



BOARD OF APPEALS
Jesse Geller, Chairman
Christopher Hussey
Jonathan Book

Town of Brookline

Massachusetts

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Patrick J. Ward, Clerk

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2015-0039
OWNER: ROBERT AND MARJIE KARGMAN
292 WARREN STREET, BROOKLINE, MA

Petitioners, Robert and Marjie Kargman, applied to the Brookline Zoning Board of Appeals to appeal an administrative decision made by the Town Building Commissioner regarding the maximum height of a fence located along the side lot line at 292 Warren Street. The Building Commissioner cited the fence height for non-compliance and an appeal was taken to this Board.

The Board administratively determined that the properties affected were those shown on a schedule certified by the Board of Assessors of the Town of Brookline and fixed October 15, 2015 at 7:10 p.m., in the Selectmen's Hearing Room as the date, time and place of a hearing for appeal. Notice of the hearing was mailed to the Petitioner, to their attorney 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 October 1, 2015 and October 8, 2015 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. 40A, the Board of Appeals will conduct a public hearing at Town Hall, 333 Washington Street, Brookline, on a proposal at:

292 WARREN STREET / 246 DUDLEY STREET – APPEAL OF ADMINISTRATIVE DECISION THAT A SIDE-YARD FENCE EXCEEDS THE MAXIMUM HEIGHT REQUIEREMENT AS MEASURED FROM THE NATURAL GRADE, in an S-40, Single-Family, residential district, on October 15, 2015, at 7:10 PM in the 6th Floor Selectmen’s Hearing Room (Petitioner: Wayne F. Dennison, Brown Rudnick LLP; Owner: Kargman Family Brookline Residence Trust Edward J. Bartlett, Trustee) *Precinct 15*

Hearings may be continued by the Chair to a date/time certain, with no further notice to abutters or in the TAB. Questions about hearing schedules may be directed to the Planning and Community Development Department at 617-730-2130, or by checking the Town meeting calendar at: www.brooklinema.gov.

*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 Town programs and services may make their needs known to **Robert Sneirson, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone: (617) 730-2328; TDD (617)-730-2327; or email at rsneirson@brooklinema.gov.***

*Jesse Geller, Chair
Christopher Hussey
Jonathan Book*

At the time and place specified in the notice, this Board held a public hearing. Present at the hearing was Chairman Mark Zuroff, and Board Members Johanna Schneider and Christopher Hussey. Gregory Sampson of Brown Rudnick LLP, One Financial Center, Boston, MA spoke on the Petitioner’s behalf. Mr. Rudnick stated the attorney representing this appeal was called to federal court, therefore the Petitioner is requesting a case continuance to November 5, 2015.

Board Members supported this request and called for public comment in favor of, or in opposition to, this proposed continuance. Abutting resident Mike Firestone, of 274 Dudley Street, requested that the Board further explain procedural details moving forward. Board Chairman Zuroff stated that the Board is required to establish a date certain to hear the

Petitioner's case for appeal if the continuance request is granted. Mr. Zuroff added that the Board also maintains the authority to deny the continuance request.

Zoning Coordinator, Jay Rosa clarified that the Petitioner's request to legalize the side-yard fence in question was previously denied by the Zoning Board of Appeals. Subsequently, the Petitioner did make fence alterations. The Building Commissioner determined that fence alterations still did not meet maximum fence height requirements and cited the fence for non-compliance. The Petitioner is appealing the Building Commissioners decision and not the original Board of Appeals decision.

Board Member Hussey also recommended that the Petitioner submit additional surveyor drawings indicating the grades and height of the fence at appropriate intervals, as well as the locations of both the property line and the fence as built prior to the future Board hearing on this matter.

The Board unanimously voted to continue this appeal hearing to November 5, 2015 at 7:10 pm in the Selectmen's Hearing Room.

At the time and place specified by the Board, this Board held a public hearing. Present at the hearing was Chairman Jonathan Book, and Board Members Mark Zuroff and Avi Liss. The Petitioner's attorney, Wayne Dennison of Brown Rudnick LLP, One Financial Center, Boston, MA, waived the reading of public hearing notice for the record and presented details of this appeal to the Board.

