



BOARD OF APPEALS  
Jesse Geller, Co-Chair  
Co-Chair Mark G. Zuroff  
Christopher Hussey

# *Town of Brookline*

## *Massachusetts*

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Patrick J. Ward, Clerk

TOWN OF BROOKLINE  
BOARD OF APPEALS  
CASE NO. 2013-0017

Petitioner, Ken Kurnos and Michelle Posner, applied to the Building Commissioner for permission to construct a 392 square foot addition to the property located at 195 Rangeley Road. The application was denied and an appeal was taken to this Board.

On January 31, 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 April 4, 2013 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 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 March 21, 2013 and March 28, 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: Ken Kurnos and Michelle Posner**

**Owner: Ken Kurnos and Michelle Posner**  
**Location of Premises: 195 Rangeley Road**

Date of Hearing: **April 4, 2013**  
Time of Hearing: **7:00 p.m.**  
Place of Hearing: **Selectmen's Hearing Room, 6<sup>th</sup> Floor**

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

1. **5.20 – Floor Area Ratio**
2. **8.02.2 – Alteration or Extension**

of the Zoning By-Law to construct a **parking to construct a 392 square foot addition to the property located at 195 Rangeley Road.**

Said premise located in a **S-15 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.*

**Jesse Geller  
Jonathan Book  
Christopher Hussey**

At the time and place specified in the notice, this Board held a public hearing. Present at the hearing was Chairman Mark G. Zuroff and Board Members Jonathon Book and Johanna Schneider. The case was presented by the attorney for the petitioner, Robert L. Allen, Jr., 300 Washington Street, Second Floor, Brookline, Massachusetts 02445. Also in attendance were Ken Kurnos and Michelle Posner, the owners of 195 Rangeley Road, and Diane Miller, the project architect.

Chairman Zuroff called the hearing to order at 7:00pm. Attorney Allen introduced the petitioner and architect and a legal brief supporting the proposal was entered into the record as Exhibit 1. The architect, Diane Miller, Miller Design, Belmont, Massachusetts discussed the project plan and specifics.

The petitioners are proposing a small, 392 square foot center-rear addition to the property intended to be used as an expansion to the kitchen. The addition will also include a new laundry room and new mudroom. Because of the shape of the land and location of the addition in the rear of the property, the addition will not be visible from the street. The current floor area ratio for a single family home in an S-15 residential district is 0.25, which would mean that given the Petitioners' lot size of 10,245 square feet, the maximum home size would be 2,561 square feet. The Petitioners' plans call for the intensification of preexisting nonconformities; specifically, to increase the floor area ratio from the current 3,309 square feet (FAR 0.32) to a proposed 3,701 square feet (FAR 0.36). Ms. Miller noted that the current home exceeds FAR, not because of the size of the home, but due to the small size of the lot.

Chairman Zuroff asked whether there are other small, similar lots in the neighborhood and zoning district. Attorney Allen gave the range of home sizes and stated that there is a mix of smaller and larger lots in the district, with the older homes situated on smaller lots. The size of the proposed home is consistent with other homes on Rangeley Road.

Attorney Allen then discussed the legal argument supporting the petitioner's position that they are entitled to zoning relief by way of Special Permit only and that a variance analysis is not required pursuant to Zoning By Law 5.20. Citing Massachusetts General Law Chapter 40A, § 6 and *Gale v. Zoning Board of Appeals of Gloucester*, 80 Mass. App. Ct. 331 (2011), Attorney Allen stated that the questions to be asked by the Board in the current matter are as follows:

Identify the particular respect in which the existing structure does not conform to the present bylaw and determine whether the proposed alteration or addition would intensify the existing nonconformities or result in additional ones.

If the proposed alteration or addition would not intensify the existing nonconformities or result in additional ones, the applicant will be entitled to the issuance of a special permit.

If the proposal would intensify or create new nonconformities, a finding of no substantial detriment under the second sentence is required for issuance of a special permit.

