

Town of Brookline

Massachusetts

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TOWN OF BROOKLINE

BOARD OF APPEALS
Jesse Geller, Chairman
Christopher Hussey
Jonathan Book

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. 2013-0049
PAUL MCADAMS

Petitioners, Jay Salvia and Steven Geller, applied to the Building Commissioner for permission to construct a ramp from the second story to the ground level at 138 Harvard Street. The application was denied and an appeal was taken to this Board.

On June 27, 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 July 25, 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 July 11, 2013 and July 18, 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: **Jay Salvia & Steven Geller**

Owner: **Paul McAdams**
Location of Premises: **138 Harvard Street**
Date of Hearing: **July 25, 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.a: Design Review**
2. **Section 5.43: Exceptions to Yard & Setback Requirements**
3. **Section 5.50: Front Yard Requirements**
4. **Section 5.51: Projections into the Front Yard**
5. **Section 5.60: Side Yard Requirements**
6. **Section 5.61: Projections into the Side Yard**
7. **Section 5.64: Side Yards for Non-Dwelling Uses in Business or Industrial Districts**
8. **Section 5.70: Rear Yard Requirements**
9. **Section 5.71: Projections into the Rear Yard**
10. **Section 5.73: Rear Yards in Business and Industrial Districts**
11. **Section 8.02.2: Alteration or Extension**

of the Zoning By-Law to construct an attached single-family for a second dwelling unit.

Said premise located in a **L-1.0 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 Zoning Board of Appeals Chairman Jesse Geller, and Board Members Mark Zuroff and Johanna Schneider. 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 was Steven Geller, the petitioner, Jarrod Monin of Bright Horizons, Mike Lindstrom and Meryl Nistler of Studio MLA, the petitioners' architects, and Nate Peck, of Kaplan Construction.

Zoning Board of Appeals Chairman Jesse Geller, called the hearing to order at 7:45 p.m. Attorney Allen stated that the petitioners propose to construct a ramp with a three and one-half foot railing that will start at the ground level and will allow for ADA access to the second floor of the premises located at 138 Harvard Street.

Attorney Allen presented to the Zoning Board of Appeals with a background of the property, stating that the stilt building located at 138 Harvard Street was built in 1987 as a commercial office building. Attorney Allen stated that the property is located at the corner of Harvard Street and Auburn Street, directly across from the Stop n' Shop. Attorney Allen stated that all parking for the structure is located directly under the structure to the rear of the lot.

Attorney Allen stated that the petitioners are representatives of Bright Horizons Childcare. Attorney Allen stated that Bright Horizons is a daycare business with 526 daycare centers, 56 of which are located in Massachusetts. Attorney Allen stated that the petitioners plan to use the entire building as a daycare facility for approximately 113 children.

Attorney Allen stated that the ramp will provide another means of egress for infant-aged children located on the second floor. Attorney Allen stated that current access to the building includes a staircase and an elevator located directly under the building. Attorney Allen stated that the ramp will allow the daycare providers to bring strollers safely to the ground level, particularly during monthly fire alarm drills required by the state.

Attorney Allen stated that but for construction of the ramp, this is a by-right proposal. Attorney Allen stated that one rear parking space will be displaced, but the petitioners otherwise meet all parking requirements under the Zoning By-Laws. Attorney Allen stated that remaining parking spaces in the rear will likely be used as the drop-off location for children. Attorney Allen stated that all existing pavement under the building will be converted into open space with a playground area. Furthermore, Attorney Allen stated that a new fence with shrubs along Harvard Street would serve as a counterbalancing amenity, which would improve both the vehicular and pedestrian experience along Harvard Street.

Attorney Allen stated the Planning Board commented that the ramp was too long and that there should be a staircase placed at the halfway point. Attorney Allen stated that the petitioners' architect came up with a strategy to accommodate the stairway without forfeiting compliance with the Zoning By-Laws. The architect, Mike Lindstrom, 232 Harvard Street, presented the revised plans, which included a staircase at the mid-point of the ramp. Mr. Lindstrom stated that in order to enhance the safety of the facility, the ramp would come out of the second floor and run down the side of the building landing on Auburn Street. Mr. Lindstrom stated that a bulk of the paved area would come as natural outdoor play space for the children, the size of which is sufficient to handle one-hour morning shifts and one-hour afternoon shifts for the children. Mr. Lindstrom stated that in addition to the outdoor play space, the petitioner proposes to plant a landscape buffer along both Harvard Street and Auburn Street.

