

Town of Brookline

Massachusetts

BOARD OF APPEALS
 Jesse Geller, Chair
 Mark Zuroff
 Johanna Schneider

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TOWN OF BROOKLINE
 BOARD OF APPEALS
 CASE NO. 2021-000068
 7 STRATHMORE ROAD
 BROOKLINE, MA

Petitioner, 90-92 Endicott Street LLC, applied to the Building Commissioner for permission to convert the three-family dwelling into a four-unit dwelling. 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 in accordance with the certification prepared by the Assessors of the Town of Brookline and approved by the Board of Appeals, and fixed January 13, 2022, at 7:00 p.m. virtually as the time and place of a hearing for the appeal. Notice of the hearing was mailed to the Petitioner, 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 December 30, 2021, and January 6, 2022, 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 the following petition:

Address: **7 Strathmore Road**
 Petitioner: **90-92 Endicott Street LLC**

Zoning District: **M-1.5 Apartment House**
Precinct: **13**
Description: **Convert basement into a fourth dwelling unit; demolish three-car garage in the rear to create four parking spaces**

Date, time, and location of the public hearing are as follows:

Date: **1/13/22**
Time: **7:00 pm**
Location: **Virtual Meeting (see below)**

Register for this virtual hearing:

<https://bit.ly/3EhOxTt>

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>

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:

§4.08 - AFFORDABLE HOUSING REQUIREMENTS

§5.05 - CONVERSIONS

§5.09.2.D – DESIGN REVIEW

§5.20 - FLOOR AREA RATIO

§5.43 - EXCEPTIONS TO YARD AND SETBACK REGULATIONS

§6.01.2.A – GENERAL REGULATIONS APPLYING TO REQUIRED OFF-STREET PARKING FACILITIES

§6.02.2.I – OFF-STREET PARKING SPACE REGULATIONS

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

§8.02 - ALTERATION OR EXTENSION Pre-Existing Non-Conformities: FAR, Front Yard Setbacks, Open Space Landscape, Open Space Usable

ANY OTHER RELIEF THE BOARD MAY FIND NECESSARY

QUESTIONS, PUBLIC COMMENT FILES, PDFs OR PRESENTATIONS:

Advanced 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 by mail or in the papers. Questions about hearing schedules may be directed to the Planning and Community Development Department at vpanak@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: 12/30/2021 & 1/6/2022

On January 13, 2022, at 7:00 pm, the Brookline Zoning Board of Appeals held a public hearing. Present at the hearing were Zoning Board Chair Johanna Schneider and Board Members Mark Zuroff and Neil Wishinsky.

The Petitioner's attorney, Robert L. Allen, RLAW, P.C., 300 Washington Street, Brookline, Massachusetts, waived a reading of the public hearing notice for the record. Also in attendance was the project architect, Eric Zachrison, The Context Workshop.

Attorney Allen stated that 7 Strathmore Road is currently a three-unit row-style building that was constructed in about 1900. He noted that the building is located in an M-1.5 zoning district

off of Beacon Street and added that the surrounding buildings are mostly these similar row-style apartment buildings.

Attorney Allen stated that the proposal is to convert the basement into an independent unit without making any changes to the footprint of the building. Attorney Allen added that many of the buildings in this neighborhood have completed similar conversions. He stated that the conversion requires the addition of window wells. The Planning Board requested the applicant to enlarge the window wells to increase the livability of the units.

Attorney Allen stated that this is an example of a project capturing new units for the new affordable housing by-law. A special permit is required for the conversion and requires a payment be made to the housing trust for the new fourth unit under the affordable housing by-law. Attorney Allen stated that many of the units on this street have converted their basements into new units. He added that the proposal includes the demolition of a garage found not historically significant. Regarding the FAR, Attorney Allen stated that it would increase from 1.21 to 1.61, where a maximum FAR of 1.5 is allowed by-right. He noted minimal exterior changes to the building are required to comply with building code requirements. He further noted that all changes will occur within the existing building footprint.

