



BOARD OF APPEALS  
Jesse Geller, Chair  
Mark Zurroff  
Johanna Schneider

# Town of Brookline

## Massachusetts

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Benjamin Kaufman, Clerk

TOWN OF BROOKLINE  
BOARD OF APPEALS  
CASE NO. 2021-000021  
17 HART STREET

Petitioners, Alex Neary and Zi Ye, applied to the Building Commissioner for permission to construct a new single-family home. 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 July 15, 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 July 1, 2021 & July 8, 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 public hearing on the following petition:**

Address: **17 Hart Street**  
Petitioner: **Alexander Ross Neary and Zi Ye**  
Zoning District: **M-1.0 (Apartment House)**  
Precinct: **5**

Description: **Demolish existing building and construct single-family dwelling**

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

Date: **07/15/2021**  
Time: **7:00 pm**  
Location: **Virtual Meeting (see below)**

Register for this virtual hearing:

<https://bit.ly/2Sv4Hr2>

*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:

**§5.10 - MINIMUM LOT SIZE**

**§5.43 - EXCEPTIONS TO YARD AND SETBACK REGULATIONS**

**§5.50 - FRONT YARD REQUIREMENTS**

**§5.60 - SIDE YARD REQUIREMENTS**

**§5.70 - REAR YARD REQUIREMENTS**

**§6.04.14 – DESIGN OF ALL OFF-STREET PARKING FACILITIES**

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

**§8.02 - ALTERATION OR EXTENSION**

***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 **Karen Chavez (kchavez@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](mailto:vpanak@brooklinema.gov), or by checking the Town meeting calendar at: [www.brooklinema.gov](http://www.brooklinema.gov).*

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

*If you have any questions regarding **Assistive Listening Devices**, please contact Caitlin Haynes at 617-730-2345 or at [chaynes@brooklinema.gov](mailto:chaynes@brooklinema.gov).*

*Jesse Geller, Chair  
Mark Zuroff  
Johanna Schneider*

**Publish: 07/01/2021 & 07/08/2021**

On January 6, 2022, the Zoning Board of Appeals held a virtual public hearing<sup>1</sup>. Present at the hearing was Chair Jesse Geller and Board Members Mark Zuroff and Johanna Schneider. The case was presented by the attorney for the Petitioner, Robert L. Allen, Jr., RLAW P.C., 300 Washington Street, Second Floor, Brookline, Massachusetts 02445. Also in attendance was the project architect, Laura Rodriguez, Sousa Design Architects, 81 Boylston St, Brookline, Massachusetts. The Petitioners, Alex Neary and Zi Ye were also in attendance.

Zoning Board of Appeals Chair Geller called the hearing to order at 7:00 pm. Chair Geller reviewed the standard hearing procedures for virtual hearings and confirmed that all Board Members and staff could visually and auditorily engage in the hearing. Attorney Allen waived a reading of the published notice.

Attorney Allen presented the case for 17 Hart Street. He described the property at 17 Hart Street as a single-family home with approximately 900 square feet on an undersized ± 2,860 square foot lot. He stated that the Petitioners would like to construct a new single-family home on the lot. Attorney Allen noted that the proposal was presented to the Planning Board on three occasions. He stated that the design was substantially modified at the Planning Board's direction and spoke to the desire of the Petitioners to compromise to find a design that would fit in with the neighborhood. He added that the changes made included reducing the width of the garage from a two-car garage to a single-car width garage, aligning the house with the front yard setbacks of the abutting homes, and a reduction in the size of the home from a FAR of .99 to a FAR of .92. Additionally, Attorney Allen stated that the setbacks were increased to address concerns raised by

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<sup>1</sup> On July 15, 2021, at the scheduled time and place, the ZBA voted to continue the hearing to September 9, 2021, to November 18, 2021 then to December 9, 2021 and to January 6, 2022. No testimony was provided to the Board until the hearing opened on January 6, 2022.

the abutters as well as the Planning Board. Design changes were also made, including simplifying the front entry.

Attorney Allen then called upon Ms. Rodriguez to present the design aspects of the proposal. Ms. Rodriguez reviewed the plans for the proposed 2,637 square foot new single-family home on the lot where a minimum 4,000 square feet lot size is required per the Zoning By-Law. She presented the site plan noting that the existing front yard setback is 4'1" with a proposed front yard setback of 3'10". Ms. Rodriguez reviewed the floor plans and elevations with the Board. Upon inquiry from Board Member Zuroff, Ms. Rodriguez reviewed the basement plan and noted the space will not be habitable because of the six (6') height. Ms. Rodriguez stated that the home was sited forward on the lot to align with the abutting properties in response to abutter requests. Board Member Zuroff expressed concern about the sides of the deck being transparent, and Ms. Rodriguez stated that the railing could instead be a solid material to protect privacy.

