



BOARD OF APPEALS  
 Jesse Geller, Chair  
 Johanna Schneider  
 Lark Palermo

*Town of Brookline  
 Massachusetts*

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Benjamin Kaufman, Clerk  
 TOWN OF BROOKLINE  
 BOARD OF APPEALS  
 CASE NO. 2022-00069  
 610-612 WASHINGTON STREET

Petitioners Jack Hall and Anna Trask applied to the Building Commissioner for permission to construct a 32 square foot dormer. 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 October 27, 2022, 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 October 13, 2022 & October 20, 2022 in the Boston Globe, a newspaper published in Brookline. A copy of said notice is as follows:

**TOWN OF BROOKLINE – Zoning Board of Appeals**  
**NOTICE OF HEARING**

**The Brookline Zoning Board of Appeals will hold a public hearing on**

**Date/Time: Thursday, October 27, 2022**

**Location: Virtual Hearing**

**Virtual Registration Link: <https://bit.ly/3ehBI4Y>**

**Petitioner: Jackson Hall & Anna M. Trask**

**Address: 610 Washington Street**

**Subject: Construct 32 square foot dormer**

**Nature of Action/Relief: Appeal from the denial of the issuance of the building permit and in the alternative request for a finding of no substantial detriment under MGL ch. 40A Section 6.**

§5.09.2.A – DESIGN REVIEW  
§5.43 - EXCEPTIONS TO YARD AND SETBACK REGULATIONS  
§5.60 - SIDE YARD REQUIREMENTS  
§5.91 - MINIMUM USABLE OPEN SPACE  
§8.02 - ALTERATION OR EXTENSION

*Plans and submissions may be viewed online at  
<https://brooklinema.gov/DocumentCenter/Index/2352>  
Interested persons may provide comments at the public hearing or by submitting written  
comments by email to [manthony@brooklinema.gov](mailto:manthony@brooklinema.gov).  
Assistive Listening Devices are available upon request:  
<https://www.brooklinema.gov/560/Americans-With-Disabilities-Act-ADA>  
Publish: 10/13/2022 & 10/20/2022*

On October 27, 2022, the Zoning Board of Appeals held a public hearing. Present at the hearing were Chair Johanna Schneider and Board Members Paul Bell and Neil Wishinsky. The case was presented by the attorney for the Petitioners, Jennifer Dopazo Gilbert., RLAW P.C., 300 Washington Street, Brookline, Massachusetts.

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

Attorney Dopazo Gilbert presented the case for the Petitioners. Attorney Dopazo Gilbert stated that the two-family home located at 610-612 Washington Street was built in 1922 and is in the T-5 Residential Zoning District. She continued that the existing structure is preexisting non-conforming with respect to the lot size, side yard setback, design review and open space. With respect to the side yard setback, she stated the required setback is 10-feet, the existing side yard setback is 6.9-feet, and the proposed side yard setback is 8.2-feet, representing a more conforming condition than the existing non-conforming condition.

Attorney Dopazo Gilbert opined that the proposal would not change the “nature” of the preexisting nonconforming building and is therefore a “small scale” project that, as a matter of

law, should be permitted as of right. In the alternative, Attorney Dopazo Gilbert stated that the Board could issue a special permit via a finding of no substantial detriment to the neighborhood.

The Board discussed the comments from Town Counsel that stated, “There are legal grounds for the board to allow small scale modifications, such as the dormer in the case tonight, as of right, with no need for a finding of “not substantially more detrimental to the neighborhood.” Board Members had questions related to the case law and the definition of “small scale modification.”

The Board of Appeals discussed “option A” and were uncomfortable making a determination that this was a small scale project for two reasons: 1) the Board wanted to have Town Counsel present or be provided with a more comprehensive legal memorandum with respect to the case law analysis; and 2) the Board wanted to get further direction from Town Counsel on whether it had the authority to make such a determination or whether the Town’s legislative body, Town Meeting, needed to first amend the Zoning By-Law.

In light of this, the Board suggested continuing the hearing in order to hear from Town Counsel, or, in the alternative it would entertain an argument for a special permit finding of no substantial detriment. Petitioner’s counsel stated that she would prefer having a decision of a finding of no substantial detriment rather than further delaying the matter.

