



RECEIVED
TOWN OF BROOKLINE
TOWN CLERK

Town of Brookline *Massachusetts*

2021 JUN 14 P 3:53

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

Benjamin Kaufman, Clerk

BOARD OF APPEALS
Jesse Geller, Chairman
Mark Zuroff
Johanna Schneider

TOWN OF BROOKLINE
BOARD OF APPEALS
EDWARD J. BARTLETT
292 WARREN STREET, BROOKLINE, MA

Petitioner Edward J. Bartlett, as Trustee for the Kargman Family Brookline Residence Trust, appealed to the Norfolk Superior Court the decision, dated October 10, 2018, of the Town of Brookline's Zoning Board of Appeals' denying his application to legalize the existing fence at 292 Warren Street that exceeds 7 feet in height, in an S-40 Single-Family Residential District. The court determined that the Board had not based its decision on the appropriate questions, and therefore it was remanded to this Board.

The Board administratively determined that the property affected was that shown on a schedule certified by the Board of Assessors of the Town of Brookline and fixed May 13, 2021, at 7:00 p.m. virtually as the date, time and place of a hearing for the appeal. Notice of the hearing was mailed to the Petitioner, 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 April 29, 2021, and May 6, 2021, 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 on the following petition:

Address: 292 Warren Street
Petitioner: Edward J. Bartlett, as Trustee for the Kargman Family Brookline Residence Trust
Zoning District: S-40 (Single-Family)
Precinct: 15
Description: Remand of 292 Warren Street ZBA Case Number 2017-0029 regarding fence height within side yard setback to Board of Appeals by Norfolk Superior Court in Edward J. Bartlett, as Trustees for the Kargman Family Brookline Residence Trust, v. The Town of Brookline Board Of Appeals

Date, time, and location of the public hearing are as follows:

Date: 05/13/2021
Time: 7:00 pm
Location: Virtual Meeting (see below)

Register for this virtual hearing:

<https://bit.ly/3tNJfuu>

After registering you will receive a confirmation email containing information about joining the hearing.

Our Virtual Meeting Guide for Applicants and the Public can be found here:

<https://bit.ly/30wRoY3>

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

QUESTIONS, PUBLIC COMMENT FILES, PDFs OR PRESENTATIONS:

*Advanced submissions of files and presentations are strongly encouraged. In an effort to ensure the Board has adequate time to review materials we ask that any additional documents such as written comment letters, photos, files, or presentations or questions be sent before the hearing to **Karen Chavez (kchavez@brooklinema.gov)**.*

*All plans and submissions may be found at: <https://aca-prod.accela.com/Brookline/Default.aspx>. An account is **NOT REQUIRED** to access materials. Public testimony will be taken during the hearing as normal.*

Hearings may be continued by the Chair to a date/time certain, with no further notice to abutters by mail or in the papers. Questions about hearing schedules may be directed to the Planning and Community Development Department at vpanak@brooklinema.gov, 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 **Assistive Listening Devices**, please contact Caitlin Haynes at 617-730-2345 or at chaynes@brooklinema.gov.*

***Jesse Geller, Chair**
Mark Zuroff
Johanna Schneider*

Publish: 04/29/2021 & 05/06/2021

On May 13, 2021, at 7:00 pm, the Brookline Zoning Board of Appeals held a public hearing. Present at the hearing were Chair Jesse Geller and Board Members Mark Zuroff and Johanna Schneider. Also present at the hearing was Assistant Director for Regulatory Planning, Polly Selkoe; Zoning Coordinator and Planner, Karen Chavez; Associate Town Counsel, Jonathan Simpson; and Deputy Building Commissioner, Paul Campbell.

The Petitioner's attorney, Wayne Dennison, Brown Rudnick, One Financial Center, Boston, Massachusetts, waived a reading of the public hearing notice for the record. Also in attendance was the Petitioner, Robert Kargman.

Chair Geller stated that this is a remand of the appeal of the decision where the court determined that the Board had not based its decision on the appropriate questions, and therefore it was remanded to the Board to review what the court felt was the appropriate standard under the relevant Zoning By-Law section. Chair Geller added that the critical language is the phrase "other

detrimental impact,” and that the charge of the Board is to make a determination about whether the nature of the fence that exceeds the Zoning By-Law requirement correlates with that standard under the appropriate section, identified as Section 5.62 of the Zoning By-Law.

Chair Geller asked Board Member Johanna Schneider for a synopsis of testimony that was offered at the previous hearing.

Board Member Schneider referenced that the two large abutting lots that are impacted, and noted that there is approximately 130 feet between the two patios in question. The issue was raised by the property owner who installed the fence; he was concerned about being able to make eye contact, from his porch across the 130-foot separation, with the occupants on the porch of the abutting property. She noted that the Building Department provided testimony that in other instances when the Board has granted fence height relief, it has been for commercial use properties or for properties bounded by railroad tracks. She further added that the relevant language can be found in Section 5.62 of the Zoning By-Law.

Mr. Kargman stated that when Attorney Wayne Dennison and Town Counsel went before the Judge, the Judge said that the record before the Judge was what should be presented to the Board on remand.

