



Town of Brookline

Massachusetts

BOARD OF APPEALS
Jesse Geller, Chair
Johanna Schneider
Lark Palermo

Town Hall, 1st Floor
333 Washington Street
Brookline, MA 02445-6899
(617) 730-2010 Fax (617) 730-2043
Benjamin Kaufman, Clerk

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2022-000060
269 LEE STREET

Petitioner, Clyde Street Partners, LLC, applied to the Building Commissioner for permission to construct a single-family dwelling. The application was denied, and an appeal was taken to this Board.

The Board of Appeals 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 November 10, 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 27, 2022, and November 3, 2022, in the Herald, a newspaper of general circulation 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, November 10, 2022

Location: Virtual Hearing

Virtual Registration Link: <https://bit.ly/3TTK6X8>

Petitioner: Clyde Street Partners, LLC

Address: 269 Lee Street

Subject: Construct single-family dwelling

Nature of Action/Relief:

§5.10 – MINIMUM LOT SIZE

§5.20 – FLOOR AREA RATIO

§8.02 - ALTERATION OR EXTENSION

Plans and submissions may be viewed online at

<https://www.brooklinema.gov/DocumentCenter/Index/3262>

Interested persons may provide comments at the public hearing or by submitting written comments by email to manthony@brooklinema.gov.

Assistive Listening Devices are available upon request:

<https://www.brooklinema.gov/560/Americans-With-Disabilities-Act-ADA>

Publish: 10/27/2022 & 11/03/2022

On January 19, 2023, the Zoning Board of Appeals held a public hearing.¹ Present at the hearing were Chair Johanna Schneider and Board Members Randolph Meiklejohn and Wadner Oge. The case was presented by the attorney for the Petitioner, Jennifer Dopazo Gilbert, RLAW P.C., 300 Washington Street, Brookline, Massachusetts. Also in attendance was Christopher Russ, the project architect, Christopher Russ Architects, Inc., 580 Farm Road, Marlborough, 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 Petitioner. She stated that the proposal for 269 Lee Street had twice been reviewed by the Planning Board. Attorney Dopazo Gilbert continued that while the Planning Board had no concerns about the proposal at its first hearing, verification of the submitted gross floor area figure for the basement was sought to ensure that the

¹ The Board of Appeals continued without testimony the matter of 269 Lee Street at its public hearing on 11/10/2022.

proposed FAR was allowed. She then stated that the FAR at 269 Lee Street is a preexisting nonconformity, as the maximum allowed FAR in the district is 0.15, whereas the existing structure measures 0.18. Attorney Dopazo Gilbert added that the FAR figures had been accurately calculated to the satisfaction of the Planning Board and that Paul Campbell, the Deputy Building Commissioner, concurred with this finding.

Attorney Dopazo Gilbert then stated that the proposal is to construct a new single-family home, measuring 7,158 square feet. She continued that a special permit was required under M.G.L. ch. 40A Section 6 because of the property's preexisting nonconforming lot size and FAR. Attorney Dopazo Gilbert noted that 269 Lee Street is located on a 32,000 square foot lot in an S-40 zoning district, where the minimum lot size is 40,000 square feet. She further stated the lot is a considered a "through lot" because it fronts onto both Clyde and Lee Streets. Attorney Dopazo Gilbert added that the existing home at 269 Lee is 5,578 square feet, with the new structure to measure 7,158 square feet, or which 6,239 square feet would be above-ground. She also stated that the preexisting FAR would be increased from 0.18 to 0.22 and that the basement would be located entirely underground.

Attorney Dopazo Gilbert then stated that the minimum applicable setbacks on Clyde and Lee Streets are 30 feet, while the proposed setbacks would be 70 feet and 31 feet, respectively. She continued that the special permit relief was modest as to FAR, as the resultant FAR of 0.22 was consistent with other homes in the neighborhood. Attorney Dopazo Gilbert further stated that no opposition had been made by neighbors, that the roof would be capable of accommodating solar power, that other renewable energy options were being explored by Petitioner, and that at least one electric vehicle charging station would be provided. She continued that the Preservation Commission had determined that the existing house was historically significant and had imposed

a stay on demolition. She continued that efforts had been made to end the stay, including providing testimony from architects and engineers for purposes of design review, but that the Commission had insisted that the stay be allowed to expire as scheduled on May 23, 2023.

