

TOWN OF BROOKLINE
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Town of Brookline Massachusetts

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BOARD OF APPEALS
Jesse Geller, Chair
Mark Zurroff
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TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2021-000072
33 SEARS REALTY LLC
33 SEARS ROAD

Petitioner, 33 Sears Realty LLC, applied to the Building Commissioner for permission to construct a new single-family home on a vacant lot in an S-40 Single-Family District. The application was denied and an appeal was taken to this Board.

The Board administratively determined that the properties affected were those shown on a schedule certified by the Board of Assessors of the Town of Brookline and fixed December 9, 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 its attorney of record, to the owners of the properties deemed by the Board to be affected as they appeared on the most recent local tax list, to the Planning Board, and to all others required by law. Notice of the hearing was published on 11/25/2021 & 12/2/2021 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: **33 Sears Road**
Petitioner: **33 SEARS REALTY, LLC**

Zoning District: **S-40 (Single-Family)**
Precinct: **15**
Description: **Construct a single-family home**

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

Date: **12/9/21**
Time: **7:00 pm**
Location: **Virtual Meeting (see below)**

Register for this virtual hearing:

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

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:

§5.09.2.N – DESIGN REVIEW

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: 11/25/2021 & 12/2/2021

At the time and place specified in the notice, this Board held a virtual public hearing. Present at the hearing were Chair Jesse Geller and Board Members Lark Palermo and Randolph Meiklejohn.

Also present at the hearing was Zoning Coordinator / Planner, Monique Baldwin and Deputy Building Commissioner, Paul Campbell.

The Petitioner's attorney, Jeffrey P. Allen, Lawson & Weitzen LLP, 88 Black Falcon Avenue, Suite 345, Boston, MA, waived a reading of the public hearing notice for the record and presented project details to the Board.

Attorney Jeffrey Allen explained that the case comes before the Board with unanimous approval of the Planning Board and required only design review. Attorney Allen explained that the proposed project is to build a new single-family home on the vacant lot and that this is a four-lot subdivision; this being the third of four houses to be built. Attorney Allen explained that the proposed project complies with the dimensional and other requirements of the Zoning By-Law and that the Petitioner was before the Board seeking design review pursuant to Zoning By-Law Section 5.09.2.n because the proposed home includes basement space, which if finished, built out, or converted to habitable space, would result in the gross floor area of the structure being greater than the permitted gross floor area in Table 5.01. Attorney Allen continued that the house is unique in the fact that it does not maximize all gross floor area available under the allowed Floor Area Ratio

but some of the space in the basement could be converted at any time as-of-right, while another portion of the basement could only be converted after ten years and this last is what triggers a requirement under the Zoning By-Law for design review. Attorney Allen commented that the Planning Board approved the design of the proposed home and the design is consistent with the other two homes on the street.

Michael McKay, project architect, gave an overview of the surrounding area and streets and described the lot and house to be built on the lot as approximately a 71,000 sq. ft. lot in an area with similar and larger sized homes. Mr. McKay stated that a portion of the lot is occupied by the cul-de-sac as shown on the site plan. Mr. McKay showed on the site plan where the proposed home is to be located on the lot and summarized the landscape plan and the trees that will be removed and those which will remain. Mr. McKay then showed a rendering of the proposed house and summarized the building materials that will be used and the elevation drawings and floor plans.

Attorney Allen stated that it is important to note that this is a difficult lot that would be a good candidate for a variance, if necessary. He explained that the lot has tough topography, ledge, and other impediments; but, the applicant was able to design the home to comply with all dimensional requirements of the By-Law. Attorney Allen stated that the height was a challenge, but the applicant worked with the building commissioner and Paul Campbell to situate the home in a way that it complies with the height requirements, and is actually below the maximum height.

In response to comments from Mr. Micklejohn, Mr. McKay explained the layout of the lot and the way in which the proposed project complies with the height requirements of the By-Law. Attorney Allen also provided details as to why the proposed home complies with the By-Law.

Chair Geller then called for public comments in favor of or in opposition to the proposal. No comments were submitted.

Chair Geller called upon Monique Baldwin, Zoning Coordinator / Planner to deliver the findings of the Planning Department and Planning Board:

Ms. Baldwin stated that the Planning Department is supportive of this proposal. She stated that the proposed house complies with all zoning requirements and is located on a vacant lot. She noted that the neighborhood does not display a particularly consistent architectural style. Ms. Baldwin stated that planning staff recommends incorporation of some of the same conditions to this decision as were included in the decision from 2015 that allowed the creation of the shared driveway.

Ms. Baldwin then stated that the Planning Board is also supportive of this proposal, although the Board is concerned with the quantity of tree removal on the property and the extent of the proposed replanting. She noted that the Board suggests that a more detailed landscaping and tree removal plan be submitted.

