



BOARD OF APPEALS
Jesse Geller, Chair
Mark Zurroff
Johanna Schneider

Town of Brookline

Massachusetts

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Patrick J. Ward, Clerk

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2019-0068
35 ELIOT CRESCENT

Petitioners, Linda Mancini and Phil Hresko, as Trustees of the Mancini Realty Trust, applied to the Building Department for a building permit to Change Use from 1-family residence to a 2-family residence; make addition on top of existing rear deck; and change existing roof from gable to a flat roof in a T-5 District. 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 January 23, 2020 at 7:00 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 Petitioners, 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 January 9, 2020 and January 16, 2020 in the Brookline Tab, a newspaper published in Brookline. A copy of said notice is as follows:

Town Hall, 333 Washington Street, Brookline, on a proposal at:

35 ELIOT CRESCENT, BROOKLINE, MA 024675 --- Renovate existing structure and change from 1- to 2- family house. Needs relief for parking in a(n) T-5 TWO-FAMILY & ATTACHED SINGLE-FAMILY on 1/23/20208 at 7 PM in the 6th Floor Selectmen's Hearing Room (Petitioner/Owner: Philip Hresko, AIA) *Precinct 14*

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:

§5.10 - MINIMUM LOT SIZE

§5.13 - LOT WIDTH

§5.43 - EXCEPTIONS TO YARD AND SETBACK REGULATIONS

§5.50 - FRONT YARD REQUIREMENTS

§5.60 - SIDE YARD REQUIREMENTS

§6.02, Paragraph 1 - TABLE OF OFF-STREET PARKING SPACE REQUIREMENTS

§6.04.5.C – DESIGN OF ALL OFF-STREET PARKING FACILITIES

§8.02 - ALTERATION OR 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 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. Assisted 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 Devices, please contact Caitlin Haynes at (617) 730-2345 or at chanynes@brooklinema.gov.

Jesse Geller, Chair

Mark Zuroff

Johanna Schneider

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

Present at the hearing were Chair Jesse Geller, and Board Members Mark Zuroff and Randolph Meiklejohn. The case was presented by Attorney Scott C. Gladstone, 822 Boylston St., Suite 300, Chestnut Hill, Massachusetts 02467. Chair, Jesse Geller called the hearing to order at 7:30 p.m.

Attorney Gladstone waived the reading of public notice and, with Elpida Peristeropoulou, AIA, an architect and designer with Hresko Associates, explained the background of the case as follows:

The subject property, 35 Eliot Crescent, is a one-family 2.5-story dwelling with clapboard siding constructed in 1905 (according to Assessor's records). The neighborhood in which the property is located has a consistent architectural style, with which this building is consistent. The building does differ from most of the other buildings in the neighborhood in that it is a one-family dwelling where most of the others are two-family or three-family dwellings. The Eliot Crescent neighborhood is located just north of Route 9 and adjacent to the Heath School.

Petitioners proposed an expansion of the existing building and conversion of the use to a two-family dwelling. The expansion of the building would involve an addition on the rear of the structure above and within the existing footprint of the deck and the addition of a third story by changing the existing pitched roof to a flat roof, thus creating more habitable space in the existing attic. The building's expansion would result in an increase in the height of the building from ~29 ft. to ~33 ft. and an increase in the floor area from 2,597 square feet to 3,669 square

feet. 87 SF would be added to the first floor, 283 SF would be added to the second floor, and 702 SF would be added to the third floor (existing attic).

Attorney Gladstone argued that the relief needed for the proposed alterations was available as follows:

- The proposed expansion will, in part, build upon portions of the existing building that are already pre-existing non-conforming as to setbacks, and as such those elements should be determined under the “not substantially more detrimental standard” of G.L. c. 40A, Section 6, and not under any Town by-law special permit standard. See *Bellalta v. Zoning Board of Appeals of Brookline*, 481 Mass. 372, 385-386 (2019) (holding that the state law standard of “no substantial detriment” creates a floor setting forth protection for pre-existing non-conformities and a Town may not add further obstacles, in addition to section 6, to an owner seeking to increase a pre-existing non-conformity). Alternatively, the relief is available under Zoning By-Law Sections 5.43 and 9.05 with the provision of counter-balancing amenities, which in this case would be installation of vegetation boxes on the flat roof to provide “green roof” features.
- Similarly, the parking area, which is not changing, but is currently within the front and side yard setbacks, could be allowed to remain under Section 8.02 of the Zoning By-Law. Moreover, if relief is needed, it is available either under G.L. c. 40A, Section 6 as explained in *Bellalta* OR by virtue of a special permit under Sections 5.43 and 9.05.
- Since the lot is pre-existing non-conforming as to lot width and minimum lot size, the change in use to a two-family requires a showing that such change renders such non-conformities “not substantially more detrimental” See *Bjorklund v. Zoning Board of Appeals of Norwell*, 450 Mass. 357 (2008). In no event would a variance be required. See *Bellalta*. Nonetheless, if a variance is required, it may be met for the same reasons that a variance is appropriate for the parking requirement.
- There are three existing parking spaces, which are compliant with the required number of parking spaces for a single-family. Within the transit overlay district, in which the property is situated, converting to a two-family use would require four spaces. No space exists for a fourth parking space as a consequence of the lot shape and topography. Petitioners need a variance with respect to parking, for which they meet the standard for a variance under G.L. c. 40A, §10.

Attorney Gladstone next argued that the special permit standard under the Zoning By-Law does not apply to the pre-existing non-conformities of setbacks, lot width and lot

size. Attorney Gladstone went through the chart describing the neighborhood, as defined by the T-5 zoning district in which the property sits, pointing out that it was typical of the “servant” neighborhood to have lots that were undersized and narrower than required which did not meet the parking requirements. The proposal will also bring the property into conformity with the majority of the neighborhood, which are two-families. Attorney Gladstone also pointed to the four letters of support from immediate neighbors and argued that the proposed project is not more detrimental to the neighborhood than existing conditions.

Attorney Gladstone went on to explain that, to the extent that the Board wished to use the Special Permit standards under Zoning By-Law Section 9.05 to further guide their Section 6 finding, the proposal complied 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 and is consistent with the predominantly two and three family nature of the neighborhood. Two-families are an allowed use in the zoning district.
- b. For the reason set forth in the neighborhood comparison chart, 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, which is not changing.
- d. 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 since the proposal does not take away any current housing.

Attorney Gladstone went on to explain that, the standard for a variance has been met under G.L. c. 40A, §10:

Condition #1 requires in relevant part that "circumstances relating to the ... shape or topography... of the land ..., and especially affecting the land ... but not affecting generally the zoning district in which it is located." While the shape of the lot, being unusually narrow, is not in and of itself sufficient to meet the standard, the narrowness of the lot combined with a significant drop in elevation does satisfy this standard, and this combination is unique in the zoning district. If the lot were flat or sloped gently, and there was more clearance to access the area behind the house on this narrow lot, then more parking could be added further back in the lot. However, because of the topography (the steep change in elevation), which is exacerbated by the placement of the pre-existing house on the narrow lot, the lot's shape and topography preclude the addition of more parking. This situation was caused by the Town of Brookline by virtue of the Town having taken by eminent domain proceeding the front of Petitioner's lot in or about 1917 in order to widen what was then Houlihan Avenue in order to create what today is Eliot Crescent. See Taking Plan of Eliot Crescent, dated January 8, 1917 ("Taking Plan"). The Petitioner's land is labeled J.H Touhy on the Taking Plan, and it can be seen that the Petitioner's house was formerly on the land that the Town took; thus, the Petitioner's house was moved back on the lot, closer to the portion of the lot that drops off in elevation. The portion taken was approximately 21 feet deep, which is the length of a parking space. But for the taking and the resulting move of the house, there would be more usable land to support additional parking. See generally *Marashlian v. Zoning Bd. Of Appeals of Newburyport*, 421 Mass. 719, 726 n. 10 (1996). Moreover, as a consequence of the taking, there is not sufficient usable open space available to add a fourth parking area without then creating another non-conformity. Other properties on Eliot Crescent also had their lot sizes reduced and their houses moved back away from the newly expanded street, but only the Petitioner's lot was narrower than the minimum lot

width; thus, Petitioner's lot was uniquely impacted by the taking, especially with respect to the amount of the lot usable for parking. The same is true with respect to the lot width and size, which were also affected by the taking.