Attorney Allen stated that relief from the dimensional requirements under **Sections 5.10, 5.50, 5.60, 5.70** of the Zoning By-Law may be granted under M.G. L. Chapter 40A, Section 6 as interpreted under the Deadrick line of cases by a finding by the ZBA of no new nonconformity and/or that any increase in pre-existing non-conformities will not create a substantial detriment to the neighborhood.

Attorney Allen continued that there was support from five abutters for the larger original proposal that has since been reduced in size. He stated that even though there was no design review required, the Petitioners worked with the Planning Board on the design over three meetings and earned the unanimous support of the Planning Board.

Attorney Allen stated that the existing house has a 0' setback on the left side, and a portion of the existing structure encroaches across the property line and sits on the abutting property (19 Hart Street). He continued that the proposal would remove that preexisting nonconformity and encroachment by providing a compliant side yard setback of 7.5'. Mr. Allen explained that the

required front yard setback under the By-Law is 15', the current front yard setback is 4'-1" and will be reduced to 3'10" at the request of the Planning Board and abutters. He opined that this represents a slight increase in the pre-existing nonconformity front yard setback. With respect to the rear yard setback, he commented that it is also pre-existing nonconforming, stating that a 30' setback is required under the By-Law with an existing rear yard setback of 23.9'. He noted that the proposal would increase this nonconformity to the rear yard setback under the proposed design to 18.66'.

Attorney Allen stated that case law (Deadrick v. Board of Appeals of Chatham, 85 Mass. App Ct. 539) has established that an owner of a single or two-family structure can expand a pre-existing nonconformity under M.G.L. Chapter 40 A, Section 6, provided that there is no substantial detriment to the neighborhood or new nonconformity. Attorney Allen stated that the dimensional relief sought under **Sections 5.10, 5.50, 5.60, and 5.70** of the Zoning By-Law are a result of pre-existing nonconforming conditions and stated that the relief requested will increase the existing non-conforming rear yard and front yard setbacks without creating any new non-conformity, and will not create any substantial detriment to the neighborhood.

Attorney Allen noted that the proposed FAR is below the maximum allowed of 1.0 at .92. He stated that the neighborhood is comprised of a mix of single-family homes as well as larger buildings and opined that the proposed house will be the most dimensionally compliant on the street.

Attorney Allen stated that the ZBA has in similar cases used the special permit standards enumerated in **Section 9.05** to review substantial detriment and noted the following: 1) Specific site is an appropriate location for such use: The existing home is a single-family located in M.1.0 residential neighborhood and the proposed structure will maintain this allowed use. 2) Use will not adversely affect the neighborhood: The new home will be more in conformance with the Zoning By-Law, and will remove an existing encroachment on the abutting lot. The existing use is a single-

family and that will not change. 3) No nuisance or serious hazard to vehicles or pedestrians: The proposed two car garage was modified to a single and meets the width requirements and was reviewed at length by the Planning Board. 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. The proposal will allow this young family to build a home in Brookline in a working-class neighborhood historically affordable for families such as the Petitioners.

Chair Geller then called for public comments noting that written comments had been received and were entered into the record of the hearing.

Ann Lusk, 18 Hart Street spoke in opposition stating that the house is too large for the parcel and will be detrimental due to the loss of air and light and increased shadows. Yanping Li, 19 Hart Street, spoke in opposition and voiced a concern about the impact of the height and general size of the structure on her abutting property, particularly given the small lot size. Meighan Rock, 8 Hart Street spoke in opposition commenting that the new house is too big for the lot. Aaron Price, 10 Hart Street, spoke in opposition noting that the massing is too great.

Chair Geller then called up on Planner and Zoning Coordinator, Monique Baldwin to Present the Planning Board report.

