

Brookline Planning Board

Guidelines for Review of Projects subject to a finding under M.G.L. c.40A §6

Adopted 2-3-22

Background

Massachusetts General Law Chapter 40A, Section 6, provides special relief for pre-existing nonconforming single- and two-family dwellings in that such structures may be altered, reconstructed, extended, or otherwise changed in a way that intensifies an existing nonconformity provided that the altered structure is found to be not substantially more detrimental to the neighborhood than the existing structure. This protection for pre-existing single- and two- family dwellings has been reaffirmed in several court cases, including *Bellalta v. Brookline Zoning Board of Appeals*, *Willard v. Board of Appeals of Orleans*, and *Deadrick v. Zoning Board of Appeals of Chatham* (among others). For example, a home in Brookline which already exceeds the allowed floor area ratio (FAR) due to a pre-existing nonconformity may further increase that FAR by obtaining a Special Permit where the sole criterion is a finding as to whether the altered structure is substantially more detrimental to the neighborhood than the existing structure.

The Planning Board has seen an increasing number of projects in recent years that have cited “Deadrick” in proposing significant expansions of existing non-conforming structures, primarily by further increasing the previously non-conforming FAR. In the case of an existing house which conforms to the FAR requirements (or other dimensional standard), the house cannot be expanded beyond the By-Law’s maximums except by Variance. The Brookline Zoning By-Law, Section 5.22 (Exceptions to Maximum Floor Area Ratio Regulations for Residential Units), does allow by Special Permit the conversion of previously non-habitable attic or basement space (not counted in FAR) to habitable space, so long as the total gross floor area does not exceed 130% of the allowed gross floor area. Similarly, 5.22 allows exterior additions that increase the FAR up to 120% of the allowed FAR. Any expansion beyond those limits would require a Variance.

The Planning Board is also concerned with cases where the FAR is calculated by the applicant to be only slightly above the maximum in the By-Law. The Board is concerned with such cases for two reasons. The first is that the calculations may be incorrect - the FAR may in fact conform to the Zoning By-Law - and the project would be unable to benefit from the provisions of c.40A, §6. The second reason is that such cases often seek a very significant increase to the FAR, one that is not proportional to the extent of their pre-existing nonconformity. The Planning Board is interested in setting standards to limit the potential abuse of the §6 finding that occurs in such cases.

Situations like this have led to the creation of these Guidelines, which set out the Planning Board's approach to the review of cases requiring a "Section 6 finding". These Guidelines should be reviewed by proponents of cases in which Special Permit relief under Section 6 will be sought, so that proponents will be informed as to how the Planning Board approaches these cases.

These are Guidelines in that they are not set criteria, but allow the Planning Board flexibility in how any individual case is reviewed. Furthermore, any determination by the Planning Board in a particular case should not be interpreted as establishing a precedent for future cases. Each case – as in any Planning Board review – will be reviewed on its own merits, and in the context of its surrounding neighborhood. It should be further noted that any Planning Board decision is in fact a recommendation to the Zoning Board of Appeals, which will make a final decision on the case, taking into consideration the Planning Board's recommendations and its own review of the applicable regulations.

Verifying the Applicability of a Section 6 Finding

In cases where, in the Planning Board's opinion, there is a *de minimis* non-conformity (in FAR or other dimensional criteria), or the Planning Board has other reason to request verification of submitted data, such as Gross Floor Area, Chapter F (see below) of the Planning Board's Rules and Regulations gives it the right to request independent verification of the submitted data, as follows:

F. Project Review Fees

Section 1. Employment of Consultants

In accordance with MGL c.44 §53G, the Planning Board, acting by and through the Director of Planning and Community Development, may require that applicants pay the reasonable cost for employment of outside consultants to review a proposed project. The Planning Board may use the Project Review Fee to engage experts, other than attorneys, as outside consultants to assist the Planning Board in its review process.

The Planning Board may decline to review a project for which it requests independent verification of the applicability of Deadrick until such data is submitted.

Levelling the Playing Field

Given the ironic and illogical disparity between the limitation on the extension of FAR in conforming properties to 120% or 130% of the allowable FAR for exterior and interior expansions respectively, and the lack of any such limitations for projects subject to a Section 6 finding, the Planning Board will generally apply these same limitations to projects subject to Section 6. Since these limitations apply to conforming houses in any given neighborhood, anything exceeding these limits may be considered substantially more detrimental to the neighborhood than the existing structure. This will be applied on a case-by-case basis, taking into account such factors as the scale of the existing structure, neighborhood density, lot size, size of other homes in the surrounding area, existing and proposed setbacks, and consultation with and/or comments from abutters and other neighbors.

Section 6 Cases on Conforming Lots with New Construction

In general, the Planning Board's position is that construction of new houses on existing buildable lots should generally not need dimensional relief. In a Section 6 case that involves the teardown of an existing house on a conforming lot, the Planning Board may consider, as a baseline standard for its review, that a completely new structure – not a “reconstruction” of the previous house -- on that lot should conform to the applicable dimensional criteria (including FAR). If that is deemed infeasible for reasons assessed and verified by the Planning Board after review, a new house that replaces a pre-existing nonconforming dwelling should at a minimum maintain the pre-existing nonconformities rather than expand them. Since these limitations apply to conforming structures in the neighborhood, any new construction that uses a Section 6 finding to significantly exceed these limitations will be found by the Planning Board to be substantially more detrimental to the neighborhood than the existing structure.