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**TOWN OF NEEDHAM
MASSACHUSETTS
BOARD OF APPEALS**

***Variance - Denied
Special Permit – Withdrawn without Prejudice***

***Amit Schwartz and Neta Levin Schwartz, owners
20 Alder Brook Lane
Map 202, Parcel 16***

March 21, 2024

Amit Schwartz and Neta Levin Schwartz, applicants, applied to the Board of Appeals for a Special Permit under section 1.4.6 and any other section of the Zoning By-Law to allow the change, extension, alteration and enlargement of a lawful, pre-existing, non-conforming structure for relief of a right setback from 9.6 feet to 8 feet; and a Variance under MGL 40A, Section 10, and Section 7.5.3 and any other section of the Zoning By-Law to allow a front setback at 15.4 feet where 25 feet are required due to unusual soil, shape or topography of the land. This request is associated with the addition and alterations to an existing single-family home. The property is located at 20 Alder Brook Lane, Needham, MA in the Single Residence B (SRB) zoning district. A public hearing was held in the Charles River Room, Public Services Administration Building, 500 Dedham Avenue on Thursday, March 21, 2024 at 7:30 p.m. The meeting was also livestreamed on Zoom and broadcast on Needham Cable.

Documents of Record:

- Application for Hearing, Clerk stamped February 26, 2024.
- Addition and Alteration Plans, G001-02, AS01-102, AD101, A101-04, A201-4, 303-4, 307 prepared by Neh-Koo-Dah, signed and stamped by Benjamin Ber Registered Architect, dated February 23, 2024.
- Existing Plot Plan prepared by Peter J. Nolan, Professional Land Surveyor, stamped; and dated June 26, 2023.
- Proposed Addition Plot Plan prepared and stamped by Peter J. Nolan, Professional Land Surveyor, and by Edmund Spruhan, Spruhan Engineering, PC., dated February 22, 2024.
- Revised Application for Hearing, Clerk Stamped March 6, 2024.

- Revised Addition and Alteration Plans, G001-02, AS01-102, AD101, A101-04, A201-4, 303-4, 307 prepared by Neh-Koo-Dah, signed and stamped by Benyamin Ber Registered Architect, dated March 7, 2024.
- Revised Proposed Addition Plot Plan prepared and stamped by Peter J. Nolan, Professional Land Surveyor, and by Edmund Spruhan, Spruhan Engineering, PC., dated March 11, 2024.
- Memorandum of Support, prepared by Bernie Ber, architect, dated March 1, 2024.
- Letter from Lee Newman, Director of Planning and Community Development, dated March 19, 2024.
- Letter from Joseph Prondak, Building Commissioner, dated March 13, 2023.
- Letter from Thomas A. Ryder, Assistant Town Engineer, dated March 12, 2024.
- Email from Chief Tom Conroy, Fire Department, dated March 12, 2024.
- Email from Chief John Schlittler, Police Department, dated March 12, 2024.
- Email from Tara Gurge, Assistant Public Health Director, dated March 12, 2024.
- Email from Joseph Miquel Jornet Montana, dated March 11, 2024.
- Memo from Clay Hutchinson, Conservation Specialist, dated March 18, 2024. Attachment *Riverfront Restoration Plan*, prepared by Goodard Consulting LLC, dated February 23, 2024.
- Power Point Presentation, prepared by Neh-Koo-Dah, March 21, 2024.

March 21, 2024

The Board included Jonathan D. Tamkin, Chair; Nikolaos M. Ligris, Member; Peter Friedenber, Associate Member; and attending remotely Valentina Elzon, Associate Member. Mr. Tamkin designated Mr. Friedenber to be a voting member. Mr. Tamkin read the public notice.

Before opening the public hearing, Mr. Tamkin addressed the applicants noting that a Variance is difficult to obtain, is limited in scope and has extraordinary standards, unlike the Special Permit which is a more common proposition. In the twenty years he has served on the Board, the Board has granted probably only three or four Variances. He informed the applicants that a denial will prohibit the re-consideration of the project for several years. He also added that the concept of hardship is limited and an economic hardship is not sufficient for the granting of a Variance. He inquired if there was an amended design which did not require a Variance.

