



BOARD OF APPEALS
Jesse Geller, Chairman

Town of Brookline Massachusetts

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Town Hall, 1st Floor
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Brookline, MA 02445-6899
(617) 730-2010 Fax (617) 730-2043

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO 2018-0078
20 WEBSTER PLACE

Petitioners Peter Y. Topalov, Irina Dobрева, Anatoly Menn, Irina Menn, Gail Roberts, Marsha Hanssen, Erica Raine are abutters to the subject property, residing at the Linden Court Condominium at 13 – 15 Linden Street. They have filed an administrative appeal, dated October 18, 2018 of the Building Department's failure to require a special permit and the denial of a request for enforcement regarding the Goldfish Swim School at 20 Webster Place.

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 December 6, 2018 at 7:00 pm, 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 and to all others required by law. Notice of the hearing was published on November 22, 2018 and November 29, 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 an administrative appeal of the Building Commissioner's failure to require a special permit at:

**20 WEBSTER PLACE (GOLDFISH SWIM SCHOOL), BROOKLINE, MA - on
December 6, 2018 at 7:00 pm in the 6th Floor Select Board's Hearing Room (Petitioners:
Peter Y Topalov, Irina Dobрева, Anatoly Menn, Irina Menn, Gail Roberts, Marsha
Hanssen, Erica Raine) Precinct 4**

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 in its programs or activities on the basis of disability or handicap or any other characteristic protected under applicable federal, state or local law. Individuals who are in need of auxiliary aids for effective communication in Town programs or activities may make their needs known by contacting the Town's ADA Compliance Officer. Assistive Listening Devices are available at the Public Safety Building for public use at Town of Brookline meetings and events. Those who need effective communication services should dial 711 and ask the operator to dial the Town's ADA Compliance Officer.

If you have any questions regarding this Notice or the Assistive Listening Device, please contact Caitlin Haynes at 617-730-2345 or at chaynes@brooklinema.gov.

***Jesse Geller, Chair
Christopher Hussey
Mark Zuroff***

Publish: 11/22/18 & 11/29/18

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

Present at the hearing on December 6, 2018 was Chairman Jesse Geller, and Board Members Johanna Schneider and Mark Zuroff. Also present was Attorney Michael O'Neill of McGregor & Legere, 15 Court Square, Suite 500, Boston, Massachusetts 02108, representing the petitioners as well as Attorney Robert L. Allen, Jr., Law Office of Robert L. Allen Jr., LLP, 300 Washington Street, Second Floor, Brookline, Massachusetts 02445, representing the owners of Goldfish Swim School.

Chairman Jesse Geller called the hearing to order at 7:50 p.m.

Chairman Geller gave an overview of the petitioner's appeal and reviewed the materials that had been submitted by both the petitioners' attorney as well as the attorney for the owner of Goldfish Swim School.

Ms. Schneider stated that before the Board is able to weigh in on the merits of the appeal, there is a jurisdictional question having to do with the timeliness of the appeal. She questioned whether this is an appeal of a building permit, in which case an appeal needs to be filed within 30 days of the issuance of the permit, or if this is an appeal under M.G.L. ch. 40A, Section 7, which would be an appeal of a use under a validly issued building permit, which has a statute of limitations of six years from the issuance of the building permit. Ms. Schneider stated that she would like the opinion of Town Counsel on this jurisdictional issue to become more informed before continuing further with the case. The Board discussed whether it would hear arguments from both parties at this time but determined that it would be preemptive to hear arguments prior to getting clarification on the legal question of jurisdiction.

Attorney Michael O'Neill presented a recently-decided Land Court case that has addressed the jurisdictional issue. Mr. Zuroff suggested that the respective counsels submit their own briefs on the issue of jurisdiction where they could present their own arguments and that, along with a brief from Town Counsel, these briefs would inform the Board members on this topic. Attorney Robert Allen, representing Goldfish Swim School, agreed that submitting a legal brief would be an appropriate way to move forward. The Board agreed to continue the hearing to January 17, 2019 and asked both parties to submit briefs by early January.

On January 17, 2019, the Board of Appeals further continued the hearing to January 31, 2019 in order to accommodate a scheduling conflict with a Board of Appeals member.

