Town of Brookline

Massachusetts

BOARD OF APPEALS
Jesse Geller, Chair
Johanna Schneider
Lark Jurev Palermo

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

Benjamin Kaufman, Clerk

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2022-000078
16 HAWES STREET

This case involves an appeal taken to this Board by Robert and Cathleen Schoen (the "Appellant") who reside at 10 Beech Road. Pursuant to G.L. c. 40A, §8, the Appellant appealed the Building Commissioner's issuance of Building Permit BP-2022-001171 (the "Building Permit") allowing the abutter Platform 9 3/4 Trust (the "Permit Holder") to, among other things, construct a large, two-car garage addition. In a memorandum dated January 27, 2023, by their attorney, the Appellant requested:

> …[T]he ZBA deliberate this Appeal in open meeting, rescind Building Permit BP-2022-001171, instruct Building Commissioner to issue a denial letter, and require that the Applicant Platform 9 ¾ Trust go through the Town's established zoning relief process as outlined in the By-Laws. Appellants further request that this ZBA consider Applicant's request for reasonable accommodation at public hearing after notice has been sent to abutters and neighbors and after mandatory review is carried out by the Planning Department.

In support of the Appellant's request for relief, the following legal arguments were made:

1. The Permit Holder was not exempt from the Town's process for zoning relief.

2. The Building Commissioner does not have the authority to create and implement a process for granting a reasonable accommodation under the Fair Housing Act.

3. The Building Permit should be rescinded because the Town has not been given the opportunity to determine whether the proposed garage addition is a reasonable accommodation; and

4. The Building Commissioner did not meaningfully balance conflicting interests as required by the Federal Housing Act Amendment.[1]

By way of background, the Permit Holder resides in a single-family residence at 16 Hawes Street (the "Subject Property"). The Subject Property is on a corner lot at the intersection of Hawes Street and Beech Road. The Appellant owns property abutting the Subject Property. The proposed garage addition to the existing single-family residence is a one-story, flat roof structure. A 42-foot, one story wall of the garage will abut the Appellant's property. Currently there is a brick and wood fence along this section of the property line. The garage wall will be 1.3 feet from the property line. As a condition of the grant of the accommodation, the Permit Holder is required to remove the existing brick and wood fence and to plant a substantial green screen with plantings at least 5-feet in height to screen the garage wall from the Appellant's property. The Appellant has a parking space next to the wall and then a two-car garage. The proposed garage will have two garage doors facing Beech Road for entry and egress of the vehicles. This face of the garage is 2.1 feet from the Beech Road sidewalk.

The purpose of the garage addition is to provide a covered accessible entrance to the Subject Property and to house its specialty vehicles, which are necessary to transport the minor

[1] The Fair Housing Act and the fair housing amendments refer to Title VIII of the Civil Rights Act of 1968 and later additions. This federal legislation will be referred to collectively as the "FHAA" for the remainder of this decision.

child, who has quadriplegia. The garage is large in part to allow for the ramps the minor child needs to access the vehicles. The garage addition will also house equipment and services the minor child needs when transitioning to and from the home.

Instead of seeking special permits to construct the garage, the Permit Holder requested a reasonable accommodation from the Town's Zoning By-Law pursuant to the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act of 1972, and the FHAA. The Building Commissioner ("Commissioner"), with guidance from the Office of Town Counsel, determined that requiring the Permit Holder to go through the Special Permit process may result in a violation of the FHAA. Moreover, the Commissioner determined, in as much as the project involved the construction of an addition, that he was the appropriate municipal official to consider the request and grant, if the law required, the reasonable accommodation.

Seeking the information he needed to make this determination, the Commissioner asked the Permit Holder to appear with him before the Town's Commission on Disability and the Planning Board. The Permit Holder agreed to the former but refused the latter over concerns that this would subject their family to unwanted inquiries into the details of their minor child's life and condition. As an alternative, the Permit Holder offered to pay for a peer review architect (the "Architect") to review the plans to assist the Commissioner in reviewing the design and function components of the garage that drive its size and determine if the project could be made more compliant with the Zoning By-Law and more compatible with neighborhood, which is on the National Historic Register. The Commissioner agreed to this peer review process.

