



Town of Brookline Massachusetts

BOARD OF APPEALS
Jesse Geller, Chairman
Mark Zuroff
Johanna Schneider

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Patrick J. Ward, Clerk

2019 OCT 28 P 4: 13

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TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2019-0059
114 CLYDE STREET, BROOKLINE, MA

Petitioner, Andrew Falkenstein, applied to the Building Commissioner for permission to demolish and construct a new single-family house at 114 Clyde Street. The application was denied and an appeal was taken to this Board.

The Board determined that the properties affected were those shown on a schedule certified by the Board of Assessors of the Town of Brookline and fixed August 29, 2019 at 7:00 PM., in the Select Board's Hearing Room as the date, time and place for the public hearing. Notice of the hearing was mailed to the Petitioners, to their attorney, if any, 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 August 15, 2019 and August 22, 2019 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:

114 CLYDE STREET, BROOKLINE, MA 02467 - Construction of new single family house with partial demolition of existing structure, preserving the front facade in a(n) S-40 SINGLE-FAMILY on 08/29/2019

at 7:00PM in the 6th Floor Select Board's Hearing Room (Petitioner/Owner: Andrew Falkenstein) Precinct 15

The Board of Appeals will consider variances and/or special permits from the following sections of the Zoning By-Law, and any additional zoning relief the Board deems necessary:

§5.20 - FLOOR AREA RATIO

§5.43 - EXCEPTIONS TO YARD AND SETBACK REGULATIONS

§5.70 - REAR YARD REQUIREMENTS

Any additional relief the Board may find necessary.

Hearings may be continued by the Chair to a date/time certain, with no further notice to abutters or in the TAB. Questions about hearing schedules may be directed to the Planning and Community Development Department at 617-730-2130, or by checking the Town meeting calendar at: www.brooklinema.gov.

The Town of Brookline does not discriminate in its programs or activities on the basis of disability or handicap or any other characteristic protected under applicable federal, state or local law. Individuals who are in need of auxiliary aids for effective communication in Town programs or activities may make their needs known by contacting the Town's ADA Compliance Officer. Assistive Listening Devices are available at the Public Safety Building for public use at Town of Brookline meetings and events. Those who need effective communication services should dial 711 and ask the operator to dial the Town's ADA Compliance Officer.

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

*Jesse Geller, Chair
Christopher Hussey
Mark Zuroff*

Publish: 08/15/2019 & 08/22/2019

On August 29, 2019 at the time and place specified in the notice, this Board held a public hearing. Present at the hearing were Chair Mark Zuroff and Board Members Stephen Chiumenti and Randolph Meiklejohn. Also present at the hearing were Polly Selkoe, Asst. Director of Regulatory Planning; Charlotte Leis, Zoning Coordinator & Planner; and Joe Braga, Deputy Building Commissioner.

The case was presented by attorney Mark Kablack of M.A. Kablack & Associates, P.C., 176 East Main Street, Suite 3, Westborough, MA. Also in attendance was the Applicant, Andrew Falkenstein.

Chair Zuroff called the hearing to order at 7:00 p.m. Mr. Kablack waived the reading of the public notice and handed the Board copies of 3 new documents. Chair Zuroff asked for a summary of the new documents.

Mr. Kablack said the documents are 1) a summary of presentation from today, 2) a rebuttal to Mrs. Richardson's FAR letter which claims that the basement was unfinished when she lived there in the 1990s, and 3) an affidavit by Mr. Falkenstein, the architect who did the FAR calculation.

Chair Zuroff said that what Mrs. Richardson remembers is subjective, and the FAR is an objective thing; he asked if the proposal is based on objective FAR calculations. Mr. Kablack said the calculations are objective, and Mr. Falkenstein's letter is anecdotal support to objective analysis. He said the formerly existing house exceeded FAR so it's a preexisting non-conforming structure. The Planning Board said the current proposal of a new structure at 126% FAR should be reduced to 120%, and the applicant has agreed to that and will reduce if the ZBA approves the plans. Mr. Kablack said besides the FAR, the new home will conform with all other respects to zoning; the case was over-advertised in regards to relief required.

