



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

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2023-000030
25 ASTON ROAD

Petitioner and owner, 25 Aston Road, LLC, applied for a building permit for construction to alter the roof of single-family home in an S-15 Single Family District in order to expand the living space on the second floor. The roof was found not to be historically significant so there was no demolition delay imposed. The additional living space will be built within a pre-existing non-conforming side setback, for which relief is needed. Relief is also cited for a portico to be built over an existing front door landing.

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 July 20, 2023 at 7:00 PM, for a virtual public hearing as the date, time and place of a hearing for appeal. Notice of the hearing was mailed to the Petitioner, to their 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 July 6, 2023 and July 13, 2023 in the *Boston Herald*, a newspaper with a wide circulation in the Town of 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, July 20, 2023

Location: Virtual Hearing

Virtual Registration Link: <https://bit.ly/3pAoR3q>

Petitioner: Aston Road LLC

Address: 25 Aston Road

Subject: Raise roof to increase living space

Nature of Action/Relief:

\$5.43 - EXCEPTION TO YARD AND SETBACK REGULATIONS

\$5.51 - PROJECTRIONS INTO FRONT YARDS

\$5.60 - SIDE YARD REQUIREMENTS

\$8.02 - ALTERATION OR EXTENSION

Plans and submissions may be viewed online at

<https://www.brooklinema.gov/DocumentCenter/Index/4379>

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: 7/06/2023 & 7/13/2023

The Board held its virtual public hearing, at the time and place specified in the notice on July 20, 2023.

Present at the hearing were Jesse Geller and Board Members Randolph Meiklejohn and Neil Wishinsky. The case was presented by Attorney Scott C. Gladstone, 822 Boylston St., Suite 300, Chestnut Hill, Massachusetts 02467. Chair Geller called the hearing to order at 7:00 p.m.

Attorney Gladstone waived the reading of public notice and explained the background of the case as follows: The current home is a single family in the S-15 Single-Family district.

Petitioner proposes to raise the roof to increase the already existing living space on the second floor. Mr. Gladstone explained that, since the roof being altered was found not to be historically

significant, no demolition delay was imposed and no design review requirement was triggered under **Section 5.09** of the Zoning By-Law.

Attorney Gladstone continued that the side setbacks are already pre-existing non-conforming and a portion of the proposed additional living space will add massing to the portion of the house that already encroaches into one of the required side set-backs; thus, the proposed roof requires a special permit for a violation of **Section 5.60** of the Zoning By-Law pertaining to required side setbacks. Attorney Gladstone explained that the relief is available under G.L. c. 40A, Section 6 as interpreted by the case of *Deadrick v. Zoning Bd of Appeals of Chatham*, 85 Mass.App.Ct. 539 (2014) and its progeny.

Mr. Gladstone commented that the second floors of the abutting homes and other homes on the block were much more imposing than the proposed mansard roof and noted the proposed roof, being a true mansard, will pull away from the side lot line more than the pre-existing roof structure to be replaced. Also, Attorney Gladstone pointed to the tall evergreens that already provide screening to the most impacted abutter. Attorney Gladstone stated that the proposed new roof is no higher than the height of the existing portion of the second story, and is well below the allowed height under the **Section 5.01 table** of the Zoning By-Law. For all these reasons, he argued, the proposed roof, within the pre-existing non-conforming side setback, would not be substantially more detrimental to the neighborhood than the existing conditions.

