



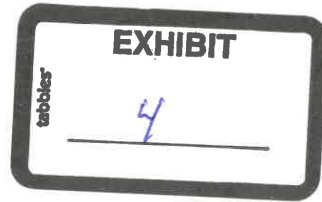
CITY OF NEWTON, MASSACHUSETTS

City Hall

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Ruthanne Fuller
Mayor

2019 NOV 19 AM 9:30

ZONING BOARD OF APPEALS

Adrianna Henriquez, Board Clerk

#06-19

DETAILED RECORD OF PROCEEDING AND DECISION

Petition #06-19 Kathy Jordan Quern and Albert F. Quern of 13 Prospect Street, Newton, Massachusetts request to amend Variance #4-13 relative to the subject property, which is a 6,611 square foot lot in a Multi-Residence 2 (MR-2) zoning district. Petitioners seek to construct a rear addition and request to amend Variance #04-13 to increase lot coverage to 32.3% where 30% is the maximum allowed per Section 3.2.3 of the Newton Zoning Ordinance and to decrease open space to 42.9% where 44.7% is the minimum allowed per Section 3.2.3 of the Newton Zoning Ordinance.

Due notice of the public hearing before the Zoning Board of Appeals for the City of Newton (the "Board") was given by mail, postage prepaid, to all "parties in interest" in accordance with M.G.L. c. 40A, § 11 and by publication in the *Newton TAB*, a newspaper of general circulation in Newton, Massachusetts, on September 11, 2019 and September 18, 2019.

The public hearing was opened on September 23, 2019. By written agreement, the parties continued the hearing to Wednesday, October 30, 2019 at 7:00 p.m. in the Council Chambers, Room 207, Newton City Hall, 1000 Commonwealth Avenue, Newton, Massachusetts.

The following members of the Board were present:

Brooke K. Lipsitt (Chairperson)
Barbara Huggins Carboni
William McLaughlin
Michael Quinn¹
Michael Rossi
Stuart Snyder



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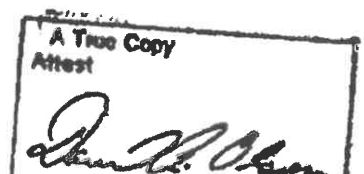
*Return:
Harrington Martini
505 Waltham St.
West Newton, MA 02465*

The following documents were submitted to the Board and/or entered into the record at the public hearing:

1. Application for Amendment to Variance, with accompanying documents, received August 14, 2019
2. Zoning Review Memorandum, with accompanying documents, dated April 23, 2019

¹ Mr. Quinn participated in discussion but did not participate in the Board's vote.

MR 59561-461



FACTS

Petitioner Kathy Quern is licensed by the Commonwealth of Massachusetts to operate her daycare service at the subject property, which is in a densely populated area surrounded by multifamily dwellings. The daycare is located in a room in the back of the Petitioners' home and extends to the unenclosed patio. The Petitioners seek to enclose the patio to make it usable full-time for the daycare. Petitioner Albert Quern explained that the 313 square feet referenced in the petition relates to enclosing the existing space, and the additional 96 square feet referenced relates to a wall and stair area, which Petitioners also seek to enclose. Petitioners' counsel, Attorney Peter Harrington of 505 Waltham Street in Newton, explained that every abutter contacted had no issue with the project.

The Board considered a petition requesting a variance relative to the subject property in 2013. Attorney Harrington requested that the Board incorporate those findings in its decision on the instant application. Moreover, Attorney Harrington noted that there have been vast changes in the neighborhood. He explained that the area in which the Petitioners live has become incredibly dense. There has been a significant increase in traffic and noise from the nearby Massachusetts Turnpike, which has raised concerns about the safety and well-being of the children attending the daycare at the subject property.

Attorney Harrington also noted that the size and the shape of the lot were contributing factors in the grant of the prior variance. He explained that without a variance, the open space requirement currently imposes a severe limitation such that the Petitioners cannot go forward with this small expansion. The daycare facility will not function at its best level if this enclosed space is not available to the children.

