



Town of Brookline

Massachusetts

BOARD OF APPEALS

Jesse Geller, Chairman

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Patrick J. Ward, Clerk

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TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2017-0029
ROBERT AND MARJIE KARGMAN
292 WARREN STREET/246 DUDLEY STREET,
BROOKLINE, MA

Petitioners, Robert and Marjie Kargman, applied to the Building Commissioner for permission to legalize an existing fence along the side yard at a modified height, but still over the allowed seven feet in height. The application was denied 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 February 22, 2018 at 7:30 PM., in the Select Board's Hearing Room as the date, time and place of a hearing for the appeal. Notice of the hearing was mailed to the Petitioners, 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 February 8, 2018 and February 15, 2018 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, BROOKLINE, MA 02445 - Applicant is looking to authorize a fence along the side yard at a modified height, but which the building inspector stated was above 7 feet high. in a(n) S-40 SINGLE-FAMILY on 02/22/2018 at 7:30PM in the 6th Floor Selectmen's Hearing Room (Petitioner/Owner: Gregory Sampson) Precinct 15

The Board of Appeals will consider variances and/or special permits from the following sections of the Zoning By-Law, and any additional zoning relief the Board deems necessary:

§5.43 - EXCEPTIONS TO YARD AND SETBACK REGULATIONS

§5.60 - SIDE YARD REQUIREMENTS

§5.62 - FENCES AND TERRACES IN SIDE YARDS

§9.04 - PROCEDURES FOR APPLICATION AND REVIEW OF SPECIAL PERMITS

Any additional relief the Board may find necessary.

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
Christopher Hussey
Mark Zuroff*

Publish: 02/08/2018 & 02/15/2018

At the time and place specified in the notice, this Board held a public hearing. Gregory Sampson of Brown Rudnick LLP, One Financial Center, Boston, MA spoke on the Petitioner's behalf. Mr. Sampson requested an extension to March 15, 2018. Mr. Sampson stated that the Planning Board wanted additional dating showing fence measurements and the Petitioner was working to obtain that information and have retained a surveyor. The Board voted unanimously to grant of continuance to March 15, 2018.

On March 15, 2018 the Petitioner requested to continue the hearing to May 10, 2018 due to a scheduling conflict. On May 10, 2018, the case was continued again to June 21, 2018 at 7:00 pm in the Select Board's Hearing Room.

At the time and place specified by the Board, this Board held a public hearing. Present at the hearing was Chairman Johanna Schneider, and Board Members Chris Hussey and Lark Palermo. The Petitioner's attorney, Wayne Dennison of Brown Rudnick LLP, One Financial Center, Boston, MA, waived the reading public hearing notice for the record and presented details of this appeal to the Board.

Attorney Dennison stated that the Petitioners seek special permit relief pursuant to **Section 5.62** of the Zoning By-Law. Mr. Dennison noted that the subject fence is located between 292 Warren Street and 274 Dudley Street. He argued that this is a request that squarely falls within the Zoning By-Law and is appropriate because the section allows relief to be granted for fences that exceed seven feet in height if it's warranted to mitigate noise detrimental impact or provide greater safety. To support his argument, Mr. Dennison described the removal of an existing vegetative screening by the immediate abutters. He noted that this created a need to construct the new fence due to the abutter's addition of an elevated patio and made an existing six foot stockade fence insufficient to provide noise or privacy protection for the Petitioner's property.

Mr. Dennison described previous efforts to legalize the fence through a special permit process in 2014 when the fence was reported by the immediate abutter as exceeding the allowable height, which triggered inspection from the Building Department. Attorney Dennison argued that the fence is compliant to the seven feet requirement if measured from his client's side of the property. However, Mr. Dennison noted, due to a drainage swale on the abutter's property, the height of the fence exceeds the allowable seven feet. He noted that the height of the fence has been reduced from the 2014 application. He also noted that the abutter's home is more than 70 feet away from the fence and therefore would

experience a seven foot high fence as the fence is only greater than seven feet from the swale along the property line. Therefore, Mr. Dennison stated, the Petitioner is seeking a special permit for an eight foot fence tall fence which they believe to be the minimum height necessary to screen Petitioner's property from the abutting property and mitigate the detrimental impact created by the abutter clearing their real property of vegetative screening.

Attorney Dennison stated that there has been a substantial change from when the Planning Board previously voted to deny an application for a nine foot high fence, as this proposed fence is two feet shorter in height.

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

Jacob Walters, Walters, Shannon and Jenson, 27 Harvard Street, Brookline, MA, representing the immediate abutters, the Firestones at 274 Dudley Street, spoke in opposition to the special permit request for the fence height. Mr. Walters stated that the grounds for the special permit were not met and conditions have not changed as the fence is still too tall and imposing.

Mr. Dennison stated that the circumstances have changed as two feet have been cut off the fence and believed it had been lowered to be seven feet tall and thus in compliance, however, the town chooses to measure from the lowest point on the abutter's property. Attorney Dennison described the intrusion of privacy from the abutters because they can observe his clients from their outdoor patio and his clients can observe activities of the other home. Therefore, Mr. Dennison argued, the fence needs to be higher to protect these privacy interests.