Chair Schneider requested that Mr. Zachrison review the plans and discuss egress for the proposed unit. Mr. Zachrison stated that the new unit would connect to the other units' shared stairs, and a secondary egress will be provided for the unit. Attorney Allen confirmed that the windows are enlarged to the Planning Board's recommendation. Upon inquiry from Board Member Wishinsky, Mr. Zachrison reviewed the mechanical systems for the building. The Board discussed the proposed office indicated on the floor plan, and Attorney Allen confirmed this is not proposed

to be a bedroom as the egress does not meet the code. Deputy Building Commissioner Campbell confirmed that a building permit would not be issued for a project that did not meet building code requirements for egress.

Upon inquiry from Chair Schneider, Attorney Allen stated that the counterbalancing amenity proposed provides landscaping and a deck at the rear of the property. Mr. Allen noted that the Planning Board requested that two trees in the rear be preserved. However, he stated that the trees appear to be at the end of their lives and are growing up along an electrical pole, posing safety concerns. Finally, Attorney Allen stated that the parking plan would improve the property as currently many cars park in this area in an unorganized way.

The Board discussed the proposed parking area. Board Member Zuroff voiced concerns about the proximity of the parking spaces to the units and residents walking into the cars as they exit the building. Mr. Zachrison reviewed the parking on the site plan and stated that there are approximately 15' between the vehicles and the building. Thereafter, the Board was satisfied that the cars were set back far enough away from the building.

Attorney Allen stated that a special permit is required under **Section 4.08** for affordable housing, and the senior housing planner has provided a condition the Petitioner agrees to comply with. Attorney Allen stated that relief is also sought pursuant to **Section 5.05** for the conversion to allow for the increase of the conforming FAR of 1.21 to allow a FAR of 1.61 and **Section 5.09.2.d** for design review for buildings with four or more units. Additionally, relief is needed under **6.04.5B** for the parking setbacks for the front yard (alleyway) and the side yards and stated that this relief is available by special permit under **Section 5.43**.

Attorney Allen then discussed **Section 5.05** and stated that the Board may grant by special permit an increase of the FAR from a conforming 1.21 to a 1.61. Attorney Allen stated that **Section**

5.05 allows the ZBA to waive any dimensional criteria except lot size by special permit. Attorney Allen read Section 5.05 of the Zoning By-law:

In the case of the conversion of a single-family detached dwelling to a two-family dwelling in an SC or T District, or the conversion of a dwelling to create additional dwelling units in an F or M District, the structure shall conform to all dimensional requirements specified in §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 nonconformity to such requirements is increased and provided that all other requirements of this By-law for such conversions are met.

Attorney Allen stated that Section 5.05 allows by special permit an increase to the FAR only when converting existing space into habitable space. Attorney Allen stated that FAR is included in the Table of Dimensional Requirements under Table 5.01, and he noted that the language in Section 5.05 expressly excludes lot size. Mr. Allen added that the proposal is to convert space within the existing footprint of the building to habitable space. In reviewing prior ZBA decisions, Attorney Allen reported that the town interpreted this section to include FAR in two previous cases. From a decision from 2009, he read that Commissioner Mike Shephard stated that “*previous Boards have given 5.05 relief for granting FAR.*” Additionally, Attorney Allen cited a 2019 decision where the ZBA granted special permit relief for FAR under Section 5.05.

Attorney Allen stated that it was suggested that as the gross floor area is increased by 1,650 square feet, the open space requirement would be made more nonconforming, thereby in violation of the portion of Section 5.05 that states that “*provided that no previously existing nonconformity to such requirements is increased.*” Attorney Allen noted that the increase in the requirement of landscaped open space is 165 square feet, and the proposal will have a total of 420 square feet of landscaped space where there is an existing 243 square feet. Concerning usable open space, Attorney Allen stated that there is no usable open space existing and the requirement is increased

by 248 square feet and noted that the proposal would provide 501 square feet of usable space. Mr. Allen stated that there is no increase in the nonconforming nature of the open space requirements. He opined that there would be a modest decrease in the nonconformity resulting from this proposal.