Attorney Allen stated that this proposal involves an increase in the FAR, but not the creation of any new nonconformities and, as a result, the resolution of this appeal is dependent upon the extent to which this Board allows changes to a preexisting single family residential structure which increases the nonconforming nature of the structure, subject only to the Petitioners' ability to show that any such proposed increase will not be substantially more detrimental to the surrounding neighborhood. Attorney Allen stressed that the proposed increase will not be substantially detrimental to the surrounding neighborhood. First, there will be no impact or change to the streetscape. Second, it is common in the zoning district to expand a kitchen in the rear of the building. Additions to preexisting single-family dwellings are increasingly common in Brookline, given its aging housing stock and the relative paucity of buildable lots. Third, the proposed addition is minimal, coming to a gross addition of 392 square feet, with the home totaling 3,701 square feet. A home of this size is reasonable and common on the street and zoning district. Fourth, there are six (6) letters in support of this proposal from home owners in the neighborhood. There will be no opposition to this proposal and there is overwhelming support by the neighbors.

Mr. Allen stated that the purpose of Chapter 40A § 6 is to support homes such as these, which were non-conforming prior to enactment of the zoning code, and relieve the duty to obtain a variance for non-detrimental modifications and extensions. Attorney Allen echoed the remarks of the architect, stating that the addition is minimal, cannot be seen from the street, comes before the Board with the support of the neighborhood, and the facts in this matter fit within the parameters of the *Gale* case. For of these reasons, it is argued that there is no substantial detriment to the neighborhood and the petitioner should qualify for a special permit. Mr. Allen stated that the petitioners meet the requirements

under Section 9.05, and that: (1) the specific site is an appropriate location for such use; (2) the proposed use will not adversely affect the neighborhood; (3) there will be no nuisance or serious hazard to vehicles or pedestrians; (4) adequate and appropriate facilities will be provided for the proper operation and proposed use; and (5) the development will not have a significant adverse effect on the supply on housing available for low and moderate income people. Further, regarding counterbalancing amenities, Attorney Allen stated that petitioner will file a landscaping plan that will make use of the rear portion of the property.

Chairman Zuroff asked whether the Board Members had any questions relative to this proposal. Board Member Schneider inquired whether the petitioner would meet the legal requirements for a variance if the Board so required. Attorney Allen stated that the significant ledge in the rear of the home is unique and an argument could be made for a variance as a result, however, Allen was confident that a variance would not be required under the circumstances. Board Member Book asked whether FAR is the only nonconforming aspect of the property. Attorney Allen stated that the side yard setback on the right side of the property might be nonconforming, but was not cited because the addition is only in the rear of the property. Board Member Book asked the petitioner about Chapter 40A Section 6, inquiring whether a pre-existing non-conforming structure may obtain zoning relief more easily than a conforming structure. Attorney Allen answered affirmatively, stating that the issue here deals with the imposition from the Town on smaller lots in the zoning district which existed prior to the enactment of the zoning code and that Chapter 40A Section 6 balances this inequality. Chairman Zuroff stated that the petitioner had met the requirements under the *Gale* case and has a sound argument in support.

Chairman Zuroff asked whether anyone in attendance wished to speak in favor or opposition of the proposal. No one rose to speak in favor or opposition.

Chairman Zuroff then called upon the Planning Department to deliver its findings to the Board.

Tim Richard, Planner for the Town of Brookline, delivered the findings of the Planning Board.

**Section 5.09.2.e – Design Review**

Comments on the most relevant of the Community and Environmental Impact and Design Standards are as follows:

*Relation of Buildings to Environment:* The proposed addition will be constructed with similar materials to match the existing dwelling. The windows on the proposed addition will be an eight-over-eight style of window, which is not consistent with the rest of the dwelling. The Planning Board would prefer the windows to match the windows on the second floor; however, the addition will not be highly visible from the affected rear yard property, so if the applicant prefers the proposed windows, the Board does not object.

