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BUILDING DEPT.
TOWN OF BROOKLINE

BOARD OF APPEALS
Jesse Geller, Chairman
Christopher Hussey
Jonathan Book

Town Hall, 1st Floor
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Brookline, MA 02445-6899
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Patrick J. Ward, Clerk

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2013-0030
ROBERT & MARA GOLDSTEIN

Petitioner, Robert & Mara Goldstein, applied to the Building Commissioner for permission to construct a 295 square foot addition at the rear of the dwelling at 26 Willow Crescent, Brookline, Massachusetts. The application was denied and an appeal was taken to this Board.

On May 18, 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 June 13, 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 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 May 30, 2013 and June 6, 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: **Robert & Mara Goldstein**

Owner: **Robert & Mara Goldstein**

Location of Premises: **26 Willow Crescent, Brookline, MA**

Date of Hearing: **June 13, 2013**

Time of Hearing: **7:30 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. **Section 5.09.2.j: Design Review**
2. **Section 5.22.3.c: Exceptions to Maximum Floor Area Ration (FAR)**
3. **Section 5.43: Exceptions to Yard & Setback Regulations**
4. **Section 5.70: Rear Yard Requirements**
5. **Section 8.02: Alteration or Extension**

of the Zoning By-Law to construct a 295 square foot addition at the rear of the dwelling.

Said premise located in a **S-10 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
Christopher Hussey
Jonathan Book**

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 case was presented by the attorney for the petitioner, Robert L. Allen, Jr., Law Office of Robert L. Allen, Jr. LLP, 300 Washington Street, Second Floor, Brookline, Massachusetts

02445. Also in attendance were Robert and Mara Goldstein, the petitioners and owners of 26 Willow Crescent and Paul Lukez, the petitioner's architect.

Zoning Board of Appeals Chairman Jesse Geller, called the hearing to order at 7:30 p.m. Attorney Allen stated that the Petitioner originally proposed a 295 square foot addition to create a mudroom and expand the kitchen at the rear of the dwelling, but the revised proposal currently before the Zoning Board of Appeals reduces the addition to 288 square feet.

Attorney Allen presented to the Board a background of the property, stating that 26 Willow Crescent is a single-family dwelling built in 1925 that is similar in style and overall size to other properties in the neighborhood. Attorney Allen stated the property is located to the South of Cleveland Circle, off Elliot Street, in the Heath School area.

Attorney Allen stated the original proposal included a 295 square foot addition to create a mudroom with a coat rack for the children and to expand the kitchen. Attorney Allen stated the Planning Board was in support of the proposal and acknowledged that two members would have been in support, if the owners moved the addition back three feet to shrink it vertically. Attorney Allen stated the decision was difficult because the closet is an important part of the mudroom and would be compromised by the Planning Board's suggestion. In response to recommendations by the Planning Board and the abutting neighbor, Attorney Allen stated the owners reduced the footprint of the addition by one foot and changed the roof to a hip roof to give the appearance of reducing the roof by three feet. Further, a complete shadow study was completed to examine what the impact would be on the abutting property. Attorney Allen stated the addition is a minimal request and qualifies for relief under **Section 5.22** of the Zoning By-Law.

The petitioner's architect, Paul Lukez, of 19 Mason Street, Lexington, Massachusetts, presented the revised plans to the Board, stating the addition is similar to those in the neighborhood and the materials and design were modified based on recommendations made by the Planning Board. Mr. Lukez stated the substitution of the hip roof would significantly reduce the impact of the shadow, which was evidenced by animations presented on the shadow path at different times of the year. Zoning Board Member Mark Zuroff inquired about the existing fence and trees in the animation. Mr. Lukez responded that everything in the animation already exists. As an alternative, Mr. Lukez presented the addition surrounded by a six-foot fence and additional landscaping. Mr. Lukez concluded by stating that although the alternative was available to the petitioner's by right, the petitioners' have worked in close consideration of the neighbors to minimize the impact of the design and do not wish to explore the alternative option.