On advice of Town Counsel, Mr. Tamkin informed the applicant that the Board would be approaching the application decision in two steps: first the Variance request, followed by the Special Permit request.

He asked the applicants if they wanted to proceed with the Public Hearing. If the Public Hearing is opened the Board will decide the granting of the Variance. He was sympathetic with their request but the Town Meeting establishes the Zoning By-Laws which the Board follows and a Variance deviates from that determination. Amit Schwartz, the owner, acknowledged that he was made aware of the challenges of pursuing a Variance and he wished to proceed.

Mr. Tamkin asked the applicants if the Variance is denied, are they prepared to go forward with

the Special Permit or an amendment to the application. Benyamin Ber, architect representing the applicants, said that if the Variance was denied there is no other plan to replace the application. Another design would need to be done.

Mr. Ber presented a power point presentation, noting that the new two-garage is proposed on the right side of the property as that is the current side entrance entering directly into the kitchen. Mr. Ber presented a February 19, 1951 plot plan of the property and a Subdivision Plan dated February 13, 1951 with a different trapezoidal lot configuration. A plot plan dated April 20, 1976 shows the property being divided into two lots leaving the current property in a triangular shape.

Mr. Ber noted that the right-side setback is non-conforming and is adjacent to riverfront, bordering vegetated wetlands and a water and sewer easement. Mr. Ber said that the proposal was reviewed by the Conservation Commission and approved on March 14, 2024, but an Order of Conditions has not yet been issued.

Mr. Ber noted that the current driveway and pavement will be removed and replanted with native plants to improve runoff. Mr. Ber illustrated on the existing plot plan the encroachment of the neighbor's property where the applicants park their cars. This encroachment would be eliminated with the addition of the new attached two-car garage and driveway. The encroachment of the driveway on the abutting neighbor's property has not been an issue but he believes the uncertainty of the access creates a hardship for the applicants under the standards for a variance under the Massachusetts General Laws.

Mr. Ber believed that the granting of the Variance would not be substantially more detrimental than the existing non-conforming use to the neighborhood under 7.5.3 of the By-Law.

Mr. Tamkin asked if the homeowners could relocate their current driveway so they would not need to encroach on their neighbor's property. Mr. Ber responded that the proposed project was not designed only to correct the encroachment issue but confirmed that there were other ways to access the property. Mr. Tamkin suggested that the stated hardship can therefore be eliminated without the need for the Variance despite it not being as desirable as the proposal.

Comments received:

- The Police Department had no issues.
- The Planning Board had no comment.
- The Engineering Department had no comment or objection.
- The Building Department noted the house is a pre-existing non-conforming structure with respect to side setbacks with the left side at 11 feet and a right side at 9.6 feet when 14 feet is required. The relief to increase the non-conforming right-side setback to 8 feet requires a Special Permit from the Board under Section 1.4.6 Alteration. He also noted that introducing a non-compliant front setback which is currently compliant at 29.5 feet to 17.5 feet when 25 feet is required for garages requires a Variance. He identified that the applicants have the right to seek relief in the form of a Variance. He had no objections to the proposals.
- The Fire Department had no issue.

- The Health Department noted that the applicant must apply for a Demolition Review online with supplemental report documentation prior to the issuance of a Building Permit, and ongoing pest control must be conducted during demolition and throughout construction.
- The Conservation Department noted that the Conservation Commission approved the plans and will be issuing an Order of Conditions for the work within the resource area with conditions: stormwater infiltration including the subsurface cultic units and driveway stone trench; establishment of a vegetated mitigation area on-site; and permanent markers protecting the mitigation area in perpetuity.
- Josep Miquel Jornet Montana, 423 Dedham Avenue, back neighbor. He had no objection.

The public hearing was open to the public.

Rich Lustig, 34 Alder Brook Lane, is the abutter whose property is encroached by the current driveway. He thought the proposal was thoughtful. He was familiar with the plans and was in full support of the project. He thought the proposal would make the neighborhood more attractive and a better place.

