



# Town of Brookline Massachusetts

BOARD OF APPEALS  
Johanna Schneider, Chair  
Neil Wishinsky  
Paul Bell

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TOWN CLERK'S OFFICE  
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TOWN OF BROOKLINE  
ZONING BOARD OF APPEALS  
CASE NO. 2022-000038  
100 COTTAGE STREET

Petitioner, Julie Wyrick, Trustee of the 100 Cottage Street Realty Trust, applied to the Building Commissioner for a building permit to install an 11" high fence within required front yard. 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 August 18, 2022 at 7:00 p.m. as the date and time for a virtual hearing on the appeal. Notice of the hearing was mailed to the Petitioner, 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 8/4/2022 and 8/11/2022 in the Boston Globe, a newspaper published in Brookline. A copy of said notice is as follows:

### Notice of Hearing

TOWN OF BROOKLINE – Zoning Board of Appeals

#### NOTICE OF HEARING

The Brookline Zoning Board of Appeals will hold a public hearing on

Date/Time: Thursday, August 18, 2022

Location: Virtual Hearing

Virtual Registration Link: <https://bit.ly/3J7xgR6>

Petitioner: 100 Cottage Street Realty Trust

**Address:** 100 Cottage Street

**Subject:** Install 10.4' fence in front yard

**Nature of Action/Relief:**

§5.52 - FENCES AND TERRACES IN FRONT YARDS

*Plans and submissions may be viewed online at*

*<https://brooklinema.gov/DocumentCenter/Index/2352>*

*Interested persons may provide comments at the public hearing or by submitting written comments by email to [manthony@brooklinema.gov](mailto:manthony@brooklinema.gov).*

**Assistive Listening Devices are available upon request:**

*<https://www.brooklinema.gov/560/Americans-With-Disabilities-Act-ADA>*

**Publish: 8/4/2022 & 8/11/2022**

A public hearing was held on August 18, 2022. Present at the hearing was Chair Johanna Schneider and Board Members Neil Wishinsky and Paul Bell. The case was presented by Chair Schneider.

Attorney Jeffrey P. Allen appeared for the Petitioner and waived the reading of the public notice. Attorney Allen explained that this is a case where the Petitioner does not have Planning Board support, but has neighborhood support. He explained that the proposal complies with zoning and does not need design review, but the majority of the Planning Board rejected the proposal because they did not like the design/make-up of the fence. It is also a case that was strongly supported by the Planning Department Staff, and the Chair of the Planning Board who felt, based on zoning, it was allowed. Attorney Allen explained that his client acquired a house that had a fence that does not comply with zoning but, as the Planning Board noted, is consistent with many fences on that street and in that neighborhood. Attorney Allen stated that the fence is consistent with the neighborhood. He explained that the height of the fence changes as you walk the length of the front of the property because the topography is very severe: at one point it is 11' and goes down as you pass the driveway.

Attorney Allen explained that the fence is needed for many purposes. He explained that the intersection of Warren and Cottage Streets is very busy, and the house is situated right on the corner of Warren and Cottage Streets. Attorney Allen stated that headlights would actually hit the house if the fence did not exceed the six-foot limit. He noted that there is an approximately 2-foot high stone wall in front of the fence. Attorney Allen stated that there are four young children at this house and explained that, where the fence is at its highest is a backyard-type area, and that is where the children play. Attorney Allen further explained that the occupant of the home is a prominent person who needs privacy and that, according to Brookline Police records, there have been some problems with privacy at this home. He explained that this is a reason that the fence was installed to be so high; because, if you stand on the wall, a person could see well over a 6-foot fence.

Attorney Allen further noted that there is a conservation restriction that was voluntarily placed on the property. He stated that the house went through the conservation commission because there are wetlands, specifically a stream running through the property.

Attorney Allen explained that the use of the fence is important and, the Petitioner meets every requirement for special-permit relief under **Section 9.05**. It is an appropriate location for such use or structure because almost every house on the street has the same type of fence in terms of height. Attorney Allen explained that there are two cut-outs in the fence, which were designed to preserve two mature trees in the front of the property. Attorney Allen stated that it will not adversely affect the neighborhood under because it is consistent with the neighborhood. According to Attorney Allen, there will be no nuisance or serious hazards to vehicles or pedestrians because there is a sidewalk in front of the stone wall that is in front of the fence. He

stated that it is adequate and proper for the use as a single-family lot and it will, of course, have no adverse effect on housing.

