



# *Town of Brookline*

## *Massachusetts*

**BOARD OF APPEALS**  
Jesse Geller, Chairman  
Mark Zuroff

Town Hall, 1<sup>st</sup> Floor  
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**Patrick J. Ward, Clerk**

TOWN OF BROOKLINE  
BOARD OF APPEALS  
CASE NO. 2018-0049  
MIGUEL & MARISA SERRANO  
150 TAPPAN STREET

Petitioners, Miguel and Marisa Serrano, applied to the Building Department for a building permit to convert a single-family dwelling to a two-family dwelling and add an addition. 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 September 13, 2018 at 7.05 PM, 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 September 6, 2018 and September 13, 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:

**150 TAPPAN STREET, BROOKLINE, MA 02445 - APPLICATION TO CONVERT 150 TAPPAN ST TO A 2 FAMILY PROPERTY. PROPERTY IS IN SC-10 DISTRICT in a(n) SC-10 SINGLE-FAMILY & CONVERTED FOR TWO-FAMILY on 09/20/2018 at 7:10 PM in the 6th Floor Select Board's Hearing Room (Petitioner/Owner: Miguel Serrano) Precinct 12**

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:

**§4.07 – TABLE OF USE REGULATIONS, USE #03**

**§5.05 - CONVERSIONS**

**§5.14.1 – LOT FRONTAGE**

**§5.14.2 – LOT FRONTAGE**

**§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](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  
Christopher Hussey  
Mark Zuroff***

**Publish: 09/06/2018 & 09/13/2018**

At the time and place specified in the notice, this Board held a public hearing. The Petitioner requested a continuance to November 1, 2018 in order to allow for time to make revisions and return to the Planning Board. The request was granted.

The Petitioner appeared on November 1, 2018. Present at the hearing was Chair Johanna Schneider and Board Members Lark Palermo and Randolph Meiklejohn. The case was presented by Attorney Scott C. Gladstone, 822 Boylston St., Suite 300, Chestnut Hill, Massachusetts 02467. Chair Johanna Schneider called the hearing to order at 7:20 p.m.

Attorney Gladstone introduced the case and stated that he was aware of a specific request that had been made by the Chair prior to the start of the hearing. Chair Schneider then explained that this case has many legal interpretation issues of both the Brookline Zoning By-law and Mass. G.L Ch. 40A. Chair Schneider stated that after reviewing legal briefs from both Attorney Gladstone and Attorney Jennifer Dopazo Gilbert, representing the abutter, she and the Board have numerous legal questions. Chair Schneider stated that she would like the applicant to request to continue the case to a future date in order to allow the Board members to seek a legal opinion from Town Counsel on the legal issues. She further stated that the Board needs assistance from Town Counsel in order to interpret the By-law and state law correctly and accurately. Chair Schneider also stated that she would like to take a roll call of the neighbors in the audience to acknowledge how many people are for and against the project because she anticipates that further discussion on this case will focus primarily on the legal issues. She asked Attorney Gladstone if his applicants will assent to a continuance of the hearing. Attorney Gladstone stated that they do assent and asked if counsel for both sides would be able to supplement Town Counsel's opinion with additional briefs. Chair Schneider responded that she does not believe that will be necessary and that the materials received from both attorneys at this point are extremely thorough and well presented. Chair Schneider further explained

that she will seek a written opinion from Town Counsel after they are able to review the same submitted materials that the ZBA has received to date. The ZBA, she stated, would be much more comfortable reviewing the legal issues if Town Counsel has also weighed in independently. Chair Schneider then presented the legal questions that she would like addressed which include: 1) under Section 4.07.2 of the By-law, is this a conversion? 2) is this a proposal that requires relief under Section 8.02? 3) an analysis of the applicability of the Bjorkland and Bransford line of case law 4) does this proposal require a Section 6 finding under Mass. G.L. Ch. 40A? 5) whether this project can proceed without dimensional variances?

Chair Schneider asked any members of the public who are present to sign a signature sheet indicating whether they are in favor or against the project. The Board voted to continue this hearing to November 29, 2018.

On November 29, 2018, the Petitioner appeared to request a continuance to January 24, 2019 in order to allow Town Counsel additional time to prepare his legal opinion for the Board. The request was granted.