Ms. Selkoe said there was a procedural defect in the application because the application itself says something different than what is proposed tonight. The original application said part of building will be kept, but now the entire building has been demolished. The notice of hearing for the project is completely different from the relief actually needed for the proposal, so the public wouldn't have known what the required relief actually is. She had suggested to the applicant before this hearing that they withdraw and resubmit with accurate information to receive new denial letter. She has received two letters from two different certified architects saying different things about the FAR, and the house was torn down before most recent Planning Board meeting so there is no way to check the numbers.

Mr. Braga read from the original denial letter. He said that since the building is now gone, the denial letter is no longer valid because the proposal is for a new structure, not for modifying an existing non-conforming structure. A project could be built on this property as of right.

Mr. Kablack said the most recent notice of hearing referred to the partial demo of an existing structure requiring relief for §5.20 among other things. He said the applicant is willing to proceed at risk if there is a procedural defect. The application is clearly for FAR ratio, and they no longer need setback relief so the notice was simply putting the public on notice for relief they don't need. The applicant followed the demolition by-law despite people not liking that house was demolished. He believes that the description of proposal changing doesn't matter in this case.

Mr. Kablack said the changes made to the application were made in response to three Planning Board hearings; it's unfortunate that a procedural issue is being raised, but the applicant has worked hard on this project. He discussed the applicability of §8.02 under *Deadrick*; *Deadrick* discusses the reconstruction of home and non-compliance issues that can be relieved through special permits. He says it's a false argument to say that project is different because building has been demolished. The *Bellalta* case also talks about fact that state legislature established special circumstances for cases like this with projects requiring special permit rather than variance. MGL c. 40A, §6 gives this project protections. The court recognizes the right of property owner to reconstruct and extend nonconformities as long as the changes comply with §6. The Planning Board recommendation says that as long as *Deadrick* applies and the FAR goes down to 120%, the Board is fine with the project. The Planning Board conditions require that landscape plan is submitted for approval to the only neighbors who have objected.

Mr. Kablack said they have met the notice requirement and are willing to proceed at risk.

Ms. Selkoe said that none of the Planning Board members or Planning Staff are attorneys, and Town Counsel wants a Town lawyer to research the issue and give an opinion as to if this conforms to

Deadrick if the Board is interested. Ms. Selkoe said that the Building Commissioner felt that because the building was demolished, *Deadrick* might not apply.

Chair Zuroff said the structure in *Deadrick* existed and wasn't torn down completely. If this was a virgin lot, the relief would require variance, and conditions for a variance haven't been met. He's not willing to live with procedural defects, and is inclined to ask Town Counsel about applicability of *Deadrick* just to be safe. As the only other lawyer in room, his recommendation is to take the case off the docket and have it go back to the Planning Board and go through the proper procedure. He said the applicant could present either an argument under *Deadrick* or an application for a variance, but he wants procedural requirements to be fully met. Whatever the measurements of house were before are no longer relevant because it doesn't exist anymore; they are not extending a non-conformity, but creating a brand new structure.

Mr. Kablack said he disagrees and that in *Deadrick* the house was completely razed and rebuilt. They are not applying for a variance, but rather relief under §8.02 and *Deadrick*. If the Board wants Town Counsel to give opinion, they are willing to grant continuance. He also disagrees with the existence of procedural issues: Planning Staff are not attorneys, but he is and he doesn't believe there is a defect and so is willing to proceed at risk.

The Board decided that the issues were too complicated to issue a decision that night, and wanted to ask Town Counsel about procedural issues and *Deadrick*.

Mr. Kablack read from a *Bellalta* case footnote about how inequities between how properties are treated are allowed.

Chair Zuroff said he can't draw a conclusion on that right now and recommends a continuance. Mr. Kablack then requested a continuance and the ZBA members voted unanimously continue the case to October 3, 2019.

Between the August 29th hearing and the October 3rd hearing, one of the Board members who was sitting on the case ended their tenure with the Board. This resulted in there being no possible way for the Board to approve the project, as approval requires the unanimous vote of a three-person Board. Therefore, the Planning Department and Applicant determined that the best course of action was for the Applicant to withdraw the current case (ZB 2018-0069) and resubmit a new application (ZB 2019-0059) so that a new Board could sit on the case and reach a decision. The plans submitted as part of the application were exactly the same as the latest version of the previous case.