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." In *Adams v. Brolly*, 46 Mass.App.Ct. 1 (1998), a taking was found to be sufficient grounds to establish a hardship to support granting a variance for insufficient frontage when the land needed to provide the required frontage was taken by the Metropolitan District Commission to facilitate a parkland acquisition program. Also, it is established law that "hardship" for variance purposes includes "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 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 (1980). Statutory hardship is usually present when a landowner cannot reasonably make use of his property for the purposes, or in the manner, allowed by the zoning ordinance. See *Rodenstein v. Board of Appeal of Boston*, 337 Mass. 333, 336-337 (1958); *Dion v. Board of Appeals of Waltham*, 344 Mass. 547, 551-552 (1962); *Sherman v. Board of Appeals of Worcester*, 354 Mass. 133, 135-136 (1968); *Broderick v. Board of Appeal of Boston*, 361 Mass. 472, 477-478 (1972). As a corollary to these cases, the SJC has held that "we reject the proposition that a variance is unwarranted if any other purpose can be made of a site." *Marashlian v. Zoning Bd. Of Appeals of Newburyport*, 421 Mass. 719, 726 (1996) (granting a parking minimum variance to facilitate the allowed hotel use). In the case of the Petitioners, if

the full parking requirement must be met, then the lot cannot be developed as a two-family, which is an allowed use in this T district. Similarly, if there is no relief from the pre-existing non-conformity of lot width and size, the lot could not be developed as a two-family.

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 narrow parcel was only one of three on which the house needed to be moved in order to accommodate the Taking Plan. The other lots, on which the houses needed to be moved; are not as narrow and they do not have the same elevation change. Consequently, this lot is unique in the zoning district; 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 and use of the immediate neighborhood. There are letters of support from the neighbors. Also, Petitioner provided a chart listing the number of family units on each lot in the zoning district including a listing of the actually parking provided on each lot. With the exception of many of the single families (but not all), nearly all of the lots in the zoning district contain less than the required parking spaces for the transit overlay district. On Eliot Crescent, excluding Petitioner's property, half of the lots are non-compliant with respect to parking. So, it cannot be said that allowing the variance will not be a substantial detriment to the public good or substantially derogating from the intent and purpose of the by-law. Similarly, with the lot width and size, many other lots in the zoning district suffer from the same pre-existing non-conformity.

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

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

Zoning Board of Appeals Chair Geller called upon Victor Panak, Planner for the Town of Brookline, to deliver the findings of the Planning Board. Mr. Panak reported that, while the Planning Department does not oppose this project in concept, it remains unclear how the proposal would satisfy the statutory requirements for the granting of a Variance since the petitioner had not submitted to the Planning Board a statement addressing those statutory requirements. The Planning Board felt that the proposed change in the use of the property was appropriate and reasonable and that the proposed structural changes would actually bring the structure into greater conformance with the established development patterns of the neighborhood. The Planning Board chose to eschew the question of whether a Variance could be granted and focus instead on the merits of the proposal from a perspective of its compatibility with its surroundings.

Therefore, the Planning Board recommends approval, provided that the Zoning Board of Appeals can find that the standards for a Variance are met, of the site plan by R.E. Cameron & Associates, dated July 7, 2019, and architectural plans by Hresko Associates, dated September 2, 2019, subject to the following conditions:

1. Prior to the issuance of a building permit, the applicant shall electronically submit final floor plans, and elevations, stamped and signed by a registered architect or engineer and a final site plan that includes 1- or 2-foot contour lines, stamped and signed by a registered engineer or land surveyor, to the Assistant Director of Regulatory Planning for review and approval.
2. Prior to the issuance of a building permit, the applicant shall submit a final landscaping plan and/or architectural plans showing proposed counterbalancing amenities which shall include solar panels and/or a green roof subject to the review and approval of the Assistance Director of Regulatory Planning.
3. Prior to the issuance of a building permit, the applicant shall 1) electronically submit the site plan, floor plans, and elevations displaying the approval stamp of the Assistant Director of Regulatory Planning; and 2) evidence that the Board of Appeals decision has

been obtained from the Town Clerk's office by the applicant or their representative and recorded at the Registry of Deeds.