On January 24, 2019, the Board reconvened to hear the case. Present at the hearing were Chair Johanna Schneider and Board Members Lark Palermo and Randolph Meiklejohn. The case was presented by Attorney Scott C. Gladstone. Chair Johanna Schneider called the hearing to order at 7:30 p.m. and went over the hearing procedures.

Attorney Gladstone presented his legal argument. He started by acknowledging the memo drafted by Associate Town Counsel Jonathan Simpson in response to the ZBA's legal questions. Mr. Gladstone stated that he agrees with parts of Mr. Simpson's memo, specifically that Mass. G.L. Ch. 40A Section 6 is the most appropriate statute to apply to the pre-existing non-conforming lot frontage. Mr. Gladstone continued that he does not agree with Mr. Simpson's interpretation of the phrase "originally constructed" under the Table of Uses #2 and #3 in the

Brookline Zoning By-law. Mr. Gladstone further explained that the conversion of this structure from a stable to a house took place nearly one hundred years ago in 1925. He argued that the building permit from that year shows that some portions of the stable may have been used to create the single-family house but that an entirely new foundation was poured in 1925 for a new dwelling. Mr. Gladstone noted that Mr. Simpson's memo states that because the house may once have been a stable, that prevents the house from qualifying as a conversion under Use #3. Mr. Gladstone argued that there is no case law or legislative history to support this opinion and that Mr. Simpson's argument regarding Town Meeting's original intention regarding stables being converted to dwellings is unsubstantiated. Mr. Gladstone states that there is no legislative record or legislative intent related to this clause of the By-law and thus any interpretation would be arbitrary. Mr. Gladstone continued that the only applicable legislative history of Use #3 comes much later, in 1994, when Town Meeting voted to convert this zoning district from an FSC-7 district to an SC-10 district. The history here is clear, Mr. Gladstone argued, that Uses #2 and #3 are intended to be literally applied to enable conversions of single- to two-family dwellings and that legislative history suggests that the Town intended to make conversions as easy as possible for owners.

Mr. Gladstone continued his argument related to the phrase "originally constructed" and stated that the only legitimate mode of analysis is grammatical – the "plain meaning" – and that the best interpretation is one that does not lead to an "illogical result". Mr. Gladstone stated that Mr. Simpson's memo uses a personal opinion to determine Town Meeting intent regarding accessory structures. Mr. Gladstone argued that his grammatical interpretation does not lead to an illogical result and therefore can be applied. He further analyzed the wording of Uses #2 and #3 which states "detached dwelling which is originally constructed for single-family occupancy prior to 1962". He argued that the definition of "detached dwelling" is a building designed or

occupied as a residence and the Serrano's home was a residence designed for single-family occupancy prior to 1962. Mr. Gladstone further analyzed the meaning of the word "originally" within the context of this phrase and also the legislative history of the re-zoning of this zoning district. He stated that if the Town had not wanted 150 Tappan Street to ever be converted to a two-family in the future, the property could have been included in the S-10 district in either 1962 or 1994. Mr. Gladstone also argued that there is no policy reason for preventing single-family homes from converting simply because they may have been a stable nearly one hundred years ago and stated that any zoning by-law found to be "unreasonable or arbitrary" or "substantially unrelated to the public health, safety, convenience, morals, or welfare" shall be found invalid, as found in *National Amusements Inc. v. City of Boston*. Additionally, Mr. Gladstone described uniformity requirements for zoning districts. Mr. Gladstone then presented PowerPoint slides showing the nearby properties and those which are able to be converted to two-family dwellings and built out to the maximum FAR.

Mr. Gladstone stated that the complaints received on this proposal are not related to the issue of the stable but instead to the frontage issue. He also referenced prior cases that utilized Use #3, such as those at 227 Tappan or 88 Mason Terrace, and noted that there was zero discussion at those hearings on the "originally constructed" interpretation. Mr. Gladstone argued that the standards of 9.05 are sufficient to be applied to this case, not a higher or different standard.

