



BOARD OF APPEALS  
Enid Starr, Co-Chair  
Jesse Geller, Co-Chair  
Robert De Vries

# *Town of Brookline*

## *Massachusetts*

Town Hall, 1<sup>st</sup> Floor  
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Brookline, MA 02445-6899  
(617) 730-2010 Fax (617) 730-2043  
Patrick J. Ward, Clerk

TOWN OF BROOKLINE  
BOARD OF APPEALS  
CASE NO. 080026

Petitioners Alex and Larisa Shabelsky, applied to the Building Commissioner for permission to use their home at 709 Hammond Street for a family day care home for more than six children. The application was denied and an appeal taken to this Board.

On 26 June 2008, 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. The Board then fixed the date of Thursday, 28 August 2008 at 7:00 p.m. on the second floor of the Main Library as the time and place of a hearing of the appeal. Notice of the hearing was mailed to petitioners and their attorney, (if any of record), to owners of 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 7 and 14 August 2008 in the Brookline Tab, a newspaper published in Brookline. Copy of said notice as follows:

LEGAL NOTICE  
TOWN OF BROOKLINE  
MASSACHUSETTS  
BOARD OF APPEALS  
NOTICE OF HEARING

**Pursuant to M.G.L., C. 39, sections 23A and 23B, the Board of Appeals will conduct a public hearing to discuss the following case:**

Petitioner: **SHABELSKY, ALEX & SHABELSKY, LARISA Y**  
Location of Premises: **709 HAMMOND ST, BRKL**  
Date of Hearing: **8/28/08**  
Time of Hearing: **7:00 p.m.**  
Place of Hearing: **Main Library, 2<sup>nd</sup> Floor**

A public hearing will be held for a variance and/or special permit from:

**4.00; Applicability of regulations; Variance Required.**

**4.07; Table of Use Regulations; Use #15A, Daycare Center...total number of children...shall not exceed six; Variance Required.**

**4.07; Table of Use Regulations; Use #15, Daycare center; Special Permit Required** of the Zoning By-Law to request for a home day care center for more than six (6) children at **709 HAMMOND ST, BRKL**

Said premises located in a **T-6** zoning 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 617-734-2134 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, or 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 Co-ordinator, Stephen Bressler, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone (617) 730-2330; TDD (617) 730-2327.*

Enid Starr  
Jessie Geller  
Robert DeVries

At the time and place specified in the notice a public hearing was held by this Board. Present were Jesse Geller, Chairman, Kathryn Ham and Jonathan Book.

The Petitioner was represented by Attorney Ronny Sydney, 370 Washington Street, Brookline, MA. Attorney Sydney waived the reading of the notice. Attorney Sydney stated that the petitioners,

Alex and Larisa Shabelsky, owners of the two-family dwelling at 709 Hammond Street, have been operating a family day care center in their home for the past ten years; four years at University Road and six years at the current address. She noted that the Shabelskys are licensed by the Commonwealth of Massachusetts to have a family day care center for 10 children. She added that they are continuously inspected by the Office of Child Care Services. Attorney Sydney said that they meet all the various requirements such as space, number of teachers and number of outdoor play settings. Attorney Sydney stated that her clients discovered that they were in violation of the Town Zoning By-Law allowing a family day care center to have a maximum of six children only after their next-door neighbors filed a complaint with the Building Department. Her clients had no prior knowledge of this provision of the By-Law, she said. She said that in order to increase the number of children allowed at the family day care center above six and to “legalize” use of the family day care center for ten children, a use variance would be required. She stated that the situation is further complicated by the fact that the Shabelskys share a driveway with their neighbor. She said that during pick-up and drop-off, the parents drive up to the curb and do not use the shared driveway.

Attorney Sydney stated that problems with the petitioners’ neighbors began two years ago when the petitioners made some renovations to the property. She said that there were complications as to use of the driveway during construction. Since that time, neighborhood concerns have been raised on a regular basis and a police officer has been assigned to the area to resolve disputes. She said that there have never been any reported noise related complaints in connection with operation of the family day care center by the petitioners. She said that the Shabelskys have a license issued by the Commonwealth of Massachusetts to operate a family day care center for ten children and the adjoining unit within the two family building is licensed by the Commonwealth for a separate family day care center for six additional children. She said the other family day care center license is not at issue in the pending matter before the Board since the business is entirely separate from and independent of

that operated by the petitioners. Attorney Sydney said that the property is unusual in that it backs up to a cemetery and there is a very steep hill in the backyard with a retaining wall. She said that the structure is situated on a very wide section of Hammond Street. She said that the petitioners' family day care center is unique because it caters to a population of Russian speaking children. Attorney Sydney said one of the goals of the family day care center is to help transition children into American culture.

Attorney Sydney stated that she did not believe that her clients meet the requirements of the Zoning By-Law for a use variance under the By-Law or Massachusetts General Laws Chapter 40A, Section 10. She noted that the residence was not used previously as a family day care center, it is not a historic building and it can obviously be used as a two-family home. She said that the Brookline Zoning By-Law allowing a maximum of six children only is arbitrary and capricious in the designation of that number. She offered that several towns surrounding Brookline allow up to ten children within a family day care center consistent with the number of children permitted under State licensing. Attorney Sydney stated that her clients were going forward with the hearing in order to preserve their right of appeal. She said that many members of the community came out in support of the Shabelsky's petition at the Planning Board hearing but since the Planning Board recommended denial of the petition, they were asked by the petitioners not to attend this hearing.

Chairman Geller asked if anyone wished to speak in favor of the petition. There were none.