On January 31, 2019, the Board of Appeals continued the hearing to February 28, 2019 at the request of the petitioner.

On February 28, 2019, the Board of Appeals resumed the public hearing. Chairman Geller called the case to order at 8:20 pm and gave a summation of the previous discussion on this case regarding the jurisdictional issue and the request for briefs from both parties as well as Town Counsel. Chairman Geller noted that since the previous hearing, all requested briefs and memoranda have been received and reviewed by the Board Members and are entered into the record for the Hearing.

Attorney Michael O'Neill stated that he had reviewed the brief submitted by Associate Town Counsel Jonathan Simpson and noted that it left out some important qualifications. He stated that the question of notice requirements is a fact-specific, case by case determination. He described what is considered adequate notice and that there must not only be fair notice of the issuance of a building permit but also an opportunity to know the potential violations (Gavin vs. Haas). He stated that the facts in this case cited are completely different than the facts in the cases cited in Mr. Simpson's memo. Mr. O'Neill stated that in the cases cited by Mr. Simpson, the petitioners all had substantial notice of the work being done and that they involved substantial construction and demolition rather than interior work only, which is the case in the Goldfish Swim School. He further stated that there is no evidence that the petitioners received any notice and that they did not know what was taking place on the site. He also added that the pipes and exhaust fans on the roof were not installed until December 2017 and that the petitioners in this case had no notice of the excess noise pollution.

Attorney Robert Allen stated that the nature of the work on the site is simply too large to not be noticeable due to the amount of demolition undertake, heavy machinery used and removal of earth to the exterior. Mr. Allen noted that the petitioners had two and one half months, when measured from the date of demolition permit's issuance, to question what was going on at the site and that the Building Department received numerous complaints from neighbors during this

time. Regarding the jurisdiction, Mr. Allen noted that Mr. Simpson's memo is correct and that the petitioners had both constructive notice and actual notice. He urged the Board to raise any questions they have with Deputy Building Commissioner Yanovitch regarding the events that took place. Mr. Allen argued that, therefore, the six year statute of limitations does not apply in this situation.

Chairman Geller called on Associate Town Counsel Jonathan Simpson to discuss his memorandum submitted to the Board of Appeals on February 25, 2019. Mr. Simpson stated that, for the purposes of his analysis he has assumed the petitioners received no actual notice of the building permit. His research indicates that constructive notice is sufficient notice to satisfy the requirements and that observable activity, including demolition, qualifies as constructive notice. He noted that construction commenced within thirty days after the building permit was issued, which allowed the petitioners sufficient time to make inquiry and submit an appeal. Mr. Simpson also stated that the petitioners' argument that the roof units (and resulting noise issues) were not installed until December 2017, well past the thirty day appeal period is not relevant because the petitioners are challenging the classified use of the building and that the use determination was made at the time of the issuance of the building permit. Mr. Simpson further stated that the petitioners live within view of this property, they were all able to observe the activity on-site and that constructive notice therefore applies and the Board does not have jurisdiction to hear this appeal.

Chairman Geller asked Mr. Simpson if in instances of observable activity, the type of activity is relevant. Mr. Simpson replied that the cases he cited cover both demolition and construction. Mr. Geller then asked if the observable activity must be an obvious indication of the kind of work being undertaken. Mr. Simpson replied that = there is a "duty to inquire" – it is not necessary to get all of the information required by observing, but the onus would be on the

plaintiff to observe the activity and then inquire further to determine what is happening on the site.

Mr. Geller asked Deputy Building Commissioner Michael Yanovitch to review a timeline of events in connection with this matter. Mr. Yanovitch explained that initially a demolition permit was issued followed by a separate building permit. Mr. Yanovitch stated that complaints were received by the Building Department during the entire process after issuance of the demolition permit but most intensely = after issuance of the building permit when the ventilation pipes were added to the roof of the building. He further explained that this was a very significant construction project involving cutting through a concrete slab and excavating, removing to the exterior and loading and transporting away a significant amount of earth and that there were many complaints raised regarding construction vehicles, parking, debris, etc. by the neighbors. He acknowledged that the Building Department does not officially maintain a log but he does know that some of the petitioners came in or called the office to inquire about what was happening on the site. Mr. Yanovitch stated that he believes that there was not only observable activity with regards to the construction but also as to the use. He noted that there remain code violation issues on the site that the Building Department is working to rectify but he believes that this is where enforcement action should take place.