The Architect determined that although large, the garage was well-designed to fit in with the neighborhood and that there were other similarly situated garages in the neighborhood with doors close to the sidewalk such that this structure would not be unduly out of character with the

neighborhood. The outcome of these processes was that the Commission on Disability determined that the two-car garage was necessary for the minor child to have access to housing in this neighborhood because a large vehicle would be necessary to transport the entire family and the smaller one more convenient when transporting, for example, only the minor child. . The Building Commissioner, based on the Architect's conclusions and the decision of the Commission on Disability, granted a reasonable accommodation via letter dated May 13, 2021.

Accommodations for the garage were granted from the following sections of the Zoning By-Law:

- Minimum front, rear and side yard setbacks for a 1-family detached dwelling in the S-10 Residential Zoning district as set forth in Table 5.01 – Table of Dimensional Requirements
- Minimum percentage of usable open space for a 1-family detached dwelling in the S-10 Residential Zoning district as set forth in Table 5.01 – Table of Dimensional Requirements
- Maximum Floor Area Ratio as set forth in section 5.20
- Section 5.43 – Exceptions to Yard and Setback Regulations
- Section 8.02.2 – Alteration and Extension

The Zoning Board's hearing of the appeal in this matter was duly noticed and opened on February 2, 2023 and continued to a second night on February 23, 2023. It was held entirely virtually in open session and lasted approximately 7 hours. Attorney Jeffrey Allen represented the Appellant and Attorneys Jennifer Dopazo Gilbert and Benjamin Fiero represented the Permit Holder. Associate Town Counsel John Buchheit was present for the entire hearing, as were Building Commissioner Dan Bennett, Deputy Building Commissioner Paul Campbell and Zoning Coordinator-Planner Madison Anthony. The issues of the case were briefed extensively by both sides in written memoranda. In addition, other interested parties submitted written

comment and/or spoke in favor of or in opposition to the appeal. The Board also questioned extensively the attorneys representing the parties and Town staff. The Board has reviewed all written material submitted in this case and has considered all testimony given.

A threshold question raised by the Appellant for the Board's consideration was whether the Commissioner had the authority to grant a reasonable accommodation. The Appellant argued that the Town of Brookline has no legally established procedure (by by-law, ordinance or otherwise) to review such applications generally and specifically that the Commissioner was not so authorized by a Town By-Law or by the Select Board, the highest executive authority of the Town. The Board received evidence that, although some municipalities have adopted specific written regulatory procedures or policies to address reasonable accommodation requests, the vast majority of municipalities have not but remain obligated to comply with the FHAA notwithstanding the absence of an established procedure. Therefore, the Board determined that, while it would have been helpful for a specific process to have been adopted by the Town, in the absence of one, it was appropriate that the Commissioner, who is charged with issuing permits for new construction and with enforcing the provisions of the Building Code and the Zoning By-Law, to decide the appropriateness of the request for a reasonable accommodation under the Zoning By-Law.[2] For assistance in the Board's analysis, the Board considered application of other statutory schemes limiting strict enforcement of the Zoning By-Law such as the Dover Amendment where, in most cases the chief building official preliminarily reviews the project and determines if an exception from zoning is appropriate and, if so, issues the building permit. As is the case here, a permit issued pursuant to the Dover Amendment can be appealed to a zoning board of appeals.

[2] The Permit Holder submitted evidence that the Building Commissioners in the cities of Salem and Springfield, with advice of legal counsel, both granted reasonable accommodation requests from zoning.

