



Town of Brookline Massachusetts

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Benjamin Kaufman, Clerk

BOARD OF APPEALS
Jesse Geller, Chairman
Mark Zuroff
Johanna Schneider

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2020-0067
MICHELLE AND PHILIPPE SCHWARTZ
15 REGENT CIRCLE, BROOKLINE, MA

Petitioners, Michelle and Philippe Schwartz, applied to the Building Commissioner for permission to construct a roof deck in an M-1.5 Apartment House District. The application was denied and an appeal was taken to this Board.

The Board administratively determined that the property affected was that shown on a schedule certified by the Board of Assessors of the Town of Brookline and fixed February 18, 2021, at 7:00 p.m. virtually 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 4, 2021, and February 11, 2021, 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 **virtual** public hearing on **February 18, 2021 at 7:00PM**

Register for this hearing:
<http://bit.ly/3oelrvi>

After registering you will receive a confirmation email containing information about joining the hearing.

Our Virtual Meeting Guide for Applicants and the Public can be found here:
<https://bit.ly/30wRoY3>

15 REGENT CIRCLE, MA 02445 – Construct a roof deck. This property is in an M-1.5 Apartment House Zone. This case is to be heard virtually on 2/18/2021 at 7pm (Petitioner: SCHWARTZ, PHILIPPE & MICHELLE) 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:

- §5.43 - EXCEPTIONS TO YARD AND SETBACK REGULATIONS**
- §5.60 - SIDE YARD REQUIREMENTS**
- §5.62 - FENCES AND TERRACES IN SIDE YARDS**
- §8.02 - ALTERATION OR EXTENSION**

QUESTIONS, PUBLIC COMMENT FILES, PDFs OR PRESENTATIONS:

*Advance submissions of files and presentations are strongly encouraged. In an effort to ensure the Board has adequate time to review materials we ask that any additional documents such as written comment letters, photos, files, or presentations or questions be sent before the hearing to **Monique Baldwin (mbaldwin@brooklinema.gov)**.*

*All plans and submissions may be found at: <https://aca-prod.accela.com/Brookline/Default.aspx>. An account is **NOT REQUIRED** to access materials. Public testimony will be taken during the hearing as normal.*

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 mbaldwin@brooklinema.gov, 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 **Assistive Listening Devices**, please contact Caitlin Haynes at 617-730-2345 or at chaynes@brooklinema.gov.*

***Jesse Geller, Chair
Mark Zuroff
Johanna Schneider***

Publish: 2/4/2021 & 2/11/2021

At the continued date¹, this Board held a public hearing. Present at the hearing were Chair Jesse Geller and Board Members Mark Zuroff and Johanna Schneider. Also present at the hearing was Zoning Coordinator and Planner, Karen Chavez and Deputy Building Commissioner, Paul Campbell.

The Petitioner's attorney, Robert L. Allen, Law Office of Robert L. Allen, Jr. P.C., 300 Washington Street, Brookline, Massachusetts, waived a reading of the public hearing notice for the record. Also in attendance were the Petitioners, Michelle and Philippe Schwartz.

By way of background, Mr. Allen stated that the Petitioners received a building permit to construct a by-right deck in November of 2020. He stated that after construction began it was discovered that the building inspector issued the permit in error, and the Schwartz's immediately sought to rectify the issue and applied for the required setback relief.

Mr. Allen stated that the proposal went to the Planning Board on February 11, 2021. He noted that the proposal included screening as a counterbalancing amenity with plantings. Mr. Allen stated that due to concerns from the immediate abutter, the Petitioners agreed to continue the Planning Board meeting to try to work towards a compromise.

Relying on a presentation, Mr. Allen described the location of the deck relative to the existing skylights of the complaining overlooking abutting property. He noted that the abutter wanted a setback of 8.5 feet, which exceeded the distance required under the Zoning By-law. Mr. Allen noted that the predecessor in title to the abutter (Case No. 3543 in 1999) at 17 Regent Circle received a variance and a number of special permits to allow for the creation of this additional space in the attic, including the installation of dormers, and the skylights.

¹ On February 18, 2021 at 7:00PM the Board, represented by Chair Jesse Geller, Kate Poverman, and Randolph Meiklejohn, continued the hearing to April 15, 2021 at 7:00PM without testimony. On April 15, 2021 at 7:00PM the Board, represented by Chair Mark Zuroff, continued the hearing to May 13, 2021 at 7:00PM without testimony.

Mr. Allen stated that it was important to the Petitioners to try to find a compromise and work with the neighbors. He noted that several abutters have provided their support for the proposal, and stated that it was a thickly settled neighborhood.