Attorney Allen stated that, therefore, the fence complies with all the sections of **Section 9.05** for the relief necessary. He acknowledged that **Section 5.43** requires the provision of a counterbalancing amenity and noted that Planning Staff felt that, the previously provided landscape plan and a conservation restriction were sufficient as a benefit. He added that the Chair of the Planning Board, who looked at the conservation restriction and looked at the use of the lands, felt that the conservation restriction was a significant give-back.

The occupant of the property, Mr. Horford, then explained why the fence is important to him and his family. Mr. Horford thanked the Board for its time tonight and for their consideration of the proposal. He stated that, when it came time for him to live near Boston for the second time, he knew he wanted to be in Brookline, because he knew how special the Town and the community are. He explained that he is a professional athlete and travels frequently, and he wants his family to be safe. Mr. Horford stated that he and his family use the front part of the property quite often; it has a basketball hoop for his son and daughters to shoot around and play. He also explained that sometimes people will stop and stand on the wall that is in front of the house, which and is uncomfortable and makes it difficult for he and his family to use the front part of the property. Further explaining his need for the fence for safety, Mr. Horford detailed an incident that occurred while he was traveling where a man had made his way into the house. Mr. Horford stated that he and his family love being part of the community and hope to be members of the community for years to come. He asked that the Board allow the fence to remain the way it is to allow some privacy, because if the fence were lower, people could stand on the wall and

look over. Mr. Horford concluded that leaving the fence the way it is will allow his family to have good quality family-time while using the front part of the property.

Attorney Allen added that, when Mr. Horford played for the Celtics the first time, he did not live in Brookline. Attorney Allen explained that, when he came back to Boston to play for the Celtics the second time, he limited his home search to Brookline because he felt it was more of a community. Attorney Allen confirmed that the Planning Board staff is in favor of the proposal. He stated that the neighbor across the street who faces this house spoke eloquently at the Planning Board meeting in favor of this proposal. He stated that no one in the neighborhood has opposed the proposal and the proposal makes sense and should be approved.

Chair Schneider invited Board members to ask questions. Board Member Wishinsky made reference to By-Law Section 5.43 and stated that, in effect, there would be some counterbalancing amenity. He asked Attorney Allen to summarize the counterbalancing amenities in more detail. Attorney Allen stated that the counterbalancing amenities are that, when the house was built, it provided a landscape plan for the approval of the Planning Department that was not required. He stated that, more importantly, it provided a conservation restriction on a good deal of the open space that surrounds this house, which was also not required. Chair Schneider asked if Attorney Allen believed no further counterbalancing amenities were needed to offset the non-compliant fence. Attorney Allen confirmed this and stated he shared that opinion with the Planning Department. Attorney Allen added that a landscape plan is often the counterbalancing amenity under Section 5.43. Chair Schneider questioned whether this was a request for relief under Section 5.63. Attorney Allen explained that, with the noncompliant fence, they are actually violating the front-yard setback and that is why they are seeking relief under Section 5.43. Chair Schneider questioned whether this

application falls under Section 5.62. Deputy Building Commissioner Paul Campbell clarified that, if the fence met the setback requirements, then it could be built up to the maximum allowed height of any other structure or principal use in the dimensional table. Chair Schneider, Attorney Allen, and Mr. Campbell agreed that Section 5.62 is inapplicable because it deals with side yards.

Chair Schneider confirmed with Attorney Allen that he is seeking relief under Section 5.52 and 5.43. Board Member Bell inquired as to the conservation restriction and Attorney Allen explained that the wetlands on the property necessitated the house being so close to Cottage Street. Board Member Bell and Chair Schneider asked Attorney Allen when the fence was built and whether it was constructed with the home. Attorney Allen stated that the fence is there now and he does not know how long it has been there. He suspects that the fence was installed with the house but he cannot confirm that. Mr. Horford stated that they moved in before the house was finished and the fence was not there, but they were expecting that the fence would be installed. Chair Schneider asked if there have been any safety issues associated with this fence. Attorney Allen said that there were not and, in fact, it has protected the property from automobiles turning onto Cottage Street.

