



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

Town of Brookline

Massachusetts

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. 2010-0016

The petitioner, Richard A. Arnoldi, Trustee of the Ilan Realty Trust, owner of 106 Naples Road, applied to the Building Commissioner for permission to legalize the use of the existing third floor unit which, if approved, would convert the building into a three-family dwelling. The application was denied and an appeal was taken to this Board.

On April 8, 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 May 27, 2010, at 7:00 p.m. in the Selectmen's conference room, 6th floor, Town Hall as the time and place of a hearing on the appeal. Notice of the hearing was mailed to the Petitioner, to his attorney of record (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 May 6, 2010 and May 13, 2010 in the Brookline TAB, a newspaper published in Brookline. A copy of said notice is as follows:

TOWN OF BROOKLINE

BOARD OF APPEALS

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: Hornstein Family Partnership

Owner: Richard Arnoldi & Harriet Korim Arnoldi

Location of Premises: 106 NAPLES RD

Date of Hearing: 5/27/2010

Time of Hearing: 7:00 PM

Place of Hearing: Selectmen's Hearing Room, 6th flr.

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 requirement other than lot size.)**
- 2. 5.50; Front Yard Requirements, variance required.**
- 3. 5.60; Side Yard Requirements, variance required.**
- 4. 6.01.2; General Regulations Applying To Required Off-Street Parking Requirements, variance required.**
- 5. 6.01.2(a); General Regulations Applying To Required Off-Street Parking Requirements, special permit required.**
- 6. 6.02.1; Table of Off-Street Parking Requirements, variance required.**
- 7. 6.04.12; For the Design of All Off-Street Parking Facilities, special permit required.**
- 8. 8.02.2; Alteration or Extension, special permit required**

Of the Zoning By-Law to: CONVERT 2 FAMILY DWELLING TO 3-FAMILY. per plans at 106 NAPLES RD

Said Premise located in an M-2.0 (Apartment House) 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
Robert De Vries**

At the time and place specified in the notice, a public hearing was held by this Board. Present at the hearing were the Chairman, Jesse Geller, and Board Members, Mark Zuroff and Christopher Hussey. The Chairman announced the docket number and described it as a case to legalize a three-family dwelling at 106 Naples Road. Mr. Geller outlined the order of procedure to be followed related to the presentation and the Board discussion of the application to follow. The petitioner, by her attorney, agreed to waive a reading of the notice.

The petitioner's attorney, Roger R. Lipson, of 7 Harvard Street, Brookline, addressed the Board on behalf of his client. Mr. Lipson explained that the sole beneficiary of the Ilan Realty Trust is the Hornstein Family Limited Partnership, the General Partners of which are Richard Arnoldi and his wife, Harriet Korim Arnoldi, the daughter of the late Jacob Hornstein, the longtime owner of the property. Mr. Lipson stated that 106 Naples Road was built in 1905 as a single-family house and converted to a two-family in 1939. He said that the property is an outstanding example of Victorian architecture and sits on the corner of Naples Road and Gibbs Street surrounded by multi-family apartment buildings. Mr. Lipson pointed out that the property has an unusual and unique history in regard to the status of the third dwelling unit. He informed the Board that beginning in 1948, upon the petition of Jacob Hornstein, the Board of Appeals granted a succession of several temporary variances legalizing the use of the third-floor dwelling unit due to a serious housing shortage following World War II. However, in 1960, the Board denied any further requests and ordered Mr. Hornstein to return the property to its former status as a two-family property. Despite this order, the unit continued as a third dwelling unit for the next 50 years, albeit illegally. Mr. Lipson pointed out that Ms. Arnoldi, who was in attendance at the hearing,

was born and raised in the house but had no knowledge that the property was not a three-family house since her father never disclosed that fact to her. After Ms. Arnoldi's father became ill and could no longer handle his business affairs, the house was transferred to the Trust. Long before that, and for many years, the property had always been assessed by the Assessor as a three-family property and taxes were paid to the Town on the basis of its being a three-family property. The Trust has continued paying taxes as a three-family house right up to the present time. The petitioner first became aware that the property was not a legal three-family house when the family decided to sell the property. Ms. Arnoldi went to the Building Department to research its legal status and discovered that the third floor dwelling unit was not legal. The third floor unit has not been occupied since Ms. Arnoldi first learned of its illegality. Mr. Lipson stated that the only zoning issues requiring relief by the Board were related to the required number of parking spaces, namely, six spaces, and the dimensional requirements. He pointed out that the three existing parking spaces had provided adequate parking for the three units for many years due, in part, to the fact that the property was located in close proximity to public transportation. He informed the Board that the petitioner chose not to remove a portion of the landscape for additional parking because it would have a negative impact on the appearance of the property as well as the neighborhood. Mr. Lipson said that the Board may, by special permit, waive up to fifty percent of the required number of spaces. In regard to the setbacks, Mr. Lipson stated that the Board could issue a special permit waiving the setbacks because the proposal to legalize the third unit would not increase the property's pre-existing nonconforming setbacks. Mr. Lipson stated further that the proposal would not result in any change in the footprint and that there that there was no issue related to FAR. In conclusion, Mr. Lipson stated that the petitioner's application for a special permit met all of the conditions required for such issuance under §9 of the zoning by-laws.

