (S-10) Zoning District. The neighborhood consists of similarly-sized lots and single-family homes.

Attorney Barnosky detailed the Petitioner's proposal, stating that the Petitioner's new construction will replace a single-family home that was demolished in 2016, after many years of falling into disrepair. The new single-family house will consist of 2,999 square feet of living space. The first floor will contain living area, a two-car garage, mudroom and a rear deck. The second floor will be composed of a master bedroom suite with a bathroom, and three additional bedrooms and two baths. There will be an upper deck on the second floor exclusive to the Master Suite. The exterior of the residence will be clad using clapboard siding and an asphalt shingle roof.

Attorney Barnosky then detailed the procedural background of the project, stating that 217 Wolcott Road is currently a vacant lot that previously contained a single-family house. The former home was demolished in 2017 after the Preservation Commission lifted the stay of demolition on the home. In August 2018, the Applicant submitted a building permit application with a Site Plan by Peter Nolan and Architectural Plans by Rockwood Design, Inc. to the Town of Brookline Building Department relative to the proposal before the Zoning Board of Appeals.

Attorney Barnosky stated that the Planning Board held public hearings on this application on January 4, 2019 and again on February 7, 2019 to discuss, among other items, the Design Review Standards under Section 5.09.2.n of the Zoning Bylaws. At the initial public hearing, the Planning Board requested modifications to the basement, including removal of the windows and removal of a

basement level walk-out balcony, both of which were undertaken by the applicant. Also, due to the substantial grade of the property, the Planning Board requested the foot print of the house be brought closer to the street. The change in location had the effect of both (a) reducing the rear elevation and (b) siting the home in similar placement compared to other homes on the street.

Attorney Barnosky stated that the Petitioner undertook the requests of the Planning Board, who approved the modified design. During the second Planning Board hearing, in which the Petitioner's application was recommended, the Planning Board made an additional recommendation to enlarge the garage width to more easily accommodate two vehicles. The Planning Board's recommendations were undertaken on the plans submitted prior to the hearing. The final design increased the size of the garage from seventeen (17) feet to eighteen (18) feet, reducing the main box of the house by one (1) foot in width.

Attorney Barnosky then discussed the special permit relief requested before the Zoning Board of Appeals pursuant to **Section 9.05** of the Zoning Bylaw. With respect to **Floor Area Ratio** and **Section 5.20** of the Zoning Bylaw, Attorney Barnosky stated the most updated plans have a Floor Area of 2,999 square feet of habitable space and FAR of 0.282. Pursuant to **Table 5.01's Dimensional Regulations**, maximum FAR in the S-10 Zoning District is 0.30.

Attorney Barnosky stated that, due to the provisions of **Section 5.09.2.N** of the Zoning Bylaw, the unfinished basement space, because it could be modified in the future to meet habitability requirements under State Building Code, would result in the total Gross FAR being greater than the permitted 0.30 under **Table 5.01**, and as such, requires a Special Permit subject to the **Community and Environmental Impact and Design Standards** of **Section 5.09.4**. Attorney Barnosky stated that, as shown on the the updated plans, the inclusion of the unfinished basement would add 1,362 s/f, bringing the total Floor Area to 4,361, and an FAR of .410, so the Special Permit requirement is triggered.

Attorney Barnosky stated that, pursuant to **5.09.2 subsection (n)** of the Zoning Bylaws, the Zoning Board of Appeals must find in granting the Special Permit, that the massing, scale, footprint, and height of the building are not substantially greater than, and that the setbacks of the building are not substantially less than, those of abutting structures and of other structures conforming to the zoning by-law on similarly sized lots in the neighborhood and S-10 Zoning District.

Attorney Barnosky stated that, in support of these findings, the Board should note that the proposed building is compliant with the minimum setback requirements for front, side and rear yard setbacks, the property complies with minimum lot size as well as landscaped and usable open space; and the proposal complies with maximum height standards. Further, in regards to size and massing, the Board should refer to the chart showing the comparable FAR of other properties on Wolcott Road. Note that 9 of the 23 homes listed, approx. 40% of such homes exceed the allowable maximum FAR in the S-10 Zoning District.

Attorney Barnosky stated that, regarding Maximum Height, which was originally cited in the Deputy Building Commissioner's denial letter, pursuant to **Section 5.30** of the Zoning Bylaw, the proposed structure is in compliance with **Table 5.01**'s Dimensional Regulations, allowing a Maximum Height of 35 Feet. At the time the original building permit set was submitted, there were no elevations or calculation demonstrating the height up to the ridge of the structure. As a result, the height was flagged as non-compliant. As show on the plans provided to the Board, as well as a letter dated Feb. 28, 2019 from Project Architect Phillip Baker, the structure is compliant with **Table 5.01** in measuring the height from the ridge down to perimeter grade (at 31 feet 3 inches) or to record grade (at 34 feet 1 and ½ inches). Attorney Barnosky stated that the height issue was discussed at length during the Planning Board hearings and accepted and understood by the Board as part of their vote to approve.

