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BOARD OF APPEALS

Jesse Geller, Chairman
Christopher Hussey
Jonathan Book

Town Hall, 1st 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
BUILDING PERMIT NO. 2017-0273
31 CATLIN ROAD

Petitioners Rubin Moreno, Carolyn Peter and Ed Needell, as Trustees of the Fisher Hill Estates Condominium Association, 547 Boylston Street, Brookline (“Association”), filed an administrative appeal on April 18, 2017, challenging the issuance of a building permit, issued on March 15, 2017, for the construction of a single family home at 31 Catlin Road (“Locus”). The Association asserts that the building permit was issued in error because the Locus lacks the required frontage pursuant to **Section 5.14** of the Town’s Zoning By-Law.

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 May 11, 2017 at 7:20 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 Association, to its 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 April 27, 2017 and May 4, 2017 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:

31 Catlin Road – ADMINISTRATIVE APPEAL OF BUILDING COMMISSIONER’S ISSUANCE OF BUILDING PERMIT #2017-0273 DATED 03/15/2017 TO CONSTRUCT A NEW SINGLE FAMILY HOME in an S-7 (Single-Family) Residence District, on May 11, 2017 at 7:20 PM in the 6th Floor Selectmen’s Hearing Room (Petitioner: Trustees of the Fisher Hill Estates) *Precinct 14*

The Board of Appeals will consider an Administrative Appeal of Building Commissioner Decision dated **03/15/2017** regarding Building Permit **#2017-0273**.

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 programs and services of the Town of Brookline are invited to make their needs known to Lloyd Gellineau, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone (617) 730-2328; TDD (617) 730-2327; or e-mail at llgellineau@brooklinema.gov

Jesse Geller, Chair

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At the time and place specified in the notice, this Board held a public hearing.

Present at the hearing was Chairman Jesse Geller, and Board Members Christopher Hussey and Mark Zuroff. The case was presented for the Association by its legal counsel Arthur

P. Kreiger of Anderson Kreiger LLP, 50 Milk Street, 21st Flr., Boston, MA 02109. Chairman Jesse Geller called the hearing to order at 7:20 p.m.

Attorney Kreiger stated that **Section 5.14** of the Zoning By-Law requires that "every lot shall have a minimum frontage of not less than 25 feet in S and SC districts and not less than 20 feet and other districts, upon a street not less than 40 feet in width." He went on to assert that **Section 2.19** of the Zoning By-Law defines a "street" as "a public or private way, alley, lane, court, or sidewalk which is open or dedicated to public use. . . ."

Attorney Kreiger made four arguments why the Locus lacks the required frontage: (1) Catlin Road, to which the right-of-way provides access, is a private way that is not open or dedicated to public use and, therefore, the right-of-way does not provide access to a "street" as defined by the Zoning By-Law; (2) Catlin Road abuts the Locus for only 21.42 feet, less than the required 25 feet; (3) Catlin Road is not paved and does not exist "on the ground" to the Locus; and (4) where paved, the pavement is only 18 feet wide and no part of Catlin Road has the required 40 foot width to satisfy the frontage requirements were,

In furtherance of his argument, Attorney Kreiger stated that the right-of-way, even if it were constructed to meet the definition of a street, would still not provide the required frontage to the Locus because Catlin Road is a private way which was neither dedicated to public use nor open to public use but rather Catlin Road is simply an access driveway for the use of the Association and the other landowners owning abutting property. In support, he made reference to the private plowing contract that he attached to his supplemental materials and made the argument that only visitors and invitees of the abutters to Catlin Road may use it. Mr. Kreiger further showed a picture of the intersection of Catlin Road at Route Nine, which showed the posted sign clearly identifying the street as "private".

Attorney Kreiger also argued that the 40 foot right of way is not sufficient because, at the time that the building permit was issued, the right-of-way was in its natural state as an “open meadow,” including mature trees, and could not be considered a "way". Attorney Kreiger continued that for a "way" to provide frontage within the meaning of the Zoning By-Law, it must be in existence, including pavement or some other construction, prior to the issuance of the building permit. Attorney Kreiger noted that it might be possible for the owner of the Locus to reapply for a building permit once a road along the right-of-way has been fully constructed. As an aside, Mr. Keiger commented that it appears the owner of the Locus has started to pour concrete along the right-of-way the morning of the hearing but questioned whether the full 40 feet width would be paved.

Zoning Board of Appeals Chairman Geller asked if anyone wished to speak in favor of the appeal. Rubin Moreno spoke in support of the appeal echoing some of the arguments made by Attorney Kreiger.

Zoning Board of Appeals Chairman Geller asked if anyone present wished to speak in opposition to this appeal.