**FINDINGS**

<b>ZONING: M-1</b>	<b>Requirements</b>	<b>Existing Conditions</b>	<b>Proposed Conditions</b>	<b>Relief Required</b>
<b>Use</b>	1-family detached dwelling	1-family detached dwelling	1-family detached dwelling	
<b>Lot Size</b>	<b>4,000sf</b>	<b>2,860sf</b>	<b>2,860sf</b>	<b><u>Special Permit</u><sup>2</sup></b>
<b>Floor Area Ratio</b>	1.0 (100%) 2,860sf	0.31 (31%) 887sf	<del>1.0 (100%)</del> 2,849sf 0.92 (92%)	

			2,637sf	
<b>Height</b>	35'	unknown	33'-2"	
<b>Front Setback</b>	15'	4'-1"	3'10"	<b>Special Permit<sup>1,2</sup></b>
<b>Side Yard Setback (Left / Right)</b>	7.5'/7.5'	~0'/22.7'	<del>5'8"</del> / <del>7'9"</del> 7.5' / 7.5'	<b>Special Permit<sup>1,2</sup></b> /
<b>Rear Yard Setback</b>	30'	23.9'	20' 18'8"	<b>Special Permit<sup>1,2</sup></b>
<b>Open Space (Landscaped / Usable)</b>	10%/20% 286sf/572sf	unknown / unknown	286sf / 572sf	
<b>Parking</b>	2	2	2	

<sup>1</sup> **Section 5.43, Exceptions to Yard and Setback Regulations:** 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.

<sup>2</sup> Under **MGL Chapter 40A, Section 6**, a pre-existing nonconforming structure can extend or intensify the nonconformity by special permit provided the Board of Appeals finds that the altered structure is not substantially more detrimental to the neighborhood than the existing structure.

**Other Zoning Relief Needed**

This relief no longer needed.

**Section 8.02, Alteration or Extension:** A special permit is required for the alteration of a non-conforming structure.

**PLANNING DEPARTMENT COMMENTS (FROM 6/24/21 STAFF REPORT – NOT UPDATED)**

Ms. Baldwin noted that initially the Planning Department was not supportive of this proposal as submitted and shared the initial staff report with the ZBA, stating that the Planning Board has previously stated clearly that where an existing building is demolished and replaced by a new building, new buildings should conform as closely to the zoning requirements as possible and this proposal did not meet this expectation and deviates significantly from an established massing and design trend evident in the surrounding neighborhood. With four bedrooms, 4 bathrooms, 2 living rooms, and a nursery/office, the proposed building and program are excessive for a single-family home in this neighborhood and provide no counterbalancing benefits to the

community. Replacing existing dwellings with new dwellings that do not provide any appreciable benefits to the community is generally unfortunate, but such proposals are especially problematic when they unnecessarily exacerbate existing zoning nonconformities or propose buildings that are inconsistent with an established neighborhood character. She stated that the Planning Department recommended that the applicant revise the proposed plans to eliminate the nonconformity under Section 6.04.14 (garage width), eliminate the nonconforming right-side setback, and generally reduce the scale of the building. If the applicant insists on maintaining a building of this scale, the Planning Department requests that, being located in an M district, the building at least provide additional dwelling units. Finally, as a new building, the proposed structure should be entirely fossil-fuel-free.

Ms. Baldwin concluded stating that many of the changes staff recommended have been made and commended the Petitioner for compromising (see memo from Sousa Design, dated 10/27/21).

#### PLANNING BOARD COMMENTS

Ms. Baldwin stated that the Planning Board found the massing and design substantially improved and that it now better reflects the character of the street. Although many of the homes on Hart Street are smaller, many are also quite large.

Ms. Baldwin then stated that the Planning Board was pleased with the following changes: the setback of the third-floor dormers from the street, the increase in the slope of the roof, the setback of the garage so that the entry of the house sits forward and meets the street, and the narrowing of the garage allowing tandem parking, rather than side by side parking. She added that there was some concern about the fenestration of the third-floor dormer windows but the applicant's architect stated they would review this.



Therefore, Ms. Baldwin stated, the Planning Board unanimously recommended approval of the requested special permit under Sec. 6 of MGL Chap. 40A. She stated that if the Board of Appeals recommends approval of the architectural plans by Sousa Design Architects, dated 10/22/21, the Planning Department recommends 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 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 Paul R. Campbell, Deputy Building Commissioner, to deliver the findings of the Building Department. Mr. Campbell stated that the front and rear setback nonconformities are being intensified. However, he noted that the side yard setbacks are being brought into conformity with the Zoning By-law, and the project otherwise complies. Upon inquiry from Chair Geller, Mr. Campbell confirmed that the proposed building complies with the height requirement and the FAR has been measured correctly and also complies. Mr. Campbell concluded that the Building Department has no objection to the requested relief and will work with the Petitioner to ensure compliance with all local and state codes.

