



Enid Starr, Co-Chair  
Jesse Geller, Co-Chair  
Christopher Hussey

# *Town of Brookline*

## *Massachusetts*

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Patrick J. Ward, Clerk

TOWN OF BROOKLINE  
BOARD OF APPEALS  
CASE NO. 2012-0063

Petitioner Andrea McCain, applied to the Building Commissioner for permission to construct an additional driveway for improved handicapped accessibility at 72 Goodnough Road . The application was denied and an appeal was taken to this Board.

On November 1, 2012, 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 December 20, 2012, at 7:15p.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 Petitioners, 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 November 28 and December 26, 2012, 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: **MCCAIN ANDREA LEE**  
Owner: : **MCCAIN ANDREA LEE**  
Location of Premises: **72 GOODNOUGH RD**  
Date of Hearing: **December 20, 2012**  
Time of Hearing: **07:15 PM**  
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. 5.43; Exceptions to Yard and Setback Regulations, special permit required.**
- 2. 5.62; Fences and Terraces in Side Yards, variance required**
- 3. 6.04.5.c.2; Design of All Off-Street Parking Facilities, variance required (driveway setbacks)**
- 4. 6.04.12; Design of All Off-Street Parking Facilities, special permit required (New facilities to serve existing structures)**
- 5. 8.02.2; Alteration and Extension, special permit required.**

Of the Zoning By-Law to **Construct an addition at the rear.**  
at **2 GOODNOUGH RD**

Said premise located in a **S-10 (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.*

**Enid Starr  
Jesse Geller  
Christopher Hussey**

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 Christopher Hussey and Jonathan

Book. Attorney Jason Rosenberg, whose office address is 246 Walnut Street, Newton, presented the case for the petitioner.

Attorney Rosenberg described the property a two-story brick colonial style single-family home with a gabled front entry vestibule. The home is built into the grade with a recessed garage at basement level. The front door is accessed by ascending several flights of stairs for access from street level. The neighborhood is comprised predominately of single-family homes.

Mr. Rosenberg said his client is proposing to legalize and pave a driveway extension which runs to the side of the existing driveway and into the rear yard to provide access to a flat area and rear door for a handicap accessible van. The new driveway runs alongside the side property line and will connect to a new patio parking area in the rear yard. A fence will also be installed on the side property line as the abutting property is at a much lower grade.

Mr. Rosenberg stated that the applicant seeks special permits in order to locate the proposed improvements within the side yard set back. He noted that all relief may be granted by special permits under **Section 5.43** and **Section 9.05** of the Zoning By-Law. Mr. Rosenberg stated that the petitioner proposed to provide landscaping in the front and to the rear of the property as well as a wooden fence for screening along the nearest property line. He said if the Board does not find that sufficient evidence has been submitted to warrant a grant of a special permit, he feels the relief could be granted by variance. Mr. Rosenberg put forth his argument for a variance and also said the petitioner will self-impose a condition that only one vehicle is allowed to park in the proposed parking area and would agree to install a fence along the Hsu's property.

Mr. Rosenberg deferred to Mr. Fred Lebow of FSL Associates, business address 358 Chestnut Hill Avenue, Boston, to present the technical details of the construction portion of the proposed project.

Mr. Lebow said he was contacted by the previous Building Commissioner, Michael Shepard, and asked to take a look at the site. The Commissioner had sent an enforcement letter to the petitioner in response to construction commencing without the benefit of a permit. Mr. Lebow said he viewed the site and he said the site was a mess with piles of soil, building material and an unfinished excavation at the right side of the property. He said he discussed the drainage issue with the abutters and had the site surveyed. He went on to say the proposal involves paving the driveway and adding a parking spot at the rear of the property so Ms. McCain can more easily transition her son from his wheelchair into her vehicle. The end of the driveway surface at the driveway entrance will consist of stone pavers as well as a trench drain to catch water runoff. He said the existing slope to the rear will be graded and planted with erosion control plantings. There will also be a small strip of landscaping added against the house, buffering the asphalt from the house. Mr. Lebow said the abutter to the right had some safety concerns due to the steep slope between the subject property and the neighbors' about a vehicle turning over onto the neighboring house. He said there would be a guardrail installed along the top portion of the driveway to address that concern. Mr. Lebow said alternatives to extending the driveway were discussed but they were deemed not financially feasible.