A motion to close the public hearing was made by Mr. Rossi and duly seconded by Ms. Carboni. The motion passed, five in favor and none opposed.

Ms. Carboni noted that the Petitioners seem to be providing the safest and highest quality daycare that they can on their property and, but for the peculiar shape and topography of this lot, they would be able to do this modest expansion as of right. Ms. Carboni noted that in the 2013 variance Decision, this Board found hardship exists with respect to the shape of the petitioners' lot. Also, the land is confined to 6,611 square feet and the 2013 decision concluded that created a hardship for the petitioners. Ms. Carboni emphasized the word "confined" in the 2013 decision. Where the instant petition seeks a variance relative to open space and lot coverage arising from the confined nature of this lot, the hardship exists and Ms. Carboni would be inclined to grant the variance.

Chairperson Lipsitt observed that part of the hardship in these circumstances appeared to be increased pollution, noise, and potential danger to the children attending the daycare. Mr. McLaughlin also remarked on the size and shape of the lot and confirmed that he agreed with the position of Ms. Carboni. In addition, he noted the quality of what exists in the relevant space, which is enclosed merely in plastic, whereas what is being proposed by Petitioners is significantly safer, higher quality, and would give a greater buffer to the children from the dense environment around them and from the Massachusetts Turnpike. Mr. Snyder further stated that he was satisfied that a hardship exists based on the points articulated by the Chairperson, the size and nature of the lot, as well as the noise and other effects on the children using the site. Chairperson Lipsitt

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[Handwritten Signature]


noted a financial hardship given that, if the children cannot be cared for in a healthy environment, the business could close.

FINDINGS, DETERMINATION, AND CONDITIONS

1. *There are special circumstances related to the soil conditions, shape, or topography of the land or structures which affect it but do not generally affect other properties in the zoning district. The site is unique and a hardship is present due to the topography and peculiar shape of the Petitioners' lot, which is confined to 6, 611 square feet.*
2. *Literal enforcement of the provisions of the Newton Zoning Ordinance would result in a substantial hardship to the owner and the variance requested is the minimum change that is necessary to allow reasonable use of the building or land. Literal enforcement of the Newton Zoning Ordinance would result in substantial hardship. The Petitioners state that increases in traffic and noise as well as increases in the density of the surrounding area pose a risk to the safety and well-being of the children attending daycare at the subject property. Furthermore, if the children cannot be cared for in a healthy environment, Petitioners' business could cease to operate. The requested amendment to Variance 04-13 seeks to protect children in the daycare from pollution, noise, and other dangers.*
3. *The variance will be in harmony with the general purpose and intent of the Newton Zoning Ordinance and will not be detrimental to the neighborhood or the public welfare. Granting the amendment to the variance requested would not derogate from the spirit and intent of the Newton Zoning Ordinance in that the departure from the ordinance requirements would not change the character of the surrounding area. In addition, granting the Petitioners' request will not result in a substantial detriment to either the neighborhood or the public welfare, but rather will promote the safety and well-being of the children attending the daycare at the subject property.*

Mr. Snyder moved to grant the petition. This motion was duly seconded by Mr. McLaughlin. The Board voted in favor 5-0. Therefore, the request to amend Variance #04-13 is granted subject to the following condition:

1. If the Petitioners are required to obtain a special permit, then the grant of the amendment to Variance #04-13 is conditioned upon the Petitioners' obtaining a special permit.
2. The addition and all site features associated with this Variance shall be located and constructed consistent with the plans submitted with the Petitioners' application.
3. No building permit shall be issued pursuant to this Variance until Petitioners have:
 - a. Recorded a certified copy of the Variance with the Registry of Deeds for the Southern District of Middlesex County; and
 - b. Filed a copy of such recorded Variance with the Clerk of the Zoning Board of Appeals, the Department of Inspectional Services, and the Department of Planning and Development.