Attorney Allen stated that the proposed house was designed based on the zoning district dimensional requirements and to meet code and noted that initially, the Town wanted a multi-family building on the lot. However, the Petitioners seek to build a single-family home that is an allowed use. He added that the abutter at 19 Hart Street noted a concern about the new structure, however, the existing building encroaches on to their lot and will now comply with the side yard setback.

Upon inquiry from Board Member Zuroff, Attorney Allen stated that the glass on the deck railing would be changed to a solid material to address privacy concerns.

Board Member Zuroff noted that the proposed FAR complies with the code and stated that the design was well presented and the requested relief from setbacks is not overreaching and meets the standards under Deadrick. He stated that the proposed structure would improve the streetscape and agreed that aligning the front yard setback with the abutting structures was a positive design choice to create some uniformity of the streetscape. He stated, therefore, that the project is worthy of the requested relief.

Board Member Schneider stated that she had a concern regarding the impact of the proposed structure on the property at 19 Hart Street. Board Member Schneider noted that it looked like there would be space for light and air; however, the resident at 19 Hart Street raised a concern about the new structure's impact. She stated that she otherwise concurred with Board Member Zuroff's analysis and noted that the proposed structure is essentially a compliant building, and the actual relief sought is minimal.

The Board discussed the rendering presented and a satellite image of the existing properties at 17 Hart and 19 Hart (see Exhibit 1). Chair Geller noted that he had the same concern as Board Member Schneider and added that what the Board is to review is: the specific nonconformity being increased and then to look at whether or not there is substantial detriment to the neighborhood created by that increase. Chair Geller continued that the Board should look to whether and how the increase in the front yard nonconformity creates a difference. He noted that the view corridor was one metric that could be used to look at detriment, though he noted that the side yard setback would comply. Chair Geller then stated that the threshold to apply is not a baseline of a compliant structure but a baseline of the nonconforming structure as in existence. Chair Geller stated that the side yard setback is increased 0' to a compliant 7.5' and with a reduced front yard setback by about 3".

In reviewing the existing conditions and the proposed conditions with increased front yard nonconformity as indicated by the site plan, the Board concluded that the increase in the front yard setback nonconformity by 3” would not cause substantial detriment to the neighborhood.

Chair Geller noted that he is not unsympathetic to the neighborhood that is used to a smaller house built in the 1800s. However, he noted that the proposed house is in a district that allows for larger structures. Chair Geller did not see how an additional approximate 3” increase in the nonconforming front yard setback would create substantial detriment. He stated that under 40A Section 6, as interpreted under the Deadrick and Gale cases, the proposal meets the requirements.

The Board then determined, by unanimous vote, that the Proposal met the requirements for a finding under M.G.L. Ch. 40A, Section 6 permitting relief from application of the provisions of **Section 5.10** of the Zoning By-Law for the nonconforming lot size of 2,860 square feet where 4,000 square feet are required, **Section 5.50** of the Zoning By-Law for the front yard requirements to permit an increase in a nonconforming front yard setback of 4’-1” to 3’10” and **Section 5.70** of the Zoning By-Law for the rear yard requirements to permit an increase in a nonconforming rear yard setback from 23.9’ to 18.8”.

In addition, the Board made the following specific findings in accordance with said **Section 9.05** in considering whether there was a demonstrated substantial detriment:

- a. The specific site is an appropriate location for such a use, structure, or condition.
- b. The use as developed will no 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. Development will not have any effect on the supply of housing available for low- and moderate-income people.

