



BOARD OF APPEALS
Enid Starr, Co-Chair
Jesse Geller, Co-Chair
Robert De Vries

Town of Brookline

Massachusetts

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TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2011-0008

Petitioners, Aylit Schultz and Ron Scharf applied to the Building Commissioner for permission to legalize decks constructed within the side yard setback and non-conforming usable open space at 19 Harris Street. The application was denied and an appeal was taken to this Board.

On September 3, 2010, 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 March 10, 2011, at 7:00p.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 his 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 February 17 and 24, 2011, 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: **RON SCHARF AND AYLIT SCHULTZ**
Owner: **RON SCHARF AND AYLIT SCHULTZ**

Location of Premises: **19 HARRIS STREET**
Date of Hearing: **March 10, 2011**
Time of Hearing: **7:00PM**
Place of Hearing: **Selectmen's Hearing Room, 6th. floor**

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

1. **5.05; Conversions, special permit required. (The issuance of a Special Permit under 5.05 may waive any dimensional requirements other than lot size)**
2. **5.22.3.b.2; Exceptions to Maximum Floor Area Ratio (FAR) Regulations For Residential Units, special permit required.**
3. **5.43; Exceptions to Yard and Setback Regulations, special permit required.**
4. **5.60; Side Yard Requirements, variance required.**
5. **5.70; Rear Yard Requirements, variance required.**
6. **5.91; Minimum Usable Open Space, variance required.**
7. **6.01.2.a; General Regulations Applying to Required Off-Street Parking Facilities, special permit required.**
8. **6.04; Design of All Off-Street Parking Facilities:**
 6.04.5.c.1,2&3, variance required.
 6.04.12, special permit required.
9. **8.02.2; Alteration or Extension, Special Permit Required.**

Of the Zoning By-Law to legalize two decks constructed contrary to the setback requirements of the Zoning By-Law and to convert an existing two-family home into a three-family home at 19 HARRIS ST.

Said premise located in a **F-1.0 (three-family)** residence 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.

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At the time and place specified in the notice, this Board held a public hearing. Present at the hearing was Chairman, Jonathan Book and Board Members Lisa Serafin and Mark Zuroff. The petitioner, Ron Scharf, represented himself at the hearing.

Mr. Scharf stated that although he had intended to request relief to convert his two-family home to a three-family, he had decided to seek only the relief related to the decks constructed as part of his recent remodeling project and usable open space at this time.

Mr. Scharf described his property at 19 Harris Street as a two-family structure that was built as a single family home in 1887. The property has undergone several significant renovations to the interior and exterior of the building, the most recent of which was completed in 2010. The home is 3 ½ stories and contains an “owner’s unit” on the second, third and attic floors, and another unit on the first floor that also occupies part of the basement. The remainder of the basement is separated by a party wall from the space occupied by the first floor unit and has a private entrance and is not accessible from the interior of the house. Mr. Scharf said that he intended to use this portion of the basement as an au-pair suite to accommodate domestic help related to the care of his children. The property is located near the Stop & Shop grocery store and is located amidst similarly sized lots occupied primarily by two and three family dwellings the neighborhood was recently rezoned to F-1.0, a three-family zoning district.

Mr. Scharf said that he is requesting relief to legalize portions of three of decks that were constructed; one on the attic story of the front façade, the second deck is located on the front of the house above the first floor deck and the third is located on the second story on the rear façade. The decks were constructed under a Building Permit on the roofs atop existing structures that were within the side yard setback. By constructing the decks, he said that he understood he had inadvertently exacerbated the pre-existing nonconformity of the side yard setback thereby requiring setback relief. The roof deck on the front of the house is setback 4’ from the side lot line and the roof deck on the second story on the

rear of the house is setback 3.59' from the side lot line and the second floor deck on the front of the house is approximately 7' from the side lot line. The required side yard setback for the district is 7.5', he said. Also, Mr. Scharf said that when he received his building permit, he was not advised that the construction would result in an increased requirement for usable open space. Mr. Scharf said that the Board could utilize Section 5.43 of the Zoning By-Law to substitute other dimensional requirements (the minimum deck size is required to be 15' X 15'). Mr. Scharf stated that he intended to provide screening on the rear deck to accommodate the concerns of his neighbor. He said that if his newly constructed deck were counted in the usable open space calculation he would have 1,777 sf. He opined that the space provided by the decks was truly "open" and would be "used" by his family.