**Section 5.20 – Floor Area Ratio**

	<b>Required</b>	<b>Existing</b>	<b>Proposed</b>	<b>Finding</b>
<b>Floor Area Ratio</b>	.25	.32	.36	SP/Variance*
<b>Total Floor Area</b>	2,561 s.f.	3,309 s.f.	3,701 s.f.	Variance

\*Under Section 5.22.3.c, the Board of Appeals by special permit may allow an addition of 350 square feet, subject to Design Review under Section 5.09. This proposal exceeds the allowed 350 square feet by 42 square feet. However, it may be possible to allow a special permit under *Gale v Zoning Board of Appeals of Gloucester* (80 Mass. App. Ct 331 (2011)).

**Section 8.02.2 – Alteration or Extension:** A special permit is required to alter and/or extend this non-conforming structure.

Mr. Richard stated that the Planning Board is not opposed to the proposal to construct an addition to the rear of the dwelling. The proposed addition is shielded by a wooded area in the rear. The most affected properties would be those on each side of the property and they have submitted support letters. Four other support letters were submitted as well. The proposed addition in its current state could potentially be granted by a variance from the Board of Appeals, provided they meet the requirements for a variance. If the applicant reduces the size of the addition by 42 square feet or if *Gale v Zoning Board of Appeals of Gloucester* (80 Mass. App. Ct 331 (2011)) is found applicable, the Board of Appeals could grant permission by special permit. If the Board of Appeals finds that the proposal

meets the requirement for a special permit, the Planning Board recommends that the applicant install additional landscaping to serve as a counterbalancing amenity.

Therefore, should the Board of Appeals approve the relief per the plans and site plan by Miller Design, revised and dated 2/5/2013, the Planning Board recommends the following conditions:

1. Prior to the issuance of a building permit, the applicant shall submit a site plan with plans and elevations of the addition, indicating all dimensions and materials subject to the review and approval of the Assistant Director of Regulatory Planning.
2. Prior to the issuance of a building permit, the applicant shall submit final landscape plans 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.

Chairman Zuroff then called upon Michael Yanovich, Head of the Building Department, to deliver the comments of the Building Department. Mr. Yanovich stated that he had no objections to the proposal and that he did not feel there was a substantial detriment based upon the square footage of other lots and homes in the neighborhood and zoning district. Mr. Yanovich did state, however, that if an applicant had wished to build the same structure on an empty lot that they would not have the same rights afforded under Chapter 40A, Section 6 and that a variance would be required. That said, Mr. Yanovich stated that if the Board finds that the *Gale* case is applicable and that the petitioner has met the elements for a special permit, the Building Department will work with the petitioner to ensure compliance with the building code.

Board Member Book stated that he had no issue with the addition; that it is modest, has the support of the neighbors, and does not believe that it will harm the neighborhood. Book stated that the

*Gale* interpretation of Chapter 40A, Section 6 is appropriate and is the applicable law in this matter. Based upon these findings, it is appropriate to grant relief by way of special permit and that the elements under Section 9.05 are met. Board Member Schneider echoed the statements of Board Member Book, but stated she is troubled by using the *Gale* case to override the requirements under the local bylaw. Chairman Zuroff stated that while he did not necessarily agree with the holding in the *Gale* case but it is the current law, and he believed this matter falls under the *Gale* analysis and that relief is appropriate under the circumstances.

The Board then determined, by unanimous vote that the requirements for special permit under **Section 8.02.2** were met. The Board made the following specific findings pursuant to said **Section 9.05**:

- 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.

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 submit a site plan with plans and elevations of the addition, indicating all dimensions and materials subject to the review and approval of the Assistant Director of Regulatory Planning.**
- 2. Prior to the issuance of a building permit, the applicant shall submit final landscape plans 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.**

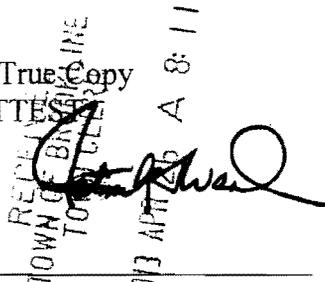
Unanimous Decision of  
The Board of Appeals

Filing Date: April 26, 2013



Mark G. Zuroff, Chairman

A True Copy  
ATTEST



REPELLED BY THE  
TOWN OF BURLINGTON  
TO THE CLERK  
2013 APR 26 A 8:11

Patrick J. Ward  
Clerk, Board of Appeals