Chair Schneider asked if there were any members of the public wishing to speak, and there were none. Chair Schneider called upon Zoning Coordinator/Planner Madison Anthony to review the findings of the Planning Board.

Ms. Anthony stated that the Planning Staff is supportive of the proposal. She stated that the subject property is on a busy road with a lot of headlight glare, and the owner is a prominent basketball player. Ms. Anthony stated that the fence provides a needed level of privacy and protection from activities on the roadway. She stated that this area features a number of other

properties that also have fences over 6 feet in height along the front property line, so the proposal is consistent with established patterns in the neighborhood. Ms. Anthony stated that, ordinarily, the Planning Department would recommend that a landscape plan be submitted providing a counterbalancing amenity, but a landscape plan which respects the wetlands on the property was submitted as part of the permitting for the house built in 2020. Ms. Anthony stated that, thus, Planning Staff believes that counterbalancing amenities have already been provided.

Ms. Anthony stated that the Planning Board did not agree with staff comments. She explained that the Planning Board found that the fence was too high and monolithic, and its appearance did not benefit the Town. She stated that Planning Board members suggested that the fence be set back from the street at several intervals to allow landscaping in front of the fence to soften its appearance. Ms. Anthony explained that this had previously been a Planning Board recommended condition for a Warren Street property, where a wood fence over the height limit needed legalization.

Therefore, the Planning Board recommends denial of the site plan by VTP Associates Inc. dated 3/9/22. However, if the Board of Appeals approves the relief, the Planning Board would recommend the following conditions:

1. Prior to the issuance of a building permit, the applicant shall electronically submit a final site and fence plan, stamped and signed by a registered engineer or land surveyor, to the Assistant Director for Regulatory Planning for review and approval.
2. Prior to the issuance of a building permit, the applicant shall a) electronically submit to the Building Commissioner for review and approval a site and fence plan displaying the approval stamp of the Assistant Director for Regulatory Planning; and b) evidence that

the Board of Appeals decision has been obtained from the Town Clerk's office by the applicant or their representative and recorded at the Registry of Deeds.

Chair Schneider requested that Deputy Building Commissioner Paul Campbell present the findings of the Building Department. Mr. Campbell stated that the Building Department has no objection to the requested relief sought by the Petitioner. Mr. Campbell stated that, should the Board grant the requested relief, the Building Department will work with the Petitioner to ensure compliance with the Zoning By-Law, the Board's decision, and the building code.

Chair Schneider requested that Board Member Bell start the deliberations. Board Member Bell referenced that the fence was the first one built at the home. He requested the thoughts of the other Board Members as to whether the counterbalancing amenities of the landscape plan and the conservation restriction can justify the requested relief under **Section 5.43**. He said that, provided those counterbalancing amenities can be considered, he can accept the landscape plan and the conservation restriction as the counterbalancing amenities. Board Member Bell observed that there is a wall that is about the same height on the other side of Cottage Street, and stated that he understood why a high fence along Cottage Street would be necessary even if there was not a prominent person living there. Board Member Bell stated that he knows the intersection well and it is busy and used as a massive cut-through in the morning and the evenings. He observed how the home needs to be sited close to Cottage Street given the wetlands and how that impacts the ability to meet the setback requirements given that there is not much of a front yard. Board Member Bell stated that if the relief could be granted under **Section 5.43** with the existing counterbalancing amenities, then he would be in support of granting relief.

Board Member Wishinsky stated that, if this were anywhere else in Town, he would not be in favor of the fence; however, most of the properties in this location have similar barriers of



some kind. He stated that he is very familiar with the monastery near this property that has a long, high fence. Thus, in this instance, the fence fits in. Board Member Wishinsky said that, while he defers to the Planning Board in many cases on design issues, in this case he will disagree with them. He asked Chair Schneider for her thoughts on whether the existing amenities can be considered as the counterbalancing amenities for this proposal.