A True Copy
Attest:




Brooke K. Lipsitt, Vice Chairman

AYES: Harvey A. Creem
Barbara Huggins
Peter Kilborn
Brooke K. Lipsitt
William McLaughlin

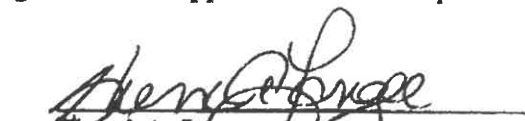
Copies of this decision and all plans referred to in this decision have been filed with the Planning and Development Board and the City Clerk.


This decision was filed with the City Clerk on: *May 2, 2013*

The City Clerk certified that all statutory requirements have been complied with and that 20 days have elapsed since the date of filing of this decision and no appeal, pursuant to Section 17 of Chapter 40A has been filed.


David A. Olson, City Clerk
acting

I, Sherri A. Lougee, am the Clerk of the Zoning Board of Appeals and the keeper of its records. This is a true copy of its decision.


Sherri A. Lougee

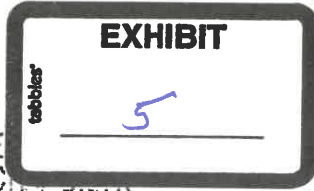
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Setti D. Warren
Mayor

ZONING BOARD OF APPEALS

Sherri A. Lougee, Board Clerk

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David A. Olson, CMC
Newton, MA 02459
#4-13

Detailed Record of Proceeding and Decision

Petition of Katherine R. Jordan Quern and Albert F. Quern, Jr., 13 Prospect Street, West Newton, MA 02465.

For the following variances: (i) a variance of 389 square feet from the lot area requirements; (ii) a 194.5 square foot variance from the lot area per unit requirement; (iii) a 13.47 foot variance from the frontage requirements; and (iv) a 5.30% variance from the open space requirements in order to build a rear addition and convert an existing single family house to a two family house.

The Zoning Board of Appeals for the City of Newton held a public hearing on the above entitled proceeding on Tuesday, March 5, 2013 at 7:00 p.m. in the Aldermanic Chambers at City Hall, Newton, Massachusetts.

The following members of the Board were present:

- Harvey A. Creem
- Brooke K. Lipsitt
- Barbara Huggins
- Peter Kilborn
- William McLaughlin



The petition was filed on January 23, 2013.

Due notice of the hearing was given by mail, postage prepaid, to all persons deemed to be affected thereby as shown on the most recent tax list and by publication in the Newton Tab, a newspaper of general circulation in Newton, Massachusetts, on February 6 and 13, 2013.

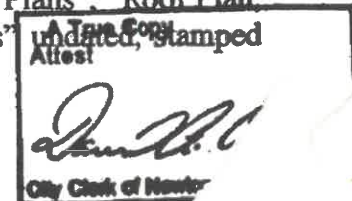
Accompanying the petition and incorporated into the record are the following documents:

Copy of FAR calculation for 13 Prospect Street, Newton, MA, undated;

Copy of partial deed dated July 11, 1933;

"Certified Plot Plan located at 13 Prospect Street, Newton, MA" dated January 18, 2013, prepared and stamped by George C. Collins, Boston Survey, Inc., Charlestown, MA;

Five (5) pages of architectural plans including "First and Second Floor Plans", "Roof Plan, Existing Elevations", "Proposed Elevations", "Framing" and "Sections" undated, stamped by John C. Staniunas of John C. Staniunas Associates, Wellesley, MA;



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Copy picture of the driveway of 13 Prospect Street;

Copy of "Building Permit Refusal Form" from the City of Newton Inspectional Services Department, dated August 24, 2012 and signed by Commissioner John D. Lojek;

Copy of "Building Permit" from the City of Newton Inspectional Services Department, dated May 17, 1999 and signed by Mark Gilroy;

Eight (8) pages of "Drywell Design Calculations, dated September 17, 1999, stamped by John J. Russell, Civil Engineer;

Copy of "Quitclaim Deed" for 13 Prospect Street, dated July 16, 2012;

Copy of "Deed" for 13 Prospect Street, dated July 21, 1994;

Copy of "Deed" for 13 Prospect Street, dated July 25, 1958;

Copy of City of Newton GIS map of 13 Prospect Street and surrounding lots;

Copy of petition in reference to the addition at 13 Prospect Street, signed by 11 abutters;

Copy of "Record of Action" from the City of Newton Planning and Development Department, Newton Historical Commission, dated September 27, 2012 and signed by Brian Lever, Commission Staff;

Letter of support from Anthony J. Salvucci, Alderman – Ward 3 of 23 Eddy Street, Newton, MA dated March 1, 2013; and

Letter of support from Rodney M. Barker, Former Alderman-at-Large, Ward 6 of 49 Woodcliff Road, Newton, MA dated March 5, 2013.