Mr. Dennison stated that the underlying issue is a question of detrimental impact, and that the complete picture of this problem is reflected in the trial transcript. He stated that this is a question of privacy interest, especially about the subject substantial property. Mr. Dennison stated that the only expert witness was architect Jessica Williams who affirmed that visual impact of a residential property is considered one of the attributes of value of the property.

Mr. Dennison stated that when the applicant went to the Board to legalize the fence initially, the Board did not unanimously approve the project, and it was therefore denied. The

applicant, after multiple efforts to confirm an appointment with the Building Department, cut the fence down without a Building Department representative present. The submission that was subsequently made identifies the significant reduction in total area in excess of 8 feet that has now occurred as a result of the fence being cut down.

Mr. Dennison noted that most neighbors were in support of the proposed fence, with the exception of one abutter who stated that he wanted a compliant fence. Mr. Dennison stated that there is a Special Permit process to obtain a taller fence that is in excess of 7 feet. He opined that it tracks the language of the Zoning By-Law, and if there is a detriment to the property then the case can be considered. Mr. Dennison stated that the applicant has been trying to bring the fence into compliance pursuant to the Special Permit process, and added that the fence is of importance to the petitioner, otherwise it would not have been pursued to the Superior Court. He further added that the same argument has been continuously made, and it is that of privacy interest.

Mr. Dennison shared the site plan and identified the locations where the fence has a height of 8.3 feet and 8.6 feet, respectively. He opined that given the existence of the patios, this makes the fence adequate for its purpose, which is to screen one property from another. Mr. Dennison added that most of the fence is in compliance with the height requirements, and that only approximately 80 feet in length of the fence exceeds 7 feet. He further added that the house is approximately 5 feet from the lot line. Mr. Dennison concluded that the applicant has a strong privacy interest, and the privacy interest is best served with this existing fence.

Chair Geller inquired whether Mr. Dennison wanted to speak specifically to “other detrimental impact.”

Mr. Dennison affirmed that he did, and in particular the privacy interest of the petitioner. He added that there was a significant change of condition when the new abutters moved in and

removed a significant amount of vegetation, and constructed an elevated rear deck. Since this minimized the privacy of the petitioner, a fence and plantings were installed.

Chair Geller asked whether the loss of privacy was the other detrimental impact, and to clarify the meaning of “privacy” – whether it was absolute privacy or expected privacy.

Mr. Dennison stated that he did not know what absolute privacy means and noted that the property was previously secluded, but due to changes from the abutter, privacy was reduced.

Board Member Schneider asked how much separation existed between the two patios.

Mr. Dennison stated that there is approximately an 80-foot separation between the abutter’s patio and the petitioner’s structure.

Board Member Schneider asked for further clarification on the distance between the patios, given the argument made by Mr. Dennison.

Mr. Dennison stated that his estimate was closer to 100 feet.

Board Member Schneider asked Jonathan Simpson, Associate Town Counsel, whether the Board was limited to information previously presented to the Board alone, or whether they were supposed to consider information that was adduced at trial.

Mr. Simpson stated that the Board has the option of taking evidence in addition to its record. He further added that the Board’s record consists of the minutes and the decision letter, as well as any information that they took pursuant to the hearings. The trial transcript would be in addition to the records, and the Board has the option of considering it.

Board Member Mark Zuroff stated that something that is missing from the record is a site plan that shows what the petitioner is claiming to be compromised, and notes that it is not even in the court record. If the issue is truly privacy, having a site view and/or pictures would be beneficial to the Board to understand the nature of the detrimental impact. He further added that there are

homes in Brookline that are closer to each other than the subject case, and expressed concern about maintaining the standard if the Board compromises the Zoning By-Law.

Mr. Dennison invited the Board to take a site visit to the property, and stated that the fence is at the minimum height necessary for the property owner and abutter to enjoy their patios without seeing each other.

Board Member Schneider asked whether Mr. Dennison had photographs.

Mr. Dennison stated that the photographs were included in the application submission of August 30, 2018, and that multiple photographs were included in the record with the Superior Court.

Chair Geller stated that it was an excellent suggestion to have a site visit, and that Mr. Dennison has an opportunity to put together a relatively concise package that supports the argument. He stated that both would be helpful to the Board.

Mr. Simpson made the Board aware that they have 60 days, pursuant to Court order, from April 20, 2021 to submit a written decision on this matter following the remand.

Board Member Schneider asked Mr. Simpson whether there was any material available that could be shared in order to understand the property better.

Mr. Simpson stated that there was not.

Chair Geller noted that the Court order was dated April 15, 2021 and the 60-day deadline was June 14, 2021.

The Board agreed to schedule a site visit on May 26, 2021 at 8:30am at 292 Warren Street.

The Board unanimously granted a continuance to June 3, 2021.

In the interim, the Board had an opportunity to visit the site on May 26, 2021.

