



BOARD OF APPEALS
Enid Starr, Co-Chair
Jesse Geller, Co-Chair
Christopher Hussey

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TOWN OF BROOKLINE

Town of Brookline Massachusetts

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

Patrick J. Ward, Clerk

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO.2013-0010

Petitioner, Marianna Kantor, applied to the Building Commissioner for permission to construct a second floor infill addition on the east, rear side of the single family dwelling and a third story addition at 22 City View Road. The application was denied and an appeal was taken to this Board.

On January 24, 2013 the Board met and determined that the properties affected were those shown on a schedule in accordance with the certification prepared by the Assessors of the Town of Brookline and approved by the Board of Appeals and fixed March 14, 2013 at 7:30 p.m. in the Selectmen's Hearing Room as the time and place of a hearing on the appeal. Notice of the hearing was mailed to the Petitioner, to its 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 February 28 and March 7, 2013 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. 39, sections 23A & 23B, the Board of Appeals will conduct a public hearing to discuss the following case:

Petitioner: **KANTOR MARIANNA**

Owner: **KANTOR MARIANNA***

Location of Premises: **22 CITY VIEW RD**

Date of Hearing: **March 14, 2013**

Time of Hearing: **07:00 p.m.**

Place of Hearing: **Selectmen's Hearing Room, 6th Floor.**

A public hearing will be held for a variance and/or special permit from

1. **5.20; Floor Area Ratio**
2. **5.43; Exceptions to Yard and Setback Regulations**
3. **5.50; Front Yard Requirements**
4. **8.02.2, Alteration or Extension, Special Permit Required**

Of the Zoning By-Law to construct a second floor addition and add a third story at **22 CITY VIEW RD**

Said Premise located in a S-7 (Single-Family) residential district.

Hearings, once opened, may be continued by the Chair to a date and time certain. No further notice will be mailed to abutters or advertised in the TAB. Questions regarding whether a hearing has been continued, or the date and time of any hearing may be directed to the Zoning Administrator at 617-734-2134 or check meeting calendar at: <http://calendars.town.brookline.ma.us/MasterTownCalendar/?FormID=158>.

The Town of Brookline does not discriminate on the basis of disability in admission to, access to, or operations of its programs, services or activities. Individuals who need auxiliary aids for effective communication in programs and services of the Town of Brookline are invited to make their needs known to the ADA Coordinator, Stephen Bressler, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone: (617) 730-2330; TDD (617) 730-2327.

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At the time and place specified in the notice, this Board held a public hearing. Present at the hearing was Chairman, Jesse Geller and Board Members, Jonathan Book and Mark Zuroff.

The petitioner was represented by Attorney Kenneth B. Hoffman of Holland & Knight, 10 St. James Avenue, Boston, MA 02116.

Attorney Hoffman said City View Road is a dead end street located on the northern border of Brookline, with half the street in Brookline and half in Boston. The side of the street in Brookline is developed with single-family dwellings. 22 City View Road is a two story single-family dwelling that was built in 1950, and is the newest structure on the street. The dwelling is a two-story structure with shingle and brick siding and many of the dwellings around it are taller.

Attorney Kenneth B. Hoffman, whose professional address is Holland & Knight, 10 St. James Avenue, Boston, Massachusetts, representing the applicant Marianna Kantor, of 22 City View Road, Brookline, Massachusetts, waived the reading of the notice. Mr. Hoffman said this is an application to construct a second floor infill addition on the east, rear side of the single family dwelling and a third story addition. Attorney Hoffman stated that this property is on the border of Boston and Brookline and is situated at the bottom of a steep hill. He stated that the house is not pleasing in its current state as to its design and that what is driving this application is the smallness of the interior and the difficulty to expand because of ledge. Attorney Hoffman stated that the only way available to improve this property is to increase the height of the structure. He noted that the lot is half the size of the minimum lot size for the district and the steep slope creates a step effect for the houses in the neighborhood creating an odd interior arrangement that needs to be re-configured.

Attorney Hoffman stated that the main objective is to create additional living space and make the property pleasing to the eye. He added that the proposal before the Zoning Board of Appeals ("Board") does not exceed the height limitations in that district. Attorney Hoffman, directing the Board's attention to the photographs in the Planning Board's report, stated that the

house behind the subject property is located in the City of Boston. Attorney Hoffman stated that the Planning Board was sympathetic. He added that the applicant went through several designs to accommodate the Planning Board's concerns, resulting in the Planning Board's support for this design proposal. He noted that the main relief required is Floor Area Ratio ("FAR").