The Chair then called upon Joseph Braga, Jr., Deputy Building Commissioner, to speak on behalf of the Building Department. Mr. Braga reported that the Building Department has no objection to the proposal.

In deliberation, Board Member Meiklejohn expressed his appreciation for the well documented design and the geographical information, which was helpful in establishing that the design is consistent with the character of the neighborhood. Board Member Meiklejohn noted that the undersized lots and inadequate parking is typical of these sorts of neighborhoods built primarily to provide servants' quarters and he noted that every square inch is needed for any improvement and that the size of the portion of the lot that was taken by eminent domain was the same length of a standard parking space.

Board Member Zuroff noted that the proposal brings the property in better conformance with existing neighborhood patterns and that all elements needed for a variance and special permits have been met.

Board Chair Geller commented that all of the elements for a variance under M.G.L. Chapter 40A, Section 10 have been met and that special permit relief was available under the Zoning By-Law Section 5.43 and Section 9.05 (especially where the lot width and size is not being changed from its existing conditions), which standards had been met as well and that the need for a counterbalancing amenity had been met by the provision of landscaping on the roof.

The Board of Appeals then determined by unanimous vote that the requirements for the special permits and for a variance as requested by the Petitioner from application of Sections 5.10, 5.13, 5.50, 5.60, 6.02, 6.04.5.C and 8.02 pursuant to Section 5.43 and Section 9.05 of the Zoning By-Law (for

Special Permit Relief) and pursuant to M.G.L. Chapter 40A, Section 10 (Variance), respectively, have been met. The Board further found that the elements of **Section 9.05** have also been satisfied:

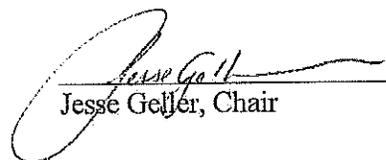
- a. The specific site in an appropriate location for such a use, structure, or condition.
- b. The use as developed will not adversely affect the neighborhood.
- c. There will be no nuisance or serious hazard to vehicles or pedestrians.
- d. Adequate and appropriate facilities will be provided for the proper operation of the proposed use.

Accordingly, the Board of Appeals voted unanimously to grant the requested relief for the alterations indicated on the site plan of **R.E. Cameron & Associates, dated July 7, 2019, and architectural plans by Hresko Associates, dated September 2, 2019, subject to the following conditions:**

1. Prior to the issuance of a building permit, the applicant shall electronically submit final floor plans, and elevations, stamped and signed by a registered architect or engineer and a final site plan that includes 1- or 2-foot contour lines, stamped and signed by a registered engineer or land surveyor, to the Assistant Director of Regulatory Planning for review and approval.
2. Prior to the issuance of a building permit, the applicant shall submit a final landscaping plan and/or architectural plans showing proposed counterbalancing amenities which shall include a so-called "green roof," subject to the review and approval of the Assistance Director of Regulatory Planning and that a Certificate of Occupancy shall not issue until proof has been provided of installation of all approved counterbalancing amenities.
3. Prior to the issuance of a building permit, the applicant shall 1) electronically submit the site plan, floor plans, and elevations displaying the approval stamp of the Assistant Director of Regulatory Planning; and 2) evidence that the Board of Appeals decision has been obtained from the Town Clerk's office by the applicant or their representative and recorded at the Registry of Deeds.

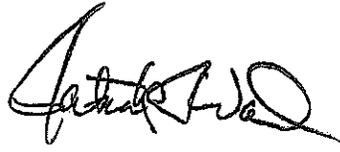
Unanimous Decision of
The Board of Appeals

Filing Date: 2/24/20


Jesse Geller, Chair

A True Copy

ATTEST

A handwritten signature in black ink, appearing to read "Patrick J. Ward". The signature is stylized and cursive, with the first name being the most prominent.

Patrick J. Ward
Clerk, Board of Appeals