Chair Schneider stated that the counterbalancing amenities is the only part of this that gives her pause. She explained that the fence is consistent with its surroundings. She stated that, with respect to potential safety hazards, this is not an instance where they need to wonder if the fence will have a negative impact: the fence has been up and it does not have a negative impact. She stated that she believes the special permit criteria of Section 9.05 are met. Chair Schneider stated that she was concerned about relying on prior counterbalancing amenities. She asked Attorney Allen if he had discussed with his client the possibility of any additional counterbalancing amenities. Attorney Allen stated that he is confident that he and the Planning Department could work together on that. He also pointed out that, when the fence was built, two breaks were put in to preserve the trees. That was not required by any permitting authority; it was just a design decision that was made when the fence was put in. Attorney Allen also added that relief under Section 5.52 and 5.50 do not require counterbalancing amenities. He stated that he was never convinced that counterbalancing amenities were needed for this proposal. Attorney Allen added that the conservation restriction was a condition in the wetlands approval but the landscape plan was not. He discussed with Chair Schneider the context in which the landscape plan was offered during the prior permitting. Attorney Allen stated that he thought it was part of the Conservation Commission approval and it was presented to Planning Staff, not the Planning

Board. Attorney Allen inquired as to whether the Board had suggestions as to further counterbalancing amenities.

Chair Schneider told Attorney Allen that it seems like the Board Members do not have a problem granting special permit relief for the fence, and that they are fine with the fence. She said that the only issue is that it appears the Petitioner needs relief from the Board under **Section 5.43**, which requires counterbalancing amenities, and it appears that the Board is not comfortable with the retroactive offer of counterbalancing amenities. Chair Schneider proposed modifying the conditions slightly to state that a landscaping plan will need to be submitted for the review and approval of the Director of Regulatory Planning, Polly Selkoe. Chair Schneider asked Attorney Allen if he would be agreeable to adding that condition and he confirmed that he was. Attorney Allen then noted that the stone wall along the sidewalk could use some repair in spots. He suggested that the Petitioner could perhaps have those spots repaired. Chair Schneider agreed that repair to the wall would qualify as a counterbalancing amenity. Attorney Allen confirmed that the Petitioner would agree to such a condition. Chair Schneider said, with that, it would be a unanimous grant of relief upon the conditions read into the record plus either a landscape plan or repair to the existing stone wall along the property line near the fence.

During deliberation, the Board found the requirements for special permit were met pursuant to **Section 9.05** of the Zoning By-Law, specifically:

- a. The specific site is an appropriate location for such a use, structure, or condition.
- b. The use as developed will not adversely affect the neighborhood.
- c. There will be no nuisance or serious hazard to vehicles or pedestrians.
- d. Adequate and appropriate facilities will be provided for the proper operation of the proposed use.

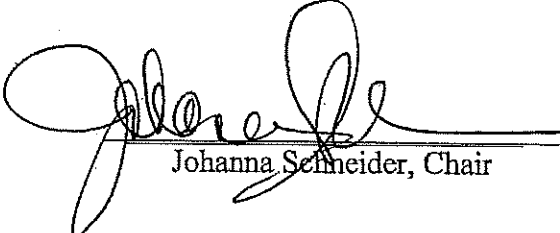
- e. The development as proposed will not have a significant adverse effect on the supply of housing available for low and moderate income people.

The Board then determined, by unanimous vote, to grant a special permit pursuant to Sections 5.43 and 9.05, from the provisions of Sections 5.50 (Front Yard Requirements) and 5.52 (Fences and Terraces in Front Yards) of the Zoning By-Law subject to the following conditions:

1. Prior to the issuance of a building permit, the applicant shall electronically submit a final site and fence plan, stamped and signed by a registered engineer or land surveyor, to the Assistant Director for Regulatory Planning for review and approval.
2. Prior to the issuance of a building permit, the applicant shall a) electronically submit to the Building Commissioner for review and approval a site and fence plan displaying the approval stamp of the Assistant Director for Regulatory Planning; and b) evidence that the Board of Appeals decision has been obtained from the Town Clerk's office by the applicant or their representative and recorded at the Registry of Deeds.
3. Applicant shall repair the spots in the existing stone wall along the property line that are in need of repair.

Unanimous Decision of  
The Board of Appeals

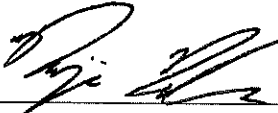
Filing Date: 9/27/22



Johanna Schneider, Chair

A True Copy

ATTEST:



Ben Kaufman  
Clerk, Board of Appeals