



BOARD OF APPEALS
Jesse Geller, Chair
Jonathan Book
Christopher Hussey

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TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2013-0070
GINGER MELTON, TRUSTEE
& DJEMS DOMERSON, TRUSTEE

Petitioners, Ginger Melton and Djems Domerson, Trustees of the Djems Domerson Revocable Living Trust and Ginger Melton Revocable Living Trust, applied to the Building Commissioner for permission to convert the attic space at 5 Irving Street Unit# 3, into additional living space for the third floor. The application was denied and an appeal was taken to this Board.

The Zoning Board of Appeals 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 September 19, 2013 at 7:30 p.m., in the Selectmen's Hearing Room as the date, time and place of a hearing for 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 September 5, 2013 and September 12, 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: **Ginger Melton, Trustee & Djems Domerson, Trustee**

Owner: **Ginger Melton & Djems Domerson, Trustees of the Ginger Melton Revocable Living Trust and Djems Domerson Revocable Living Trust.**

Location of Premises: **5 Irving Street, Apartment 3**

Date of Hearing: **September 19, 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 5.10 – Minimum Lot Size
2. Section 5.20 – Floor Area Ratio
3. Section 5.43 – Exceptions to Yard and Setback Regulations
4. Section 5.72 – Accessory Buildings or Structures in the Rear Yard (condenser)
5. Section 5.91 – Minimum Usable Open Space
6. Section 8.02.2 – Alteration or Extension

of the Zoning By-Law to convert the attic to additional living space for the third floor unit.

Said premise is located in a **T-5 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 Zoning Board of Appeals Chairman, Jonathan Book, and Zoning Board of

Appeals Board Members Christopher Hussey and Mark Zuroff. The case was presented by the attorney for the Petitioners, Robert L. Allen, Jr., Law Office of Robert L. Allen, Jr. LLP, 300 Washington Street, Second Floor, Brookline, Massachusetts 02445. Also in attendance were Ginger Melton and Djems Domerson, the owners of 5 Irving Street Unit #3, and Philip Kramer, the Petitioners' architect. The hearing was opened on September 19, 2013 and, at the request of the Petitioner, continued to October 10, 2013.

Zoning Board of Appeals Chairman Jonathan Book called the hearing to order at 8:00 p.m. on September 19, 2013. Attorney Allen stated that the Petitioners propose to convert the attic to additional living space for Unit #3.

Attorney Allen presented to the Zoning Board of Appeals a background of the Petitioners and the property, stating that 5 Irving Street is a multi-family home built in 1912 on a 2,750 square foot lot. Attorney Allen stated that the home is located near the intersection of Irving Street and Walnut Street in a T-5 District. Attorney Allen stated that the exterior of the home gives the illusion of a single-family dwelling with one front entrance, but the dwelling includes three separate living areas. Attorney Allen stated that the Petitioners are in a unique position to extend the third floor living space into the attic in order to create a bedroom, bathroom, and storage area without altering the roofline or exterior of the building. Attorney Allen stated that additional space became necessary after one of the Petitioners' fathers died in a tragic house fire, forcing the mother to move to Brookline and share a bedroom with her grandson.

Attorney Allen described the details of the proposal, which include a bedroom, bathroom, storage area, three new windows on the rear façade, nine new skylights, and a spiral staircase from the third floor to the attic. Attorney Allen stated that home is located in the Pill Hill Local

Historic District and the windows and skylights will be subject to review by the Preservation Commission.

Attorney Allen stated that the proposal comes before the Zoning Board of Appeals with the unanimous support of the Planning Board. Attorney Allen stated that the Planning Board supported the requested relief after a finding that the size of the lot was significantly smaller than most in the zoning district.

Attorney Allen stated that the Petitioners are requesting special permit relief from **Section 5.10** and **Section 5.43** of the Zoning By-Law to waive minimum lot size and dimensional requirements for side yard setback. Furthermore, Attorney Allen stated that the Petitioners are requesting variance relief from **Section 5.20** of the Zoning By-Law to increase the allowable FAR. Attorney Allen stated the requirements for a variance relative to M.G.L. c. 40A, §10.