Board Member Hussey expressed concerns about the drainage and Mr. Lebow replied that the Brookline Engineering Department had already reviewed and approved the proposed drainage system. Mr. Lebow said that since the ground would be sloped for safety there would be no need for a new retaining wall.

The Chairman then asked if anyone in attendance wished to speak in support of the petitioner's proposal. Dr. Henry White, Clinical Director of the Brookline Community Mental Health Center, said he has been working with the family to find a solution to this matter and they have explored various alternatives. He addressed concerns about the driveway maintenance by saying the purpose of the driveway is for the family to have safe access in order to move petitioner's son more safely and easily. He has no doubt that due to this reason that the driveway will be maintained. He feels the relief requested would help this family immensely and asked the Board to grant the requested relief.

Dr. Mary Brown, principal of the Baker School, Brookline, spoke in favor of the requested relief.

The Chairman asked if anyone in attendance wished to speak in opposition to the petitioner's proposal. Attorney Jacob Walters said he represents Mr. and Mrs. Hsu of 76 Goodnough Road, direct and most affected abutter. Mr. Walters said his client's main concern is about safety. In particular, due to the slope of the property that a vehicle could rollover from the petitioner's property and end up on his client's house. He said his client would also like to see a fence added to the plan to screen their property from the proposed parking area and does not feel that there

are adequate counterbalancing amenities. He said cleaning up the property is not a sufficient counterbalancing amenity.

Peggy McGuire, abutter, said the property has been a mess and the McCains have not been good neighbors. She asked the Board to deny the request for relief.

Attorney Howard Smith, whose business address is 1 Gateway Center, Newton, Massachusetts, said he represents David and Jeanette Kohn of 64 Goodnough Street. Mr. Smith said he feels it is unfortunate but believes the McCains put themselves in this position through a series of bad decisions and his client opposes the requested relief.

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

**Section 5.62 – Fences and Terraces in Side Yards** – The applicant is cited for relief for the height of a retaining wall; however, the applicant has indicated that no new retaining wall is necessary.

**Section 6.04.5.c.2 – Design of Off-Street Parking Facilities**

<b><u>NEW PARKING AREA</u></b>	<b>Required/Allowed</b>	<b>Proposed</b>	<b>Finding</b>
<b>Driveway Setback</b>	5 feet	.1 Feet	Special Permit *†
<b>Retaining Wall Height</b>	7 feet	none	Complies

\*Under **Section 5.43**, the Board of Appeals may waive yard and setback requirements if counterbalancing amenities are provided should the Board of Appeals determine a counterbalancing amenity is required.

†Under **Section 6.04.12**, the Board of Appeals may waive dimensional requirements for new parking facilities to serve existing structures.

#### **Section 8.02.2 – Alteration or Extension**

A special permit is required to alter or extend a non-conforming condition.

Mr. Richard said the Planning Board is sympathetic to the applicant's desire to provide handicap accessibility to the home for her disabled son. After the property was bulldozed in preparation for construction of an extended driveway, a cease and desist order stopping construction was issued by the then Building Commissioner, Mike Shepard. The Building Department had been alerted to the unapproved and unpermitted driveway by the abutting property owner, who expressed concern about the safety and appearance of having the driveway so close to her property, which drops down to a much lower level. The potential of having several parked cars in the backyard, as had previously happened, was also a concern.

The Planning Department suggested that the applicant and her representatives explore alternatives that would not require widening the driveway and extending it to the rear yard. The applicant's representatives have now received two quotes to provide a lift to the home – one to the main front entrance, and one to a side door. However, these schemes are both more than twice the expense. Two Planning Board members felt that additional alternatives should be

explored which might have less impact on the direct abutter, while three Planning Board members felt that it was appropriate to grant relief in order to provide safe access into the house and allow the family to remain in their home.