Once the new application was submitted, the Board fixed October 3, 2019 at 7:00 PM., in the Select Board's Hearing Room as the date, time and place for the public hearing. Notice of the hearing was mailed to the Petitioners, to their attorney, if any, 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 19, 2019 and September 26, 2019 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 on **10/03/2019 at 7:00PM** in the **6th Floor Select Board's Hearing Room, Town Hall, 333 Washington Street, Brookline**, on the following:

114 CLYDE STREET, BROOKLINE, MA 02467. *Petitioner/Owner - Andrew Falkenstein Reconstruction and expansion of a pre-existing non-conforming single family 6 BR residence.. S-40 SINGLE-FAMILY Zone. Precinct 15.*

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:

§5.09.2.N – DESIGN REVIEW

§5.20 - FLOOR AREA RATIO

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.

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*Jesse Geller, Chair
Mark Zuroff
Johanna Schneider*

Publish: 09/19/2019 & 09/26/2019

On October 3, 2019 at the time and place specified in the notice, this Board held a public hearing. Present at the hearing were Chair Johanna Schneider and Board Members Paul Bell and Randolph Meiklejohn. Also present at the hearing were Charlotte Leis, Zoning Coordinator & Planner, and Joe Braga, Deputy Building Commissioner.

The case was presented by attorney Mark Kablack of M.A. Kablack & Associates, P.C., 176 East Main Street, Suite 3, Westborough, MA. Also in attendance was the Applicant, Andrew Falkenstein.

Chair Schneider called the hearing to order at 7:00 p.m. Mr. Kablack explained the situation regarding the two applications and first requested to withdraw without prejudice the original application, identified as ZB 2018-0069. The Board approved the request to withdraw without prejudice. He then went on to present the application identified as ZB 2019-0059.

Mr. Kablack said that 114 Clyde Street contained a pre-existing non-conforming structure that was deemed significant by the Preservation Commission. The house had a 12-month stay of demolition imposed on it in June 2018; when that stay expired in June 2019 the house was demolished. He said that the project has gone through multiple revisions to satisfy the Planning Board's concerns. The original

proposal was to incorporate the façade of the original building, but the Planning Board did not see merit in that design. He said the Planning Board wanted a smaller massing and was fine with a new façade. He said that the Planning Board also didn't like the second version of the plan which had a mansard roof, which led them to the third and current version of the proposal which has an Italianate design.

He said that the Planning Board had also expressed concerns about the applicability of *Deadrick*, §8.02 of the Brookline Zoning By-law, and MGL 40A §6. For that reason, the Planning Board had recommended conditional approval provided that the FAR of the project shrink from 126% of what's allowed to 120% as is allowed by §5.22 and that final review of the plans is done by the Planning Board. Mr. Kablack said that the plans submitted with the current application conform to the 120% FAR maximum as required by the Planning Board. He also said that one neighbor to the rear of the property had been concerned about adequate fencing at the rear, and that the Planning Board wanted the applicant to consult with that neighbor about plans for rear yard screening. He said that no other neighbor had expressed concerns at either the Planning Board meeting or the previous ZBA hearings.

Mr. Kablack said that at the August 29th ZBA hearing, the Board had wanted him to provide a brief addressing the applicability of *Deadrick* and other case law dealing with reconstructing non-conforming structures. He said he submitted that memo on September 27th. He noted that the Town's Assistant Attorney had agreed with his legal analysis but expressed concern about existence of pre-existing non-conformities.

He said that at Planning Board meetings, the Planning Board had expressed concerns about whether the existing house's FAR was non-conforming. He said that Alison Richardson, a former resident of the house, had given the Planning and Zoning Boards anecdotal evidence that the FAR was conforming. However, Mr. Kablack said, architect Andrew Falkenstein had submitted a memo to the ZBA reaffirming that the existing structure is non-conforming with respect to FAR requirements.