The Zoning Board of Appeals then considered whether it has the requisite authority to review an appeal of the grant of a reasonable accommodation from the Zoning By-Law and/or make that determination of its own accord. As to the former, the Board determined G.L. c. 40A, §14, which provides that the Board has the power to hear and decide appeals pursuant to G.L. c.40A, §8, and in doing so, in conformity with c. 40A, the Board has the power to "make orders or decisions, reverse or affirm in whole or in part, or modify any order or decision, and to that end [has] all the powers of the officer from whom the appeal is taken and may issue or direct the issuance of a permit."

A further challenge raised by the Appellant was whether a determination by the Commissioner was premature and rather the Commissioner should have required the Permit Holder to go through the Town's process for zoning relief and, only thereafter, should the relief have been denied, could the Commissioner have entertained a request for a reasonable accommodation. This issue has been framed by some courts as whether one seeking a reasonable accommodation must first exhaust its administrative remedies. The parties agree that the First Circuit has not decided this issue. The Appellant cite one case that held that exhaustion is required. See *Oxford House, Inc v. City of Virginia Beach, Va.*, 825 F. Supp. 1251 (E.D. Va. 1993). This case involved a corporation setting up a group home. The Permit Holder and Attorney Buchheit cited two cases from other federal districts where exhausting the zoning process was not required. The first case was *Stewart B. McKinney Foundation v. Town Plan & Zoning Commission*, 790 F. Supp. 1197 (D. Conn. 1992). There the court rejected the municipality's argument that the plaintiff's claim must fail because the injury "is self-inflicted and could be remedied if the plaintiff agreed to apply for a special [permit]." The *McKinney* court said that "being forced to apply for a special permit in order to use its property is

burdensome and discriminatory under the Fair Housing Act because it imposes special terms and conditions on the occupants of property that would not be imposed if the prospective tenants were not HIV-infected." The second case was *Horizon House v. Township of Upper Southampton*, 804 F. Supp. 683 (E.D. Pa. 1992), where the court held that making the provider "obtain a variance ... is no accommodation at all[,][pointing out that] ... a variance is a lengthy, costly and burdensome procedure." Here the provider was a group home for people with cognitive disabilities. Finally, in the case of *USA v. Village of Palatine*, the court took an intermediate position regarding waiver of a public hearing for disabled applicants. 37 F.3d 1230 (7th Cir. 1994). In *Palatine*, a non-profit organization which provided housing for recovering alcoholics sought a reasonable accommodation from group home licensing requirements because there were no paid staff residing on the premises. The court determined that the burden of holding a public meeting regarding the waiver would not outweigh the city's interest in applying its facially neutral law. *Id.* at 1234. The court added that where a public hearing would subject a vulnerable applicant to "a firestorm of vocal opposition within the neighborhood" it is reasonable for the municipality to waive these procedures. *Id.* at 1233.

The Zoning Board of Appeals, finding merit to both party's arguments, agreed with the Appellant and others in the neighborhood that had the Permit Holder applied for Special Permits there would have been opportunity for neighborhood input which may have accrued to the benefit of the project and the neighbors. In particular, the Board believed Planning Board participation may have resulted in a better project.

The Zoning Board Members also recognized the concerns of the Permit Holder and its desire to maintain privacy about the minor child's condition. The Board taking note that the cases cited above are distinct from this case in that they all involve corporate entities seeking

relief to operate groups homes in which the details of the individual occupants of these properties were not being scrutinized in a public process. The Board recognized that under these circumstances, exhaustion by way of going through the zoning process may be warranted. In contrast, this case involves a family with a disabled child seeking to reside in a single-family home in a neighborhood. Requiring the Permit Holder to seek zoning relief in open hearings could subject them to the kind of public scrutiny about which the Courts seem to take issue.