Architect Gregory K. Boghosian, whose professional address is Civil Environmental Consultants, LLC, 8 Oak Street, Peabody, Massachusetts, stated that the intent of the design was to carry the footprint of the building vertically. He added that it is impossible to expand backwards or down due to ledge. He added that the Planning Board urged changes in the design, specifically the window treatment and the façade. Attorney Hoffman added that only one neighbor appeared at the Planning Board hearing and they were in support of the proposal. He noted that neighbor was the most affected by the additional windows and they expressed that they were comfortable with the design. Attorney Hoffman then stated that FAR requires a variance because it exceeds the maximum allowed by special permit under Section 5.22 of the Zoning By-Law. He stated that the topography, elevation and the ledge qualifies for a variance to allow the most beneficial use of this property. He added that this proposal will also make the interior of the property safer.

Board Member Jonathan Book stated that the problem is that this house is too big for the lot. He asked if there is any case law supporting the applicant's argument for relief based on the ledge rather than the lot. Attorney Hoffman stated that the reason that it is an FAR issue is

because the lot is too small – it is the smallest lot on the street. He added that additional FAR needs to be added to the height of the building due to the ledge on the property and the slope of the hill doesn't allow the owner to enlarge the footprint.

Chairman Geller asked if the ledge and the slope are unique to this lot and are not present generally within the zoning district. Attorney Hoffman stated that there is ledge and slope through the neighborhood. Chairman Geller then asked if the applicant could have expanded in their basement, would an FAR of 180% been necessary. Attorney Hoffman stated that he doesn't know because they didn't prepare a plan of a design that could not be built. He added that the Petitioner is requesting a variance to make this house reasonably livable. Chairman Geller stated that this application is not about the ability to expand but the ability to expand beyond the maximum FAR under Section 5.22. Attorney Hoffman stated that was correct.

Architect Boghosian stated that there is only a crawl space of about three to four feet in height with ledge. It would be prohibitively expensive to blast the ledge in order to go down. Board Member Book acknowledged that the ledge is making this impracticable but questioned why the applicant is entitled to go to 180% FAR rather than 150%. Attorney Hoffman responded that this is an architectural issue but while the applicant will exceed volume they will not be exceeding the height dimensions. They are able to offer better architectural materials and allow the living space to be organized in an efficient and safe manner.

Board Member Jonathan Book, raising concerns about fitting this request into the statutory requirements, asked if any thought was given to a third floor addition that stayed within the 150% maximum FAR. Attorney Hoffman stated that even going to the maximum allowable under Section 5.22.2 the Petitioner would only be able to accomplish half of what is needed.

Chief Building Inspector Michael Yanovitch clarified for the Board that this proposal would not be allowed the 150% maximum because it is an exterior addition which is allowed only 120%.

Chairman Geller asked whether circumventing the statutory maximums caps placed on special permits would circumvent the Zoning By-Law and be detrimental to the public good. Attorney Hoffman stated that the achievement of the additional living space cannot be accomplished by the maximum caps under the Zoning By-Law.

Board Member Zuroff asked if there was any consideration given to expanding on the ground level. Attorney Hoffman stated that remedy would bring the property closer to the neighbors. He added that the stepping issue becomes a problem due to the steep slope. He noted that the neighbors would strongly oppose that remedy.

The Chairman asked if anyone present wanted to speak in favor of the application. No spoke.

The Chairman then asked if anyone wanted to speak in opposition to the application. No one spoke.

The Chairman called upon Timothy Richard, Planner, to deliver the comments of the Planning Board.

FINDINGS

Section 5.20 – Floor Area Ratio

	Allowed	Existing	Proposed	Finding
Floor Area Ratio	.35	.42	.63	Variance
(% of allowed)	100%	120%	180%	
Floor Area (s.f.)	1,320	1,559	2,397	

Section 5.43 – Exceptions to Yard and Setback Regulation

Section 5.50 – Front Yard Requirements

	Required/Allowed	Existing	Proposed	Relief
Front Yard Setback	20'	12'	12'	Special Permit*

* Under Section 5.43, the Board of Appeals may waive setback requirements if a counterbalancing amenity is provided.

Section 8.02.2 – Alteration or Extension

A special permit is required to alter a nonconforming structure or use.

Mr. Richard said the Planning Board is sympathetic to the applicant wanting more living space in this small single family home of less than 1600 s.f. However, the lot size is almost half the minimum lot size for this S-7 zoning district. The house, however, is significantly smaller

than the surrounding homes and was designed with very small windows. A third story on the home, with a reconfiguration of the windows, would help improve the appearance of the facade. After meeting with staff, the applicant made some changes to the building design. The primary difference in the alternatives is the orientation of the sloped roof. At the Planning Board meeting, the Board suggested further changes to the elevations and were happy to have the Assistant Director of Regulatory Planning review the revised plans, if the Board of Appeals approves the proposal. The applicant has also submitted four letters of support from abutters/neighbors.