Attorney Allen stated a literal enforcement of the Zoning By-Law would create a substantial financial hardship for the Petitioners. Given their current living situation resulting from tragic house fire cited above, without the ability to expand their living space into the attic, the Petitioners will likely be forced to move from the area. Attorney Allen further stated that due to the shape of the land and the structure upon which it is located, 5 Irving Street should not be subject to a literal enforcement of the Brookline Zoning By-Law where desirable relief can be granted without a substantial detriment to the public good. Attorney Allen stated that 5 Irving Street is a three-family home built in 1912 on a 2,750 square foot lot. Attorney Allen stated that the size of the lots in this zoning district are significantly larger and range from 3,500 square feet to 9,000 square feet. Attorney Allen stated that unlike any other lot in the district, 5 Irving Street is narrowly wedged between 9 Irving Street and 162 Walnut Street and the desired relief may be

granted without detriment to immediate abutters. Attorney Allen stated that while the Petitioners do not have the ability to extend the property into the side or rear yard due to the minimum lot size, the Petitioners are in a unique position to improve the dwelling and provide a safer means of egress from the attic without nullifying or substantially derogating from the intent or purpose of the Zoning By-law. Furthermore, Attorney Allen stated the Petitioners come before the Zoning Board with nearly one-hundred percent support from neighbors, a factor seldom found in pursuit of an FAR variance.

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, Attorney Allen noted: (1) the specific site is consistent with other multi-family homes in the T-5 District located on Walnut Street, which runs perpendicular to Irving Street and Upland Road, which runs parallel to Irving Street; (2) there will be no adverse affect to the neighborhood where the proposal was designed to preserve the nature and character of the neighborhood and has received support from 35 abutters including the immediate abutters and the trustee of the condominium association; (3) no nuisance or serious hazard to vehicles or pedestrians where there will be no significant increase to traffic patterns on Irving Street or Walnut Street; (4) adequate and appropriate facilities will be provided for the proper operation and proposed use; and (5) development will not have a significant adverse effect on the supply of housing available for low and moderate income people.

The Zoning Board of Appeals then asked several questions of the Petitioners. Zoning Board of Appeals Member Mark Zuroff asked Attorney Allen how the grant of FAR relief will not substantially derogate from the intent and/or purpose of the Zoning By-Law. Attorney Allen

stated that the shape of the 2,750 square shape of the lot is both unique and limiting because the Petitioners do not have the opportunity to add additional height or extend the property to the side or rear yard like other homes in the neighborhood. Attorney Allen recognized that **Section 5.20** of the Zoning By-Law is concerned with density and offered that circumstances relating to the narrow shape of 5 Irving Street necessitate relief. Zoning Board of Appeals Member Zuroff stated that he does not have a prejudice against expansion of attics. Next, Zoning Board of Appeals Member Christopher Hussey asked Attorney Allen to point to the affected property on the assessor's map of the zoning district. Attorney Allen showed 5 Irving Street on a larger assessor's map of the zoning district.

Zoning Board of Appeals Chairman Jonathan Book asked if there was anyone present who wished to speak in opposition to this application. Shannon Liss-Riordan, 9 Irving Street, stated support for the proposal and offered that the renovation will not change the number of people that currently reside in the Petitioners' unit.

Zoning Board of Appeals Chairman Jonathan Book asked if there was anyone present who wished to speak in opposition to this application. No one spoke in opposition.

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

FINDINGS:

Section 5.10 – Minimum Lot Size

Section 5.20 – Floor Area Ratio

Floor Area	Allowed	Existing	Proposed	Finding
Floor Area Ratio (% of allowed)	1.0 100%	1.67 167%	2.06 206%	Variance
Floor Area (s.f.)	2,750	4,593	5,680	

Section 5.43 – Exceptions to Yard and Setback Regulations

Dimensional Requirements	Required	Existing	Proposed	Relief
Side Yard Setback (Accessory Structure)	6'	N/A	2'	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 non-conforming structure or use.

Mr. Richard stated that the Planning Board supports the requested relief to allow the applicant to convert the attic space to living area. Mr. Richard stated that there will be minimal exterior changes to the dwelling in the form of windows and skylights. Mr. Richard stated that the Planning Board felt the lot's small size, significantly smaller than most in the area, should be taken in to consideration. Mr. Richard stated that the property is located in a Local Historic District and the Preservation Commission must approve all changes visible from a street and therefore will approve the final plans. Therefore, the Planning Board recommends approval of the site plan by Philip Kramer, AIA, and Frank P. Janusz Architecture, dated 6/24/13, and site plan by Dennis O'Brien, dated 7/17/13, subject to the following conditions:

- 1. Prior to the issuance of a building permit, the applicant shall submit final plans and elevations subject to the review of the Preservation Commission and the Assistant Director of Regulatory Planning.**
- 2. Prior to the issuance of a building permit, the applicant shall submit a final 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 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; and 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.**

Attorney Allen suggested that due to the nature of the proposal, the Board consider altering Condition Nos. 1 and 3 because there is no need for final elevations, a final landscaping plan or a final site plan stamped and signed by a registered engineer. Furthermore, Attorney Allen suggested that the Board strike Condition No. 2 because the final landscaping plan requirement is inconsistent with the revised denial letter issued by the Building Department. Chief Building Inspector Mike Yanovitch agreed.