Board Chairman Schneider then called upon Zoning Coordinator, Ashley Clark, to deliver the comments from the Planning Board.

FINDINGS

Section 5.43 – Exceptions to Yard and Setback Regulations

Section 5.60 – Side Yard Requirements

Section 5.62 – Fences and Terraces in the Side Yard

Dimensional Requirements	Allowed	Proposed	Relief
Fences in Side Yards	7 feet	8 to 8.5 feet	Special Permit*

* Under **Section 5.62**, the Board of Appeals may allow a special permit to allow fences over 7' high where it is determined that it is warranted to mitigate noise or other detrimental impact or provide greater safety, such as when a property is bounded by active train tracks.

Section 9.04 – Procedures for Application and Review of Special Permits

The Building Commissioner shall determine whether the applicant's plans are in compliance with any applicable decision and corresponding conditions previously issued by the Board of Appeals.

Ms. Clark noted that at the time of the Planning Board meeting there was no opposition from the abutter which may have informed their unanimous support. Ms. Clark stated that the Planning Board does not oppose legalization of the side yard fence by special permit and the applicant hired a contractor to modify the fence in response to the ZBA's denial of their earlier special permit application and was under the impression that the fence was now in compliance based on their contractor's grade measurements. Ms. Clark explained that the fence height does not appear to be overly imposing and was installed to provide privacy after the abutter removed vegetation that had provided screening from any noisy activities in his yard. However, Ms. Clark stated, the Planning Board strongly urges the applicant to provide the Board of Appeals with a site plan that shows the location of the fence and estimates what percentage of the fence is over seven feet. Since the Building Department's policy is that fence height should be measured from whichever property has the lowest grade, and since in this case the abutter's property has the lower grade, the applicant cannot take a precise measurement without going on the abutting property.

Therefore, Ms. Clark stated, the Planning Board recommends legalization of the fence, as currently constructed, per the site plans by Reed Hilderbrand Associates Inc., dated 1/12/05.

Chairman Schneider then called upon Mike Yanovitch, Deputy Building Commissioner

Mr. Yanovitch stated that the application is not an administrative appeal so it is not the venue to delve into the history of the interpretation of measuring a fence; however, he noted that the policy has been consistent dating back to at least when Mike Shepard was the Building Commissioner. He stated that the intention is to protect the abutter from having a looming fence, so the measurement is from lowest grade, which has been a consistent and reasonable approach.

Mr. Yanovitch stated that the fence requires a special permit for the height. He noted that relief is available in the Zoning By-Law for fence height in two separate sections (1) **Section 5.62** which allows a special permit to be granted in order to buffer a nuisance or (2) **Section 5.43** as setback relief for an accessory structure in a setback, which requires a counterbalancing amenity. Mr. Yanovitch concluded by stating that while the fence currently is in violation of the height, based on inspections by Dan Bennett, the Building Commissioner, the Building Department has no objection to the request and will continue to work with the Petitioner to bring the fence into compliance.

Upon inquiry from Board Member Palermo, Mr. Yanovitch stated that the fence is approximately eight feet in height; however, an official survey indicating the exact dimensions has not been submitted by the Petitioner.

The Board then discussed whether or not they felt the proposal had substantially changed from the previous application reviewed by the Board which resulted in a denial and if they felt it met the requirements for special permit relief. Chairman Schneider did not feel that, given the demonstrated distances between the two properties, an argument for mitigating a nuisance condition had been

adequately made. Board Member Palermo concurred. The Board also stated a concern about a lack of information regarding exactly how much of the fence required relief and to what degree was it in excess of the allowed seven feet and felt an official survey would help inform their deliberation.

Attorney Dennison stated that they would be happy to provide the Board with a survey of the fence and provide more evidence to support that this application has substantially changed from the previous request for special permit relief to present at a future hearing. He noted that he was confident that by removing 1.5 feet of the fence that was previously perceived as too high did qualify as a significant change and would appreciate a continuance to provide accurate measurements to the Board.

Ms. Clark reiterated that the Planning Board strongly urged the applicant to provide more details of the fence heights and to indicate what percentage of the fence is over seven feet in height.

Chairman Schneider was amenable to granting the requested continuance and instructed Attorney Dennison to review the Planning Board's recommended materials closely as they would have been helpful in the Board's deliberation. Attorney Dennison agreed to waive their rights under M.G.L c. 40A relative to the Board of Appeals time limits and the Board unanimously voted to grant the hearing to September 6, 2018 at 7:00 pm in the Select Board's Hearing room.

September 6, 2018. Second night of the public hearing.

Present at the continued hearing were Chairman Johanna Schneider and Board Members Lark Palermo and Chris Hussey. After re-opening the Hearing on September 6, 2018, Chairman Schneider invited Attorney Dennison to present the information requested at the previous hearing.