Ms. Baldwin stated that the Planning Board recommends approval of the site plan by Verne T. Porter JR PLS, dated October 21, 2021, and architectural plans by McKay Architects, November 12, 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, a drainage plan shall be submitted subject to the review and approval of the Director of Traffic and Engineering, with a copy of the approved plan submitted to the Assistant Director for Regulatory Planning.
3. The proposed building shall include, as per the recommendation of the Town of Brookline Fire Chief in his letter dated August 19, 2014, the installation of residential sprinklers in accordance with N.F.P.A 13 standards for the installation of sprinklers.
4. If the applicant chooses to convert the basement to habitable space, no more than 1,848 square feet may be converted as-of-right and 2,602 square feet may be converted to habitable space pursuant to Section 5.22 of the Zoning By-Law. Should Section 5.22 of the Zoning By-Law be

amended in the future, the applicant may convert more or less habitable space according to the amended requirements of Section 5.22.

5. 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.
6. The applicant shall provide a more detailed landscaping plan that includes the trees that will be preserved on site for review and approval by the Assistant Director for Regulatory Planning.

Attorney Allen in response argued that the last sentence of Condition # 4 violates the Zoning By-Law and G.L. c. 40A because there has to be definitiveness to the Board's decision and Section 5.09.2.n of the Zoning By-Law provides that a condition of the special permit shall set forth as a condition of the special permit the extent to which such space may or may not be converted to habitable space in the future, not that it could change in the future. Attorney Allen continued that a purchaser of the property needs to know what the approval is and, to include a condition that the includable basement area could change, is not in compliance with the By-Law or G.L. c. 40A. Attorney Allen stated that a subsequent zoning change cannot affect an approval that is given today, as a matter of land-use law. The Board Members discussed Mr. Allen's requested change to Condition #4.

Attorney Allen also objected to Condition #3, requiring the building to include sprinklers. Attorney Allen said that this requirement dates back to the Zoning Board's approval of the common driveway and there are two other houses that have since been constructed on the common driveway without sprinklers. Attorney Allen stated that he spoke with Captain Todd Cantor of the Brookline Fire Department, who is in charge of fire prevention. Captain Cantor told Attorney Allen that whether or not the building includes sprinklers is up to the Board because there is no fire code that requires it. Attorney Allen also pointed out that there is a

hydrant in the cul de sac at the point of where this house is located that did not exist at the time the common driveway was approved. Attorney Allen asked that this house be consistent with the other houses on the common driveway and Condition #3 be stricken. Chair Geller asked for details concerning the sprinkler requirement in the decision regarding the common driveway. Chair Geller indicated that the common driveway decision would need to be modified with appropriate prior public notice if the Condition was to be removed.

Deputy Building Commissioner, Paul Campbell stated he wanted to amend Condition #2 to provide that the Director of Engineering and Transportation shall be the appropriate Town Department for review and approval, however, that copies of plans shall be submitted to the Building Commissioner. Mr. Campbell indicated that the Building Department has no objection to the relief requested. He stated that the Building Department will work with the Petitioner to ensure compliance with the Board's decision, the Zoning By-Law, and all state building codes.

The Board then deliberated on the merits of the application. Board Member Meiklejohn stated that he supported the granting of the special permit. Board Member Palermo indicated that she also voted in favor of the special permit requested. Chair Geller stated that the proposed project meets the requirements under Sections 5.09.n and 9.05 of the Zoning By-Law and that he is in favor of granting the relief subject to the conditions as revised per the Board's discussions. Chair Geller indicated that the requirements were met 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.

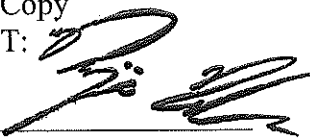
The Board then determined, by unanimous vote, to grant a special permit from the provisions of Section 5.09.2.n of the Zoning By-Law for Design Review. Accordingly, the Board voted unanimously to grant special permit relief, subject to the following conditions:

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.
2. Prior to the issuance of a building permit, a drainage plan shall be submitted subject to the review and approval of the Director of the Engineering and Transportation, with a copy of the approved plan submitted to the Building Commissioner.
3. The proposed building shall include, as per the recommendation of the Town of Brookline Fire Chief in his letter dated August 19, 2014, the installation of residential sprinklers in accordance with N.F.P.A 13 standards for the installation of sprinklers.
4. If the applicant chooses to convert the basement to habitable space, no more than 1,848 square feet may be converted as-of-right and 2,602 square feet may be converted to habitable space pursuant to Section 5.22 of the Zoning By-Law.
5. 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.
6. The applicant shall provide a more detailed landscaping plan that includes the trees that will be preserved on site for review and approval by the Assistant Director for Regulatory Planning.

Unanimous Decision of
The Board of Appeals

Filing Date: JAN 20 2022


Jesse Geller, Chair

A True Copy
ATTEST: 
Benjamin Kaufman
Clerk, Board of Appeals