The Chairman then called upon Michael Yanovitch, Chief Building Inspector for the Building Department, to deliver the comments of the Building Department. Chief Building Inspector Michael Yanovitch, stated that the Building Department had no objections to the relief sought under this application. Mr. Yanovitch stated that although the Zoning Board of Appeals does not set precedent, this Board has historically been sympathetic to conversions that do not require exterior changes. Mr. Yanovitch cited 178 Naples Road whereby the Zoning Board of Appeals granted FAR relief for a basement conversion where the FAR was previously non-conforming.

Zoning Board of Appeals Member Zuroff inquired about the use of the additional 1,000 square feet cited in the Planning Board report. The Petitioners' architect, Philip Kramer, stated that the best use of the space requires each end of the attic to be used for light because it is unclear whether the Preservation Commission will grant relief for the skylights. Mr. Kramer stated that the Brookline By-Law calculates FAR down to 0 feet whereas the Massachusetts Building Code does not include any portion of a room measuring less than 5 feet from the floor to the ceiling into the FAR calculation. Mr. Yanovitch stated that under the Massachusetts Building Code, the only the area in the Petitioners proposal measuring above five feet would be calculated towards FAR. Attorney Allen stated that under the Massachusetts Building Code this

would only include 380 square feet. Mr. Yanovitch stated that unlike the Massachusetts Building Code, the Brookline By-Law includes the space above and below 5 feet in the FAR calculation.

Zoning Board of Appeals Member Zuroff next asked whether the Petitioners would consider reducing the FAR if the Preservation Commission granted relief for the skylights. Attorney Allen stated that he would discuss the option with the Petitioners. Zoning Board of Appeals Member Hussey suggested the Petitioners eliminate the storage areas in order to reduce FAR. Zoning Board of Appeals Chairman Book stated that if elements for a variance can be met, relief should be granted for use of the entire space. Zoning Board of Appeals Chairman Book asked Attorney Allen to discuss the uniqueness of the structure compared to those in the zoning district. Attorney Allen stated that there were at least four three-family residents located in the zoning district on Walnut Street that were able to expand the basement and/or attic to increase FAR. Attorney Allen stated that unlike 5 Irving Street where the shape of the lot is extremely narrow, these properties were not limited by the square footage of the lot.

Zoning Board of Appeals Chairman Jonathan Book stated that in order to grant FAR relief for 5 Irving Street, the argument needs to focus on uniqueness of the structure not the narrowness or size of the lot. Attorney Allen consulted with the Petitioners and then requested that he Board continue the hearing to a later date to give the Petitioners the opportunity to dissect the FAR calculation above 5 feet and below 5 feet. The Board granted Attorney Allen's request for a continuance.

The hearing was continued to October 10, 2013. At the continued hearing, Zoning Board of Appeals Chairman Jonathan Book motioned to re-open the hearing for the limited purpose of allowing Attorney Allen to present information focused strictly on **Section 5.20** of the Zoning By-Law. The motion was adopted and the hearing re-opened.

Attorney Allen presented to the Zoning Board of Appeals several ways to interpret the Building Department's FAR calculation of the Petitioners' attic conversion. Attorney Allen stated that the allowable FAR in a T-5 (Two-Family) district is 1.0 FAR. Attorney Allen stated that the existing FAR is 1.67 and according to the Building Department, the proposal would have an FAR of 2.07. Attorney Allen stated that in arriving at an FAR of 2.07 the Building Department calculated the entire attic space, including 318 square feet of unfinished storage space. Attorney Allen stated that the storage space should be excluded pursuant to **Section 2.07(1)(a)** of the Zoning By-Law because the storage space is a portion of the attic that is not habitable. Attorney Allen stated that exclusion of the storage area would reduce the FAR to 1.98. Moreover, Attorney Allen stated that the FAR calculation is substantially limited by the low pitch of the roof. Attorney Allen stated that the Zoning By-Law calculates FAR by accounting for the sum of all floors regardless of height. Attorney Allen stated that due to the low pitch of the roof and the amount of storage encompassed in the Petitioners' proposal, the FAR calculation is substantially lower than the 2.07 FAR calculated by the Building Department.

Attorney Allen next discussed the uniqueness of the lot. Attorney Allen stated that 5 Irving Street is uniquely shaped compared to the substantial majority of lots in the zoning district. Attorney Allen stated that this Zoning Board granted a similar variance for 178 Naples Road to convert 266 square feet of unfinished basement space where the property exceeded the allowable FAR. Attorney Allen stated that the Zoning Board of Appeals Chairman, Jesse Geller found a substantial hardship existed for 178 Naples Road due to the inefficient use of existing space that resulted from the narrow shape of the lot and particular type of construction of the property. Attorney Allen stated that similar to 178 Naples Road, the Petitioners are seeking to develop attic space where the uniqueness of the lot prevents unit owners from expanding because

the dwelling is built on the property line and the dimensional requirements are pre-existing non-conforming.