In closing, Mr. Scharf requested that the Board look at the fourth condition recommended by the Planning Board relative to "cooking facilities of any type". He said that the elimination of a mini-fridge was overly restrictive and not within the definition of a "dwelling unit" as it pertains to living, sleeping, cooking, and eating.

Courtney Synoweic, Planner, reported the findings of the Planning Board.

Section 5.60 – Side Yard Setback

Section 5.70 – Rear Yard Setback

Section 5.91 – Minimum Usable Open Space: When the applicant finished the attic and the basement (with a building permit) the minimum usable open space on the property became noncompliant. The applicant has 1,078 square feet of usable open space which entirely complies with the requirement for usable open space. Should the Board of Appeals waive the 15' x 15' dimensional requirement for usable open space so that the decks can be counted, the applicant would then have 1,777 square feet of usable open space.

Dimensional Requirements	Required	Existing	Proposed	Finding
Side Yard Setback (front attic roof deck)	7.5	n/a	4'	Special Permit*
Side Yard Setback (front 2 nd story deck)	7.5	n/a	Est. 7'	Special Permit*
Side Yard Setback	7.5	n/a	3.59'	Special Permit*

(rear 2 nd floor roof deck)				
Rear Yard Setback (rear 2 nd floor roof deck)	15	n/a	17'7"	Complies
Usable Open Space	1,742 s.f.	1,078 s.f.	1,078 s.f.	Special Permit/ Variance *

*Under Section 5.43 the Board of Appeals may waive by special permit yard and setback requirements in return for the provision of counterbalancing amenities. The applicant is seeking relief under Section 5.43 to waive the side yard setbacks for the decks as well as the required 15' x15' dimension for usable open space. The applicant is proposing to provide screening for the upper story decks per the request of his neighbor and provide additional landscaping in the front and rear yards as counterbalancing amenities.

Section 8.02.2 – Alteration or Extension

A special permit is required to alter a nonconforming use or structure.

Ms. Synoweic reported that the Planning Board was supportive of the legalization of the location of the decks and the relief for the minimum usable open space. The Planning Board appreciated the efforts of the applicant to work with his neighbor at 21 Harris Street to come to an agreement on how to manage privacy issues with the front (second story) deck by bringing in the railings on all three sides to substantially reduce the functionality of the deck. The Planning Board felt that given the reduced size of that deck and the location of the roof deck on the attic level of the front façade, neither deck has a detrimental impact on neighboring properties. However, the Planning Board believed the rear roof deck does potentially have a negative impact on the neighboring property at 21 Harris Street and would like both parties to come to an agreement as to how to screen the rear second story deck. At a minimum, the Planning Board requested that the railings on the rear deck are brought in so that they are at least flush with the side of the building instead of projecting beyond the wall. The Planning Board is amenable to the applicant installing either a 6' semi-opaque or opaque screen or trellis structure or for the applicant to install planters with evergreens to mitigate the impact. The Planning Board also noted the applicant should submit a site plan showing the location of all of the decks and their setbacks, consistent floor plans showing how the applicant actually intends to use the space and elevations indicating the structure

and decks as built. Therefore, the Planning Board is supportive of the legalization of the deck setbacks and usable open space and recommends approval of the site plan by Neil J. Kelly, dated 5/5/10, subject to the following conditions:

1. Prior to the issuance of a certificate of occupancy, the applicant shall submit a final site plan indicating the location and setbacks of all the decks, subject to the review and approval of the Assistant Director of Regulation Planning.
2. Prior to the issuance of a certificate of occupancy, the applicant shall submit a final landscape plan indicating all counterbalancing amenities and screening methods subject to the review and approval of the Assistant Director of Regulatory Planning.
3. Prior to the issuance of a certificate of occupancy, the applicant shall submit a final FAR analysis stamped and signed by a registered architect to the Assistant Director of Regulation Planning and the Building Commissioner.
4. The basement "au pair suite" shall not contain separate cooking facilities of any type including the presence of minor kitchen appliances such as, but not limited to, microwave ovens, toasters, mini-fridges or hot plates.
5. Prior to the issuance of a building permit, the applicant shall submit to the Building Commissioner for review and approval to ensure conformance with the Board of Appeals decision: 1) final elevations, stamped and signed by a registered architect; 2) a final site plan, stamped and signed by a registered land surveyor or engineer; and 3) evidence the Board of Appeals decision has been recorded at the Registry of Deeds.

The Chairman then called upon Michael Shepard, Building Commissioner, to deliver the comments of the Building Department. Mr. Shepard stated that when he first visited the site, before construction, it was in poor condition. He said that it appeared to be rental property that had been poorly maintained. There was a large steel fire escape that provided egress from the upper floor. The roofline, over time, had been altered in such a way to maximize space and minimize architectural integrity. When approached by Mr. Scharf he said that the Building Department was excited that the structure would be remodeled in such a way as to contribute, once again, to the fabric of the neighborhood. Mr. Shepard said that his Department was responsible for not recognizing that construction of the decks or finishing

of additional space would exacerbate existing non-conformities. He said that the petitioner has been cooperative with his neighbor at 21 Harris Street relative to the deck issues and appears willing to resolve the issue to the benefit of all. As to the recommended condition relative to no cooking appliances including a mini-fridge in the au-pair suite, Mr. Shepard opined that the au-pair by definition, dined with the family. He said the inclusion of cooking facilities would make the accessory suite another dwelling unit. Inclusion of this limitation would make enforcement at this location easier in the future, he said. Mr. Shepard stated that his Department supported the requested relief as the newly remodeled structure will add value to the neighborhood.

During deliberations, Board Members discussed the accommodations made by the petitioner regarding the location of the decks. They were satisfied that the improvements made to the structure and grounds met the requirement for counterbalancing amenities required under Section 5.43 of the Zoning By-Law. Regarding the inclusion of a mini-fridge in the au-pair suite, the Board supported the argument of the Building Commissioner.

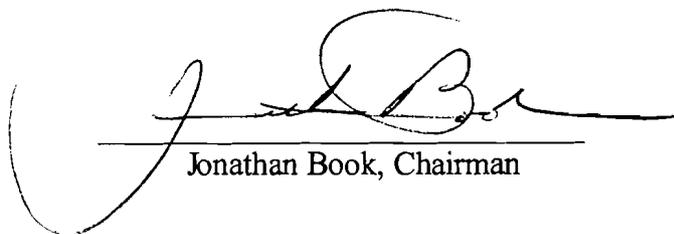
The Board, having deliberated on this matter and having considered the foregoing testimony, concludes that all the requested relief could be granted by special permit. The Board found that that the petitioner has satisfied the requirements necessary for relief under Sections 5.60, 5.91, 8.02.2, and 9.05 of the Zoning By-Law and 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. **Prior to the issuance of a certificate of occupancy, the applicant shall submit a final site plan indicating the location and setbacks of all the decks, subject to the review and approval of the Assistant Director of Regulation Planning.**
2. **Prior to the issuance of a certificate of occupancy, the applicant shall submit a final landscape plan indicating all counterbalancing amenities and screening methods subject to the review and approval of the Assistant Director of Regulatory Planning.**
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Unanimous Decision of
The Board of Appeals



Jonathan Book, Chairman

Filing Date: May 20, 2011

A True Copy
ATTEST:



Patrick J. Ward
Clerk, Board of Appeals