Attorney Barnosky discussed **Section 5.13**, sets a requirement of 85 feet for lot width. Here the lot has a pre-existing non-conformity, being 60 feet in width. Attorney Barnosky stated that, as noted in

the Planning Board memo, pursuant to *Deadrick*, the Board may authorize an extension of an existing non-conformity where there is a finding of no substantial detriment. Attorney Barnosky stated that here, unlike many of the facts surrounding *Deadrick* and the line of cases, including *Bransford* and *Bjorklund*, the non-conformity relates to the land, not the structure and there is no intensification of non-conformity. Further, this non-conformity is not unique to the street, as nearly every other house on the immediate stretch of Wolcott Road does not meet the requirements for lot width.

Ms. Schneider inquired whether the Petitioner's request regarding lot width would be analyzed under relief for special permit or a variance. Deputy Building Commissioner Michael Yanovitch stated that, pursuant to *Bjorklund v. Zoning Bd. of Appeals of Norwell*, 450 Mass. 357 (2008), lot width would be interpreted as a special permit under M.G.L.c. 40A Sec. 6, upon a finding of no substantial detriment to the neighborhood.

Attorney Barnosky discussed that Special Permit standards pursuant to **Section 9.05** of the Zoning Bylaws; stating that the specific site is an appropriate location for such a use, structure, or condition. This is a Single-Family Home located in a Single-Family Zoning District. As discussed previously, (1) the proposed building is compliant with the minimum setback requirements for front, side and rear yard setbacks; (2) the property complies with minimum lot size, height, as well as landscaped and usable open space. The use as developed will not adversely affect the neighborhood, as the proposal is a by right use in the neighborhood and zoning district. There will be no nuisance or serious hazard to vehicles or pedestrians. The project has been designed in compliance with the design review standards of **5.09.2.n**. The redesigned garage allows for parking for two vehicles. Adequate and appropriate facilities will be provided for the proper operation of the proposed use. Development will not have a significant adverse effect on the supply on housing available for low- and moderate-income people. This development is consistent, and even modest, in comparison to other homes in the zoning district and community.

Ms. Palermo inquired about the height of the residence. Attorney Barnosky stated that, as shown on the plans provided to the Board, as well as a letter dated Feb. 28, 2019 from Project Architect Phillip Baker, the structure is compliant with Table 5.01 in measuring the height from the ridge down to perimeter grade, at 31 feet 3 inches, or to record grade, at 34 feet 1 and ½ inches.

Chairman Zuroff asked whether the Petitioner had any objection to a condition on the Special Permit prohibiting converting the uninhabitable basement space into habitable space within ten (10) years. Attorney Barnosky stated there was no objection.

Ms. Schneider asked whether the Petitioner had letters of support or whether any neighbors spoke for or against the proposal at the Planning Board hearings. Attorney Barnosky stated that there were no letters in support, however, several neighbors and abutters attended the first Planning Board meeting on January 4, 2019 and spoke in favor of the application.

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

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

Karen Martin, Planner for the Town of Brookline, delivered the findings of the Planning Board:

## **FINDINGS**

### **Section 5.09.2.N**

n. any construction of newly created space, whether or not habitable, finished or built out, where such space substantially satisfies the requirements for habitability under the State Building Code or could with the addition of windows or doors and without other significant alterations to the exterior of the building be modified to substantially meet such habitability requirements, and which space if finished or built out or converted to habitable space would result in the total Gross Floor Area of the structure being greater than the permitted Gross Floor Area in Table 5.01. In granting any such special permit, the Board of Appeals, in addition to the requirements of §5.09 and §§9.03 to 9.05, shall be required to find that the massing, scale, footprint, and height of the building are not substantially greater than, and that the setbacks of the building are not substantially less than, those of abutting structures and of other structures conforming to the zoning by-law on similarly sized lots in the neighborhood. **In granting a special permit for construction of such non-habitable space, the Board of Appeals shall set forth as a condition of the special permit the extent to which such space may or may not be**

converted to habitable space in the future pursuant to Section 5.22 or otherwise, with the allowed future conversion to habitable space no greater than the applicant's representation of the intended amount of future conversion.