Attorney Gladstone continued that the Building Department also cited a need for relief from **Section 5.51** of the Zoning By-Law for the projection of the front portico into the front yard, even though it is not projecting into the required front yard setback. He stated that **Section 5.51** provides in pertinent part: “Bays and porches not over half the length of the front wall may project into any front yard three and one-half feet” And the proposed covering for the existing

portico will project 4.75' beyond the current main structure. Attorney Gladstone argued, however, that **Section 5.51** is not violated for two reasons. First, the proposed portico is being built over the pre-existing landing and stairs and the portico will extend no further from the main structure than the existing landing and stairs or a nearby pre-existing bay window. Attorney Gladstone argued that this is determinative because (i) the definition of "Yard, Front" in **Section 2.25** of the Zoning By-Law is "An open space extending across the full width of the lot and lying between the front lot line and the nearest point of the building" and (ii) the definition of "building" in **Section 2.02** of the Zoning By-Law specifically includes "part or parts thereof." Thus, Attorney Gladstone argued that the furthest edge of the existing landing and stairs would be the "nearest point of the building" and, that being the case, the proposed addition of the front portico over the existing landing and stairs, and extending no farther than the adjacent existing bay window, is n further into the front yard; thus, there is no violation of **Section 5.51** . Second, Attorney Gladstone argued that combining the plain meanings of **Sections 2.25** and **2.02** makes it clear that the intention of **Section 5.51** would be best served by imputing the word "required" to "front yard" and to do otherwise would make **Section 5.51** senseless. Regardless., Attorney Gladstone explained that, even if the Board found that **Section 5.51** does apply to the proposed portico, relief could be granted under **Section 5.43** of the Zoning By-Law with the provision of increased landscaping as a counter-balancing amenity.

Architect David King showed the elevations and compared them to the existing house as well as to photos of other roofs in the neighborhood. Mr. King also described the proposed counterbalancing amenities as indicated by the proposed landscape plan. Mr. King reviewed the corrections he made to the plans, dated July 18, 2023, correcting inconsistencies identified by the Planning Board.

Attorney Gladstone concluded by reviewing how the proposed project meets the requirements of Section 9.05 of the Zoning By-Law, which is necessary should counterbalancing amenities be required and as a lens through which the Board traditionally makes its determination under G.L. c. 40A, Section 6 as interpreted by *Deadrick*. Attorney Gladstone stated Petitioner has met the special permit standards under Section 9.05 of the Zoning By-Law as follows:

- a. The site is an appropriate location for such a use, structure, or condition: The proposed project is a single family in an S-15 single family district and the lot is a generous 17,187 square feet, which is well over the required 15,000 square foot minimum.
- b. The proposed use will not adversely affect the neighborhood as use remains unchanged as a single family and the proposed roof addition is modest in relation to the roof lines of the surrounding homes. The setback relief that is required is modest as it is well within the existing house footprint.
- c. There will be no nuisance or serious hazard to vehicles or pedestrians since there is going to be no change to the garage parking and existing driveway on the site.
- d. Adequate and appropriate facilities will be provided for the proper operation of the proposed use. See all of the above.
- e. The development as proposed will not have a significant adverse effect on the supply of housing available for low and moderate income people as the proposal does not take away any current housing.

The Board Members discussed the distinction between the relief required and available for the side yard set back and the front yard projection, which if the Building Department's interpretation of **Section 5.51** is correct, would be a new non-conformity, and would not have the benefit of Chapter 40A, Section 6 as interpreted by *Deadrick*. Chair Geller asked if counterbalancing amenities could also be applied to the pre-existing non-conforming side setbacks, and attorney Gladstone responded that he believed it could not, citing the ruling announced in *Bellalta v. Zoning Board of Appeals of Brookline*, 481 Mass. 372, 385-386 (2019) (holding that the state law standard of "no substantial detriment" creates a floor setting forth protection for pre-existing non-conformities and a Town may not add further obstacles, in addition to section 6, to an owner seeking to increase a pre-existing non-conformity).

Board Chair Geller invited the public to make any comments in support of or in opposition to the application. There were no comments from the public.

Board Chair Geller called upon Madison Anthony, Planner for the Town of Brookline, to deliver the recommendations of the Planning Staff and the findings of the Planning Board. Ms. Anthony explained that the Planning Staff comments were as follows: The proposed expansion will provide additional living space to the family while still complying with the maximum allowed floor area ratio. The structure has pre-existing non-conforming setbacks and the expansion will be built respecting those setbacks. The most significant change is regarding the roof type, which will be altered from a hip to a mansard style – a feature that will be unique to this house in the street. It is up to the Board to determine if such uniqueness will be significantly detrimental to the neighborhood.

