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*Town of Brookline*  
BUILDING DEPT.  
TOWN OF BROOKLINE *Massachusetts*

BOARD OF APPEALS  
Enid Starr, Co-Chair  
Jesse Geller, Co-Chair  
Christopher Hussey

Town Hall, 1<sup>st</sup> 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. BOA 2012-0035

Petitioner, Shablesky, applied to the Chief Building Inspector for the issuance of a building permit to construct a day care facility at 1473 Beacon Street, Brookline, MA. Building Permit #2012-0492 was issued on May 8, 2012, and subsequently revoked by the Chief Building Inspector claiming a special permit was needed for use as a day care facility. An administrative appeal of the Chief Building Inspector's decision to revoke the permit was taken to this Board.

On May 17, 2012 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 31, 2012 at 7:15 p.m. in the Selectmen's hearing room as the time and place of a hearing on the appeal. Notice of the hearing was mailed to the Petitioner, to their attorney (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 17, 2012 and May 24, 2012 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. 39, sections 23A & 23B, the Board of Appeals will conduct a public hearing to discuss the following case:

Petitioner: **ALEX SHABELSKY**  
Owner : **ALEX SHABELSKY**  
Location of Premises: **1473 BEACON STREET**  
Date of Hearing: **MAY 31, 2012**  
Time of Hearing: **07:15 PM**  
Place of Hearing: **Selectmen's Hearing Room, 6<sup>th</sup>. floor**

A public hearing will be held for an appeal of an Administrative Decision by Chief Building Inspector, Michael Yanovitch, for revoking Building Permit #2012-0492 dated May 8, 2012

at **1473 BEACON STREET**

Said Premise located in a **M-2.5 (Apartment House) Residential 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 617-730-2134 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  
Christopher Hussey**

At the time and place specified in the notice, this Board held a public hearing. Present at the hearing were Board Members, Enid Starr, Jonathan Book and Lisa Serafin. The case was presented by the attorney for the petitioner, Robert L. Allen Jr., 300 Washington Street, Brookline MA 02445.

Mr. Allen explained that the appellant, Alex Shabelsky, had entered into a lease to rent 1473 Beacon Street, a former rug store for purposes of opening a day care facility in that location. Prior to renting out the space, Mr. Shabelsky and his architect met with the now retired building commissioner, Mike Sheppard to ensure that a day care facility could be opened as a matter of right in this M 2.5 district. Then Commissioner Sheppard opined that G.L.c.40a sec 3, allows the use of a child care facility by right in that location and provided a letter confirming this opinion.

On or about May 8, 2012, Chief Building Inspector, Michael Yanovitch, issued Building Permit #2012-0492 (the "Building Permit"). Subsequent to that, Mr. Yanovitch, citing Section 4.07, Use 15 of the Town of Brookline's Zoning By-Law, revoked the Permit finding that a Special Permit was needed. Mr. Allen explained that it was as a result of that revocation that this administrative appeal was filed on the grounds that the Chief Building Inspector has exceeded his authority in denying this application to allow for a change of use to construct a day care center. Specifically Mr. Allen explained that the Town of Brookline's Zoning Code, cited by Mr. Yanovitch, is preempted by State Law, specifically G.L.c.40A, Sec. 3, which states, in relevant part:

: "No zoning ordinance or bylaw in any town shall prohibit, or require a special permit for... the use of land...for the purpose of operating a child care facility... provided...[it] may be subject to reasonable regulations (bulk and height of structures, yard sizes, lot area, setbacks, open space, parking)...[The] term "child care facility" shall mean a child care center or a school-aged child care program."

Mr. Allen continued that the Town has a long history of allowing day care facilities in nearly all zoning districts throughout the Town without imposing any condition relating to parking etc. This location is on Beacon Street, which has access to both on street parking as well as median parking, and the owners control two private parking spaces within a short walk.

Further, Mr. Allen cited *The Teddy Bear Club et. al. v. City of Newton et. al.*, where a day care facility appealed a decision of the ZBA for the City of Newton after its building permit to construct a day care center on Commonwealth Ave. in Newton was revoked, seeking injunctive relief under G.L.c.40A, Sec. 17 to enforce day care's right to continue construction. Plaintiff's Motion for Partial Summary Judgment was GRANTED relative to building permit claims under G.L.c.40A, Sec. 17. The court wrote, in relevant part, that "[t]he ZBA was beyond the scope of its authority in rescinding the Building Permit". Mr. Allen claimed that the Teddy Bear case is right on point and that because the provision in Brookline Zoning By-Law conflicts with State Law, State law must trump, and thus the Building Permit should be reinstated.

Chairman Starr then called upon Michael Yanovitch, Assistant Building Commissioner, to deliver the comments of the Building Department and on behalf of the Planning Board. Mr. Yanovitch concurred with Mr. Allen as to the factual background and felt that this was a matter of the Town By-Law being more restrictive than Massachusetts General Laws.

After a short deliberation the Board found that they had no choice but to grant the appeal and instruct the building department to re-issue the Building Permit, specifically stating their familiarity with *The Teddy Bear* case, and that G.L.c.40A sec 3 trumps the provision in Brookline's Zoning Code, thus, no special permit is needed for this day care facility.

Unanimous Decision of  
The Board of Appeals

Filed Date: June 22, 2012

  
Enid Starr, Chairman

A True Copy  
ATTEST:

  
Patrick J. Ward  
Clerk, Board of Appeals

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