Attorney Allen next brought to the Zoning Board of Appeal's attention **Section 9.12** of the Zoning By-Law, entitled Administrative Review Process for Day Care Centers. Attorney Allen stated that **Section 9.12** of the Zoning By-Law was approved by Town Meeting in 2012 in response to numerous day cares using Brookline parks for playground space. Attorney Allen

stated that Section 9.12 of the Zoning By-Law provides a process that requires the applicant to submit a proposal to the Health Department, Building Department, Planning Department, and Brookline Parks and Recreation Department. Attorney Allen stated that the administrative review process requires the petitioners to submit information regarding the day care program, location where the children will play, employee parking, drop-off and pick-up times/zones, and other safety considerations. Attorney Allen stated that the petitioners have complied with all departmental requests and filed the necessary paperwork to go through the administrative review process with the Town of Brookline.

Attorney Allen reminded the Zoning Board of Appeals that the proposed ramp triggers Sections 5.50, 5.51, 5.60, 5.61, 5.64, 5.70, 5.71, and 5.73 of the Zoning By-Law as a pre-existing non-conforming structure. Attorney Allen asked for relief under Section 5.09.2.a of the Zoning By-Law, whereby new structures on Harvard Street require a special permit subject to the design review standards listed under Section 5.09.4(a-l) of the Zoning By-Law. Attorney Allen stated the most relevant sections of the design review standards include the following:

Preservation of Trees and Landscape: The proposal will minimally affect the trees located on the property and there will be a significant amount of landscaping to the property.

Relation of Buildings to Environment: The ramp will be constructed on the side and rear of the building and is not expected to negatively impact the relation of the building to the environment.

Relation of Buildings to the Form of the Streetscape and Neighborhood: The ramp will be constructed on the side and rear of the building and is not expected to be visible from the street.

Open Space: Constructing open space from what is currently pavement will increase the open space.

Circulation: The proposal may affect circulation of traffic on the property by displacing ten parking spaces and creating usable open space. It is not anticipated that the change will negatively impact the property.

In addition, 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 of the Zoning By-Law if counterbalancing amenities are provided. Attorney Allen stated that the petitioners are proposing to replace the pavement with a significant landscaping plan to accommodate an outdoor play area.

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 for such use where the property is located in an L-1.0 District; (2) there will be no adverse affect to the neighborhood where the building will not be used as a business; (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.

Finally, Attorney Allen stated that the Planning Board unanimously voted to approve construction of the ramp to allow access to the second story from the ground level. Finally Attorney Allen stated that the petitioners received letters of support from immediate neighbors.

The Zoning Board of Appeal Members then asked several questions about the proposal. Zoning Board of Appeals Member Mark Zuroff inquired whether the rear abutter had any objection to the ramp. Attorney Allen stated that the rear abutter presented concerns regarding circulation at the Planning Board and Assistant Director for Regulatory Planning, Polly Selkoe, suggested this proposal may provide the Town of Brookline with a way to circulate ingress traffic onto Auburn Street and egress traffic out of Harvard Street. Zoning Board of Appeals

Member Zuroff asked if the petitioners met all parking requirements. Attorney Allen stated in the affirmative. Zoning Board of Appeals Chairman Jesse Geller asked whether relief was required for the parking located at 138 Harvard Street at the time of construction in 1987. Attorney Allen deferred to Tim Richard, Town Planner for the Town of Brookline, who stated that in 1987 special permit relief was requested in order to require 25% of parking spaces be designated for compact cars.

Zoning Board of Appeals Chairman Geller asked if anyone present wanted to speak in favor of the application. No one spoke in favor.

Zoning Board of Appeals Chairman Geller asked if anyone present wanted to speak in opposition to the application. Ernest Frey, 423 Washington Street, Town Meeting Member for Precinct 7, stated concerns with the safety of an infant childcare facility located on the second floor, and that the ramp be removed in the event the property is not used for a day care facility. He also questioned the adequacy of issuance of notice to abutting property owners, and the number of childcare centers in Brookline.