Mr. Allen stated that a revised deck proposal was presented to the Planning Board on April 22, 2021. He stated that the revised proposal increased the setbacks to make about one-third of the deck railings compliant with the required side yard setback. He noted that the revised proposal provided ample counterbalancing amenities that were designed to respect the abutter's privacy and the ability for light to enter into the existing skylights. Mr. Allen stated that an alternate proposal, plan "B", was shared with the Planning Board as an option. Mr. Allen stated that the Planning Board was unanimously supportive of both options, and suggested that the 17 Regent Circle abutter review each option and indicate if there were a preference. Mr. Allen stated that by way of notifying the Planning Department, the abutter indicated that plan "A," which was presented to the Planning Board and presented again to the ZBA, was the preferred option.

Mr. Allen stated that the zoning relief is available by special permit to allow for a deck to be closer to than the required 6 feet. Mr. Allen noted that the deck railings have been brought into compliance with the required 6 feet along areas that have been identified as of particular concern to the abutter. Mr. Allen stated that a shadow study was conducted and the findings evidence that the proposal should not have a significant impact on the amount of light coming into the abutting unit, as compared to having a setback of 8.5 feet. Mr. Allen stated that viewsheds out of the skylight onto the Petitioner's roof will be impacted, but commented this should not be a standard for the Board's review. Mr. Allen stated that the proposed counterbalancing amenity consists of perforated screening that would allow sunlight through, and would have minimal-to-no-shadow cast on the skylight. Mr. Allen noted that the new perforated screen was modified as a response to

concerns heard about the original solid wall that was proposed to provide privacy. He noted that the perforated wall is a design solution to provide both privacy to the abutters while also not blocking sunlight from going through the skylight. Additionally, Mr. Allen noted that planter beds were added to the top of the railing to push people even further away from the skylight, while maintaining the functionality of the deck.

Mr. Allen stated that the proposal more than adequately addresses both the abutters and the Planning Board's concerns over the impact to the privacy and impact to light into the abutting unit. Mr. Allen further stated that the abutter voiced a preference that the faux green foliage have greenery facing 17 Regent Circle, and the Petitioner would accept a condition to that effect.

Mr. Allen stated that the Board may grant the special permit relief pursuant to **Section 5.43** of the Zoning By-law to allow the deck within the side yard setback where 6 feet are required. He noted that the deck platform is proposed at the property line, however, the railings will be set back as presented to the Board and represented in the Planning Board report.

Mr. Allen stated that the proposal will meet all of the requirements for a special permit under **Section 9.05**, stating the following: 1) Specific site is an appropriate location for such use: The site is appropriate for the proposed rooftop deck, as it is an allowed use in the M-1.5 zoning district and there are other similar decks in the area. 2) Use will not adversely affect the neighborhood: The Petitioner worked with the neighbors to design the counterbalancing amenities. Abutters have provided support of the proposal. Additionally, the Planning Board was unanimously supportive and found that it was modest and reasonable living in a dense and urban area. 3) There will be no nuisance or serious hazard to vehicles or pedestrians 4) Adequate and appropriate facilities will be provided for the proper operation and proposed use: Adequate and appropriate facilities will be provided for the proper operation of the proposed deck and will meet

all required codes. 5) There will be no effect on the supply on housing available for low- and moderate-income people.

Upon inquiry from Board Member Zuroff, Attorney Allen responded that the ivy base of the railings is faux and there are planter boxes that will have live plants.

Chair Geller then called for public comments in favor of the proposal. The abutter at 3 Regent Circle spoke in support of the deck and noted that the Petitioners engaged all the neighbors very early on in their process, and further noted they appreciated the engagement.

Chair Geller then called for public comments in opposition to the proposal. No comments were submitted and no one spoke in opposition.

Chair Geller then called upon Karen Chavez, Planner and Zoning Coordinator, to deliver the reports of the Planning Department and Board:

FINDINGS

§5.43 - EXCEPTIONS TO YARD AND SETBACK REGULATIONS

§5.60 - SIDE YARD REQUIREMENTS

§5.62 - FENCES AND TERRACES IN SIDE YARDS: Uncovered porches or decks may not extend into the yard more than fifty per cent of the required yard setback but in no case closer than six feet to the property line.

ZONING: M-1.5	Required/ Allowed	Proposed	Relief
Side Yard Setbacks (Left / Right)	6' / 6'	2.1' / 0'	<u>Special Permit¹</u>

¹§5.43: Relief from setback requirements can be granted through Section 5.43 which states that relief may be granted if the applicant can provide an adequate counterbalancing amenity that mitigates negative impacts arising from the requested deviation from the requirements of the Zoning Bylaw.

§8.02 – ALTERATION OR EXTENSION – A special permit is required for the alteration of a non-conforming structure.

PLANNING DEPARTMENT COMMENTS

Ms. Chavez stated that the Planning Department has received letters of both support and opposition to the roof deck. She noted that the one from the abutter at 17 Regent Circle objected to the roof deck because people on the deck might be able to see into a bedroom through a roof skylight that they built in 1999, when the attic was converted to livable space. To address this concern, Ms. Chavez stated, the applicants have submitted updated plans, dated 4/13, which show the railing jogged back from the abutter's unit in the location of the skylight and a row of ivy screening the view from the deck. She noted that because the deck is not facing Regent Circle, but a rear alleyway, there should be no detrimental impact to the architectural symmetry of the front of this historic building.