Ms. Anthony explained that the Planning Board is supportive of this proposal. However, the Board has noted some inconsistencies in the representation of windows and the dormer area

in the plans and elevations. The plans show a different number of window panes compared to the elevations. The Board recommended correcting all discrepancies before the Zoning Board of Appeals hearing.

The Planning Board recommends approval of the site plan by TODD P. CHAPIN, PLS dated 2/21/2023, and architectural plans by DAVID L. KING ARCHITECTS, RA, dated 4/24/23, 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 inconsistencies between plans and elevations should be cleared up.

2. Prior to the issuance of a building permit, the applicant shall electronically submit a landscape plan that shows proposed counterbalancing amenities subject to approval by the Assistant Director for Regulatory Planning. The counterbalancing amenities must be executed in accordance with the approved plan.

3. 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 Campbell to speak on behalf of the Building Department. Mr. Campbell responded to the question concerning the application of **Section 5.51** to a projection into a front yard, but which did not project into the required front yard

setback. Mr. Campbell explained that the immediately following Zoning-By-Law section, **Section 5.52**, refers to the height of fences within the “required front yard” and that this is distinct from the use of the term “front yard” as used in **Section 5.51**, which is why the Building Department has determined that the term “front yard” in that Section is different than the term “required front yard” as that term is used elsewhere in the Zoning By-Law . Mr. Campbell expressed that he has discussed this issue with the Building Commissioner and that this interpretation has consistently been applied by the Building Department.

Mr. Campbell reported that the Building Department has no objection to the proposal and that the Building Department would ensure that all provision of the code and any conditions would be enforced.

In deliberation, Member Meiklejohn expressed his ongoing skepticism that **Section 5.51** pertaining to projection into front yards should be applied in instances wherein the required front yard setback is not implicated, explaining that the provision would make no sense when new construction was being proposed. Regardless, Member Meiklejohn stated that the requirements of G.L. c. 40A, Section 6 have been demonstrated in this case, the proposal merits a special permit and that the relief being requested for the front yard projection is nominal and that relief is available under **Section 5.43** of the Zoning By-Law with the provision of sufficient counterbalancing amenities. Member Wishinsky agreed that the proposal would not be substantially more detrimental and that other relief was appropriate. Chair Geller stated the proposal met all of the **Section 9.05** requirements as they are used to determine whether the proposal is (or is not) substantially more detrimental to the neighborhood under *Deadrick* and that, subject to the provision of the counterbalancing amenities, the requirements of **Section 5.43** have been met.

The Board then determined by unanimous vote that the requirements for Special Permits allowing relief from application of Sections 5.51 and 5.60 pursuant to Sections 5.43, , 8.02 and 9.05 have been met, and, as to the side yard set back, there will be an extension of a pre-existing non-conformity protected under G.L. c. 40A, Section 6. The Board found that the requirements of Section 9.05 have also been satisfied as follows:

- a. The specific site in 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.*

Accordingly, the Board of Appeals voted unanimously to grant the requested relief for the project as shown on and in reliance on the site plan by TODD P. CHAPIN, PLS dated 2/21/2023, and architectural plans by DAVID L. KING ARCHITECTS, RA, dated 4/24/23, (and as corrected, dated July 18, 2023 or otherwise per condition #1 below), 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 inconsistencies between plans and elevations should be cleared up and reviewed and approved by the Assistant Director for Regulatory Planning.

2. Prior to the issuance of a building permit, the applicant shall electronically submit a

landscape plan that shows proposed counterbalancing amenities subject to review and approval by the Assistant Director for Regulatory Planning. The counterbalancing amenities must be executed in accordance with the approved plan.

3. 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

AUG 17 2023



Jesse Geller, Chairman

Filing Date: _____

A True Copy

ATTEST

Benjamin Kaufman
Clerk, Board of Appeals