Attorney Robert R. Berluti, 44 School Street, Boston, Massachusetts spoke on behalf of the owner of Unit 1, 3-5 Harvard Avenue. Attorney Berluti contested the nature of the variance requested. Chairman Geller explained that the petitioners were not seeking a variance. Attorney Berluti stated that parking was insufficient to handle the pick-up and drop-off for 113 pre-school aged children. Attorney Berluti stated that a traffic study should have been completed. Attorney Berluti questioned why the proposal did not include a cover to protect the ramp from inclement weather. Finally, Attorney Berluti commented on the issue of notice.

James Slayton, 15 Auburn Street, Town Meeting Member for Precinct 7, echoed similar concerns with improper use of the ramp, circulation during peak pick-up and drop-off periods, maintenance during inclement weather, and the proximity of the ramp to the property line.

The Zoning Board of Appeals Board Members then asked several questions about the proposal. Zoning Board Member Mark Zuroff inquired whether consideration was given to moving the ramp to the center of the lot. Attorney Allen explained this option was unfeasible given the topography of the lot. Zoning Board of Appeals Member Mark Zuroff asked if any thought was given to covering the ramp or installing a higher guardrail. Attorney Allen stated that the Planning Board took issue with covering the ramp and the current proposal includes a forty-two inch guardrail on both sides of the ramp, which is standard on decks and similar areas. Mike Lindstrom, the petitioners' architect stated that this proposal is a voluntary means of egress that would require a major alteration to construct a roof. In addition, Mr. Lindstrom explained that the petitioners' plan to discourage improper use by installing a gate at the bottom of the ramp and staircase. Attorney Allen stated that in order to alleviate abutting neighbor concerns, the petitioners are willing to include a six-foot section of fence where access to the rear abutter is most directly affected. Finally, Zoning Board of Appeals Member Mark Zuroff asked if the petitioners considered heating elements to melt the snow on the ramp. Attorney Allen stated that the proposal will likely improve snow removal because the playground will provide a place to deposit the snow.

Attorney Allen resumed his presentation to the Zoning Board of Appeals. Attorney Allen clarified that the aforementioned fire drills are required by the Commonwealth of Massachusetts, not the Town of Brookline Fire Department. Attorney Allen stated the petitioner's lease agreement requires the premises be restored after the lease terminates, therefore the ramp must

be removed and open space restored to the parking lot. Finally, Attorney Allen stated that the petitioners comply with the parking requirements and the traffic study is not relevant to the special permit relief requested.

Timothy Richard, Planner for the Town for Brookline, delivered the findings of the Planning Board:

FINDINGS

Section 5.09.2.a – Design Review: New structures on Harvard Street require a special permit subject to the design review standards listed under *Section 5.09.4(a-l)*. All the conditions have been met, and the most relevant sections of the design review standards are described below:

- a. Preservation of Trees and Landscape – The proposal will affect trees located on the rear of the property.
- b. Relation of Buildings to Environment – The ramp will be constructed on the side and rear of the building, and is not expected to impact the relation of the building to the environment.
- c. Relation of Buildings to the Form of the Streetscape and Neighborhood – The ramp will be in the side and rear of the building, and is not expected to be very visible from the street.
- d. Open Space – The open space will be increased by the proposal.
- e. Circulation – The proposal will affect circulation of traffic on the property, as it will displace 10 parking spaces, and create usable open space. It is not anticipated that the change will negatively impact the property.

- Section 5.43 – Exceptions for Yard and Setback Requirements
- Section 5.50 – Front Yard Setback Requirements
- Section 5.51 – Projections into the Front Yard
- Section 5.60 – Side Yard Requirements
- Section 5.61 – Projections into the Side Yard
- Section 5.64 – Side Yards for Non-Dwelling Uses in Business or Industrial Districts
- Section 5.70 – Rear Yard Requirements
- Section 5.71 – Projections into the Rear Yard
- Section 5.73 – Rear Yards in Business and Industrial Districts

Dimensional Requirements	Required	Existing	Proposed	Relief
Front Yard Setback (Ramp)	10'	13.37'	13.37'	Special Permit*
Side Yard Setback (Ramp)	0'	9.14'	2.58'	
Rear Yard Setback (Ramp)	20'	21.30'	1.67'	

* Under Section 5.43 of the Zoning By-law, the Board of Appeals may waive dimensional requirements in lieu of a counterbalancing amenity. The applicant is proposing to make improvements to the landscaping by installing a playground and landscaping in place of existing parking spaces.