In response to various inquiries from Board Members about the demolition and excavation, Mr. Yanovitch explained the process of test pits to measure the soil, the type of machinery used to remove it and the timeline for excavation.

Ms. Schneider asked if there had been a police detail at this construction site. Mr. Yanovitch replied that there was not.

Mr. Zuroff asked if any signage was posted on the site during construction. Mr. Yanovitch replied that he cannot recall exactly but there was some type of temporary signage for

Goldfish Swim School. Mr. Zuroff then asked if the building permit was displayed on site. Mr. Yanovitch stated that there was a demolition permit that would have been posted and then a building permit, which would have identified the purpose to “install swimming pool”.

The Board reviewed copies of the building permit and discussed whether a neighbor who saw this permit posted would have been prompted to call the Building Department to inquire further. Ms. Schneider asked Mr. Yanovitch if he recognizes any of the names of the petitioners as the same individuals who placed the complaint phone calls. Mr. Yanovitch replied that he recognizes some of the names.

Mr. O’Neill responded to Mr. Simpson’s statement that it does not matter if the some (or all) of the petitioners were on vacation or absent during the time of construction. He stated that in all the cases he has cited, constructive notice involves the petitioners being present to observe the construction. He continued that there was no notice given that a use that would create excessive noise was going to be installed on the site. He also stated that the petitioners are ready to testify that they had no notice and did not contact the Building Department. Mr. O’Neill presented exhibits from his legal briefs showing correspondence from the petitioners to the Building Department from late in 2017, to show that the petitioners never reached out or knew about the work taking place during the thirty day appeal window. He commented that the Goldfish Swim School and the Building Department should have contacted neighbors before commencing construction.

Mr. Geller asked the Board Members to consider the jurisdictional question. Mr. Zuroff stated that publishing or other notice is not required for an as-of-right project and that the petitioners would have seen the project progressing every day. He stated that he believes the petitioners had site notice of what was going on and that their complaints mostly have to do with

the result of the construction and not the use. He questioned how one can prove a negative and how the Board can know who did not receive notice.

Ms. Schneider stated that the case law and statues are very clear about the thirty day appeal period and that there are a number of factors that establish constructive notice and placed the petitioners on inquiry notice. She added that whether there was correspondence between these petitioners and the Town does not seem to matter as much as whether there was enough going on on-site to cause a reasonable person to question what was going on. She believes that based on what the Board has heard about the scope of the project, this was a noticeable project and if you live next door to this going on, it is up to you to make inquiry. Ms. Schneider stated that she is not unsympathetic to the neighbors and the issues going on currently but she sees this more as a code enforcement issue or a private nuisance action. For those reasons, she stated that she does not believe the Board of Appeals has jurisdiction.

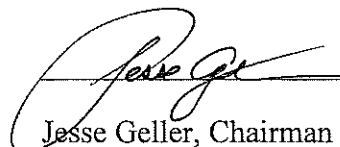
Mr. Geller agreed that he is sympathetic to the statement of petitioners' counsel that the developer might have given actual notice of this work to the neighbors as a courtesy but he noted that is no such obligation exists. He stated that clearly there was constructive notice and that because the appeal did not come within the thirty day appeal window the Zoning Board of Appeals does not have jurisdiction to hear the appeal.

The Members of the Zoning Board of Appeals then voted unanimously to deny the appeal.

Unanimous Decision of

The Board of Appeals

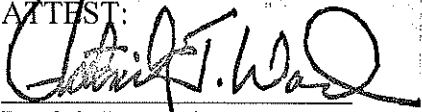
Filing Date: 3/25/19



Jesse Geller, Chairman

A True Copy

ATTEST:

A handwritten signature in black ink, appearing to read "Patrick J. Ward". The signature is written in a cursive style with a large, prominent "P" and "W".

Patrick J. Ward
Clerk, Board of Appeals