



# Town of Brookline Massachusetts

## BOARD OF APPEALS

Jesse Geller, Chairman

Jonathan Book

Christopher Hussey

Town Hall, 1<sup>st</sup> Floor

333 Washington Street

Brookline, MA 02445-6899

RECEIVED  
TOWN OF BROOKLINE  
TOWN CLERK  
2017 SEP -6 A 11:50

TOWN OF BROOKLINE  
BOARD OF APPEALS  
CASE NO 2017-0001  
40 ASPINWALL AVENUE

Petitioners Li Chen and Badele Jocelyn are abutters to the subject property, residing at 46 Aspinwall Avenue, Brookline (Badele Jocelyn is the owner of 46 Aspinwall Avenue). They have filed an administrative appeal, dated June 13, 2017, of the Building Department's denial of a request for enforcement to revoke the Special Permit issued on November 12, 2015 in case No. 2015-0046, issued to Bodyscapes IV, LLC, permitting, with conditions, the operation of a Cross Fit gym in portions of the basement of 40 Aspinwall Avenue, or to otherwise enforce the Town noise 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 July 13, 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 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 June 29, 2017 and July 6, 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:

40 ASPINWALL AVENUE - ADMINISTRATIVE APPEAL OF DENIAL OF A REQUEST FOR ENFORCEMENT TO REVOKE THE SPECIAL PERMIT FOR CROSSFIT GYM IN A L-1.0 LOCAL BUSINESS DISTRICT, on JULY 13, 2017 at 7:20 PM in the 6th Floor Selectmen's Hearing Room (Petitioner Baolele Jocelyn) *Precinct 7*

*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](http://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 Sneider**, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone: (617) 730-2328; TDD (617)-730-2327; or email at [rsneider@brooklinema.gov](mailto:rsneider@brooklinema.gov).*

*Jesse Geller, Chair*

*Christopher Hussey*

*Jonathan Book*

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

Petitioners, through counsel, requested and were granted a continuance of the hearing until August 10 at 7:00 PM.

Present at the hearing on August 10, 2017 was Chairman Jesse Geller, and Board Members Christopher Hussey and Mark Zuroff. The case was presented by Jeffrey D. Knight of

Long, Knight Huff-Harris & Hagen, P.C., 222 Lewis Wharf, Boston, MA 02110. Chairman Jesse Geller called the hearing to order at 7:00 p.m.

Attorney Knight presented the argument on behalf of the Petitioners. Attorney Knight, acknowledging that there were procedural issues with the appeal, made two arguments: First, his clients are suffering harm and have lost value in their home due to the heavy weight dropping at the Cross Fit gym as a consequence of how very close Petitioners' house is to the building containing the Cross Fit. Attorney Knight submitted a report from Unlimited Sotheby's International Realty in support of his argument about the lost value. Second, Attorney Knight argued that the 2015 Special Permit was granted assuming that it was appropriate to issue a permit for a Cross Fit gym under Use 18A described in Section 4.01 of the Zoning By-Law, which, he argued, was a mistake because Cross Fit should not be considered a gym due to the weight dropping activity, which he argued is more impactful and like an industrial type of use. Attorney Knight argued, therefore, that the Petitioners were not provided proper notice of the Zoning Board of Appeals hearing because they thought the hearing involved typical gym uses.

Zoning Board of Appeals Chairman Geller asked if there was anyone present who wished to speak in favor of the appeal.

Petitioner Badele Jocelyn spoke about how difficult it is for them because of the dropping of the weights. Mr. Jocelyn echoed the message that he did not understand what kind of gym was being permitted and that he had originally planned to join the gym when it opened.

Petitioner Li Chen spoke as well to describe how the weight dropping at the Cross Fit was negatively affecting her and her family. Ms. Chen stated that the Cross Fit has taken remedial measures, which has reduced but not eliminated the effect on her home caused by the weight drops.

Jessica Stokes, a neighbor at 9 Auburn Place complained that she thought that such gyms were required to prove that they installed effective noise reduction insulation as part of their approval process.

Zoning Board of Appeals Chairman Geller asked if there was anyone present who wished to speak in opposition to the appeal.

Attorney Scott Gladstone, representing Cross Fit, presented an opposition to the Appeal. Mr. Gladstone referred to his brief, submitted in advance of the hearing, argued that the Board does not have jurisdiction to hear the appeal.