Attorney Allen next discussed uniqueness of the structure. Attorney Allen stated that 5 Irving Street was originally built as a three-family home that was later zoned in a two-family district. Furthermore, Attorney Allen stated that of the three-family homes located in the zoning district, 5 Irving Street is distinctly unique as it is the only three-family with a significant amount of unusable space due to the low pitch of the roof, and one of the few homes in the zoning district without a finished attic. Attorney Allen stated that this uniquely low pitch limits the usable space to 461 square feet. Attorney Allen cited 29 Harvard Avenue, where the Zoning Board determined that due to the pitch of the roof, relief was proper to recapture existing space created by the low pitch of the roof. Furthermore, Attorney Allen cited 124 Davis Ave, where the Zoning Board granted an FAR variance to allow an applicant to convert 800 square feet of attic space to be combined with the third floor because the height of the structure would not physically change. Finally, Attorney Allen stated that given the previous decisions, the Zoning Board is well within its discretion to grant relief for 5 Irving Street, Unit 3.

The Zoning Board of Appeals Members then asked several questions. Zoning Board of Appeals Member Christopher Hussey asked Attorney Allen to elaborate on the FAR pursuant to the Petitioners' proposal, as defined by the Zoning By-Laws and the Massachusetts Building Code. Attorney Allen stated that according to the Brookline Zoning By-Law, the calculated FAR, less the 318 square feet of storage space, amounts to 1.98 FAR. In the alternative, Attorney Allen stated that the Massachusetts Building Code provides that any portion of the room measuring less than 5 feet from the finished floor to the ceiling shall not be included in the FAR

computation. Here, Attorney Allen argued that the FAR above 5 feet is 1.94. Zoning Board of Appeals Member Christopher Hussey stated the square footage under consideration is approximately 848 square feet. Attorney Allen agreed.

Zoning Board of Appeals Chairman Jonathan Book called on the Board to deliberate. In deliberation, Zoning Board of Appeals Chairman Jonathan Book stated the issue before the Board should be limited to the uniqueness of the structure, rather than the narrowness or size of the lot. Chairman Book stated support for FAR relief where the structure is unique and use of the conversion of the attic is appropriate, where there are no exterior changes (i.e. dormers) and the construction will take place within the confines of the existing structure, where a literal enforcement of the Zoning By-Law would involve a substantial hardship to the Petitioners and where relief can be granted without substantial detriment to the public good and without substantially derogating from the Zoning By-Law. Zoning Board of Appeals Member Hussey stated support of the relief where the lot at 5 Irving Street is 55% of the allowed size and the lot at 178 Naples Road was nearly 65% of the allowed size. Zoning Board of Appeals Member Hussey recognized that the Zoning By-Law provide relief to ameliorate properties of this nature. Zoning Board of Appeals Member Zuroff stated that the structure is unique, and the Petitioners' substantial hardship supports FAR relief where there is no expansion of the footprint or envelope of the building. Further, Zoning Board of Appeals Member Zuroff cautioned that support of this proposal should not be interpreted as an expansion of the Board's interpretation of M.G.L. c. 40A, §10 or the nature of FAR limitations under the Brookline Zoning By-Law.

The Board then determined, by unanimous vote, that variance relief from the requirements of **Section 5.20** of the Zoning By-Law is warranted. The Board then determined,

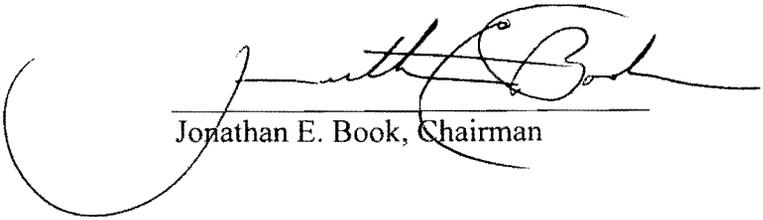
by unanimous vote that special permit relief from the requirements of Section 5.10, Section 5.43, and Section 8.02.2 of the Zoning By-Law pursuant to Section 9.05 of the Zoning By-Law were desirable and appropriate. The Board made the following specific findings pursuant to said Section 9.05 of the Zoning 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 final plans subject to the review and approval of the Preservation Commission and the Assistant Director of Regulatory Planning.**
- 2. Prior to the issuance of a building permit, the applicant shall submit to the Building Commissioner evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.**

Unanimous Decision of
The Board of Appeals



Jonathan E. Book, Chairman

Filing Date: November 12, 2013

A True Copy
ATTEST:



Patrick J. Ward
Clerk, Board of Appeals

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