Attorney Dennison stated that the subject fence has resulted in a "dispute" between neighbors that now involves the Town due to enforcement action made by the Brookline Building Commissioner. The Petitioner sought special permit relief to legalize an existing side-yard fence located between properties at 292 Warren Street and 272 Dudley Street. This request

for zoning relief was denied and the Petitioner made fence alterations as a good faith effort to comply with the 7 foot maximum fence height requirement included in Zoning By-Law 5.62. Subsequently, the Building Commissioner cited the modified fence for non-compliance following a site visit. The Petitioner is now appealing that administrative decision. Attorney Dennison specifically noted two flaws in the Building Commissioner's determination of the maximum fence height: 1) The determination of the natural grade from which to measure the fence height; and 2) the Building Department practice of measuring fence height from the lowest natural grade on an abutting property, 274 Dudley Street in this instance. For these reasons, Attorney Dennison suggested that the Building Commissioner's enforcement order should be overturned by this Board.

Attorney Dennison stated that the Brookline Zoning By-Law does not explicitly define natural grade but guidance on this term is provided by Massachusetts General Law and federal regulations. Additionally, Attorney Dennison stated that existing case law related to this matter has established a precedent that structure or fence heights cannot be determined based on the condition of abutting properties or land (*Anna Gray Noe McLendon v. Town of Stockbridge, Appeals Court of MA, May 10, 2006*).

Attorney Dennison believed that an existing drainage swale along the side property line, which has been interpreted as the lowest natural grade on the abutting property, is in fact not naturally occurring. A signed affidavit was provided by a professional engineer and soil examiner stating that the swale in question is not naturally occurring, and was specifically created for drainage purposes prior to the development of these properties. Additionally, this affidavit states that the appearance of site work exists on both sides of this fence, further supporting the historical development of an artificial drainage feature.

Attorney Dennison played a recorded portion of the original Board hearing from October 2, 2014 in which the Petitioner was seeking legalization of the fence height. The recording included comments by the abutter's attorney/landscaper stating that much of the land around Brookline is not natural grade and this particular swale has existed for approximately 50 years. Additionally, a 4 foot tall chain link fence closely follows this swale, further supporting human alteration of the grade in this area. Attorney Dennison characterized these findings as being comparable to a concrete drainage culvert, which obviously does not constitute natural grade.

Attorney Dennison submitted a photograph to the Board (Figure 1) and described it as a seven foot tall fence located two feet off of the property line in question. If this fence is measured from the abutting property, it is eight feet tall. In Attorney Dennison's opinion, this is an inaccurate measurement because it is not measured from the property that the fence is actually situated on. Attorney Dennison informed the Board that Mr. and Ms. Kargmen reached out to the Building Department for guidance prior to engaging in fence alterations. Attorney Dennison stated that these requests for guidance were not answered so the petitioner modified the fence with a clear directive of maintaining a maximum fence height of 7 feet, as measured from the 292 Warren Street property. Attorney Dennison submitted an invoice to the Board detailing this fence modification work.

Attorney Dennison further stated that the 292 Warren Street property slopes down toward the shared side lot line with the 274 Dudley Street property. Attorney Dennison submitted additional photos that illustrate the property grade change, the fence height as compared to an existing 6 foot tall stockade fence, and mature trees on the 292 Warren Street property that are located in close proximity to the fence. Attorney Dennison also stated that the Petitioner's property is "elevated" above the abutting property, necessitating the 7 foot tall fence to provide

adequate privacy, particularly because the abutting resident has recently completed land clearing in the immediate area around the fence.

Attorney Dennison concluded his comments by stating that the Petitioner has spent approximately \$5,000 to bring this fence into compliance with height requirements. The Building Commissioner's determination of non-compliance was reached by measuring the fence height from a point which is not the natural grade (bottom of swale on adjacent property). Attorney Dennison stated that the fence, as currently constructed, is not unsightly. In Attorney Dennison's opinion the Petitioner maintains a compliant fence and the Board is faced with an inaccurate interpretation of how the height should be measured. For these reasons, Attorney Dennison encouraged the Board to overturn the enforcement order.