**Therefore, the Planning Board voted (3-2) to recommend approval of the proposal per the site plan by FSL Associates, Inc., dated 2/22/12, subject to the following conditions:**

1. Prior to the issuance of a building permit, the applicant shall submit final plans for the driveway indicating: all grading details; the location of the retaining walls, guard rails, and bollards preventing vehicular access to the patio; and setbacks stamped and signed by a registered engineer 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 plans for the proposed guard rails and pedestrian fence, indicating all dimensions including height and materials and load capacity, stamped and signed by a registered engineer subject to the review and approval of the Assistant Director of Regulatory Planning and the Director of Transportation and Engineering.
3. Prior to the issuance of a building permit, the applicant shall submit a drainage plan subject to the review and approval of the Director of Transportation and Engineering.

4. Prior to the issuance of a building permit, the applicant shall submit a final landscape plan indicating all counterbalancing amenities, should they be required, subject to the review and approval of the Assistant Director of Regulatory Planning.
5. Prior to 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; and 2) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

The Chairman then called on Michael Yanovitch, Chief Building Inspector, to deliver the comments of the Building Department. Mr. Yanovitch said he has spoken to the abutters and understands their concerns. He said he has also spoken to the petitioner's representatives. Mr. Yanovitch said the alternatives have been explored and do not appear to be feasible. He went on to say he sees a few possible outcomes and the most desirable is to have the relief granted and the petitioner to proceed to clean up and complete the project. Enforcement is not a desirable outcome because it will exacerbate an already bad situation. He also said the applicant could choose to install an accessible ramp as of right which would be a large unsightly structure in the front yard. He said the Building Department supports the request for relief and if the Board should grant relief, the Building Department will ensure compliance with the Boards decision as well as the State building Code.

Chairman Geller asked Attorney Rosenberg if he would like a brief recess so he could speak with Attorney Walters to discuss the fence and guardrail issues. The Board took a five minute recess. Upon re-opening the hearing, Attorney Rosenberg said Attorney Walters' clients were satisfied with the proposed fence and guardrail. Attorney Walters confirmed Mr. Rosenberg's statement.

During deliberations Board Member Book said he felt the relief necessary could be granted via a special permit. Chairman Geller said he agrees with Attorney Walter in that the cleaning up of the property and addition of a safety feature, a guardrail, does not constitute counterbalancing amenities since the former is a problem created by the petitioner and the latter is already required for safety. Board Member Hussey said the addition of the fence would satisfy the requirement for a counterbalancing amenity. Chief Building Inspector Michael Yanovitch said that the anti-erosion landscaping and addition green strip at the rear of the structure would also be a counterbalancing amenity. The Board also discussed that use of the extended driveway and the parking area should be limited to one handicap accessible vehicle.

The Board, having deliberated on this matter and having considered the foregoing testimony, concludes that it is desirable to grant Special Permits and that the petitioner has satisfied the requirements necessary for relief under Sections 5.43, 8.02.2 and 9.05 of the Zoning By-Law , and has made the following specific findings 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. Relief is granted for use of the extended driveway by and parking of one handicap accessible vehicle in the rear.
2. Prior to the issuance of a building permit, the applicant shall submit final plans for the driveway indicating: all grading details; the location of the retaining walls, guard rail, and bollards preventing vehicular access to the patio; and setbacks stamped and signed by a registered engineer 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 final plans for the proposed guard rails and pedestrian fence, indicating all dimensions including height and materials and load capacity, stamped and signed by a registered engineer subject to the review and approval of the Assistant Director of Regulatory Planning and the Director of Transportation and Engineering.
4. Prior to the issuance of a building permit, the applicant shall submit a drainage plan subject to the review and approval of the Director of Transportation and Engineering.

5. Prior to the issuance of a building permit, the applicant shall submit a final landscape plan indicating all counterbalancing amenities, (including, without limitation, the solid wood fence to be affixed to the guardrail of a height sufficient to screen the handicap accessible vehicle from view of the abutting property and landscaping in the front and rear yards of the property), subject to the review and approval of the Assistant Director of Regulatory Planning.
  
6. Prior to 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; and 2) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Unanimous Decision of  
 The Board of Appeals

RECEIVED  
 TOWN OF BROOKLINE  
 TOWN CLERK  
 JAN 28 PM 12:4

Date: January 28, 2013

  
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 Jesse Geller, Chairman

A True Copy  
 ATTEST:



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 Patrick J. Ward  
 Clerk, Board of Appeals