Attorney Dopazo Gilbert then detailed the requested zoning relief. She stated that, pursuant to the Deadrick line of cases and M.G.L. ch. 40A Section 6, the Petitioner sought a finding by the Board that the proposal would not be substantially more detrimental to the neighborhood than the preexisting nonconforming structure. Attorney Dopazo Gilbert stated that several cases, including Deadrick, involved preexisting nonconforming homes being demolished and replaced by new homes, some of which increased preexisting nonconformities. She noted that because no new nonconformities were being created by the present proposal, the Board's inquiry would focus solely on whether the new home would be substantially more detrimental to the neighborhood than the existing home.

Attorney Dopazo Gilbert noted that the Board had previously used the more stringent Special Permit requirements of Section 9.05 to determine whether a change to a preexisting nonconformity would constitute substantial detriment to the neighborhood. She then stated the followings: 1) Specific site is an appropriate location for such use: The property is located in a residential neighborhood, and the new single-family home is an allowed use and complies with all dimensional requirements, but for the preexisting nonconforming FAR and lot size. There are similarly sized homes in the neighborhood. 2) Use will not adversely affect the neighborhood: There will be no change to the use. The new home is beautifully designed. There is no known opposition to the proposal, and the Planning Board voted unanimously to recommend approval. 3) No nuisance or serious hazard to vehicles or pedestrians: The new driveway has been designed to meet current safety and design codes. 4) Adequate and appropriate facilities will be used for

the proper operation of the proposed use. 5) Development will not have any effect on the supply on housing available for low and moderate income people.

Chair Schneider then inquired as to why the proposal was to destroy the existing home, not renovate it. Christopher Russ, the project architect, responded that the new home would be rotated 180 degrees from the existing one to better utilize available space. He continued that the existing home has low ceilings and other design constraints that would make a renovation infeasible.

Board Member Meiklejohn then inquired as to whether drawings of the existing home were available. Mr. Russ, sharing a view of his screen, presented each of the floors of the existing home and the accompanying calculations of gross floor area. Board Member Meiklejohn stated that he was comfortable with the calculated figures.

Board Member Oge then asked whether there was a reason that the mechanical space of the home would be increased from just over 200 square feet to roughly 900 square feet. Mr. Russ responded that building codes required minimum distances between various appliances. He continued that the additional space was also partly attributable to the addition of an HVAC system. Board Member Oge then inquired as to the plans for the home's heating system. Mr. Russ responded that the client plans to install a hydro-air system.

Chair Schneider inquired as to whether the hydro-air system was gas or electric. Mr. Russ responded that the system was gas, adding that the roof was designed to accommodate future solar installations.

Board Member Oge inquired as to why the home wouldn't be entirely reliant on electric power. Attorney Dopazo Gilbert responded that the decision was the result of four coinciding factors: The existing Stretch Code being updated; adoption of a new "Super-Stretch" Code, expected to be enacted on July 1, 2023; issuance of the 10th Edition of the State Building Code,

to be published in May of 2023; and Brookline’s participation in a pilot program for a no fossil-fuels by-law, at a date to be determined. She added that even under the stringent standards of the Super Stretch Code, new homes are allowed to have gas, so long as they are also solar-ready. Attorney Dopazo Gilbert, noting that prices—for materials, installation, and certification—had increased dramatically in recent months, stated that Mr. Campbell may have additional insight. Mr. Campbell stated that the Super Stretch Code had taken effect in January of the current year and that it was more stringent than expected, particularly as it relates to residential development.

Chair Schneider then called for public comments in support of or in opposition to the proposal. No public comments were made.

Chair Schneider then called upon the Planner and Zoning Coordinator, Madison Anthony, to present the Planning Board report.

FINDINGS

§5.10 - MINIMUM LOT SIZE

§5.20 - FLOOR AREA RATIO

§8.02 - ALTERATION OR EXTENSION¹

ZONING: S-40	Requirements	Existing Conditions	Proposed Conditions	Relief Required
Floor Area Ratio	0.15 (max.)	0.18	0.22	<u>Special Permit</u>
Minimum Lot Size	40,000 sqft	32,095 sq ft	32,095 sq ft (no change)	<u>Special Permit</u>

¹Under **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.
with 8 or more units is required. Therefore, 11 bike spaces would need to be shown on the site plan.