Chair Schneider asked if the Board were to find that the property did not meet the qualifications for a conversion under Use #3, would the Board then be required to grant a use variance for the relief. Chair Schneider also asked Mr. Gladstone if he will be making a use variance argument this evening. He replied that he would not and if the project is to move forward, it would have to be under special permit under Use #3. Mr. Gladstone stated that he had

not deeply analyzed the issue. but does not believe the property qualifies for a variance. Ms. Schneider recapped Mr. Gladstone's argument and observed that his interpretation involves reading out the word "originally" from the By-law's language. Mr. Gladstone disputed that characterization of his argument and stated that that he provided explanations for the use of the word "originally". Mr. Gladstone re-iterated that the word "originally" is in the Bylaw to emphasize that the single-family detached dwelling needed to be in place prior to 1962. Ms. Palermo replied that his argument makes the word "originally" unnecessary at all. Mr. Gladstone then provided an additional hypothetical interpretation that the word is included to prevent a clever developer from converting an existing two-family dwelling to a single-family dwelling and then converting it back to a two-family simply to take advantage of the FAR bonus available to conversions only. Chair Schneider asked to confirm that there is no legislative history on this provision. Ms. Schneider questioned whether the Board should discuss the conversion issue separately prior to hearing the remainder of Mr. Gladstone's argument. Mr. Gladstone stated that he would like to make his entire argument at once.

Mr. Gladstone continued making his argument, moving into the Section 6 findings. He presented the proposal and the architectural plans and described how they had been revised over time in response to Planning Board feedback. He presented the proposal, including the proposed FAR and setbacks, in the context of the neighborhood and argued that the conversion and addition are not substantially more detrimental to the neighborhood. He further discussed the existing shared driveway and how the addition of two vehicles onto the property will not negatively impact the existing driveway situation. Mr. Gladstone stated that the proposal could not possibly be substantially more detrimental to the neighborhood because it is under every dimensional requirement for the zoning district. He therefore argued that the proposal complied as follows:

- a. The site is an appropriate location for such a use, structure, or condition because it is located in an SC district.
- b. For the reason set forth under the Section 6 analysis, the proposed use will not adversely affect the neighborhood.
- c. There will be no nuisance or serious hazard to vehicles or pedestrians as there will be no change in parking or traffic patterns on and off the property.
- d. For the reasons set forth under the Section 6 analysis, adequate and appropriate facilities will be provided for the proper operation of the proposed use.
- 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 this will remain a single family home.

Attorney Gladstone continued by stating that Attorney Robert Allen's office has successfully argued cases under Use #3 in the past which were granted special permits. He stated that in both cases these homes doubled in size and were opposed by the neighborhood. Mr. Gladstone concluded by stating that the Serranos need to expand their home for their growing family and need the second unit on this property to finance their renovations and property improvements. They have also been involved in an expensive legal battle with their neighbors, the Bignamis, who have vilified them amongst their neighborhood, he stated. He further stated that he believes his interpretation of Use #3 is reasonable and that an interpretation that creates an exception for this house that may have been a stable one hundred years about would be arbitrary and would challenge uniformity requirements.

Chair Schneider asked to hear testimony in favor of the proposal. Marisa Serrano, the homeowner, stated that she and her husband have worked hard and sacrificed to create their



home but that since moving into 150 Tappan Street they have been met with hostility from their abutter to the front, the Bignamis. Ms. Serrano explained that her family loves Brookline and is making a home in Brookline by volunteering and giving back to the community. She stated that her family is looking to convert their one-family home to a two-family dwelling and believes that this is a common condition in Brookline and that the traffic conditions on Tappan Street should not impact their plans for their property. She stated that she has worked extensively to adjust their proposal to satisfy their abutters but have been unable to come to any agreements. She asked the Board to rise above the chaos of this case and consider what they would do in their shoes. Miguel Serrano, homeowner, also stated that he would like to be treated fairly.

Fran Hoy, 295 Reservoir Road, stated that she is long-term friends of the Serrano family and also the real estate agent who sold them this property. She stated that the property was extremely dilapidated at the time it was purchased. She also stated that there is nothing in the home that is reminiscent of a stable and she believes this is a completely new structure. Ms. Hoy also stated that the Serranos are the type of family Brookline should want to keep in town and that the family is not proposing anything out of the ordinary and just want to be treated fairly.

Ambreen Landa, 17 Gibbs Street, stated that she moved to Brookline about ten years ago and felt extremely welcomed to Brookline. She stated she has known the Serranos for a number of years and that she is horrified to see how the family has been treated by their neighbors to the front.

Chair Schneider than asked to hear from anyone wishing to speak in opposition.