The Chairman asked if any of the Board members had any questions.

Mark Zuroff asked if the third floor unit was in compliance with the Building Code and had the required number of egresses.

Michael Shepard, the Building Commissioner, replied that he hadn't inspected the unit yet but that, before a building permit could be issued, he would have it inspected for compliance. He stated that since the unit wasn't being rented, there was no need for him to inspect it at this point.

Harriet Arnoldi informed the Board that the third floor unit has a fire escape as a second means of egress.

Christopher Hussey asked if the conversion to a three-family would make the property a multi-family under the Building Code.

Michael Shepard responded that since nothing was being added to the property and the fact that it is a nonconforming property and not new construction, it would not be subject to the Building Code.

The Chairman stated that regardless of whether the property was conforming or nonconforming, the Board has no jurisdiction to make a determination as to whether or not the property complies with the Building Code.

The Chairman asked whether anyone wished to speak in favor or against the proposal. No one spoke in favor or against the petition.

Lara Curtis, Senior Planner, delivered the findings of the Planning Department:

FINDINGS

Section 5.05 – Conversions: When converting a dwelling to create additional units in an M District, the structure shall conform to all dimensional requirements, such as setbacks. However, the Board of Appeals by special permit may waive the dimensional requirements except minimum lot size, provided that no previously existing nonconformity to such requirements is increased. *Special permit required.*

Section 5.50 – Front Yard Requirements

Section 5.60 – Side Yard Requirements

	Required	Existing	Proposed	Finding
Front Yard	15 feet	11.4 feet	11.4 feet	Special Permit*/Pre-

Setback				existing Nonconforming
Side Yard Setback	13 feet 10 + L/10	5.6 feet (south) 11.1 feet (west)	5.6 feet (south) 11.1 feet (west)	Special Permit*/Pre- existing Nonconforming

*Under Section 5.05, when converting a dwelling to create additional units in an M District, the structure shall conform to all dimensional requirements, however, the Board of Appeals by special permit may waive setback requirements, provided that no previously existing nonconformity to such requirements is increased.

Section 6.01.2 – General Regulations Applying to Required Off-Street Parking Requirements:

When there is an alteration of a structure or change of use which increases the parking requirements by 15 percent or more, the total additional parking requirements for the change shall be provided.

Section 6.01.2(a) – General Regulations Applying to Required Off-Street Parking Requirements:

In M Districts, when a structure is converted for one or more additional dwelling units and the conversion results in an increased parking requirement, parking requirements for the entire structure shall be provided. The Board of Appeals may by special permit waive up to half of the number of parking spaces required.

Section 6.02.1 – Table of Off-Street Parking Facilities

Section 6.04.12 – Design of All Off-Street Parking Facilities: The Board of Appeals may by special permit waive the dimensional requirements for new parking facilities being installed to serve existing structures and land uses. The proposal does not entail the provision of any new parking facilities, only the continued use of three tandem spaces in the existing driveway.

	Required	Existing	Proposed	Planning
Parking Spaces	6	3 tandem	3 tandem	Special Permit*

*Under Section 6.01.2(a), when a dwelling is converted for additional units, the Board of Appeals by special permit may waive up to half of the required parking spaces.

Section 8.02.2 – Alteration or Extension: A special permit is required to alter/extend a nonconforming use or structure.

Ms. Curtis said that the Planning Board, while not endorsing the past behavior of the property’s ownership and management, does not oppose the legalization of this building’s conversion into a three-family dwelling. This property has operated as a three-family dwelling for over 50 years, albeit illegally and in direct contradiction to previous Board of Appeals decisions. Those decisions did not support the conversion of this dwelling into a three-family. The Planning Board is extremely concerned that the

property was knowingly managed in direct defiance of its Board of Appeals decisions. However, focusing on the property itself, allowing the dwelling to continue to operate as a three-family dwelling will support its preservation, by allowing it to be used as it has been in the past and making it an economically viable option in a multi-family district. The property is a lone Victorian dwelling surrounded by brick townhouses, and it is a welcome feature of the intersection. The building does not exceed its allowed gross floor area, and no changes are being proposed to the structure or its parking. Though the parking arrangement is not ideal, it has been sufficient while the third unit has been in existence. Removing landscaping in order to put in an additional parking space would detract from the property's current attractive street presence.