Chair Schneider said that it makes sense to first determine whether *Deadrick* applies to this project or whether it requires a variance. She asked Mr. Kablack if he's prepared to make a variance argument at this hearing if they determine that *Deadrick* does not apply. Mr. Kablack said they would not make a variance argument but would make an argument under By-law §5.22.

Chair Schneider asked whether there was any effort made prior to the demolition of the existing structure to confirm the FAR in person or whether FAR measurements were made based on drawn plans. Mr. Kablack said the memos done by architects Andrew Falkenstein and Derek Rubinoff were based on real-life conditions. Chair Schneider said the two memos do not have the same FAR. Mr. Kablack said the original FAR calculation was based on a draftsman's geometric analysis of plans rather than of in-person calculations. Once concerns were expressed about whether the FAR was accurate, they moved to architect certified plans which led to the later, smaller number.

Chair Schneider asked to confirm that Mr. Kablack wants the Board to rely on only Derek Rubinoff's numbers. Mr. Kablack confirmed that was correct.

Ms. Leis said that the Planning Department has two architect certified plans in the case file that have different FAR results. She said that she checked the Building Department's file on 114 Clyde, but the file doesn't show any building permit applications to finish the basement since Ms. Richardson's family moved out of the house in the 1990s.

Board Member Meiklejohn asked whether the Board can ask the Building Department to take a stance on what they believe about the FAR. Chair Schneider clarified for the record that the Board is addressing the threshold factual question of whether the Board can establish that the FAR is a pre-existing nonconformity. If they can establish that it is a pre-existing non-conformity, then *Deadrick* applies. Chair Schneider asked Deputy Building Commissioner Braga about his thoughts on the project and the chronology of what he has reviewed.

Mr. Braga said that the first Plan Review Denial Letter was issued in August 2018 and that the project then went to the Planning Board; in that version of the plan, the applicant was going to keep the existing façade. In July 2019, he found out that the building had been recently demolished. He said that the Building Department regularly checks the existing FAR of houses if there are any questions about whether the numbers are accurate or not, but that in this case they didn't have a chance to verify the FAR before the house was demolished.

Board Member Meiklejohn said there might not be any way to verify the FAR now, but the Board still needs an answer from the Building Department, otherwise the case can't move forward. He said that an architect's stamp is something to rely on, especially if we can't do on-site verification.

Mr. Braga said that there are two architect-stamped plans that show different numbers, and that he cannot verify which plan is correct. Board Member Meiklejohn said that Architect Falkenstein says there are not two statements from the applicant about what the existing FAR is, and that the Board should rely on the calculations done by Derek Rubinoff.

Mr. Falkenstein said that he did certify the original FAR calculation but that he didn't draw or measure it himself. He also said that he had only stamped a letter saying what the FAR was, and not an actual set of plans. He said that that letter he had stamped relied on plans done by other people. He said that the delta between the FAR he had certified and the FAR that Mr. Rubinoff had certified was 540sf rather than closer to 1,000sf because for the total gross floor area in his letter he had accidentally switched two numbers. He also noted that his numbers show the 3rd floor as being larger than 2nd floor, but that the person doing the FAR calculation had likely made a mistake. Mr. Falkenstein explained why he believed that the first estimator/architect whose numbers he had certified differed from the second architect, Derek Rubinoff, but that he couldn't explain all of the differences. He said that at the last

Planning Board meeting, he took responsibility for the mistake of the first plans, and so had then contacted Mr. Rubinoff to get stamped, as-built drawings to determine the FAR.

Mr. Braga said that if the first plans have an admitted error they can't be certain that the second plans don't also have an error, and because the building no longer exists they can't verify the numbers. Board Member Meiklejohn said that he believed the difference between the two FAR numbers is a distraction, and that the real issue is that the house doesn't exist anymore. He said that the house was rightfully demolished, and unless the Board is deciding that no information about demolished houses can be used, they need to decide something.

Mr. Braga said they are currently seeking relief for a pre-existing non-conforming house, but no house exists anymore. Board Member Meiklejohn asked Mr. Braga if he sees the architect's statement as credible and reasonable. Mr. Braga said he can't verify the numbers and so isn't sure if the statement is credible and reasonable.