Attorney Allen then resumed his presentation to the Zoning Board of Appeals. Attorney Allen asked for relief under **Section 5.09.2.j** of the Zoning By-Law, whereby any exterior addition for which a special permit is requested pursuant to **Section 5.22** is subject to design review standards. The most relevant sections of the design review standards include the following:

Preservation of Trees and Landscape: The subject property has a significant amount of landscaped area and the proposal will not disturb any of the existing trees or landscaping.

Relation of Buildings to Environment: The proposed addition is planned for the rear of the dwelling and the massing fits the residential scale of the neighborhood.

Relation of Building to the Form of Streetscape and the Neighborhood: The proposed addition does not affect the streetscape as it will not be visible from the street.

In addition, Attorney Allen suggested the Zoning Board of Appeals grant special permit relief under **Section 5.22.3c** of the Zoning By-Law to increase the floor area of a dwelling by less than 350 square feet, provided the resulting floor area is not more than 150% of the

permitted area. Attorney Allen stated the revised proposal includes a 288 square foot addition, thereby reducing the total requested floor area from 4,480 square feet to 4,472 square feet and the proposed floor area percentage from 123% to 121%.

Attorney Allen stated that under **Section 5.43** of the Zoning By-Law, the Zoning Board of Appeals may waive yard and setback requirements as well as rear yard requirements under **Section 5.70** if counterbalancing amenities are provided. Attorney Allen stated the lot is unique insofar as the Zoning By-Laws are interpreted, because what would be considered a side yard becomes a rear yard. Attorney Allen stated that if **Section 5.43** of the Zoning By-Law were interpreted strictly, the area to build the original house would have been limited because the rear yard setback goes through the existing kitchen and garage because a significant portion of the lot would not be buildable. Attorney Allen stated the counterbalancing amenities include both a landscaping plan and a revised fence plan; amenities consistently approved by the Zoning Board of Appeals. Furthermore, Attorney Allen stated the petitioners would install high quality materials throughout the project based on the Planning Board suggestion that the material used match the existing material.

Finally, Attorney Allen discussed relief under **Section 8.02.2** of the Zoning By-Law, whereby a special permit is required under **Section 9.05** of the Zoning By-Law to alter and/or extend a non-conforming structure. As for **Section 9.05** of the Zoning By-Law, Mr. Allen noted: (1) the specific site is an appropriate location where several similarly sized additions have been added to the neighborhood; (2) there will be no adverse affect to the neighborhood where the addition is in the rear and visually consistent with the neighborhood; (3) no nuisance or serious hazard to vehicles or pedestrians exists; (4) adequate and appropriate facilities will be provided

for the proper operation; and (5) development will not have a significant adverse effect on the supply of housing available for low and moderate income people.

Attorney Allen stated that the Planning Board was mostly supportive of this proposal, however two Planning Board members wanted the petitioners to reduce the addition by 3 feet. Attorney Allen stipulated it is impossible to know whether their votes would have changed given the revised plan to reduce the addition by 1 foot and add a hip roof. Attorney Allen stated unlike 90% of additions that expand area like the kitchen or the social part of the house these petitioners meet the standards for a small addition that would give them an area for additional storage for the family of 5.

The Board Members then asked several questions about the proposal. Zoning Board Member Mark Zuroff inquired about whether there was a prior grant of relief or expansion to the house and whether the rear addition was pre-existing. Attorney Allen recognized that there was an expansion, but noted the building jacket did not include a building permit. Attorney Allen stated that under Section 5.22.3.c of the Zoning By-Law any prior grant was "by right," which has been interpreted by the Zoning Board of Appeals to include expansion to the attic and/or basement. Attorney Allen stated that according to Section 5.22.1.c of the Zoning By-Law, additional floor area must be allowed if the Certificate of Occupancy for the original construction was granted at least ten years prior to the date of the application. Thus, Attorney Allen stated where Section 5.22.1.c of the Zoning By-Law provides the general definition for Section 5.22 of the Zoning By-Law, even if the addition was undertaken in accordance with a building permit, it does not constitute as of right improvements because it is beyond the 10-year period prescribed by the Zoning By-Law.