The Petitioners were represented by Attorney Peter F. Harrington, Harrington & Harrington, 505 Waltham Street, Newton, MA, 02465.


FACTS:

The Subject Property is located at 13 Prospect Street, Newton, MA, Section 33, Block 3, Lot 9 containing approximately 6,611 square feet in a Multi Residence 2 (MR-2) District.

The Petitioners' seek the aforementioned variances in order to remodel their existing house to create a two family dwelling. The Petitioners' house has been deemed Preferably Preserved by the Newton Historic Committee and their plans to remodel the existing building and create a two family dwelling were approved by the Newton Historical Commission on September 27, 2012.

According to the Petitioners, a hardship exists due to the topography of their lot, which slopes upward and away from Prospect Street resulting in a positive drain of storm water from the Petitioners' lot onto Prospect Street. Under Newton ordinances, and Engineering Division Requirements [See Newton Zoning Ordinance, Section 30-5 and Department of Public Works,

Warrant 013
City Clerk of Newton, Mass.



Engineering Division, Requirements for On-Site Drainage (Stormwater Management)], in the event of development, the Petitioners are required to install drainage structures to capture storm water runoff and prevent it from flowing into the municipal storm drain system and/or neighbors property. The Petitioners are also required to realign the topography of their land to establish a surface water drain system to accommodate the use of the drainage structures. In order to make the property conform to stormwater management requirements, the Petitioners will suffer a financial burden that is unreasonable under existing conditions, they claim.

The shape of the Petitioners' lot was established by a Plan dated August 2, 1920 and recorded in the Middlesex South District Registry of Deeds in Plan Book 290, Plan 36. The Zoning District in which the land lies was adopted to create land intended for high density residential use. The shape of the lot is such that the land is confined to 6,611 square feet and as such, is insufficient to meet the requirements of the Newton Ordinance.

On October 26, 1999, Building Permit No. 714-99 was issued to the Petitioners for an addition for a two-family dwelling on the Petitioners' property. The Petitioner did not proceed, however, due to the cost of installation of drainage structures required by the ordinance and Engineering Division requirements.

According to Petitioners, while the costs of the improvement have increased since 1999, reduced mortgage interest rates and the potential to divide that cost between two units, will allow the Petitioners to proceed with the improvements required if their petition is granted.

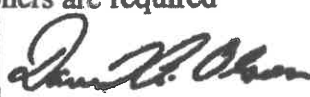
According to the Petitioners, the improvement of the property to conform to municipal stormwater management requirements will be a benefit to the immediate and nearby abutters by reducing existing storm water discharge onto Prospect Street, into the municipal storm water drain system and excess discharge onto the property of the Massachusetts Turnpike, that is approximately 200 feet from the Petitioners' property.

Attorney Harrington stated that the submitted plan shows a change in elevation and a distinct drop in elevation of the land. He stated that the Petitioners' project would not pose a detriment to the neighborhood, as the neighborhood is one of a few residential MR2 Zones in the City, and that the Petitioners' home is abutted by an eight-unit condominium complex, a two-family house on a substandard lot to the left, and across the street, also on a substandard lot a three-family home. Attorney Harrington cited the institutional use across the street and stated that this project will not have any negative impact on the Zoning district or the neighborhood. He also stated that the neighborhood is densely used and zoned, and a two-family use would not be inappropriate.

No one spoke in opposition to the petition.