Attorney Scott Gladstone, 1244 Boylston St., Suite 200, Brookline, representing the owner of the Locus, argued that the appeal should be denied and the building permit should be determined to have been correctly issued.

Mr. Gladstone presented a site plan showing how the right-of-way was to be fully built out as a serviceable road, which plan has been approved by the Town’s Transportation Department. Attorney Gladstone stated, however, that the road need not be clearly built out in order for there to be sufficient frontage under the Zoning By-Law citing in support *Shea v. Board of Appeals of Lexington*, 35 Mass.App.Ct. 519, 522 (1993), and *Cassella v. Sacco*, No.

279910 2004 WL at 9 (Mass. Land Ct. Oct. 8, 2004). Those cases, Mr. Gladstone argued, hold that, even a paper street could be considered a "street" for purposes of calculating lot frontage as long as it is passable by more than an "all-terrain" vehicle. He pointed out that the underlying public policy is to provide a passable area for emergency vehicles such as a fire truck. This consideration does not necessarily require that all 40 feet of a way be fully paved over as long as there are no obstructions.

Attorney Gladstone pointed out that the instruments creating and thereafter referencing the right-of-way date back at least to 1916 and specify that the right-of-way is "for all purposes for which ways are or may hereafter be commonly used in the town of Brookline. . . ." Thus, Attorney Gladstone argued, the creators of the right-of-way intended for the right-of-way to be for public use.

Attorney Gladstone continued that Catlin Road was necessarily open for public use in the same way as most other private streets in Brookline. He observed that Catlin Road had been identified on plans of the Town of Brookline since at least as early as 1913, well before the Association was an abutter. Attorney Gladstone noted that there is an existing home at 30 Catlin Rd., which is not a part of the Association, the only frontage for which is Catlin Road and/or the right-of-way accessing Catlin Road.

Attorney Gladstone spoke of Walnut Place, an offshoot of Walnut Street, as an example of a similar private way, open for public use, which shares many if not all of the same characteristics as Catlin Road. He observed that Walnut Place is a dead-end street, marked as "Private" on the street sign, is bordered by independently owned parcels, and otherwise contains no gate or any "private property – keep out" signage. Nonetheless, Walnut Place is considered

open for public use as people who are not residents or invitees of the abutters drive and walk on it.

Mr. Gladstone observed that Catlin Road does not contain a gate or any signage indicating that the public should keep out under the penalties of the trespass laws nor could it ever become closed to public use without the consent of every one of the abutters. Without such outward indicia of the public not being welcomed (i.e., a no trespass sign posted or a gate), and since there are existing built-out parcels that depended on Catlin Road having been open for public use in order to satisfy the frontage requirement, in keeping with the use and practice of all private streets of Brookline, the default assumption is that the private street is open for public use and thus constitutes a street for purposes of frontage under the Zoning By-Law.

Attorney Michael Merrill, representing the contractor who applied for the building permit, spoke in opposition to the appeal. Attorney Merrill stated his belief that Catlin Road is for public use based both on personal experience as well as on his knowledge of the language of recorded title documents for the properties of Ms. Lee and Mr. White (the owners of each side of Catlin Road before the Association came into being) evidencing the grantor clearly intended for all of the lots on the west side of Catlin Road, including Lot 3A (the Locus), to use Catlin Road and the right of way for access. He noted that in reliance on the belief that Catlin Road was available for access, the owner of the Locus terminated alternative access to Leicester Road.

Attorney Kenneth Goldstein (co-counsel with Attorney Gladstone representing the Locus owner) highlighted and read into the record the provision of the 1922 deed to the subject property (Norfolk Registry Book 1511, Page 59), which established the right of way extension of Catlin Road at the southerly end of Lot 3A as a public way. Mr. Goldstein stressed that this deed, provides that the right-of-way is granted “together with the right to use for all purposes for

which ways are or may hereafter be commonly used in the Town of Brookline, so much of said forty foot right of way as lies easterly of the westerly line of the granted premises and the westerly boundary line of lot 2, as shown on said plans, such right to be in common with the grantor and others now or hereafter entitled to use the same."

Chairman Geller asked Mr. Kreiger to identify the characteristics of a private road that is not open for public use as distinct from one that is open for public use. Attorney Kreiger stated that the signage that says "private" is one such indicator. Chairman Geller also asked Mr. Kreiger the legal process by which new lots are to be created if preliminarily a fully built out roadway as frontage is required. Attorney Kreiger responded that it should be a two-step process whereby a permit is sought to build the road and only thereafter should a permit be sought to build on the lot, just like is done with a subdivision. Chairman Geller pointed out that the Locus is the product of an ANR plan, which is different than a subdivision requiring approval.

Georgia Johnson of 80 Seaver Street, an abutter to 83 Leicester, stated that she was in support of the project moving forward and noted that the owner walked the property with her, including the right of way, to show her that the trees marked to be cut down were only those on the Locus.