Chairman Jesse Geller asked if anyone present wanted to speak in favor of the application. Adam Riemer, 1732 Beacon Street, spoke of his familiarity with the project and felt it would be a great addition to the neighborhood. Robert Helman, 47 Taylor Crossway, spoke in favor of the petitioners' ability to improve their lifestyle and live more comfortably. Lewis Eisenberg, 27 Willow Crescent, spoke in favor of the proposal stating that he had no objection to the addition because it preserved the style and integrity of the neighborhood.

Chairman Geller asked if there was anyone present who wished to speak in opposition of this application. Attorney Jacob Walters, 27 Harvard Street, spoke on behalf of Elliot and Sharon Rivo who immediately abut the petitioners at 20 Willow Crescent. Attorney Walters presented evidence of an addition built in 1996. Attorney Walters argued that **Section 5.22.3.c** of the Zoning By-Law prohibits the granting of relief under that Section if there was a prior grant of additional floor area as of right or by special permit. Attorney Walters acknowledged that there was no evidence of issuance of a building permit or special permit relief for the prior addition. Furthermore, Attorney Walters contested the Building Department's denial letter and argued that it would have been different if the building jacket was complete.

Laura Curtis-Hayes, Senior Town Planner for the Town of Brookline, delivered the findings of the Planning Board:

FINDINGS

Section 5.09.2.j – Design Review

Section 5.22.3.c – Exceptions to Maximum Floor Area Ratio (FAR) for Residential Units

Dimensional Requirements	Required	Existing	Proposed	Relief
Floor Area Ratio	.30	.35	.37	Special Permit*
Floor Area Percentage	100%	115%	121%	Special Permit*
Total Floor Area	3,633 s.f.	4,184 s.f.	4,472 s.f.	Special Permit*

* Under **Section 5.22.3.c**, the Board of Appeals grant a special permit to increase the floor area of a dwelling by less than 350 square feet, provided the resulting floor area is not more than 150% of the permitted floor area.

Section 5.43 – Exceptions to Yard and Setback Requirements

Yard and setback requirements may be waived if a counterbalancing amenity is provided.

Section 5.70 –Rear Yard Requirements

Dimensional Requirements	Required	Existing	Proposed	Relief
Rear Yard Setback	30'	13'	10'	Special Permit*

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

Section 8.02.2 – Alteration or Extension

A special permit is required to alter a pre-existing nonconforming structure.

Ms. Curtis-Hayes stated the Planning Board was mostly supportive of the requested relief to increase the floor area by 295 square feet. Two members of the Planning Board voted against the proposal because they thought the applicant should push the wall back by three feet, and would have voted for the project if the applicant had agreed to do so. The area of the proposed addition is largely shielded by a row of trees from the affected properties. The applicant’s desire is for the roof of the addition to be constructed with standing seam copper that will extend to cover existing floor area. The Planning Board recommended that the applicant install additional landscaping to serve as a counterbalancing amenity required for a special permit. Therefore, the Planning Board recommends approval (Voted 4-2) of the plans by Paul Lukez Architecture, submitted 4/17/13 subject to the following conditions:

1. Prior to the issuance of a building permit, the applicant shall submit final floor plans and elevations 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 a final site and landscape 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 Commission 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 by an architect; and 3)

evidence that the Board of Appeals decision has been recorded at the registry of Deeds.

Chairman Geller then called upon Michael Yanovitch, Chief Building Inspector, to deliver the comments of the Building Department. Mr. Yanovitch stated the building jacket for the property was incomplete. Mr. Yanovitch explained that Section 5.22 of the Zoning By-Law permits expansion of the basement or attic where FAR permits additional square footage. Mr. Yanovitch stated if there was a previous addition, it was granted with a valid building permit, as of right more than ten years ago. Chairman Geller asked Mr. Yanovitch to confirm that there was no record of a special permit in the Town of Brookline and asked if there was evidence of a special permit in the chain of title. Attorney Allen stated that without doing a full title search, there was no record of a special permit or variance in the Norfolk Registry of Deeds. Zoning Board of Appeals Member Jonathan Book asked if the screened-in porch, replaced by the addition in 1996, counted towards FAR. Mr. Yanovitch stated there was not enough information to determine whether the screened-in porch was utilized as open space.