Floor Area	Allowed	Proposed	Finding
Floor Area Ratio (% of allowed)	.30 (100%)	Without basement: .28 With basement: .42	Special Permit
Floor Area (s.f.)	3,189	Without basement: 3,016 With basement: 4,475	

**Section 5.13 – Lot Width**

**Section 5.30 – Maximum Height of Buildings**

	Allowed/Required	Proposed	Finding
Lot Width	85 feet	60 feet	Special Permit/Variance*
Maximum Height	35 feet	34.75 feet**	Complies**

\* 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.

\*\* The Deputy Building Commissioner and the applicant have not agreed on the interpretation of how to measure the height of this structure.

**Section 8.02.2 – Alteration or Extension**

A special permit is required to alter this non-conforming structure.

**PLANNING BOARD COMMENTS**

The Planning Board appreciated the significant improvements made to the plans with regards to the siting and grading and the basement level. The Board felt that the house is modest in size and scale and appropriate. The Board would like to see the width of the garage increased by one foot by removing one foot from the interior living space because the garage currently seems too narrow to be useable for two cars.

Therefore, the Planning Board recommends approval of the site plan by Peter Nolan dated 2/27/18 and floor plans and elevations by Rockwood Design, Inc. dated 1/17/2019 subject to the following conditions:

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

and elevations showing an enlarged garage, subject to the review and approval of the Assistant Director of Regulatory Planning.

2. The extent to which any non-habitable space may be converted to habitable space in the future, in addition to other relevant By-law sections regulating FAR, must comply with §5.22 of the Zoning By-law.
3. Prior to the issuance of a building permit, the applicant shall submit a final landscaping plan showing retaining walls and materials, subject to the review and approval of the Assistant Director of Regulatory Planning.
4. 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: a) a final site plan stamped and signed by a registered engineer or land surveyor; b) final floor plans and elevations stamped and signed by a registered architect or engineer; and c) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Chairman Zuroff then called upon Deputy Building Commissioner Michael Yanovitch to deliver the comments of the Building Department. Mr. Yanovitch stated that the application required review pursuant to Sections §5.09.2.N and §5.13 of the Zoning Bylaw and that such relief could be granted by the Zoning Board of Appeals by a finding, pursuant to *Bjorklund v. Zoning Bd. of Appeals of Norwell*, 450 Mass. 357 (2008), of no substantial detriment to the neighborhood. Mr. Yanovitch stated that the Building Department had no objections to the relief sought under this application and Sections §5.09.2.N and §5.13 of the Zoning Bylaw. Mr. Yanovitch stated that the height of the proposed structure was in compliance with Sections 5.20 and 5.30 of the Zoning Bylaw and Table 5.01's Dimensional Regulations.

Chairman Zuroff inquired whether the application is subject to a special permit under M.G.L. c. 40A Sec. 6. Mr. Yanovitch answered affirmatively.

Mr. Yanovitch stated that the Building Department will work with the applicant to ensure compliance with all building codes.

In deliberation, Ms. Schneider stated that the application shows a suitable proposal for the lot and that there is no substantial detriment to the neighborhood. Chairman Zuroff concurred with Zoning Ms. Schneider's assessment.

The Board then determined, by unanimous vote that there was no substantial detriment to the neighborhood, and the requirements for relief by special permit from the application of the provisions of the Zoning By-Law pursuant to Section 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 a significant adverse effect on the supply on housing available for low and moderate income people.

The Board further found that the massing, scale, footprint, and height of the building would not be substantially greater than, and that the setbacks of the building would not be substantially less than, those of abutting structures and of other structures conforming to the zoning by-law on similarly sized lots in the neighborhood and S-10 Zoning District.

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

- 1. Prior to the issuance of a building permit, the applicant shall submit final site plans, floor plans and elevations showing an enlarged garage, subject to the review and approval of the Assistant Director of Regulatory Planning.**
- 2. The extent to which any non-habitable space may be converted to habitable space in the future, in addition to other relevant By-law sections regulating FAR, must comply with §5.22 of the Zoning By-law.**
- 3. Prior to the issuance of a building permit, the applicant shall submit a final landscaping plan showing retaining walls and materials, subject to the review and approval of the Assistant Director of Regulatory Planning.**

4. 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:
- a) a final site plan stamped and signed by a registered engineer or land surveyor;
  - b) final floor plans and elevations stamped and signed by a registered architect or engineer; and
  - c) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

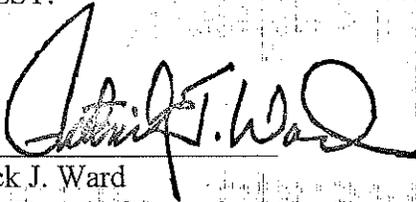
Unanimous Decision of  
The Board of Appeals

Filing Date: 03/12/19



Mark G. Zuroff, Chairman

A True Copy  
ATTEST:



Patrick J. Ward  
Clerk, Board of Appeals