



BOARD OF APPEALS
Jesse Geller, Co-Chair
Jonathan Book, Co-Chair
Christopher Hussey

RECEIVED
JUN 23 11 11 AM '13
TOWN OF BROOKLINE
Town of Brookline
Massachusetts

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

Patrick J. Ward, Clerk

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO.2013-0024

Owner: Samuel and Sandra Comerchero

Petitioners, James Dillon and Stone Wiske of 182 Buckminster Road, Clifford and Carol Holderness of 194 Buckminster Road and Austin Wertheimer and Caryl Goodman of 59 Holland Road requested the Building Commissioner enforce provisions of the Zoning By-Law for a tennis court at 51 Holland Road. The request for enforcement was denied and an appeal was taken to this Board.

On December 13, 2012 the Board met and determined that the properties affected were those shown on a schedule in accordance with the certification prepared by the Assessors of the Town of Brookline and approved by the Board of Appeals and fixed May 9, 2013 at 7:30 p.m. in the Selectmen's Hearing Room as the time and place of a hearing on the appeal. Notice of the hearing was mailed to the Petitioner, to its 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 18 and April 25, 2013 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. 39, sections 23A & 23B, the Board of Appeals will conduct a public hearing to discuss the following case:

Petitioner: James Dillon and Stone Wiske
Owner: Samuel and Sandra Comerchero
Location of Premises: 51 Holland Road
Date of Hearing: **May 9, 2013**
Time of Hearing: **07:30 p.m.**
Place of Hearing: **Selectmen's Hearing Room, 6th Floor.**

A public hearing will be held to appeal an Administrative Decision of the Building Commissioner's denial to enforce sections 5.72; 4.07(62); and 5.74 regarding a tennis court/basketball court

At 51 Holland Road

Said Premise located in a S-15 (Single-Family) residential district.
Hearings, once opened, may be continued by the Chair to a date and time certain. No further notice will be mailed to abutters or advertised in the TAB. Questions regarding whether a hearing has been continued, or the date and time of any hearing may be directed to the Zoning Administrator at 617-734-2134 or check meeting calendar at: <http://calendars.town.brookline.ma.us/MasterTownCalendar/?FormID=158>.

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 the ADA Coordinator, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone: (617) 730-2330; TDD (617) 730-2327.

Jesse Geller

Christopher Hussey

Jonathan Book

At the time and place specified in the notice, this Board held a public hearing. Present at the hearing was Chairman Jesse Geller and Board Members, Mark Zuroff and Johanna Schneider. James Wagner, attorney, of Conn & Cavanaugh, business address Ten Post Office Square, Boston, presented the case for the petitioner.

Mr. Wagner said he represents Stone Wiske and James Dillon of 182 Buckminster Road along with Clifford and Carol Holderness of 194 Buckminster Road, and Carol Goodman and Austin Wertheimer of 59 Holland Road. He said his clients are before the Board to appeal an administrative decision of the Building Commissioner not to enforce the Zoning By-Law on a sports facility at 51 Holland Road. Mr. Wagner filed written briefs before the hearing.

Mr. Wagner said there are three basic questions that need to be answered. First, did the petitioners appeal in a timely manner? Two, is the paved area at 51 Holland Road grandfathered as to its structure and use? And three, is the project a reconstruction or alteration that requires a Special Permit? Mr. Wagner said these are significant because the burden of proof is on the respondents and the facts of the case have all been provided by the petitioners. Attorney Wagner utilized a Power Point presentation to illustrate his points and to present a number of photographs. He cited the sections of the Zoning By-Law that he argued the structure and use (tennis court) did not conform to and went on to cite section 8.04 of the Zoning By-Law, which sets forth the criteria for abandonment. Mr. Wagner described various sections of the By-Law that pertain to non-conforming uses and structures. A copy of the original building permit was presented and Mr. Wagner pointed out the narrow description for the proposed scope of work.

Slides were presented by Mr. Wagner, illustrating the work, as perceived by his architect that had been conducted on the tennis court. A series of photographs were presented that were taken during the construction. He stated that the court was raised at least eighteen inches and retaining walls were constructed, as well as additional fencing. Mr. Wagner argued that given the substantial construction undertaken on the court, a building permit could not have issued without

a Special Permit and a finding made pursuant to Massachusetts G.L. c. 40A, Section 6. He further argued that a court this size does not belong in a residential neighborhood.

Member Schneider asked Mr. Wagner if he contended that the setbacks have been changed. Mr. Wagner said "we don't know". Member Schneider asked for a clarification of the before and after pictures, which appeared to have been taken from different vantage points on the property. Mr. Wagner confirmed that they had. Chairman Geller asked if the area of paving has expanded. Mr. Wagner said "we don't know". Attorney Wagner said he believes it does not matter because the height, use and structure have changed. Member Zuroff asked if the existing setback is known. Attorney Wagner pointed to a picture within the Power Point presentation that illustrated the existing setback. He said his client did not have a survey conducted to determine the setbacks.