Chairman Geller asked if the predecessor Zoning By-Laws would have required the previous owners to obtain special permit relief for the 1996 addition. Attorney Allen stated affirmatively. Mr. Yanovitch confirmed that Section 5.22.3 of the Zoning By-Law existed in 1996, and stated special permit relief would have been required. Attorney Allen agreed with Chairman Geller and Mr. Yanovitch that the addition was not original to the house. Chairman Geller asked if the previous owners would have needed special permit relief. Attorney Allen stated that it was difficult to know whether the screened-in porch was existing FAR.

Chairman Geller asked whether -- in the event special permit relief was previously required, and overlooked -- this another bite at the apple essentially rewarding the applicant for their predecessor's failure to comply with the legal requirements. Attorney Allen stressed the

importance of the 10-year provision under M.G.L. Chapter 40A, Section 7 as he suggested must be read into Section 5.22.1.c of the Zoning By-Law and stipulated that it was put in as a specific definition for floor area for Section 5.22 of the Zoning By-Law. Chairman Geller acknowledged that a 10-year provision was placed in Section 5.22.1 the general provisions for Section 5.22 of the Zoning By-Law but questioned Mr. Allen's interpretation. Attorney Allen stated that he believed that Section 5.22.1.c was clear on its face and the intent was meant to describe FAR.

Senior Town Planner Ms. Curtis-Hayes stated the language in Section 5.22 of the Zoning By-Laws published in 1994 was substantially the same. Zoning Board Member Jonathan Book stated the 1994 Zoning By-Laws would have been the version in effect at the time of the 1996 addition. Attorney Allen stated Section 5.22 of the Zoning By-Law has not changed according to the Amendments to the Text.

Attorney Allen assured the Board that the petitioners' reached out to each neighbor, giving special consideration to the abutters at 20 Willow Crescent. Attorney Allen stated the petitioners have spent a significant amount of time and money on architectural fees to show the Board an accurate impact, albeit a de minimis one, that the addition will have on the abutters. Attorney Allen stated Section 5.22.1.c of the Zoning By-Law makes it clear that where there is no special permit, the addition should be allowed under Section 5.22.3. of the Zoning By-Law because it is under 350 square feet.

In deliberation, Zoning Board of Appeals Member Jonathan Book stated the addition is modest and was unconvinced the abutting view would be affected. Board Member Mark Zuroff stated that neighbors do not have rights of view and agreed that Section 5.22.3.c of the Zoning By-Law lists specific requirements, and without evidence of a special permit in 1996, the special permit should be granted. In addition, Board Member Zuroff stated that the opposition is really

in the nature of a private neighbor dispute where the neighborhood is generally in favor of the addition. Chairman Geller stated that applying the strict language of **Section 5.22** of the Zoning By-Law, Attorney Allen is correct. In particular, Chairman Geller noted that no evidence was provided of the prior issuance of a building permit or of a special permit and the evidence otherwise provided by Attorney Walters does not support rejection of this application.

The Board then determined, by unanimous vote that the requirements for special permit relief from the requirements of 5.09, 5.20, 5.70, and Section 8.02.2 of the Zoning By-Law as requested pursuant to Sections 5.09.2.j., 5.22.3.c 5.43 and 9.05 of the Zoning By-Law were met.

The Board made the following specific findings pursuant to said Section 9.05:

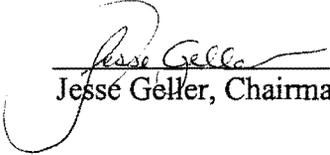
- a. The specific site is an appropriate location for such a use, structure, or condition.
- b. The use as developed will not adversely affect the neighborhood.
- c. There will be no nuisance or serious hazard to vehicles or pedestrians.
- d. Adequate and appropriate facilities will be provided for the proper operation of the proposed use.

Accordingly, the Board voted unanimously to grant the requested relief for a 288 square foot addition in accordance with the revised plans subject to the following conditions:

- 1. Prior to the issuance of a building permit, the applicant shall submit final floor plans and elevations 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 a final site and landscape 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 Commission 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 by an 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

Filing Date: July 23, 2013

A True Copy
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