Therefore, the Planning Board recommends approval of the proposal and submitted plans, including the site plan prepared by Bruce Bradford and dated 2/22/2010 and the floor plan prepared by Osborn Studio + and dated 1/8/2010, subject to the following conditions:

- 1. Prior to the issuance of a final certificate of occupancy, the applicant shall submit to the Building Commissioner for review and approval to ensure conformance with the Board of Appeals decision: (1) a final site plan, stamped and signed by a registered engineer or land surveyor; (2) final floor plans, stamped and signed by a registered architect; and (3) evidence the Board of Appeals decision has been recorded at the Registry of Deeds.**

Michael Shepard, Building Commissioner delivered the comments of the Building Department. He stated that he had no opinion one way or the other as to the proposal but that he had a fundamental problem with the fact that the illegal third-floor unit had existed for fifty years and that no-one in charge knew about it. He said that this type of situation flies in the face of what he and this Board and previous Boards are supposed to be doing. On the other hand, from his perspective, he believed that the legalization of this unit is an extremely important procedure. He recalled a recent incident where a student died in an illegal unit which had an unsatisfactory egress so he felt strongly that legalization of the unit was a key factor for the Board's consideration.

The Chairman expressed his strong agreement with the Building Commissioner's views about property owners who completely ignore decisions of the Board and the zoning by-laws. Mr. Geller stated that when it serves their purpose, these property owners will come before the Board because they have to, of course, when they want to sell. He stated that he is concerned about rewarding that type of conduct but he realizes that legalization is extremely important in a multi-family neighborhood. He expressed his belief that they need to send a strong message to the community that the Board of Appeals frowns upon this type of conduct.

Mark Zuroff agreed that the Board should send out a message to property owners to discourage this type of behavior. He stated that the property owners should be aware that if anyone is injured or killed as a result of a violation of the zoning by-laws and the building code, it could result in criminal penalties as well as civil liability requiring violators to pay damages. Mr. Zuroff also agreed that legalization is important to prevent such a situation from occurring and that he is not opposed to the petitioner's application for relief.

The Chairman suggested that there might be a middle ground in these situations such as issuing a temporary special permit for five years and requiring the property owner to reapply again. Mr. Geller thought such an action might serve as a sufficient slap on the hand.

Christopher Hussey stated that the denial of a special permit or the issuance of a temporary special permit would jeopardize the financial support for maintaining and keeping this old Victorian property in a good and safe condition.

The Chairman said he really couldn't think of any other way to send a message to the public.

Mr. Lipson reminded the Board that 106 Naples Road had been assessed and taxed as a three-family for many years by the Assessors, a fact which reinforced the petitioner's belief that the property had always been a three-family dwelling.

The Chairman reiterated that the Board understood that this was not the usual case of a scofflaw coming before the Board for relief and that the Board unanimously agreed that the special permits for relief should issue. Mr. Geller wanted to add a second condition to their decision requiring the three tandem parking spaces to be used solely by the occupants of the property. Mr. Zuroff and Mr. Hussey were in agreement.

Mark Zuroff wanted to add a third condition requiring inspection for code compliance for the third floor dwelling unit.

Mike Shepard replied that an inspection for code compliance is always a prerequisite for the issuance of a building permit in such cases and that it would be done routinely without the necessity of adding a condition.

The Board, having deliberated on this matter and having considered the foregoing testimony, concludes that the requirements for the issuance of a special permit have been met for the waiving of the setback requirements pursuant to Section 5.05 and that the requirements for the issuance of a special permit have been met for the waiving of the off-street parking requirements pursuant to Section 6.01.2(a).

The Board finds that a special permit is warranted based upon 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.
- e. The proposed third floor unit will not have a significant adverse effect on the supply of housing available for low and moderate income people.

Accordingly, the Board votes unanimously to grant the requested relief subject to the following conditions:

- 1. Prior to issuance of a final certificate of occupancy, the applicant shall submit to the Building Commissioner for review and approval to ensure conformance with the Board of**

Appeals decision: (1) a final site plan, stamped and signed by a registered engineer or land surveyor; (2) final floor plans, stamped and signed by a registered architect; and (3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

2. That the three existing tandem parking spaces are to be used solely by the occupants of the property.

Unanimous Decision
of the Board of Appeals



Jesse Geller, Chairman

Filing Date: June 25, 2010

RECEIVED
TOWN OF BROOKLINE
TOWN CLERK
8:00
2010 JUN 25
True Copy
TEST:
Patrick J. Ward
Clerk, Board of Ap