PLANNING BOARD RECOMMENDATION

Ms. Chavez stated that the Planning Board first reviewed this case at their meeting on February 11, 2021. She noted that the Board was generally supportive of the proposal but heard from an abutter that expressed strong opposition to the project on privacy grounds. Ms. Chavez stated that several Board members felt that the abutter's concerns were sufficiently justified to request that the applicant make revisions to the plan to further address the concerns. At their meeting on April 22, 2021, she noted, the Planning Board reviewed a revised plan proposing an indent in the deck railing facing the neighbor's skylight and an ivy screen. Ms. Chavez stated that the indent in the deck was proposed to be at 6 feet from the middle of the party wall where the rest of the deck is at 3 feet. She stated that the Planning Board felt that this proposal and an alternative proposal presented by the applicant both adequately provided counterbalancing amenities to the neighbor that mitigated any negative impacts from the non-compliant setback. Ms. Chavez added that the Board left the decision to the neighbor at 17 Regent Circle #5 as to which of the two plans would constitute the final submission to the ZBA and the Building Department. She concluded

that the neighbor has expressed a preference for the plan proposing an indent (described above) that was formally submitted to the Planning Board.

Therefore, Ms. Chavez stated, the Planning Board recommends approval of the plans submitted to the Planning Board dated 4/22/2021, 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, and a final site plan, stamped and signed by a registered engineer or land surveyor, to the Assistant Director for Regulatory Planning for review and approval.
2. Prior to the issuance of a building permit, the applicant shall electronically submit a landscape and railing plan that shows proposed counterbalancing amenities subject to approval by the Assistant Director for Regulatory Planning. The counterbalancing amenities must be executed in accordance with the approved plan.
3. Prior to the issuance of a building permit, the applicant shall electronically submit to the Building Commissioner for review and approval a) the site plan, floor plans, and elevations displaying the approval stamp of the Assistant Director for Regulatory Planning; and b) 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.

Chair Geller then called upon acting Deputy Building Commissioner, Paul Campbell to deliver the opinion of the Building Department. Mr. Campbell stated that the Building Department has no objection to the relief requested and will work with the Petitioner to ensure compliance with the Board's decision and all state building codes. Mr. Campbell recommended that the Board amend the Planning Board condition to require the Petitioner to submit as-built floor plans and elevations, stamped and signed by a registered professional engineer or design professional, and a final site plan, stamped and signed by a registered engineer or land surveyor prior to the issuance of a Certificate of Occupancy to demonstrate conformance with the Board's decision since building permits have already been issued to construct the deck.

The Board then deliberated on the merits of the application. Board Member Schneider stated that she appreciated the revisions that were made to address the concerns raised by the

abutter. Board Member Zuroff concurred and stated that Attorney Allen has indicated that a condition requiring a year-round ivy type screen would be acceptable. Chair Geller agreed with Board Members Schneider and Zuroff, and noted that the counterbalancing amenity proposed offsets the setback violation. He stated that the proposal meets the requirements under **Section 9.05**. Chair Geller commented that neither the roof deck nor the neighboring skylights were part of the original building and noted that the proposal represented a reasonable compromise.

The Board voted unanimously to grant a special permit from the provisions of **Section 5.62** pursuant to **Sections 5.43** and **9.05** of the Zoning By-Law.

The Board made the following specific findings pursuant to **Section 9.05** of the Zoning By-Law:

- 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. The development as proposed will not have a significant adverse effect on the supply of housing available for low- and moderate-income people.

Accordingly, the Board voted unanimously to grant special permit relief based upon the foregoing plans and submittals, subject to the following revised conditions:

1. Prior to the issuance of a Certificate of Occupancy, the applicant shall electronically submit final floor plans and elevations, stamped and signed by a registered professional engineer or design professional, and a final site plan, stamped and signed by a registered engineer or land surveyor, to the Assistant Director for Regulatory Planning for review and approval.

2. Prior to the issuance of a Certificate of Occupancy, the applicant shall electronically submit a landscape and railing plan that shows proposed counterbalancing amenities including a year-round faux ivy screening, subject to approval by the Assistant Director for Regulatory Planning. The counterbalancing amenities must be executed in accordance with the approved plan.
3. Prior to the re-issuance of a building permit, the applicant shall electronically submit to the Building Commissioner for review and approval a) the site plan, floor plans, and elevations displaying the approval stamp of the Assistant Director for Regulatory Planning; and b) 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: 6/3/21


Jesse Geller, Chair

A True Copy
ATTEST:


Benjamin Kaufman
Clerk, Board of Appeals