Board Member Bell said that the original letter was based on an architect/estimator's numbers and asked what the purpose was of preparing that document. Mr. Kablack said the floor plan drawing and schematic of an old iteration of the plan. Board Member Bell asked whether the building was standing when that was drawn. Mr. Kablack said it was.

Mr. Kablack said the Planning Board had questions about the assessor's FAR numbers versus Mr. Falkenstein's numbers, and so they had gotten Mr. Rubinoff to measure the FAR for an independent determination. Board Member Bell asked whether Mr. Rubinoff went on site to measure. Mr. Falkenstein said Mr. Rubinoff had and that he took into account Brookline's GFA definition; he also said that Mr. Rubinoff had never seen the previous affidavit.

Board Member Bell said they don't have any evidence that the basement was legally finished.

Chair Schneider asked the applicant whether there was any evidence that the basement was finished pursuant to a building permit done by the town. Mr. Kablack said that work done on a structure not in conformance with zoning is found to be lawful and a pre-existing non-conforming structure if it was built more than 10 years ago. Chair Schneider said she agreed with that, but that she had no way of knowing whether the work was done more than 10 years ago or not.

Mr. Kablack said both certifications from architects show the house as over the allowed FAR. They could ask the previous owner to come in and provide testimony if needed, but they don't think it's necessary. Mr. Kablack said he thinks that the Town just doesn't like the project, but the applicant has worked hard to get the Planning Board on board with the project and no one in the neighborhood is opposed. The question of whether to grant the special permit should be based only on whether the proposal is substantially detrimental to the neighborhood.

Chair Schneider said she doesn't necessary disagree with Mr. Kablack, but she is trying to establish the proper precedent of how to deal with an issue like this. The Board is taking their time to consider this project because they want to make sure whatever their decision they make is well substantiated and one that they are comfortable with. She is personally satisfied with Mr. Rubinoff's certification about the FAR and while it is annoying that the applicant didn't have the Building Department check the FAR, the Board cannot just say that they don't have enough information and refuse to move forward. She said that Mr. Falkenstein acknowledges that he messed up, but he cleaned it up by getting Mr. Rubinoff to independently certify the FAR.

Chair Schneider said that the next issue they need to address is what they should do if the space was finished illegally. *Deadrick* only applies if it's a legally existing non-conformity. She agreed with Mr. Kablack that if a non-conformity exists for 10 years it's legal and she asked the Board whether they want to pursue the question of when the non-conforming FAR was created.

Ms. Leis told the Board that while Mr. Kablack had said that the applicant would apply for a special permit under §5.22 if it's found that a non-conformity doesn't exist, that section is not applicable when a house has been demolished.

Board Member Meiklejohn acknowledged that it is challenging for the Building Department to make a determination of whether the basement is legally built or not.

Chair Schneider asked the other Board members whether they were willing to accept Mr. Rubinoff's certified number of 7,153sf as correct based on the best available information in the record. According to the applicant, Mr. Rubinoff's number is based on certified plans corroborated by an affidavit after being on site that the numbers are correct. Board Members Meiklejohn and Bell agreed with Chair Schneider to rely on Mr. Rubinoff's numbers.

Chair Schneider asked Jonathan Simpson, Associate Town Counsel, to provide his opinion on this case regarding the applicability of *Deadrick*. Mr. Simpson said that his analysis is based on the Board assuming that this is a legally existing pre-existing non-conforming structure. He said that *Deadrick* and *Gale* deal with the reconstruction of non-conforming structures and that in those cases courts allowed an increase in the non-conforming nature of a rebuilt 1- or 2-family structure. He believes that this represents an extension of those cases, but it is not directly covered by any case he could find. He said that this case is increasing a non-conformity that is specific to the structure that was demolished, but that a *Deadrick* analysis in this case allows a non-conforming structure to be fully reconstructed in a manner that increases the non-conformity with only a §6 finding.