Mr. Swartz argued that the project as designed would not interfere with any neighbors as there are no abutters on the right side of the property and that the Conservation Commission agreed that the project would be an improvement to the environment and wetlands as the project would be further from the conservation area. Mr. Tamkin agreed that that was a positive consideration.

Mr. Tamkin stated that the standards for the grant of a Variance include that:

- a) there be an unusual soil condition, shape or topography of the land or structure in question; and
- b) as a result of one of these circumstances, literal enforcement of the Zoning By-Law would result in a substantial hardship to the applicant.

Mr. Tamkin did not think the driveway issue presented by the applicant met the standard of a substantial hardship.

Mr. Ber argued that relocating the driveway would mean removing a larger tree they wished to preserve. Mr. Tamkin responded that a variance generally means there are no options except for the variance route.

Mr. Ligris thought the triangular lot certainly was unique, and the Alder Brook Lane appears not to be the standard street width and there may be a question of the actual distance from the house to the street line. In addition, he was swayed by the neighbor's support of the project. Mr. Tamkin, too, was sensitive to the applicants but he did not feel the legal arguments for a Variance had been demonstrated.

Mr. Friedenberg thought it was a nice project and he agreed that the proposal would have little or no impact on abutters. The standard, however, for the granting of a Variance is a high one under the Town's By-Law. The Courts have established that not doing what you want to do is not a

hardship nor does the irregular shape of the property prevent the usage of the driveway. The driveway can be realigned and there is no immediately pressing issue requiring the project to go forward. He'd like to see the project go forward but without a demonstrable hardship he did not see a road forward for the granting of a Variance. The applicants have been living in the house for many years, demonstrating the functional use of the house, which is contrary to demonstrating hardship. Realigning the driveway seems a possible option but hasn't been explored because the encroachment hasn't been a real issue and the applicant has not demonstrated it to be a hardship. Mr. Friedenbergr did not want to start a precedent when the courts and the By-Law are clear on the granting of Variances and the applicant had not demonstrated the hardship. He was unhappy about this result but saw no alternative.

Mr. Tamkin concurred with Mr. Friedenbergr. Mr. Tamkin said that the need for something better is not a hardship.

Mr. Ber asked if they could request a continuance to seek further legal advice. Mr. Tamkin said a continuance may be granted to allow the applicant to come back with new focused information demonstrating hardship under the Variance.

Mr. Friedenbergr did not see the purpose of granting a continuance. He could not see a scenario or case for a demonstration of hardship. He did not want to see the applicants incur the expense to chase it. He would not be supportive of a continuance.

Mr. Tamkin was open to the applicants withdrawing their Special Permit without prejudice so that they could come back seeking a Special Permit with a modified project.

Mr. Ligris would like the Variance hearing be continued to allow the applicants to seek and explore legal advice regarding hardship.

Mr. Ligris moved to continue the hearing and vote to the May 16, 2024. Mr. Friedenbergr seconded the motion. The motion was unanimously approved.

Mr. Swartz asked what would happen if they didn't find a rationale for hardship for the Variance. Mr. Tamkin responded that the public hearing would continue in May and a vote on the Variance would be taken. The Special Permit could be allowed to be withdrawn without prejudice. Mr. Friedenbergr suggested the applicants be offered the opportunity to withdraw their request to continue the hearing on the Variance and allow them to withdraw without prejudice the Special Permit application tonight.

Mr. Swartz thought that rather than waste everyone's time he'd rather have a decision on the Variance now, a withdrawal of the Special Permit without prejudice, and resubmit a modified plan for a Special Permit.

Mr. Ligris moved to withdraw the motion to continue the public hearing to May 16, 2024. Mr. Friedenbergr seconded the motion. The motion was approved.

Mr. Friedenbergr moved to deny the grant of a Variance under MGL 40A, Section 10, and

Section 7.5.3 of the By-Law to allow a front setback at 15.4 feet where 25 feet are required as applied for by Amit Swartz and Neta Levin Swartz at 10 Alder Brook Lane. Mr. Ligris seconded the motion. The motion to deny the grant of a Variance was unanimously approved.