Attorney Dopazo Gilbert stated that the proposed 32-square foot dormer would not be detrimentally more detrimental than the existing structure to the neighborhood. She stated that under Deadrick (Deadrick v. Board of Appeals of Chatham, 85 Mass. Appt Ct 539), the Board of Appeals may allow for the extension or alteration of the aforementioned preexisting nonconformities as long as no new nonconformities are created and there is no substantial detriment to the neighborhood. She argued that the minor addition will not create any new nonconformity and there will be no substantial detriment to the neighborhood. Attorney Dopazo

Gilbert continued that there was no known opposition to the proposal, and the most impacted abutter has voiced her support. Furthermore, Attorney Dopazo Gilbert noted that the proposal also satisfied the special permit requirements enumerated in **Section 9.05**.

Chair Schneider called for public comments in support of or opposition to the Petition. Phoebe Hyde, 616 Washington Street and direct abutter facing the proposed dormer, spoke in strong support of the proposal. She stated the proposed dormer addition is exceptionally minor and would not impinge on her property. No one spoke in opposition.

Chair Schneider then called upon Planner and Zoning Coordinator, Madison Anthony, to deliver the comments of the Planning Department.

**FINDINGS**

**§5.09.2.A – DESIGN REVIEW**

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

**§5.60 – SIDE YARD REQUIREMENTS**

**§5.20 – MINIMUM USABLE OPEN SPACE**

**§8.02 - ALTERATION OR EXTENSION<sup>1</sup>**

<b>ZONING: T-5</b>	<b>Requirements</b>	<b>Existing Conditions</b>	<b>Proposed Conditions</b>	<b>Relief Required</b>
<b>Side Yard Setback</b>	10 ft	6.9 ft	6.9 ft (8.2 ft from dormer)	<b><u>Special Permit</u></b>
<b>Front Yard Setback</b>	15 ft	13.3 ft	13.3 ft (no change)	Pre-existing Non-conformity
<b>Rear Yard Setback</b>	30 ft	6.8 ft	6.8 ft (no change)	Pre-existing Non-conformity
<b>Minimum Usable Open Space</b>	30% (1,166 sf)	0 sf	0 sf (no change)	Pre-existing Non-conformity

<sup>1</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.

**PLANNING DEPARTMENT STAFF COMMENTS**

Ms. Anthony stated that the dimensional relief requested is very minor and the dimensional non-conformities are pre-existing non-conformities. In addition, there is no change in the front yard setback, rear yard setback, side yard setback or usable open space. She added that the dormer addition does not appear to increase any dimensional non-conformity.

However, Ms. Anthony stated, this proposal has also been cited for design review, a process in which the Planning Board is usually very involved. She added that because this proposal has not been to the Planning Board, there has not been an opportunity for the applicant to hear their feedback on the design from the Board.

She stated, if the Zoning Board of Appeals recommends approval of the architectural plans Richard B. Levey, dated 9/8/22, and site plan by D. O'Brien Land Surveying, dated 8/17/22, the Planning Department recommends the following conditions:

1. Prior to the issuance of a building permit, the applicant shall electronically submit 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 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 Paul R. Campbell, Deputy Building Commissioner, to deliver the findings of the Building Department. Mr. Campbell stated that the Building Department concurred with the Planning Board analysis and added that should the Board grant the requested relief, the Building Department would work with the Petitioners to ensure conformance with the Board's decision and all applicable building codes.

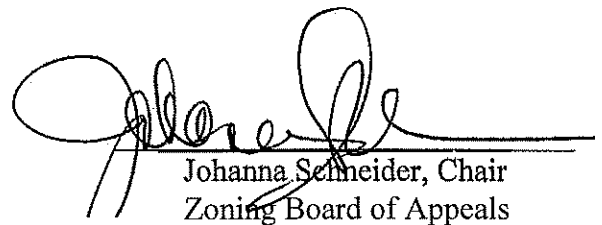
The Board then deliberated. The Board discussed the case law surrounding small scale modifications and while the Board of Appeals generally concurred that the proposed dormer was

“small scale”, there was no consensus regarding to what extent the case law defined “small scale” or the Board’s authority to make a “small scale” finding and direct the Building Commissioner to issue a by-right building permit. Chair Schneider stated that ample evidence was provided to make a finding that the proposed alteration to the existing structure would not be more detrimental to the neighborhood. Board Member Wishinsky and Bell concurred that, even absent a Planning Board report, the Board of Appeals could make a finding of no substantial detriment under M.G.L. Ch. 40A, Section 6.

Accordingly, the Board voted unanimously to grant the requested finding of no substantial detriment, 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 to the Building Commissioner 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



Johanna Schneider, Chair  
Zoning Board of Appeals

Filing Date: 12/19/2022

A True Copy  
ATTEST:



Benjamin Kaufman  
Clerk, Board of Appeals