Chair Schneider asked Mr. Kablack to make the case for a §6 finding. Mr. Kablack said that even though §5.22 doesn't apply the project has gone through design review anyway. The Planning Board recommended approval of the current design provided that the FAR is limited to 120% of the maximum for the district and that rear fencing is installed after consultation with the rear abutter. He said that the

lot is conforming, but the prior structure was non-conforming with respect to FAR and setbacks. He said that the current design will conform in all aspects of zoning except for the FAR and that prior non-conformities (besides the FAR) are being made better. This is a single-family home replacing a single-family home. They will be improving the landscaping and storm water controls on the lot. He said that the proposed plan is not substantially more detrimental to the neighborhood than the existing situation.

Chair Schneider asked if anyone was present to speak in favor of the project. No one spoke.

Chair Schneider asked if anyone was present to speak in opposition to the project. No one spoke.

Chair Schneider then called upon Charlotte Leis, Zoning Coordinator & Planner, to deliver the findings of the Planning Board. Ms. Leis noted the following:

FINDINGS

Sections 5.09.2.j and n – Design Review: Any exterior addition for which a special permit is requested pursuant to *Section 5.22 (Exceptions to Maximum Floor Area Ratio Regulations)* requires a special permit subject to the design review standards listed under *Section 5.09.4(a-l)*. The most relevant sections of the design review standards are described below:

- a. Preservation of Trees and Landscape – The proposal requires removal of some trees, including one with a 30” caliper and a red maple.
- b. Relation of Buildings to Environment – Although this is a large lot, the new house, cobblestone drive, pools, pool house and greenhouse cover much more of the lot than is the current condition.
- c. Relation of Buildings to the Form of the Streetscape and Neighborhood – The proposed house will be closer to the street than the existing house but is well-screened from the street by shrubbery.

Section 5.20 – Floor Area Ratio

Floor Area	Allowed	Existing	Proposed	Finding
Floor Area Ratio (% of allowed)	0.15 (100%)	0.156* (104%)	0.19 (126%)	Special Permit**/ Variance
Floor Area (s.f.)	6,875	7,963 (11/2018)* 7,153 (8/2019)*	8,668 (previously 10,653)	

**The Planning Board questioned the figures for the existing floor area and asked for an independent certified analysis to ensure this project would fall under Deadrick for a special permit. Several different figures were submitted at different times.

**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.*

Section 8.02.2 – Alteration or Extension

A special permit is required to alter this non-conforming structure. This is no longer applicable when revisions were made which do not retain part of the house.

PLANNING DEPARTMENT ANALYSIS

The Planning Department would have preferred to see this historic home renovated, and not demolished. After the first Planning Board meeting on this case and in response to Planning Board comments on the massing and design, the applicant has significantly revised the architectural style of the proposed new house and reduced the floor area by 1,985 s.f. At 8,668 s.f., however, the proposed house is still quite large, and the façade and form very busy. With some simplifications to the varied roof lines, the design of this house could be improved. The Planning Department would like the Planning Board to weigh in on the architectural aspects of this new house.

PLANNING BOARD COMMENTS

The Planning Board was pleased with the revised design of the house, which was changed from a Mansard Second Empire design to an Italianate design. However, the Board still found the size of the house too large and that, therefore, it would be detrimental to the neighborhood. The Board felt that if the floor area of the house were reduced by 200 s.f., making it a little less than 120% of the allowed FAR, the Board could find the house not detrimental. The Board used as a guide Sec. 5.22.3.b.1.b, Exceptions to Maximum FAR, in the Zoning By-Law, which allows an addition to an existing house to go up to 120% of the allowed FAR by special permit.

The Board also wanted to note that the floor area calculations provided of the previously existing house changed several times, including on two “certified” floor plans. The most recently submitted calculation was over the allowed .15 maximum FAR by only .006, a *de minimis* amount. The Board specifically questioned the accuracy of the amount of floor space in the basement that was counted as habitable space, noting that the Assessors data considered only 351 SF of the existing basement as habitable. Plans and elevations of the existing house indicated that the front portion of the basement was windowless and may not have qualified as habitable space, and therefore would not count as part of the gross floor area for purposes of determining FAR. Since the house has now been demolished, this cannot be verified. The Planning Board believed that allowing a house to use Deadrick to greatly exceed the FAR allowed for a new house on the same size lot, was questionable. The Board was particularly concerned that, even if accurate, the application of Deadrick where the previous FAR non-conformity was so minimal was a worrisome precedent.