FINDINGS AND DETERMINATION:

1. A hardship is present due to the topography and shape of the Petitioners' lot. With respect to the topography, the Petitioners' lot slopes upward and away from Prospect Street which results in a positive drain of storm water from the Petitioners' lot onto Prospect Street. Under Newton ordinances and Engineering Division Requirements [See Newton Zoning Ordinance, Section 30-5 and Department of Public Works, Engineering Division, Requirements for On-Site Drainage (Stormwater Management)], in the event of development, the Petitioners are required

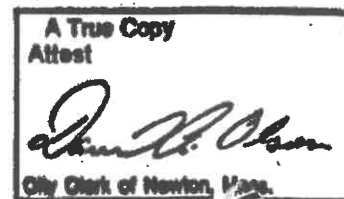
Attest

City Clerk of Newton, Mass.

to install drainage structures to capture storm water runoff and prevent it from flowing into the municipal storm drain system and/or neighbors property. The Petitioners are also required to realign the topography of their land to establish a surface water drain system to accommodate the use of the drainage structures. In order to make the property conform to storm water discharge requirements, the Petitioners will suffer a financial hardship related to the topographical conditions of the land.

2. A hardship also exists with respect to the shape of the Petitioners' lot, because the lot was established, prior to the enactment of Zoning Laws and Regulations in Massachusetts, by a Plan dated August 2, 1920 and recorded in the Middlesex South District Registry of Deeds in Plan Book 290, Plan 36. The shape of the lot is such that the land area is confined to 6,611 square feet and as such, creates a hardship for the Petitioners.
3. The granting of the Petitioners' request will not result in a substantial detriment to the public good because:
 - a. the Petitioners' house has been deemed Preferably Preserved by the Newton Historical Commission. The Petitioners' plans to remodel the existing building and create a two family dwelling were approved by the Newton Historical Commission on September 27, 2012.
 - b. the improvement of the property to conform to municipal stormwater management requirements will be a benefit to the immediate and nearby abutters by reducing existing storm water discharge onto Prospect Street, into the municipal storm water drain system.
4. Granting the variances requested would not derogate from the spirit and intent of the Zoning Ordinance in that the departure from the Zoning Ordinance requirement would not change the character of the surrounding area.

Accordingly, a motion was made by Brooke Lipsitt and duly seconded by William McLaughlin to grant all the variances, which motion passed, five in favor and none opposed. Therefore, (i) a variance of 389 square feet from the lot area requirements; (ii) a 194.5 square foot variance from the lot area per unit requirement; (iii) a 13.47 foot variance from the frontage requirements; and (iv) a 5.30% variance from the open space requirements in order to build a rear addition and convert an existing single family house to a two family house of the Newton Revised Zoning Ordinance, Section 30-15, Table One is granted subject to the following conditions:

1. The variance is conditioned upon relief required by the Board of Aldermen.
2. That this variance must be recorded with the Middlesex Registry of Deeds within one year from the date of its filing with the City Clerk or the variance lapses.
3. That this variance must be exercised within one year from the date of its filing with the City Clerk or the variance lapses.




Brooke K. Lipsitt, Vice Chairman

AYES: Harvey A. Creem
Barbara Huggins
Peter Kilborn
Brooke K. Lipsitt
William McLaughlin

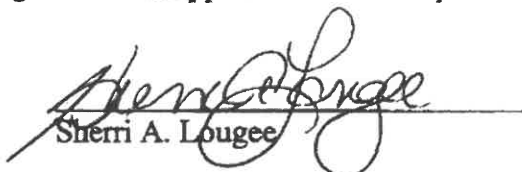
Copies of this decision and all plans referred to in this decision have been filed with the Planning and Development Board and the City Clerk.


This decision was filed with the City Clerk on: *May 2, 2013*

The City Clerk certified that all statutory requirements have been complied with and that 20 days have elapsed since the date of filing of this decision and no appeal, pursuant to Section 17 of Chapter 40A has been filed.


David A. Olson, City Clerk

I, Sherri A. Lougee, am the Clerk of the Zoning Board of Appeals and the keeper of its records. This is a true copy of its decision.


Sherri A. Lougee

A True Copy
Attest

City Clerk of Newton, Mass.