Section 8.02.2 – Alteration or Extension

A special permit is required to alter a pre-existing non-conforming structure or use.

Mr. Richard stated that the Planning Board is supportive of the proposal to construct a ramp that will allow access to the second story from the ground level. Mr. Richard stated that the proposal is attractively designed, and is not expected to negatively impact the neighborhood. Mr. Richard stated that the most impacted property is directly to the north, and there are no windows on that side of the neighboring building. Mr. Richard stated that the Planning Board views the proposed playground and landscaping as sufficient to satisfy the counterbalancing amenity requirement. Therefore, the Planning Board recommends approval of the plans by Davis Square Architects, dated 7/3/2013, subject to the following conditions:

1. Prior to the issuance of a building permit, the applicant shall submit a final elevations and a final site plan 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 landscape plan, lighting plan, and auxiliary stair, 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 building elevations stamped and signed by a registered engineer; and 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Zoning Board of Appeals Chairman Geller then called upon Timothy Richard, who spoke on behalf of the Building Department, to deliver the comments of the Building Department. Mr. Richard stated that the use is as of right, subject to the multi-department administrative review process under Section 9.12 of the Zoning By-Law. Mr. Richard stated that the proposed play area is a fantastic use of space that will allow Bright Horizons to be the only day care in Brookline, Massachusetts to have a play space that can be used in inclement weather. Mr. Richard stated that the ramp will allow for safe egress for infants, bassinets, and cribs to be transported from the second floor to the first floor. Mr. Richard stated that there will be minimal

effect on the abutting properties. Mr. Richard stated that the ramp will not be used for daily ingress and egress travel, so the benefits of including a staircase are unknown.

In deliberation, Board Member Johanna Schneider stated that it is important to keep in mind that the issue before the Zoning Board of Appeals is whether to construct a ramp, not the use of the premises as a daycare. Board Member Schneider stated no objection to granting special permit relief in the interest of children's safety. Board Member Zuroff concurred and restated the condition that the special permit be limited to the use of the ramp for a childcare facility.

Zoning Board of Appeals Chairman Geller stated that he felt relief was proper. Chairman Geller stated the petitioners are creating a functional building that will face Harvard Street. Chairman Geller stated that there is testimony of no significant impact on abutting properties. Chairman Geller stated that the petitioners comply with all parking requirements. Chairman Geller stated that the petitioners are subject to further review under **Section 9.12** of the Zoning By-Law prior to issuance of the Building Permit. Chairman Geller reaffirmed support for adding height to the fence and limiting the use of the ramp for a childcare facility only. Chairman Geller further stated that the elements under **Section 9.05** of the Zoning By-Law were met.

The Board then determined, by unanimous vote that the requirements for Special Permit relief from **Sections 5.09.2.a, 5.43, 5.50, 5.51, 5.60, 5.61, 5.64, 5.70, 5.71, 5.73** and **8.02.2** of the Zoning By-Law were met. The Board made the following specific finding pursuant to **Section 9.05** of the Zoning By-Law:

- 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 final elevations and a final site plan 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 landscape plan, lighting plan, fencing plan (evidencing increased fence height to 6'), and auxiliary stair, indicating all counterbalancing amenities subject to the review and approval of the Assistant Director of Regulatory Planning.
3. The Building Permit will expire upon cessation of use of the second floor (or that portion of the second floor accessed by the ramp) by a daycare facility.
4. 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 building elevations stamped and signed by a registered engineer; and 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

TOWN OF BROOKLINE
TOWN CLERK
2013

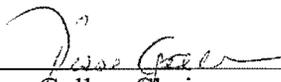
Unanimous Decision of
The Board of Appeals

Filing Date: September 13, 2013

A True Copy
ATTEST:

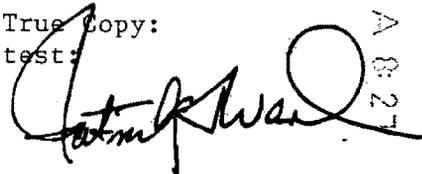


Patrick J. Ward
Clerk, Board of Appeals


Jesse Geller, Chairman

Twenty days have elapsed
and no appeal has been filed.

A True Copy:
Attest:



Patrick J. Ward
Town Clerk

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