Chairman Geller called upon Deputy Building Commissioner, Michael Yanovitch, to clarify the Building Department's basis for issuing the building permit. Mr. Yanovitch responded that the Building Department undertook a complete and thorough analysis and asked for further information and comment from attorneys for the owner and the builder prior to issuing the building permit. Mr. Yanovitch and the Building Commissioner inspected the Locus and noted that the right-of-way was sloping slightly but had otherwise relatively flat topography and was clearly differentiated from the rest of the buildable portion of the lot. Mr. Yanovitch also noted

that although the right-of-way contained vegetation to some degree at the time that the permit was issued, it was easily passable by a street vehicle.

Mr. Yanovitch further noted that the right-of-way was given additional legal consequence since the owner was told that all setbacks for any building would be counted from the edge of the right-of-way, not from the deeded property line, and that the area of the right-of-way could not be counted toward minimum lot area under the Zoning By-Law. As a consequence, the owner prepared an amended ANR plan expanding the area of the Locus by taking land from the lot at 83 Leicester Street.

Mr. Yanovitch stated that both the right-of-way and Catlin Road were streets open for public use just like many other similar private streets in Brookline, such as Greenough Circle and Weybridge Road. He commented that these streets are to be distinguished from the interior roads servicing Hancock Village, which contain dedicated parking spaces not open to the general public. Mr. Yanovitch also noted as prior precedent the existence of the house at 30 Catlin Road, constructed in 1989, which relied on Catlin Road in order to satisfy its frontage requirement. Mr. Yanovitch further noted that Catlin Road has been on the plans on record with the Town of Brookline since at least 1922. In sum, Mr. Yanovitch stated that private streets such as Catlin Road had always been considered open for public use for purposes of providing frontage for buildable lots.

Chairman Geller called upon Jonathan Simpson, Assistant Town Counsel to clarify certain definitions and interpretations under the Zoning By-Law. Mr. Simpson stated his opinion that both the right-of-way and Catlin Road were streets under the Zoning By-Law, as they were open for public use and could, thus satisfy the frontage requirement. Mr. Simpson also noted

that Catlin Road is clearly open for public use as it has already been used to satisfy the frontage requirement for the home built at 30 Catlin Road.

The board engaged in discussion. Board Member Hussey expressed his opinion that the 40 foot wide right-of-way was sufficient frontage under the Zoning By-Law.

Board Member Zuroff agreed with Mr. Hussey and stated that the owners of the right-of-way clearly intended for it to provide frontage to make the Locus buildable. Mr. Zuroff also noted that when he was investigating this area with respect to a prior case, he drove up Catlin Road and used what was clearly the right-of-way under discussion in order to turn this car around to head back to Route 9 over Catlin Road. Member Zuroff also noted that all the old plans and deeds, which are of the sort that he regularly examines in his work as evidence of rights granted, show that the right-of-way is a way for all purposes. Member Zuroff also expressed his belief the public already does use Catlin Road in the same way that other private ways throughout Brookline are used.

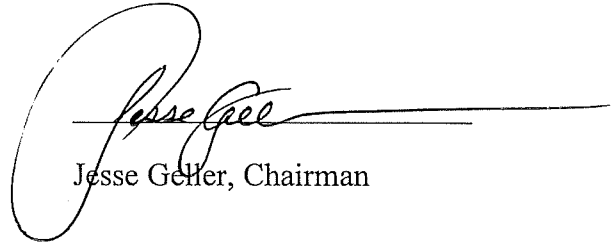
Chairman Geller expressed his agreement with the opinion of the other Board Members and further stated, that in his experience as a conveyancing attorney, the type of language used in the instrument creating the right of way clearly indicate the intent by the grantor that it (and Catlin Road) be used for all purposes for which ways are, commonly used in the Town of Brookline and this language is deliberately chosen words of art recognized creating a street that is open for public use. Mr. Geller further added that he was not persuaded by Mr. Kreiger's other arguments, including the need that the street be completed prior to issuance of a building permit (and to be distinguished from issuance of a certificate of use and occupancy for the improvements).

The Board Members then voted that the petition be denied and that the issuance of the building permit be upheld.

Unanimous Decision of

The Board of Appeals

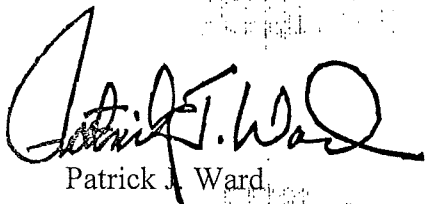
Filing Date: 7/26/17



Jesse Geller, Chairman

A True Copy

ATTEST:



Patrick J. Ward

Clerk, Board of Appeals