Attorney Jennifer Dopazo Gilbert, representing the Bignamis at 146 Tappan Street, stated that she will be making an argument on the "substantial detriment" of the proposal. She stated that the Planning Board recommended denial of this project because it is too massive and too large. She referenced the memo by Associate Town Counsel Jonathan Simpson and his opinion that the

plain language interpretation of Use #3 must be used. She argued that you cannot delete the word “originally” and give in no meaning, as Mr. Gladstone had argued. She further stated that the Board does not need to reach the “substantial detriment” finding if they agree with Town Counsel’s opinion and if they also support the Planning Board’s recommendation and 17 letters of opposition from Town Meeting members. Ms. Gilbert showed images of the original home compared to the proposed structure and described how the new structure will triple the existing length. She stated that the property is non-conforming with zero frontage along Tappan Street. She explained that the applicants are not entitled to convert from a single-family to a two-family and the Board should deny the request. In addition, she stated that the project is clearly more detrimental to the neighborhood and that no other rear lots with no frontage have been converted to a two-family dwelling. She spoke about the dangerous intersection and traffic implications as well as the Town-owned drainage easement at the rear of the property. She also stated that the structure was originally built as a stable, not as a single-family dwelling, and that each word of the By-law and its plain language meaning should be interpreted.

Ms. Gilbert then introduced Attorney Brian Kaplan to go over the history of the building as a stable. Mr. Kaplan stated the plain meaning of the By-law is that any structure not originally constructed as a single-family dwelling is not eligible for conversion. He previewed that he would also address the factual issue which is that the structure was, indeed, built as a stable. Mr. Kaplan showed various supporting materials including the 1906 Town Atlas, a 1925 Board of Assessors Record, a plumbing application from 1925 and a building application for alterations from 1925. The alteration permit showed that the existing stable at the rear of the lot was being altered to become a single-family residence. Mr. Kaplan showed that the dimensions of the stable and the original footprint of the Serranos’ home are nearly identical. A Board of Assessors record from 1926 then shows that 150 Tappan Street no longer contained a stable, but now a

dwelling and a garage. Mr. Kaplan showed numerous other exhibits that supported the argument that the structure was originally constructed as a stable and argued that “plain meaning” interpretation of the statute must be used. Mr. Kaplan argued that the By-law could have stated that the structure must have been used as a single-family dwelling prior to 1962, but it does not – it clearly states it must have been constructed as a single-family dwelling and this plain interpretation must be applied.

Petra Bignami, owner of 146 Tappan Street and front abutter to the property, spoke in opposition to the project. She stated that her opposition to the project are not legal in nature, but include the dangerous driveway, the unreasonable increase in square footage and increased cars and traffic. Ms. Bignami stated that she is concerned for the safety of her children but also the entire neighborhood. She stated that her family had hoped to have friendly new neighbors at the rear and were relieved they were not developers but have realized that the proposed project is a massive, lucrative development. Ms. Bignami stated that they are not alone in opposing this project – there is significant neighborhood opposition. She stated that the lot is non-conforming and requires access over their property and that this proposal will force more cars over their property. She asked the Board to consider the impacts of this project on those most acutely impacted. Ms. Bignami also presented letters of opposition from her neighbors.

Jill Wittels, 121 Clark Road, abutter at the rear, stated that she would like to speak on behalf of herself as well as her neighbors who could not be present. She stated that her neighbors have already lived through the previous construction project at 150 Tappan Street which has recently been completed. She stated that she had been hopeful there would be landscaped screening but all of the trees on the lot have now been torn down. Ms. Wittels stated that the Clark Road neighbors will be the ones who have to see the huge proposed house at 150 Tappan Street and that their privacy has been lost.

Mr. Gladstone spoke in response to these comments. He asked the landscape architect, Clara Bachelor, to present the landscaping plan in order to show what trees had been cut down. Ms. Schneider stated that the past removal of trees, while unfortunate, is not relevant to the present discussion of the ZBA. Mr. Gladstone further argued that there is evidence that the stable was located on the site of the previous garage.

Chair Schneider called upon Karen Martin, Planner, to deliver the findings of the Planning Board. Ms. Martin noted the following:

**FINDINGS**

**Section 4.07 – Table of Use Regulations, Use #3**

A special permit is required for a detached dwelling converted for two-family occupancy that has external evidence of conversion.

**Section 5.05 – Conversion**

In the case of a conversion of a single-family detached dwelling to a two-family dwelling in an SC, the structure shall conform to all dimensional requirements in Section 5.01; however, the Board of Appeals by special permit may waive any of said dimensional requirements except minimum lot size, provided that no previously existing non-conformity to such requirements is increased and provided that all other requirements of this by-law for such conversions are met.