Board Chairman Book asked the Petitioner to clarify how this appeal of the administrative decision is not a reconsideration of a prior hearing that this Board has already decided upon. Mr. Book further stated that the Building Department and the Planning Board, all clearly stated at the prior hearing that it is the standard practice of the Building Department to determine fence height by measuring from the lowest natural grade on the abutting property, and that the Board of Appeals rendered its prior decision on that basis.

Attorney Dennison clarified that the previous hearing in which the Petitioner sought to legalize the existing fence specifically focused on Zoning By-Law Section 5.62. The Petitioner sought special permit relief to maintain a fence over 7 feet tall above the natural grade to "mitigate noise or other detrimental impact or provide greater safety, such as when a property is bounded by active train tracks." Attorney Dennison confirmed that the special permit request did not consider the interpretation of natural grade, or the legality of determining fence height from an adjacent property. Now the Petitioner has a fence that Attorney Dennison maintains is

fully compliant and the only point of consideration before the Board is how to appropriately measure the maximum fence height.

Chairman Book called for public comment in favor of, or in opposition to, the Petitioner's request.

David Firestone of 274 Dudley Street stated that his primary interest is to have a compliant fence along the shared property line. Mr. Firestone stated that the grade change of the property, particularly the swale, is over exaggerated by the Petitioner and no recent alteration to the swale has occurred on his property. Mr. Firestone agreed that the measurement of the fence is critical. Mr. Firestone noted that wood was installed at the base of the fence on the Petitioner's property in order to "retain" earth material. Mr. Firestone also agreed that the fence was modified following the prior hearing on this matter but the height was reduced from 9-10 feet in certain areas to 8-9 feet, which still exceeds the maximum height requirement. Mr. Firestone described the fence as a 7 foot tall structure installed on top of a retaining wall created by the Petitioner.

Chairman Book noted that the Board does not require findings from the Planning Board and requested that Chief Building Inspector Michael Yanovitch review the opinion of the Building Department.

Mr. Yanovitch stated that the request before this Board is an appeal of Building Department enforcement but does extend into a "de novo" evaluation of the fence height, specifically where to measure the maximum fence height from. Mr. Yanovitch stated that the interpretation of fence height from the lowest natural grade on the abutting property has been consistent and is intended to prevent fences from looming over an abutting property. Mr. Yanovitch confirmed that fences built on top of retaining walls are consistently measured from

the base of the retaining wall, i.e. the natural grade. Mr. Yanovitch added that the Building Department looked to the Board of Appeals to make a reasonable interpretation of this Building Department enforcement practice at the prior hearing on this matter. Additionally, the Building Commissioner determined that the modified fence still exceeds the 7 foot maximum height after measuring the fence in accordance with the established and consistent interpretation of the Zoning By-Law.

Mr. Yanovitch stated that this fence height debate has drawn out for a year and the non-compliance issue was reinforced by the Board's previous finding. Mr. Yanovitch also stated that the Zoning By-Law establishes several instances in which the "average grade of abutting property" is used as the baseline to determine the height of structures.

Board Member Mark Zuroff and Chairman Book both questioned why the untreated wood retaining wall was installed and who installed the wall itself.

Attorney Dennison disagreed that the 2 by 10 wood boards located at the base of the fence are indeed a retaining wall but did acknowledge that the intent of the wood is to prevent dirt from sliding into the swale. This wood was not installed in order to "pile up loam" on the Petitioner's property, according to Attorney Dennison. Attorney Dennison also referenced submitted photographs that indicate no suffocation of existing trees as being evidence that no fill has occurred.

Mr. Firestone stated that the wood retaining wall was installed at the same time that the fence was installed.

Board Member Liss questioned who installed an existing 4 foot tall chain link fence, and which property it is located on.

Attorney Dennison confirmed that the chain link fence was installed prior to both current property owners and the fence is located on the Petitioner's property.

Mr. Liss stated that the base of the existing 4 foot fence may be interpreted as the lowest natural grade on both the Petitioner's property and the abutting property. Mr. Liss stated that he was sympathetic to the situation created for both property owners and was concerned that a more detailed definition of natural grade is not included in the Zoning By-Law. Mr. Liss did believe however that the Building Department has established a consistent interpretation regarding the determination of maximum fence height. This interpretation was also communicated to the Petitioner.