Attorney Dennison stated that since the previous hearing on June 21, 2018 they have retained a surveyor and obtained a site plan per Planning Board's suggestion. He noted that the site survey is helpful as it demonstrates the impact of the grade. He then described the site plan and noted that at the

very top of the site plan is the Firestone property patio is at 193.3 feet and the Petitioner's patio is at 194.0 feet. Mr. Dennison then reviewed the colored sections indicated on the site survey provided and noted that the portion in yellow which is approximately 2.8' in length is the area the Building Department has identified as exceeding the allowed seven foot height. The portion near the yellow section of the property has a depression along the fence line and is roughly 0.5 feet lower than due to an artificial drainage swale that divides these two properties; that swale is reflected in these numbers which creates the portion of the fence higher than seven feet. The portion of the fence out of compliance ranges from 7.4' to 8.6' in height. Mr. Dennison argued that the effective height is different as the fence is experienced from the patio which as an effective height ranging from 5.7' to 3.6'. Mr. Dennison described the previous fence proposal as 10 feet in height and argued that the new height is a material change and argued that it is half the amount of square footage as the previous application. Mr. Dennison noted that the current height of the fence is the lowest necessary to protect from a nuisance condition and argued that a special permit is intended to protect against detriment.

Upon inquiry from Chairman Schneider, Mr. Dennison stated that the two patios under discussion are approximately 120 to 130 feet away from one another. He argued that privacy is an element that the Zoning By-Law seeks to protect as evidenced in **Section 5.11** for cluster subdivisions which specifically describe providing dense landscaping between properties to protect privacy. Additionally, Mr. Dennison noted that the Board may also grant relief under **Section 5.43** for setback relief, and the Petitioner would provide additional setbacks that required as the counter balancing amenity. He noted that there is no effect on traffic or pedestrian traffic, or affordable housing, and the fence is in an appropriate location as it is common for fences to be along property lines and therefore meets the requirements for the grant of special permit relief. As for adverse effect, Mr. Dennison noted that the previous application for a 10 foot high fence received support from all the neighbors except one.

Chairman Schneider pointed out that the one neighbor in opposition was the one who is most impacted by the fence. Mr. Dennison noted that the previous fence was over 250 square feet and the current fence is down to 100.4 square feet, and is therefore a much smaller fence.

The Board then discussed whether or not privacy is an interest that needs special protection, and whether the distance of approximately 120 feet between the patios warranted a fence that exceeds the allowable height. Mr. Kargman stated that he would like to stay in the home as long as possible and has sought to screen the abutting property with landscaping but it has failed, with the exception of rhododendrons that will need a few years to grow to the necessary height to provide the sought after privacy. He noted that he would like this fence to mitigate “eye contact transmission” which he felt is what really causes a privacy violation. Mr. Kargman described how visual privacy is important in the backyard. He noted that if sat in the chaise lounge, the fence may be adequate to avoid eye contact; this is not the case if one is sitting straight up in a chair.

Upon inquiry from Chairman Schneider, Ms. Clark noted that the previous Planning Board report from 2014 specifically stated that a fence exceeding seven feet in height is not necessary.

Mr. Yanovitch reiterated that the Building Department’s interpretation of fence height is reasonable and is consistent. He noted that an argument for exceeding the allowable fence height to provide privacy may have implications for future applications should someone built a patio 10 feet away from their property line.

The Board discussed with the Petitioner various solutions to provide screening of the fence to mitigate the height impact. Mr. Yanovitch noted that plantings do not need to meet the same height requirement as fences and that generally the Board grants special permits under **Section 5.62** for properties that abut commercial parking lots.

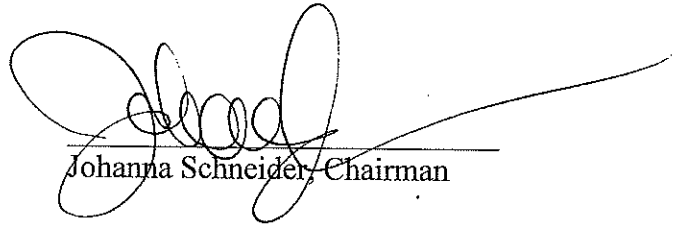
The Board further deliberated on the merits of this application for special permit relief as

requested. Chairman Schneider did not feel the criteria had been met for relief under Section 5.62 which must demonstrate height relief is warranted to mitigate some nuisance. Board Member Palermo concurred. The Board was willing to contemplate granting relief under Section 5.43 and discussed the immediate neighbor's strong opposition to the fence height. As the counterbalancing amenity, the Board felt that it would be appropriate to screen the fence from the abutter, which would necessitate moving the fence away from the property line to allow for adequate space for plantings. The Petitioner was not amenable to this suggestion.

Accordingly, the Board voted unanimously to deny the Petitioner's application for special permit relief to legalize and existing fence at 292 Warren Street.

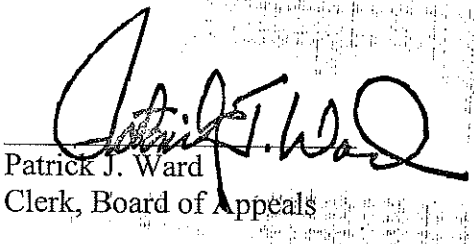
Unanimous Decision of
The Board of Appeals

Filing Date: 10/10/18



Johanna Schneider, Chairman

A True Copy
ATTEST:



Patrick J. Ward
Clerk, Board of Appeals