Therefore should the Board of Appeals find that the statutory requirements for a variance are met, the Planning Board recommends approval of the floor plans and elevations by Civil Environmental Consultants, LLC, dated 3/7/13, subject to the following conditions:

1. Prior to issuance of a building permit, final elevations, indicating all exterior alterations and proposed materials, shall be submitted to the Assistant Director of Regulatory Planning for review and approval.
2. Prior to the issuance of a building permit, the applicant shall submit a final site plan and final landscaping plan, indicating all counterbalancing amenities, subject to the review and approval of the Assistant Director of Regulatory Planning.
3. Prior to the issuance of a building permit, the applicant shall submit to the Building Commissioner for review and approval for conformance to the Board of Appeals

decision: 1) a final site plan stamped and signed by a registered engineer or land surveyor; 2) final floor plans and building elevations stamped and signed by a registered architect; and 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Chief Building Inspector Michael Yanovitch stated that 22 City View Road is the only house in the neighborhood that doesn't have useable basement space. He stated that the proposed design is better than the existing house, particularly in terms of life/safety issues. He noted that the current windows do not conform to code and their upgrade is something the Building Department would like to see occur. Mr. Yanovitch stated that should the Board grant the variance to the applicant the Building Department will work with the applicant to make sure they conform to code and any conditions that are required.

In deliberation, Board Member Book stated that he is tremendously sympathetic with the applicant and that the proposed design is a great improvement over what currently exists but he feels the Board is constrained by Massachusetts General Laws Chapter 40A. He stated that he is having a hard time fitting this application into the constraints of Chapter 40A. Chairman Geller stated that while the soil, shape of the lot, topography – the sloping terrain – and significant amount of ledge is prevailing within the immediate neighborhood he stated that he is not so sure that it is prevailing within the district. Board Member Zuroff stated that he used to reside in that neighborhood and he does not believe the ledge extends through most of that district. Board Member Book stated that assuming this condition precludes the applicant from creating a basement, and notwithstanding a big house on a small lot, but for the ledge they would

have as of right an extra 30%. Board Member Mark Zuroff stated that if the Board were to allow a variance based on this application it would be nullifying the intent of the Zoning By-Law. He stated that he was sympathetic to the applicant but he is unconvinced that there is enough to go beyond the requirement. Chairman Geller stated that it is a worthy project. It creates a more functional space for the applicant and it has the support of the neighbors. He stated that he too has reservations under Chapter 40A and that it is borderline but that no case has been made under the required standards.

Attorney Hoffman stated that perhaps it is worth taking a look at the interior of the dwelling. He stated that one could only build partially above and couldn't achieve the roof and window improvements requested by the Planning Board. There are life/safety issues regarding the windows and you cannot achieve it with a special permit. He added that life and safety is an issue internally and the Board may want to see how that affects the proposal. Chairman Geller stated that a memorandum citing case law would also be helpful to the Board in order to determine this issue.

Upon motion made and duly seconded, it was UNANIMOUSLY

VOTED: To continue the hearing for BOA#2013-0010 – 22 City View Road to a date to be determined, provided that the applicant files with the Town Clerk, a waiver of the time requirements.

Chairman Geller re-opened the continued hearing on April 4, 2013. Chairman Geller stated that this case was a continuation of a hearing held on March 14, 2013. and that the preliminary matters read into the record at the initial hearing remained in effect. Chairman Geller added that the Board held a site visit at 22 City View Road on the morning of April 4, 2013.

Attorney Hoffman presented several documents and a memorandum to the Board for its consideration. Chairman Geller accepted these documents and memorandum as exhibits in the following order: Exhibit A – new elevation plans; Exhibit B – three letters of support from neighbors; Exhibit C – an April 2, 2013 memorandum from Attorney Hoffman to the Board; and Exhibit D – a new set of existing and proposed floor plans.

Attorney Hoffman stated that while this application is both a Chapter 40A, Section 6 case and a case that qualifies for a variance, he had reservations using the decision in Gale v. Zoning Board of Appeals of Gloucester in support of this application and would continue to make the argument for a variance.

Attorney Hoffman stated that in order to be able to install proper windows to accommodate the Fire Code, the enlargement of the windows significantly affects the interior of the building. He added that the building is also “the ugly duckling” of the neighborhood and the applicants want to improve that as well. Attorney Hoffman stated that the Board, at the site visit, saw the interior of the property, He noted that the interior is awkward at its best and dangerous at its worst. Attorney Hoffman added that the interior cannot be improved without enlarging the windows and that cannot be accomplished without a variance. Attorney Hoffman stated that the applicant has tried to scale back the non-complying FAR. He added that the applicant can live with the smaller plan but noted that there is also a middle-ground plan. Attorney Hoffman stated that the applicant is not getting any closer to the abutters in any of these plans. He noted that the new stairs are aligned to the existing entry way and the footprint doesn’t change. He stated that the only issue is the front yard setback where the only one being impinged on is the street.