First, Attorney Gladstone argued, an alleged violation of the Town Noise ordinance, which is not under the Zoning By-Law, cannot be the subject of an appeal per G.L. c. 40A, §7 or §8. These sections, he noted, require any appeal to the Zoning Board of Appeals to be a matter arising out of the Zoning By-Law only. Moreover, Attorney Gladstone pointed out that the allegations of noise and vibrations do not involve a violation of any condition of the Special Permit issued in November, 2015.

Second, Attorney Gladstone argued, the relief the Petitioners seek, rescinding the Special Permit, needed to be brought within twenty (20) days after the Special Permit was granted. The appeal cannot be used to circumvent the missed appeal period deadline, particularly when there is no issue with the Petitioners having received notice of the hearings in October 2015 and of issuance of the Special Permit on November 12, 2015. Attorney Gladstone referred to the cases of *Connors v. Annino*, 460 Mass. 790, 791-799 (2011) and *Gallivan v. Zoning Bd. of Appeals of Wellesley*, 71 Mass.App.Ct. 850, 887 N.E.2d 1087 (2008) in support of his argument.

In response to Attorney's Knight's argument that there was a misrepresentation about the nature of the use described in connection with the application for Special Permit relief, Mr.

Gladstone recounted how he made it very clear at the special permit hearing that this was a gym for extreme athletes and that there were noisy exercises. Reflecting the special nature of a Cross Fit type of gym, Attorney Gladstone stated that the Planning Board recommended the condition restricting outdoor activities (no outdoor activities are allowed before 8AM) because the Cross Fit was known to conduct exuberant exercises outside of the gym as part of the exercise program. He also pointed out that Cross-Fit has been engaged in this type of exercise (dropping weights) from the first day that it opened and, even if the Petitioners had no actual knowledge of the type of exercises in which CrossFit engaged or the impact, , the Petitioners certainly had that knowledge soon after the gym opened. Nonetheless, Attorney Gladstone noted, the Petitioners failed to appeal the issuance of the Special Permit until now, nearly two years later, which is far beyond the appeal time limits under Chapter 40A.

Attorney Gladstone next explained some of the efforts that have been made by his client to mitigate the vibrations and he suggested additional steps that could be tried in order to address the Petitioners' complaints, presenting to the Board Members an example of the additional pads that have been installed to absorb the sound and vibration of the weights. He concluded that the parties must attempt to resolve this problem privately because the Zoning Board of Appeals no longer has jurisdiction.

Board Member Christopher Hussey asked if anyone had used a device to measure the decibel level of the noise being generated at Cross Fit. Attorney Gladstone answered that, to his knowledge, no one had done so. Attorney Gladstone further stated that he has learned from multiple presentations at Town Meeting that the threshold for a noise violation under the Town ordinance is very high, such that even two leaf blowers from ten feet away might not violate the ordinance. Chairman Geller called upon Building Commissioner, Daniel Bennett to explain

the Building Department's justification for denying the Petitioners' request. Commissioner Bennett stated that Assistant Commissioner Michael Yanovitch had visited the site and reported hearing no noises or feeling any vibrations. Commissioner Bennett further explained that the noise ordinance, which governs noise and not vibrations, is enforced by four agencies of the Town depending on where the site is: Police Department, Health Department, Department of Public Works and the Building Department. Commissioner Bennett noted that no condition of Cross Fit gym's Special Permit was alleged to have been violated.

Zoning Board Member Christopher Hussey asked if the Building Department has a measuring device to determine if there is a violation of the Town noise ordinance. Commissioner Bennett responded that the Building Department has a noise meter but that they are not trained on how to use it, although they will bring it to a site to respond to a complaint to see if the noise comes close to a violation level, at which point further steps are taken.

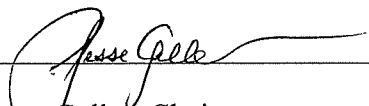
Chairman Geller began the Board's deliberations by stating that the Zoning Board did not have jurisdiction to hear an appeal of enforcement of the Town noise ordinance. He further commented that the appeal of the enforcement request was really an appeal of the special permit decision and was therefore brought beyond the statutory appeal period. Chairman Geller expressed the belief that Petitioners might have other remedies outside the scope of the Zoning By-Law. Board Member Mark Zuroff expressed his agreement with Chairman Geller's comments as did Member Christopher Hussey.

Based on the foregoing, the Zoning Board Members voted unanimously to deny the appeal.

Unanimous Decision of

The Board of Appeals

Filing Date: 9/5/2017

  
\_\_\_\_\_  
Jesse Geller, Chairman