June 3, 2021. Second Night of the Public Hearing

On June 3, 2021, at 7:00 pm, the Brookline Zoning Board of Appeals continued the public hearing. Present at the hearing were Chair Jesse Geller and Board Members Mark Zuroff and Johanna Schneider. Also present at the hearing was Assistant Director for Regulatory Planning, Polly Selkoe; Zoning Coordinator and Planner, Karen Chavez; Associate Town Counsel, John Buchheit; and Deputy Building Commissioner, Paul Campbell.

The Petitioner's attorney, Wayne Dennison, Brown Rudnick, One Financial Center, Boston, Massachusetts, waived a reading of the public hearing notice for the record.

Mr. Dennison stated that the uniqueness of the property was shown to the Board during the site visit, including that the structure is approximately 5 feet from the lot line; that the property is removed from the street upon which it has access evidencing privacy as a principle and important component. Mr. Dennison opined that if the fence is moved any lower it will go down from about five feet in most places, to about four feet or less.

Mr. Dennison opined that the highest portion of the fence serves a purpose to the abutting property, and stated that the main question is whether there is a detriment to the neighborhood, and not just to a single neighbor. He noted that this is a neighborhood that is concerned about privacy.

Chair Geller asked Mr. Dennison if there was evidence of noise.

Mr. Dennison noted that there has been modest evidence of noise when the abutter uses their patio. He further stated that with regards to noise that amounts to the nuisance level, there is no nuisance.

Chair Geller asked if the argument is that the detrimental impact is the privacy expectation.

Mr. Dennison stated that it is a principal privacy interest, and opined that it is a privacy interest that makes sense in the context of the location.

Paul Campbell, Deputy Building Commissioner, noted that the Building Department identifies issues and that the Building Department holds its position that a special permit is needed to allow the fence height to exceed seven feet, however he will work with the applicant if the Board of Appeals grants the relief. Mr. Campbell further added that the Building Department agreed with the Board of Appeals' suggestion in 2018 that the fence should be moved back, and still feels that it should happen.

Mr. Dennison stated that the Building Department's position when public hearings began, was that they had no objection. He further stated that to the extent that they had an objection to the fence in previous public hearings was relative to the manner in which they chose to measure the fence, since the applicant measured it differently. Mr. Dennison noted that since the structure is 5 feet away from the lot line, moving the fence back is untenable and unworkable. He added that the suggestion would require the removal of maturing plant material, which ought not to be moved.

Mr. Campbell stated that the Building Department has no opinion on what the Board of Appeals chooses to do, and will work with the Petitioner if the relief is granted.

Polly Selkoe, Assistant Director for Regulatory Planning, stated that the Building Department has been steadfast on the interpretation of the height of fences, which is measured from the lowest side. This measurement is taken even if that means that it is measured from the abutter's side, the reason being that the height affects both the property owner and abutter.

Ms. Selkoe also noted that there are many properties in Brookline, that are not as large as the subject property, where structures are 7 feet from the property line or less resulting in a 14 foot separation between two structures, and yet the Zoning By-Law maintains that the fence should not be over 7 feet tall. She further added that in this case, the two structures have a separation of over

150 feet, and there would be no reason why the fence could not meet the standards of the Zoning By-Law.

Mr. Dennison noted that fences that exceed 7 feet need a Special Permit, and that is why he is here.

John Buchheit, Associate Town Counsel, stated that he wanted to make the Zoning Board of Appeals aware of the deadline for getting this to the court, on June 19.

Board Member Mark Zuroff stated that the site visit was enlightening and having reviewed the Board's prior decision, and seeing the property up close, it is his opinion that the privacy issue is not compelling. He further added that the houses are so far apart, and that there is a vegetative screening that exists between the properties. Board Member Zuroff noted that there is no compelling reason why they should grant a Special Permit for an extra foot of height on a fence that does indeed provide privacy, and does not see an issue with one house intruding on the other's privacy.

Board Member Johanna Schneider agreed with Board Member Zuroff, and noted how tall the fence would be even if a foot was removed, and would still perform a solid buffering task. She further added that there is a tremendous amount of vegetation that has been planted that further shores up that buffering, and there is not a compelling privacy reason. Board Member Schneider added that there is no prohibition on fences over 7 feet but the Board, in its discretion, has to find that the standard of Section 5.62 of the Zoning By-Law is met, and does not believe that it is met in this case. Board Member Schneider noted Brookline is a Town of houses built in close proximity to one another, and in most cases closer than these two houses. Board Member Schneider expressed concern about parsing out neighborhoods where exceeding the fence height is or is not allowed, and what that would mean for the Board's obligation to rigorously apply the standards.

Chair Jesse Geller agreed with Board Members Zuroff and Schneider, and noted that if the standard is that the Board is supposed to find that the fence is warranted to mitigate noise or other detrimental impacts, by the petitioner's attorney's own admission, noise is clearly not an issue. Chair Geller further added that he does not find other detrimental impacts, as the argument has been made that privacy is the other detrimental impact. Chair Geller stated that after all the hearings that have taken place, the site visit was the most illuminating.

Accordingly, the Board voted unanimously not to grant the Special Permit.

Unanimous decision of the
Board of Appeals

Filing Date: 6/14/21


Jesse Geller, Chair

A True Copy
ATTEST:


Benjamin Kaufman
Clerk, Board of Appeals