Mr. Ligris moved to allow the applicants to withdraw without prejudice the application for a Special Permit for 20 Alder Brook Lane. Mr. Friedenberg seconded the motion. The motion was unanimously approved.

The meeting adjourned at 8:21 p.m.

Findings:

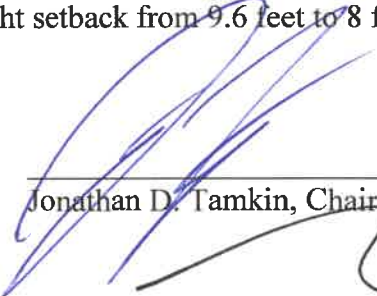
1. The premises is a 10,280 square foot property located in the Single Residence B (SRB) Zoning District improved with a three bedroom and two bathroom single-family residence totaling 2,025 square feet built in 1929 with an addition constructed in 1976.
2. In 1951-1952, the structure was relocated to its current location to a 19,634 square foot rectangular corner lot.
3. In a Plot Plan for Building Permit #4173 dated March 6, 1976 the lot had been subdivided to its reduced triangular shape of 10,280 square feet. As a corner triangular lot it has two side yards and one long front yard along the street. The house is non-conforming in that it has a left side set back of 11.9 feet and a right side set back of 9.6 feet where 14 feet are required. All other setbacks and build factors are compliant. Since the non-conformity has existed for more than 10 years without challenge, MGL Chapter 40A, Section 7 provides that the structure is considered to be legally non-conforming.
4. The property contains a water easement and is located in proximity to vegetative wetlands and riverfront. The project is subject to the Conservation Commission review and approval, which was granted on March 14, 2024 with the Order of Conditions to be issued.
5. The applicants propose to add to the existing structure a two-car garage and a half story above with a primary bedroom with a bathroom totaling 507 feet. Under Section 4.2.1(g) of the By-Law the required front yard setback for a garage is 25 feet for the SRB district and the applicants seek zoning relief in the form of a Variance under Chapter 40A, Section 10 and Section 7.5.3 of the By-Law for a garage front set back of 15.4 feet.
6. The applicants argued that due to the irregular triangular shape; the property's proximity to wetlands and riverfront; the water easement on the property; and the current approach and exit to their driveway encroaching on their abutter's property, they will suffer a substantial hardship if the Variance is not granted.
7. The Board conveyed prior to the meeting through its *Memo to Applicants for a Variance* dated March 10, 2004 and the Board Minutes of April 15, 2021 the required legal

standards for obtaining a Variance, and again at the meeting the high bar established in the By-Law and MGL 40A, Section 10.

8. The Board found that the applicants have been living and enjoying their property within the configuration of its shape, adjacent to the wetlands and the easement since 2016; and could modify the driveway approach without encroaching onto their neighbor's property. In addition, the abutting neighbor had no issue with the applicants encroaching on their property to access their driveway. The Board found that the applicants did not meet the showing of a substantial hardship required under the MGL and By-Law and denied the granting of a Variance.
9. Associated with the project, the applicants also sought a Special Permit under 1.4.6 to allow the change, extension, alteration and enlargement of a lawful, pre-existing, non-conforming structure for relief of a right setback from 9.6 feet to 8 feet. Upon the denial of the Variance, the applicants requested to withdraw the Special Permit without prejudice.

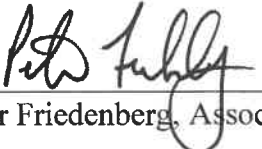
Decision:

On the basis of the foregoing findings, following due and open deliberation, upon motion duly made and seconded, the Board by unanimous vote voted to Deny the applicants' request for a Variance under MGL 40A, Section 10 and Section 7.5.3 of the By-Law; and further voted to allow the applicants to withdraw without prejudice the application for a Special Permit under section 1.4.6 to allow the change, extension, alteration and enlargement of a lawful, pre-existing, non-conforming structure for relief of a right setback from 9.6 feet to 8 feet.



Jonathan D. Tamkin, Chair

Nikolaos M. Ligris, Member



Peter Friedenber, Associate Member