The Board then discussed with the Deputy Building Commissioner, Paul Campbell, the interpretation of Section 5.05. Mr. Campbell stated that Sections 5.05 and 5.20 were cited in the denial letter. Attorney Allen opined that Section 5.05 is similar to Section 5.43 as to how it functions to convert what would be a variance to a special permit request. Attorney Allen added that FAR relief is available by Section 5.22 and under Section 6. The Board discussed the limitations within Section 5.05, noting that it is for conversion and would not permit an exterior addition. The Board discussed **Table 5.01**, Table of Dimensional Requirements, and indicated that FAR is included within that table. Chair Schneider stated that reading the plain language, she had trouble disagreeing that the language of Section 5.05 and Table 5.01, together, create in the case of a conversion a mechanism to allow special permit relief for dimensional requirements, provided there is no increase to a nonconformity and all requirements are otherwise met.

The Board discussed that the request before them is for a modest increase to the FAR above the maximum permitted by-right. Board Member Wishinsky expressed concern about a future FAR request well over the maximum allowed. The Board discussed the limits built into Section 5.05, such as that no nonconformity can be increased and all other sections of the by-law must be met. The Board discussed that a future conversion that increased FAR would be limited as it would need to comply with the open space requirements or provide enough open space to offset the increase as to not increase a nonconforming condition. In addition, an application would also need to meet "*all other requirements of this by-law*" that would include meeting the requirements under Section 5.09 for Design Review and Section 9.05 for special permit requirements.

Attorney Allen then stated that according to Section 9.05, the Petitioner meets the following standards of a special permit: 1) Specific site is an appropriate location for such use: The property is a row house located in M-1.5 Multi-Family District and is surrounded on both sides of the street with other multifamily row houses, many of which have also converted their basements unit new units. 2) Use will not adversely affect the neighborhood: The proposal will create a fourth unit within the existing footprint of the building so it will not adversely affect the neighborhood. Additionally, and the proposal has the unanimous support of the Planning Board. 3) No nuisance or serious hazard to vehicles or pedestrians: The removal of the garage that is in poor condition will allow four organized parking spaces. 4) Adequate and appropriate facilities will be provided for the proper operation and proposed use. 5) Development will not have any effect on the supply on housing available for low- and moderate-income people. This project will not have a negative effect on the supply of housing for low-and moderate-income people; it will create a new garden level unit in an area close to the MBTA, is consistent with the Town's goals to generate less expensive housing units, and a payment will be made to the affordable Housing Trust fund that will go toward the creation of more affordable units in the Town.

Chair Schneider then called for public comments in favor of the proposal. No comments were submitted in support of the proposal.

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

Chair Schneider then called upon Monique Baldwin, Planner and Zoning Coordinator, to deliver the reports of the Planning Department and Board:

PLANNING DEPARTMENT COMMENTS

Ms. Baldwin stated that the Planning Staff does not object to the creation of a new basement dwelling unit in this multi-family building. Basement conversions have been allowed in many of the row houses on both sides of Strathmore Road by the Board of Appeals. Four parking spaces are provided to the rear of the building and with the MBTA rapid transit trolley line one block away on Beacon Street, parking should not be a problem. It should also be noted that the minimal exterior changes to the façades of the building in the front and rear are to provide adequate light and air to the new basement unit.

PLANNING BOARD RECOMMENDATION

Ms. Baldwin stated that the Planning Board is supportive of the proposal with the exception of two stipulations. The first is that the two ailanthus trees in the rear of the property must be preserved. The second is that all window well be expanded to a minimum size of 4 feet from the face of the building and a width extending a minimum of one foot from the outer edges of each window. The Board also requested that the applicant maintain the basement room next to the kitchen along the back façade as an office.