EXHIBIT 1: Existing Conditions 17 Hart Street and 19 Hart Street

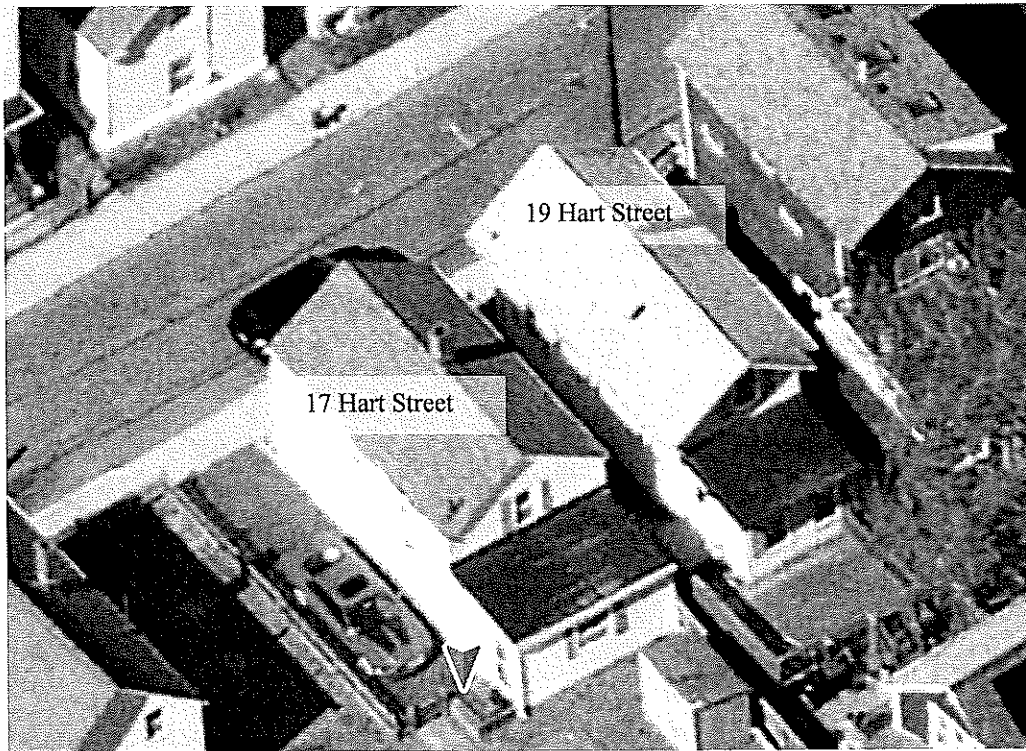
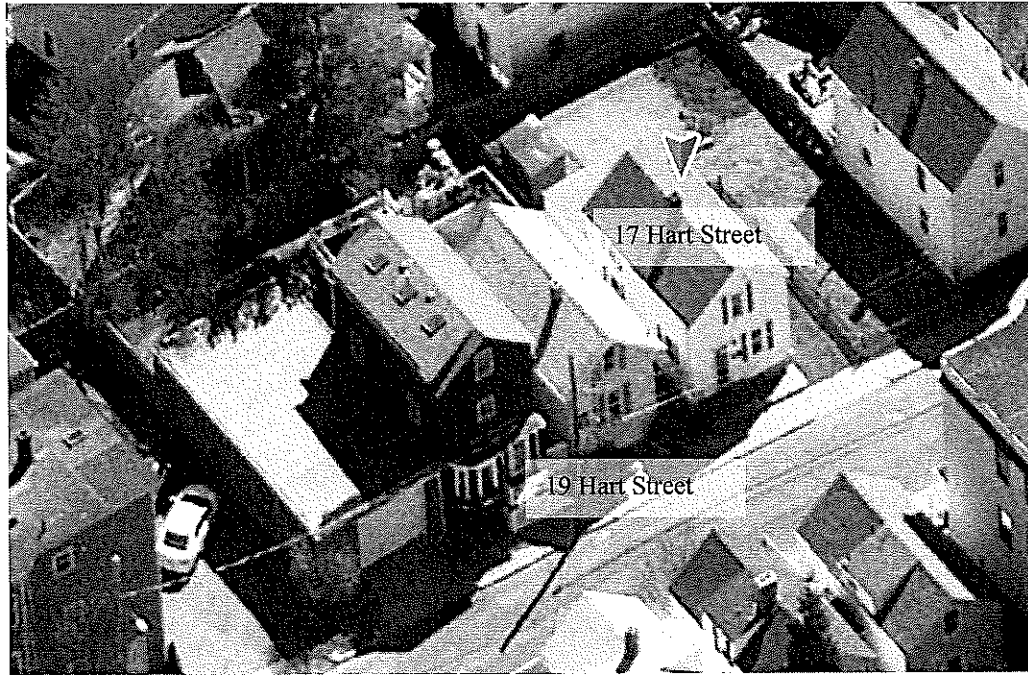


EXHIBIT 1: Proposed Conditions 17 Hart Street and 19 Hart Street



Accordingly, the Board voted unanimously to grant the requested relief 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 material for the deck shall be solid or opaque for privacy screening.
2. 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: 01/31/22

  
Jesse Geller, Chair

A True Copy  
ATTEST:



Benjamin Kaufman  
Clerk, Board of Appeals