The Board considered the Appellant's argument that the Town has not been given an adequate opportunity to determine whether the proposed garage addition is a reasonable accommodation. In reaching a determination that the Town had been given an adequate opportunity (and rejecting the Appellant's argument), the Board Members gave credence to the written opinion of the Town body authorized by Town Meeting, pursuant to Article 3.23.3 of the General By-Laws, to "[a]dvise and assist municipal officials and employees in ensuring compliance with state and federal laws and regulations that affect people with disabilities," the Town's Commission on Disability. The Commission on Disability determined (as evidenced by a written letter to the Commissioner) that that the proposed two-car garage was needed by the minor child and a reasonable accommodation, and in reliance on the Architect's review of the proposal and conclusion that the garage was appropriate for the home and the neighborhood (and that no further design changes could be made such that the garage could be more compliant with zoning and/or more appropriate for the neighborhood without compromising its usefulness to and need by the Appellant), determined that no further changes to the garage were required.

The Zoning Board Members did raise concern over the proximity of the garage entry to the sidewalk (and the safety of pedestrians), which was not expressly addressed in the Architect's consideration, the determination of the Commission on Disability or by the

Commissioner. The Board received evidence entered into the record that this is a condition that already exists in this neighborhood and in the Town generally. Nevertheless, to mitigate the potential danger, the Board imposed the additional condition set forth at the end of this decision. Lastly, the Board considered the Appellant's argument that the Commissioner did not meaningfully balance conflicting interests as required by FHAA. Other than the sidewalk safety issue noted above, the Board determined that the Commissioner did adequately conduct the balancing test set forth in the FHAA. To address instances where neutral rules and regulation might interfere with a disabled individual's equal opportunity to use and enjoy a dwelling, Congress mandated that municipalities make reasonable accommodation in rules, policies, practices, or services. The Town's Zoning By-Law falls into this category. An accommodation is reasonable "if it does not cause any undue hardship or fiscal or administrative burdens on the municipality, or does not undermine the basic purpose that the [By-Law] seeks to achieve." *Oxford House, Inc. v, Town of Babylon*, 819 F.Supp. 1179, 1186 (E.D.N.Y. 1993). An accommodation is reasonable unless it requires a fundamental alteration in the nature of a program or imposes undue financial or administrative burdens. *Smith & Lee Assocs., Inc. v City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996). Courts have held that municipalities must change, waive, or make exceptions to their rules to afford people with disabilities the same access to housing as those without disabilities. *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1104 (3rd Cir. 1996).

In the subject matter, the first part of the reasonable accommodation analysis is whether allowing construction of the garage causes any "undue hardship or fiscal or administrative burdens" on the Town. The first part of the analysis is whether the accommodation would require the Town to expend resources. Allowing construction of the garage does not impose these types

of burdens on the Town. In other words, it will not cause the Town additional work or require it to expend significant additional funds.

The second part of the analysis is whether the accommodation undermines the basic purpose of the Zoning By-law or requires a fundamental alteration in the nature of the program. Given that accommodation for construction in the setback is provided for by special permit, and that other garages in Brookline are constructed in the setback, it is difficult to conclude that the allowance of this accommodation amounts to a "fundamental alteration in the nature of the program." Moreover, the Architect determined specifically that the garage is well-designed and appropriate for the neighborhood.

In closing, the Commissioner's decision to grant a reasonable accommodation from the requirements of the Zoning By-Law set forth above and the Commission's subsequent issuance of Building Permit BP-2022-00117 is affirmed in all respects, except that this Board imposes the additional condition that the Commission shall obtain input from the Town's traffic engineer on what measures should be taken to mitigate any danger to pedestrians and other travelers using the sidewalk and the public way caused by vehicles entering and exiting the subject garage.

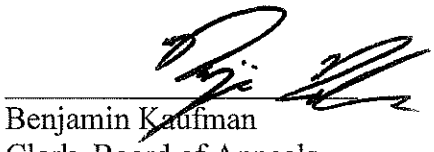
Unanimous Decision of
The Board of Appeals

Jesse Geller, Chair
Zoning Board of Appeals

Filing Date: 4/20/2023

A True Copy

ATTEST:



Benjamin Kaufman
Clerk, Board of Appeals