Board Member Book stated that the applicant’s previous argument had centered on the ledge but that now their argument is centering on the house or more specifically the windows and

life-safety improvements. Attorney Hoffman stated that was correct. He noted that while the ledge is a problem, the more direct hardship is related to the interior and the windows – life-safety issues.

Architect Gregory K. Boghosian, whose professional address is Civil Environmental Consultants, LLC, 8 Oak Street, Peabody, Massachusetts, stated that Exhibit D is the latest iteration to decrease the FAR as much as possible without sacrificing the intent of the proposal. Mr. Boghosian stated that the first and second floor plans don't really change. The third floor proposal has reduced the floor area by 400 square feet. He noted that if the applicant has to reduce FAR that this would be the applicant's preferred layout. He also noted that this proposal has considerable effect on the roof's design and configuration.

Chairman Geller asked if the unique condition of this structure and the ledge are specific to this lot from the rest of the zoning district. Mr. Yanovitch stated that he has been a Building Inspector in four municipalities and he has never seen a house like this before.

In deliberation, Chairman Geller stated that this proposal is far more pleasing and functional and is worthy of the requested relief. He noted that these homeowners care for their property and are attempting to do the right thing. Chairman Geller stated that he cannot interpret the meaning of the Gale decision and its impact on Massachusetts General Laws Chapter 40A, Section 6 but that he does not believe it is the giant "get out of jail" card that freely allows expansion without any limitation. Chairman Geller noted that before the Board is a property that is worthy of a variance under Chapter 40 A, Section 10. He noted that due to the ledge and the windows this is such a unique property with such unique problems.

Board Member Zuroff stated that the applicants also must comply with Section 5.43 of the Zoning By-Law and asked what the counter-balancing amenity would be. Attorney Hoffman

stated that the improvement of the house – bringing it up to code – was the counter-balancing amenity. He added that the applicants could certainly add additional landscaping in the front.

Board Member Jonathan Book stated that this proposal is certainly a worthy one and meets the criteria under Section 5.43 and Section 9.05 of the Zoning By-Law. He added that after visiting the site the uniqueness of the structure is a more compelling argument than the ledge. He added that the life-safety issues certainly speak to the hardship. Mr. Book stated that he was in favor of granting a variance and the special permit under Section 5.43 and Section 9.05 of the Zoning By-Law.

Mr. Zuroff stated that he is in support of granting the variance based on the original square footage request, as well as the the special permit relief.

Board Member Jonathan Book stated that he concurred with Mr. Zuroff and he would like to see the variance granted for the original square footage.

Chairman Geller asked if Mr. Book saw the excess FAR from the structure/hardship, rather than the ledge/hardship, as still derogating from the Zoning By-Law. Member Jonathan Book stated that because the hardship is a result of the uniqueness of the structure he doesn't see a problem because FAR is a proxy for dealing with issues of volume and bulk and they are staying within the setback and height requirements.

Chairman Jesse Geller asked if the applicant would prefer to return to the initial proposal. Attorney Hoffman stated that they would prefer that.

Chairman Geller stated that the variance relief can be granted under Chapter 40A, Section 10 and that the setback relief can be granted by special permit. He continued that it meets the criteria of Section 9.05 of the Zoning By-Law in that the specific site is clearly appropriate for the use, structure and condition; that it will not adversely affect the neighborhood; that there will

be no nuisance or serious hazard to vehicles or pedestrians; and adequate and appropriate facilities will be provided for the proper operation of the use.

Upon motion made and duly seconded, it was UNANIMOUSLY

VOTED: That the relief sought under BOA#2013-0010 – 22 City View Road per the floor plans and elevations by Civil Environmental Consultants, LLC, dated 3/7/13, subject to the following conditions:

1. Prior to issuance of a building permit, final elevations, indicating all exterior alterations and proposed materials, shall be submitted to the Assistant Director of Regulatory Planning for review and approval.
2. Prior to the issuance of a building permit, the applicant shall submit a final site plan and final landscaping plan, indicating all counterbalancing amenities, subject to the review and approval of the Assistant Director of Regulatory Planning.
3. Prior to the issuance of a building permit, the applicant shall submit to the Building Commissioner for review and approval for conformance to the Board of Appeals decision: 1) a final site plan stamped and signed by a registered engineer or land surveyor; 2) final floor plans and building elevations stamped and signed by a registered architect; and 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Unanimous Decision of
The Board of Appeals



Jesse Geller, Chairman

RECEIVED
CLERK OF BROOKLYNE
COURT HOUSE
MAY 10 A 10 59
Filing Date: May 10, 2013
True Copy
ATTEST



Patrick J. Ward
Clerk, Board of Appeals