Chairman Geller asked if anyone wished to speak against the petition. James Roarke of 679 Hammond Street spoke of the safety and well-being of the people of the neighborhood. He said that any more than six children at the site will create a hazard. Mr. Roarke raised concerns over pick-up and drop off at the family day care home. He said that a dangerous precedent would be set by converting a home in a residential district into a commercial enterprise.

Sam Prinzi of 721 Hammond Street, a trustee of the nearby condominiums at 715-729 Hammond Street, stated that all the condominium owners are opposed to the petition because of concern over devaluation of their property values. He provided photographs, Exhibits A-D, and cited repeated instances in which the owners of the family day care center and their clients parked on and over sidewalks and tree lawns (causing damage) at drop-off and pick-up times, otherwise parked along Hammond Street creating a dangerous condition to drivers and pedestrians, trespassed onto the property of neighbors before and after construction and generally did not comply with “rules and regulations”. He said that although many people spoke in favor of the petition at the Planning Board hearing, none of them lived in the neighborhood.

Mr. Ricardo Garcia of 705 Hammond Street, a direct abutter, submitted a folder containing documents and photographs. The clerk marked them as Exhibit E. Mr. Garcia said he was representing both himself and Thomas Stefanick the co-owner of 705 Hammond Street. Mr. Garcia refuted several claims made at the Planning Board hearing. Among which were the length of operation, the number of complainants, increased police activity and the addition of a family day care when the expansion was completed. He said that although the residence at 709 Hammond Street is considered a two-family, it does not meet the requisite parking requirements. He said that diminished area due to the addition and the steepness of the driveway inhibits the safe use of the driveway for pick-up and drop-off. He said patrons of the family day care center park on the grass border and sidewalk in front of the property, thereby blocking the sidewalk to pedestrians. Sometime, parents park across the street on Pine Road, and crossing is dangerous due to the width of the road and lack of crosswalks, he said. Mr. Garcia noted that a statement, provided by the petitioners, prior to obtaining a Building Permit for their expansion, said that there would never be more than six children being cared for at the property. He said that shortly after completion of the additional unit, another family day care started operating without the benefit of a license from the Commonwealth. Mr. Garcia

referenced public records from the Department of Early Education and Care (EEC) stating that their regulations had been violated as well as the Zoning By-Law. Mr. Garcia cited destruction of town property, namely the grass borders at the curb. He said that the area at the curb in front of 709 Hammond has become an eyesore. Mr. Garcia spoke about the use of their common driveway and specifically about it being blocked from his use by patrons of the child care center. He said that they had posted signs to no avail. Mr. Garcia opined that if the petitioners are seriously interested in the welfare of the children under their care, they should lease an appropriate space in a commercial zone that has ample and legal parking.

Penelope Green of 756 Hammond Street, spoke of the safety concerns created by cars (of clients of the family day care center) parking along Hammond Street.

Attorney Sydney, in rebuttal, stated that clients of the family day care center are allowed by law to park in front of 709 Hammond Street. She said her clients have agreed to institute a process whereby staff comes out to the car to pick-up children, thereby decreasing drop-off/pick-up time at the curb. She said that her clients were not flaunting the rules. They were unaware of the provisions of the By-Law since they had operated a family day care center for ten years without complaint. She said that although the Planning Board unanimously voted to recommend denial of the requested relief, they didn't say it wasn't a worthy project or object to it in any way.

Planner, Courtney Starling, said that although the Planning Board is very supportive of providing good quality day care, it could not recommend approval of the application to increase the number of children at 709 Hammond Street because the strict statutory requirements for a use variance are not met. Some Planning Board members also felt that allowing ten children at this day care center would result in unacceptable impacts to the surrounding neighbors from traffic during drop-off and pick-up times, especially due to the second daycare center in the other dwelling unit of this building. She said that the Planning Board would be supportive of a Warrant

Article that allowed up to ten children in residential areas by special permit, thus allowing a case-by-case consideration of each application and whether appropriate facilities, including parking, are provided. Therefore, she said, the Planning Board recommended denial of the application to legalize the family day care center at 709 Hammond Street for use by ten children.

Michael Shepard, Building Commissioner, stated that the Building Department is not in favor of granting the requested relief. He said that the citizens of Brookline thought very carefully when they capped the number of children allowed at family day care centers at six. He said that most residential districts can accommodate up to six children in a home. Mr. Shepard said he suspected the drafters of the applicable section of the Zoning By-Law did not anticipate a situation where both sides of a duplex would have six children thereby increasing the number of children on the site to twelve. He said that if the requested relief were granted, the total number of children on the property could approach sixteen children. Regarding parking, he opined that the building housing the family day care center is in a bad location and that safety issues would be exacerbated during inclement weather, particularly snow, when there are snow banks with which to contend.

During deliberations, Board Member, Kathryn Ham stated that in her opinion, the Board's hands were tied since the application does not meet the statutory requirements for a use variance. Board Member, Jonathan Book agreed, saying he did not believe the Board had the authority to grant the requested relief. He noted that the petitioner's attorney stated that her client's request does not satisfy the requirements of the Zoning By-Law. Chairman Jesse Geller stated that he agreed with his fellow Board Members. He stated that the sole focus of the Board of Appeals is this specific property and the requirements of the Zoning By-Law. He added, that while much supplemental information had been provided, it is not within the scope of what the Zoning Board

of Appeals considers in its deliberation, nor relevant in making a decision under the Zoning By-Law and Chapter 40A with respect to the issuance of a use variance.

Therefore, the board voted unanimously, to deny the requested relief.

  
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Jesse Geller, Chairman

Filing Date: September 18, 2008

A True Copy ATTEST:

  
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Patrick J. Ward

Clerk, Board of Appeals

RECEIVED  
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REGISTRARS OF VOTERS  
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