Board Member Zuroff stated that there is a clarity issue in determining when a grade, whether natural or man-made shall be interpreted as the natural grade. Mr. Zuroff noted that both parties agree that the drainage ditch is around 50 years old and was created prior to the construction of both single-family homes. The grade of the swale existed prior to the construction of both the 4 foot chain link fence and the taller fence installed by the Petitioner. In Mr. Zuroff's opinion, the non-conforming fence was created at a time when the grade of the swale was clearly established and had been established for an extended period of time. Mr. Zuroff also agreed that installed wooden boards clearly do not constitute natural grade.

Attorney Dennison stated that eight abutting property owners submitted written support for the existing fence height. Attorney Dennison also stated that further appeal will most likely follow if the Board upholds the Building Commissioner's enforcement action.

Board Members agreed that the consistent and reasonable interpretation of fence height as measured from the natural grade should be upheld. Board Members also stated that they did not encourage further appeal.

Attorney Dennison requested that enforcement penalties issued prior to July 13, 2015 be waived because they were assessed prior to the fence modification deadline established by the Building Commissioner.

Board Members supported this request but did not believe that they possess the authority to relieve penalty fees.

Mr. Yanovitch confirmed that enforcement fees have stopped following the filing of this appeal. Mr. Yanovitch also agreed that the Board does not have the power to relieve fees that have already been assessed. Board Members also agreed that they would prefer a compliant fence rather than additional enforcement fees.

The Board further deliberated on the merits of this appeal of administrative decision as requested. Board Chairman Book stated that he sees no reason to deviate from the decision of the Building Commissioner. Mr. Book believed that the Commissioner made a reasonable interpretation in accordance with consistent practices. Mr. Book specifically noted that the 4 foot chain link fence located near the base of the swale is also located on the Petitioner's property. Mr. Book believed that the Petitioner elected to install a fence located on a higher portion of the property but still must comply with the Building Department's interpretation which is reasonable in Mr. Book's opinion.

Board Member Zuroff agreed that the prior hearing pertaining to the legalization of the non-conforming fence reinforced the Building Department's interpretation of the natural grade from which this fence height shall be measured from. Mr. Zuroff was in favor of enforcing the decision made by the Building Commissioner.

Board Member Liss was unconvinced that the lowest natural grade in this instance is actually located on the abutting property. For this reason, Mr. Liss agreed that the fence height

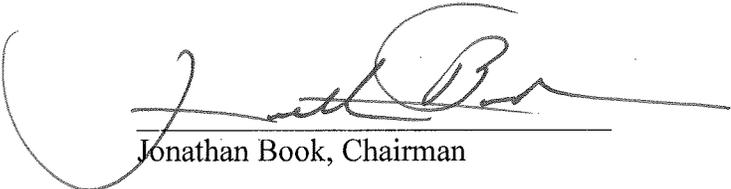
should be measured from the lowest point of the swale. Mr. Liss also stated that various zoning compliant options do exist to provide the level of visual screening that the Petitioner is seeking including stepping the fence back beyond the required side-yard setback or installing additional landscaping.

Accordingly, the Board voted unanimously to deny the Petitioner's appeal of administrative decision and to uphold the Building Commissioner's finding that the fence located between properties at 292 Warren Street and 274 Dudley Street exceeds 7 feet in maximum height when measured from the natural grade. Additionally, the Board unanimously supported the Building Department's consistent interpretation of the Zoning By-Law that the maximum height for fences shall be determined by measuring from the lowest natural grade on the immediately abutting property.

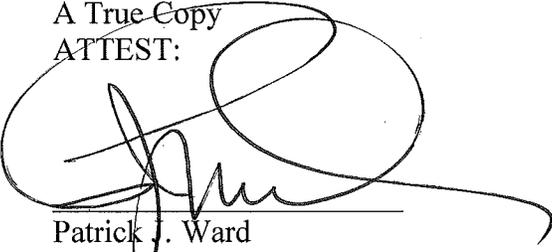
Unanimous decision of the
Board of Appeals

Filing Date:

11/19/15


Jonathan Book, Chairman

A True Copy
ATTEST:


Patrick J. Ward
Clerk, Board of Appeals

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