Ms. Baldwin stated that the Planning Board recommends approval of the site plan by Boston Survey Inc., dated 8/2/21, and architectural plans by Context, dated 6/16/21, 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. The basement unit shall retain the proposed office space. Any lightwells shall extend at least 4 feet from the face of the building, front and rear, and at least 1 foot from either edge of any windows.
2. Prior to the issuance of a building permit, the applicant shall electronically submit a final landscaping plan to the Assistant Director for Regulatory Planning for review and approval. The landscape plan shall include the preservation of the two ailanthus trees in the rear of the building.

3. In accordance with Section 4.08 of the Zoning By-law and guidelines regarding “Cash Payments in Lieu of Affordable Units”, and with the choice of the applicant to make a cash payment in lieu of providing affordable units, the owner of the property shall make the following payment to the Brookline Housing Trust and provide the following documentation before the Town’s issuance of a Certificate of Occupancy for the project:

A sum equal to 0.5% of the Market Value of the property (as determined by the Assessor’s Department of the Town per the Town’s guidelines for “Cash Payment in lieu of Affordable Units”) provided to the Town of Brookline in the form of a bank check, certified check or a check drawn on an Attorney Client’s Fund Account, payable to the Brookline Housing Trust.

The check should be mailed by first class mail or hand delivery to:

*Director of Planning & Community Development
333 Washington Street – 3rd floor
Brookline, MA 02445*

Should the property be subsequently converted and sold as condominiums, the developer or subsequent owner shall make an additional trust payment as a condition of a transfer of each condominium, calculated per the Town’s guidelines for “Cash Payment in lieu of Affordable units”

Prior to the issuance of a building permit, the owner shall execute a mortgage, escrow agreement, letter of credit or other documentation approved by the Director of Planning and Community Development to secure the cash payments required by this condition.

4. 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 Schneider then called upon Deputy Building Commissioner, Paul Campbell, to deliver the report of the Building Department. Mr. Campbell stated that the requirements for open space to increase due to the FAR increase. Mr. Campbell added that previous decisions of the Board or previous decisions by building officials don’t set a precedent. Mr. Campbell stated that in the 2016 Town Meeting, the Zoning By-law was amended to remove **Section 5.22** in the M-

Zoning District, thereby removing the exceptions to FAR and noting there will no longer be a cap for FAR. Mr. Campbell stated that the Building Department's position is that a variance is required to increase the FAR in this case and that **Section 5.05** did not include FAR. Mr. Campbell added that the Building Department will work with the Petitioner to ensure compliance with the Board's decision and all codes.

Chair Schneider inquired how the Board should reconcile the language in **Section 5.05** that states that "*the Board of Appeals by special permit may waive any of said dimensional requirements except minimum lot size.*" She stated that the provision excludes lot size, however, she inquired where the language was that excluded FAR. Board Member Zuroff stated that he did not recall FAR being treated differently from other dimensional requirements such as height and setbacks. Chair Schneider stated that if it is the case that no previously existing nonconformity is increased and the project is otherwise compliant with the requirements for conversion, this increase in FAR request is available by a special permit pursuant to Section 5.05, and not a variance.

The Board discussed the increase in the open space requirement and how **Section 5.05** has not been used often due to parking requirements that limit the ability to add open space. The Board agreed that the analysis should look at the nonconforming condition and determine if it is being made more nonconforming. The Board reviewed the increase in the landscape and usable space for the proposal and was comfortable that there would be no increase in the nonconformity. The proposal creates 501 square feet of usable open space that does not exist, and the increase is approximately 253 square feet. The usable open space is a preexisting nonconforming condition. The Board was comfortable that the preexisting open space nonconformity would decrease and not increase as a result of the proposal.