PLANNING DEPARTMENT COMMENTS

Ms. Anthony stated that Planning Staff is supportive of this proposal. She continued that the proposed new single-family home will allow more space for the family with the additions of a finished basement, a mudroom, and an additional bedroom on the second floor. Ms. Anthony

added that the proposal appears not to be detrimental to the neighborhood. She then noted that the Planning Board wanted the FAR of the existing house to be confirmed, particularly, whether or not the basement space was habitable space as defined by the Zoning By-Law. Ms. Anthony continued that this confirmation was important because it was the basis of the new house being allowed to exceed the maximum FAR for single-family homes in an S-40 district through a special permit under MGL Chap. 40A, Sec. 6. She further stated that Planning Staff asked the Building Commissioner to inspect the house to determine if the current FAR was being calculated correctly. Ms. Anthony concluded that a site visit was made by the Building Commissioner and Deputy Building Commissioner and that they confirmed that the basement space was habitable space and that additional space in the basement could also have been counted toward the existing FAR.

Ms. Anthony then stated that the Planning Board was pleased to learn from Planning Staff that the Building Commissioner and Deputy Building Commissioner found that the basement space was habitable space as defined by Sec. 2.07, Gross Floor Area, in the Zoning By-Law. She continued that this allowed the application to qualify for a special permit under Section 6 of MGL Chapter 40A, Sec. 6, which permits the new house to exceed the allowed FAR for a single-family house in an S-40 district as long as no new non-conformities are created and the proposed structure is not more detrimental to the neighborhood than the existing structure. Ms. Anthony added that the surrounding neighborhood has many homes of a comparable size to the one being proposed.

Ms. Anthony continued that the Planning Board, therefore, recommended approval of the site plans by Everett M. Brooks Co., dated May 10, 2022, and architectural plans by Christopher Russ Architects, dated August 19, 2022, 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 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 Paul R. Campbell, Deputy Building Commissioner, to deliver the findings of the Building Department. Mr. Campbell stated that the Building Department had no objections to the proposal and that, should the Board grant the requested relief, the Building Department would ensure compliance with all applicable codes and by-laws.

The Board then deliberated. Chair Schneider stated that she was presently unlikely to find that the new home would not be substantially more detrimental to the neighborhood than the existing one. She continued that the alleged justifications for the demolition of the existing home were not sufficient and that she had concerns about constructing a larger home. Chair Schneider then stated that she had issues with the demolition of a home for purposes of raising the ceilings and changing its orientation, as well as with the new home's increased size and failure to commit to being emissions-free.

Board Member Meiklejohn stated that there was nothing in **Section 9.05** that required an applicant to provide a justification for demolishing an existing home. He continued that he could not recall a similar condition being required for other proposals involving demolition. Board Member Meiklejohn also stated that he believed the conditions of **Section 9.05** were satisfied by the proposal and that he understood the applicant's desire to reorient the home toward Clyde Street.

Chair Schneider then stated that, as far as **Section 9.05** was concerned, she believed that adequate and appropriate facilities were not being proposed for the new house. She continued that while there was little case law discussing the issue, the size of the proposed mechanical room suggested that the Petitioner could do more to decrease emissions. Chair Schneider reiterated that

her concerns were grounded in the language of M.G.L. ch. 40A §6 and Deadrick, adding that she believed the new structure would be substantially more detrimental to the neighborhood, given the environmental impacts of demolition and of constructing a home that would use fossil fuels. She continued that a much larger new structure without fossil fuel-free amenities was at least more detrimental than the existing nonconforming home, possibly substantially more so.

Mr. Russ stated that the construction materials and design standards of the existing home made it impossible for the existing home's energy consumption to be comparable to that of the proposed structure. He continued that to bring the existing home to a comparable level of efficiency, it would have to be gutted entirely, a process that creates nearly as much interior waste as an outright demolition. Mr. Russ then stated that the proposed home's construction would involve much higher quality materials and building standards, both of which would make the home easier to maintain, insofar as painting, scraping, and other exterior work would be negligible.

Chair Schneider inquired as to what materials would be used for the exterior of the new home. Mr. Russ responded that the front consisted of a stone façade and that a synthetic material similar to wood would be used for the trim work.

Chair Schneider asked Attorney Dopazo Gilbert whether she would be willing to accept a condition that the new home be Passive House. Attorney Dopazo Gilbert responded that she would have to ask the Petitioner. Mr. Russ then spoke privately with the Petitioner.

Attorney Dopazo Gilbert then stated that additional research was needed before reaching a definitive answer on the new home being Passive House. She then requested a continuance to March 2, 2023.

The Zoning Board of Appeals then voted unanimously to continue the matter of 269 Lee Street to March 2, 2023.