**Section 5.14.1 – Lot Frontage**

**Section 5.14.2 – Lot Frontage**

**Section 5.43 – Exceptions to Yard and Setback Regulations**

**Section 5.70 – Rear Yard Requirements**

	Required	Existing	Proposed	Relief Required
Lot Frontage	25 feet	none	none	Special Permit*
Rear Yard Setback	30 feet	10.7 feet	10.7 feet	Special Permit**

\* 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.

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

**Section 8.02.2 – Alteration or Extension**

A special permit is required for alterations to a non-conforming structure.

### **PLANNING BOARD COMMENTS**

The Planning Board has remaining concerns about the legal issues of this case and whether this proposal requires special permits or variances under the Zoning By-Law. However, the Planning Board agrees that these issues will be best resolved by the Zoning Board of Appeals. The Board felt that although the applicant made strides in reducing the square footage of the addition, it is still too large for the lot. The Board would like to see the size reduced even further and was compelled to deny the proposal in its current form.

**Therefore, the Planning Board recommends denial of the site plan, floor plans and elevations by Kent Duckham dated 10/17/2018, subject to the following conditions:**

- ~~1. Prior to the issuance of a building permit, the applicant shall submit a revised site plan, floor plans and elevations, subject to review and approval by the Planning Board.~~
- ~~2. Prior to the issuance of a building permit, the applicant shall submit a final landscaping plan, subject to review and approval by the Planning Board.~~
- ~~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 the issuance of a building permit for each house, the applicant shall submit to the Building Commissioner, for review and approval for conformance to the Board of Appeals Decision: 1) final floor plans and elevations stamped and signed by a registered architect; 2) a final site plan, stamped and signed by a registered engineer or land surveyor; and 3) evidence that easements for the common driveway and the Board of Appeals decision have been recorded at the Registry of Deeds.~~

Chair Schneider then called upon Associate Town Counsel Jonathan Simpson to present his legal brief. Mr. Simpson stated that he could go into his argument on Section 6 findings but believes that before that issue was to be reached, there is the threshold issue of whether the property qualifies for a conversion under Use #3 and he believes it does not. Mr. Simpson stated that nothing he has heard this evening changes his legal opinion that the structure was originally constructed as a stable.

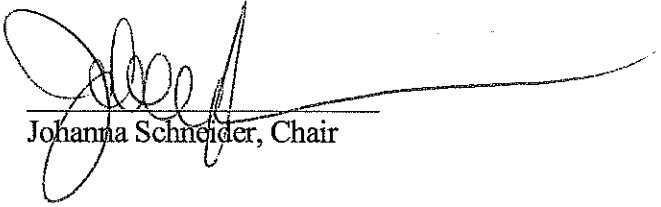
The Board began its deliberations. Chair Schneider began by stating that she believes this is an incredibly sad situation that these neighbors and the neighborhood seem to be at war with

each other. She stated that it is sad that some type of accommodation could not be made to resolve this issue peaceably. She stated that she can see this project ending up in litigation and if she was looking at this project through the lens of Section 6 findings, she is not sure she would find the addition of 2 extra cars to be substantially detrimental. However, she did note that many neighbors and Town Meeting members have expressed strong opposition. She stated that if a court were to be weighing in on this, it would be a tossup as to how they would rule. However, she stated that she does not believe the Board needs to get to that point because she cannot get past the plain language meaning of "originally constructed" and that the Board must consider that our By-law contains that language and that the structure was originally constructed as a stable. Chair Schneider stated that she does not believe this property qualifies for a conversion and will not meet the qualifications for a use variance.

Ms. Palermo stated that she agrees and that the plain language meaning of the statute is that the word "originally" modifies "constructed". She stated that she is very dismayed by this situation and it is very atypical for Brookline to see this number of opponents for a proposal. Mr. Meiklejohn stated that as an architect, this is not really a design discussion, but he agrees with the Chair's comments on the "originally constructed" meaning. Chair Schneider stated that on these grounds, the Board is denying this proposal because it does not meet the qualifications for a conversion. The proposal was unanimously denied.

Unanimous Decision of  
The Board of Appeals

Filing Date: \_\_\_\_\_



Johanna Schneider, Chair

A True Copy

ATTEST

Patrick J. Ward  
Clerk, Board of Appeals

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