Chair Schneider stated that from the plain reading of **Section 5.05**, the ZBA is authorized to grant a special permit for FAR. Board Member Wishinsky noted that the By-law creates limitations to the increase to FAR, as the Board must look to whether or not nonconformities are increased and to the special permit criteria. Board Member Zuroff stated that FAR is a dimensional requirement. He concurred with Chair Schneider that the ZBA did have the latitude to grant a special permit to increase the FAR under **Section 5.05** as the proposal is a conversion and other criteria have been demonstrated to have been met. Board Member Wishinsky pointed out that intuitively it seems wrong to deny a proposal that currently has zero open space that seeks to add such space because it is not adding enough.

Attorney Allen requested that the Board revise the Planning Board condition that is drafted as *“the basement unit shall retain the proposed office space.”* He suggested that it could read, *“the office space in the basement unit shall not be used as a bedroom and shall comply with all building code requirements.”* The Board concurred.

The Board then deliberated on the merit of the application. Board Member Zuroff stated that the relief requested is available by a special permit and added it complies with **Section 5.05** and agreed that the requirement to preserve trees at the rear should be removed. Board Member Wishinsky stated that he concurred and added that the Assistant Director of Regulatory Planning should review the landscape plan to ensure conformance with the Board’s discussion. Chair Schneider stated that she concurred with Board Member Zuroff and added that the special permit standards under **Section 9.05** were also met.

The Board voted unanimously to grant a special permit under **Sections 4.08** for affordable housing and **5.09.2.D** for design review. The Board also voted unanimously to grant a special

permit pursuant to Section 5.05 and a special permit pursuant to Section 5.43 to waive the provisions of Section 6.04.5B for parking setbacks.

The Board made the following 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, subject to the following modified 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. *The office space in the basement unit shall not be used as a bedroom and shall comply with all building code requirements.* Any lightwells shall extend at least 4 feet from the face of the building, front and rear, and at least 1 foot from either edge of any windows.
2. Prior to the issuance of a building permit, the applicant shall electronically submit a final landscaping plan to the Assistant Director for Regulatory Planning for review and approval.
3. In accordance with Section 4.08 of the Zoning By-law and guidelines regarding “Cash Payments in Lieu of Affordable Units”, and with the choice of the applicant to make a cash payment in lieu of providing affordable units, the owner of the property shall make the following payment to the Brookline Housing Trust and provide the following documentation before the Town’s issuance of a Certificate of Occupancy for the project:

A sum equal to 0.5% of the Market Value of the property (as determined by the Assessor’s Department of the Town per the Town’s guidelines for “Cash Payment in lieu of Affordable Units”) provided to the Town of Brookline in the form of a bank check, certified check or a check drawn on an Attorney Client’s Fund Account, payable to the Brookline Housing Trust.

The check should be mailed by first class mail or hand delivery to:

*Director of Planning & Community Development
333 Washington Street – 3rd floor
Brookline, MA 02445*

Should the property be subsequently converted and sold as condominiums, the developer or subsequent owner shall make an additional trust payment as a condition of a transfer of each condominium, calculated per the Town's guidelines for "Cash Payment in lieu of Affordable units"

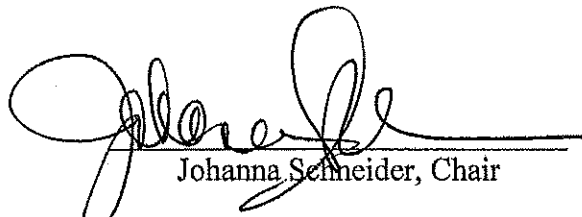
Prior to the issuance of a building permit, the owner shall execute a mortgage, escrow agreement, letter of credit or other documentation approved by the Director of Planning and Community Development to secure the cash payments required by this condition.

4. 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.

Unanimous decision of the

Board of Appeals

Filing Date: FEB 08 2022


Johanna Schneider, Chair

A True Copy
ATTEST:



Benjamin Kaufman
Clerk, Board of Appeals