On March 30, 2023, the Zoning Board of Appeals held a public hearing at which it continued the matter of 269 Lee Street. Present at the hearing were Chair Johanna Schneider and Board Members Randolph Meiklejohn and Wadner Oge. The case was presented by the attorney for the Petitioner, Robert Allen, Jr., RLAW P.C., 300 Washington Street, Brookline, Massachusetts. Also in attendance was Jeff Birnbaum, manager of the Petitioner, Clyde Street Partners, LLC.

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 Allen waived a reading of the published notice.

Attorney Allen presented the case for Petitioner. Attorney Allen stated that his law partner, Jennifer Dopazo Gilbert, had conducted the previous hearing on 269 Lee Street and that she was unavailable for the present hearing. He continued that he understood that at that hearing, the board had made a request for more information about the proposed structure's energy consumption. Attorney Allen then stated that, after discussions with the design team, the Petitioner was willing to commit to the following changes, in addition to the previously proposed provision of electric vehicle parking: Constructing a solar-ready home, installing heat pumps, and using an all-electric HVAC system. He continued that the proposal would still include gas for a stove and fireplace, but that the oven may be electric.

Attorney Allen noted that with these changes, particularly the HVAC system, the proposed home would be far more efficient than the existing home. He continued that the requested zoning relief required a finding from the board of no substantial detriment under M.G.L. ch. 40A Section 6. Attorney Allen stated that the proposal, which would increase the FAR from 0.18 to 0.22, was

not substantially more detrimental to the neighborhood than the existing structure. He further noted that the Board had previously used the more stringent Special Permit requirements of **Section 9.05** to determine whether a change to a preexisting nonconformity would constitute substantial detriment to the neighborhood. Attorney Allen stated that to his knowledge, this inquiry had already been conducted at the Board's hearing on January 5, 2023.

Board Member Meiklejohn then disclosed that a letter, submitted to the board from a resident at 161 Cypress Street, had been sent by his wife. He continued that he had no reservations about his ability to exercise his judgment independently.

Board Member Oge then asked if there was a reason for changing the frontage street of the home from Lee Street to Clyde Street. Attorney Allen responded that the foremost reasons were safety and convenience: Lee Street only allowed for a right-turn upon exiting, something that often entails a subsequent U-turn, whereas Clyde Street provided immediate access in both directions.

Chair Schneider, noting that the Planning Board report and comments had already been presented at the Board's hearing on January 5, 2023, then called for public comments in favor of or in opposition to the proposal, particularly as it related to the design modifications presented by Attorney Allen. No public comments were made.

The Board then deliberated. Board Member Oge stated that he was glad to see the Petitioner adopt the changes the Board had suggested. He continued that the changes appeared to be consistent with the recently incorporated Stretch Code and with the overall trend in Brookline of improving energy efficiency. Board Member Oge noted that with the new changes to the proposal, he was comfortable voting in favor of granting the requested relief.

Board Member Meiklejohn stated that he believed the proposal was not substantially more detrimental than the existing home and that the proposal satisfied the Special Permit conditions of

Section 9.05. Board Member Meiklejohn concluded that he was also in favor of granting the requested relief.

Chair Schneider stated that she was pleased to see the applicant make changes to the design and incorporate more energy efficient features. She continued that with these changes, she was comfortable concluding that the proposal would not be substantially more detrimental to the neighborhood than the existing structure. Chair Schneider concluded that she would vote in favor of granting the requested relief.

The Board then determined, by unanimous vote, that the proposal met the standards for a finding, as required under M.G.L. ch. 40A Section 6, that the proposal would not be substantially more detrimental to the neighborhood than the preexisting nonconforming structure. The Board also made the following specific findings under **Section 9.05** based on the evidence submitted at the hearing and the Board's deliberation:

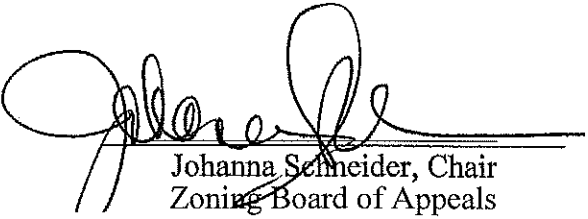
- a. The specific site is an appropriate location for such a use, structure, or condition.
- b. The use as developed will no adversely affect the neighborhood.
- c. There will be no nuisance or serious hazard to vehicles or pedestrians.
- d. Adequate and appropriate facilities will be provided for the 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.

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.

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



Johanna Schneider, Chair
Zoning Board of Appeals

Filing Date: 5/25/2023

A True Copy
ATTEST:



Benjamin Kaufman
Clerk, Board of Appeals