Therefore, if the Board of Appeals finds that this proposal falls under Deadrick, the Planning Board recommends approval of the site plan by Michael Clancy, revised 6/24/19, and the floor plans and elevations by Tipler, dated 7/1/2019, subject to the following conditions:

1. Prior to the issuance of a building permit, the applicant shall submit a final site plan, floor plans certified and dimensioned demonstrating that the FAR of the new house does not exceed 120% of the allowed floor area, and elevations subject to the review and approval of the Planning Board.
2. Prior to the issuance of a building permit, the applicant shall submit a final landscaping plan showing screening on both sides and rear of the property, after input from the rear abutter, subject to the review and approval of the Assistant Director of Regulatory Planning.
3. Prior to the issuance of a building permit, the applicant shall submit to the Building Commissioner for review and approval for conformance to the Board of Appeals decision: 1) a final site plan stamped and signed by a registered engineer or land surveyor; 2) final floor plans and elevations stamped and signed by a registered architect or engineer; and 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Chair Schneider asked to hear from the Building Department. Mr. Braga, Deputy Building Commissioner, said the Building Department objects to the relief being sought because they have no way of verifying the FAR and determining whether the case falls under *Deadrick* or not. Chair Schneider said the Board has already deliberated on whether *Deadrick* applies, and now just needs to deliberate about the no substantial detriment standard.

Board Member Meiklejohn said he believes the design meets the no substantial detriment criteria.

Chair Schneider said that this is a large proposal on a large lot and would the Board would have expected to have heard if neighbors were opposed, but there is nothing on the record showing that neighbors are opposed to the project. The new house is using the same curb cut and upgrading the landscaping, and she believes that the proposal meets the no substantial detriment criteria.

Board Member Bell agreed that the case meets the no substantial detriment criteria.

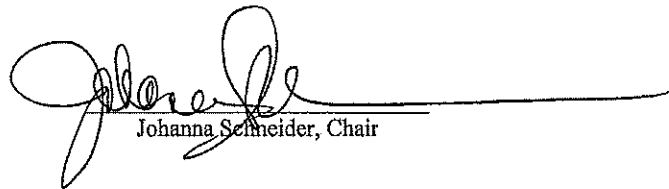
Mr. Simpson stated for the record that this is not intended as a commentary on the applicant's proposal, but it is the policy of the ZBA and the Town that the Board's decision on this case does not

create a precedent for future cases. The findings for this case are specific to this case and should in no way be understood as setting a precedent for any future cases.

Accordingly, the Board voted unanimously to grant the zoning relief per the site plan by Michael Clancy, revised 6/24/19, and the floor plans and elevations by Tipler, dated 7/1/2019, subject to the following conditions:

1. Prior to the issuance of a building permit, the applicant shall submit a final site plan, floor plans certified and dimensioned demonstrating that the FAR of the new house does not exceed 120% of the allowed floor area, and elevations subject to the review and approval of the Planning Board.
2. Prior to the issuance of a building permit, the applicant shall submit a final landscaping plan showing screening on both sides and rear of the property, after input from the rear abutter, subject to the review and approval of the Assistant Director of Regulatory Planning.
3. Prior to the issuance of a building permit, the applicant shall submit to the Building Commissioner for review and approval for conformance to the Board of Appeals decision: 1) a final site plan stamped and signed by a registered engineer or land surveyor; 2) final floor plans and elevations stamped and signed by a registered architect or engineer; and 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

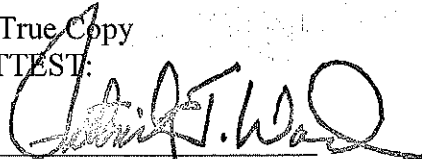
Unanimous Decision of
The Board of Appeals



Johanna Schneider, Chair

Filing Date: 10/28/19

A True Copy
ATTEST:



Patrick J. Ward
Clerk, Board of Appeals