Carol Holderness, petitioner, spoke to the Board to share her knowledge of the project and how it has affected her. Mrs. Holderness said her house is closer to the court than the house at 51 Holland Road. Mrs. Holderness said she was not in Brookline when the court was constructed. She said the intensity of use has increased, with both tennis and basketball being played. She went on to say basketball is the more intrusive use. Mrs. Holderness presented a video showing a considerable water flow from a hole in her rear retaining wall. Mrs. Holderness said she believes the construction of the court is causing the water issue. Mrs. Holderness invited the Board to view the court from her home. Attorney Wagner addressed the timeliness of the appeal by saying the Holderness's were not in town during the construction and the other abutters were not aware of the scope of work.

The Chairman asked if anyone in attendance would like to speak in favor of the petition requesting the Commissioner to enforce the Zoning By-Law at 51 Holland Road. CeCe King of 177 Buckminster Road said she hears more activity from 51 Holland Road than she ever heard before. She added that the tennis court was always dilapidated and never used. Gil Fishman of 79 Holland Road said it is an illegal tennis court and has not been a tennis court for 25 years. He said he agrees that the use of the court should not be allowed to continue. Myron Belfer of 155 Seaver Street said his driveway is on Holland Road and his house overlooks 51 Holland Road and the tennis court. Mr. Belfer said until the Comerchero's bought the house he didn't even know there was a tennis court on the site. Pam Lodish of 195 Fisher Avenue urged the Board to protect her neighbors and enforce the By-Law.

Attorney Scott Gladstone, business address 1244 Boylston Street, Brookline, presented the opposition to the request on behalf of Samuel and Sandra Comerchero, owners of 51 Holland Road. Mr. Gladstone also filed several briefs prior to the hearing. Mr. Gladstone said the complaints that he has heard before the Board revolve around noise. He pointed out that his clients have children who play ball and that there is nothing unusual about children playing ball in a residential neighborhood. Mr. Gladstone presented a photo to the Board showing a basketball backboard on the fence prior to the replacement of the court. Mr. Gladstone said the court was built in 1950 and the Assessor's office has assessed the property with a tennis court every year since.

Mr. Gladstone argued that the most important part of the case before the Board is whether or not the petitioners had notice and filed a timely appeal. He went on to detail the timeline of

notification and correspondence with the Comerchero's abutters. He explained how the Comercheros had contacted each of the petitioners to alert them about the work. He stated that the permit was issued on June 3, 2011 and that construction commenced and the building permit was displayed almost immediately after the permit was issued. Mr. Gladstone said that even without the actual notice given to the abutters, the abutters' claims of substantial construction and the photographic evidence of the construction presented at the hearing, supported the theory that the abutters at least had a duty to inquire. Mr. Gladstone stated that, nevertheless, the abutters waited until October 9, 2012 to file their request for enforcement.

Member Schneider asked Mr. Gladstone how he responds to the testimony that the court was abandoned. Mr. Gladstone said he does not know what happened on the court prior to the Comerchero's moving in. He said he urges the Board to consider not even getting to the question of abandonment because the Board does not have jurisdiction. Member Zuroff asked if the existing retaining walls were moved. Mr. Gladstone said no. Member Zuroff asked if there were new retaining walls. Mr. Gladstone said yes. Member Zuroff went on to ask if a simple coat of paving were installed would you still be allowed to play tennis. Attorney Gladstone said yes, but, we would still be before the Board because the petitioner's contention that the court was abandoned would still apply.

Sandra Comerchero, owner of the subject property at 51 Holland Road, spoke on her own behalf in opposition to the petition. Mrs. Comerchero said she has tried to work with the abutters to come up with solutions including landscaping and sound buffers. She said a basketball hoop and tennis posts were present when they moved in. Mrs. Comerchero said they decided to

undertake the court renovation and notified two of their neighbors in writing and, when it came to their attention that one neighbor was in Europe, she contacted that neighbor via email and the neighbor acknowledged receipt.

Chairman Geller asked if anyone present would like to speak in opposition to the petitioners request asking the Building Commissioner to enforce the Zoning By-Law at 51 Holland Road.

Kwame Morris of 270 Buckminster Road spoke in opposition. Mr. Morris said the Comerchero's are reasonable people. He said he was present when the Comerchero's viewed the house with the tennis court. Jonathan Dinsmore of 166 Clinton Road said he has lived in Brookline for twenty years and on Clinton Road for seven years and the property has always had a tennis court. David Cohen of 77 Norfolk Street said he was present when the court was renovated and the dimensions of the court are the same. Elena Olson of 61 Welland Road said the noise in the neighborhood is not intensified by the Comerchero's. Lisa Halpert of 9 Hyslop Road said she has lived in her house for seventeen and one half years. She said people should not be accountable to neighbors when doing work that is allowed under the laws and By-Laws. Liz King said she formerly lived in the neighborhood in question for fifteen years. She said she was familiar with the house and the former owners. Ms. King said the owners were elderly and could not play tennis but the court was always there. Sam Comerchero, owner of 51 Holland Road, said his family really wants to work these issues out. Lidia Brill said she has been a Brookline resident for thirty years and had a professional relationship with the Comerchero's. She said she was present for an incident with a construction dumpster, during a kitchen renovation. She said the neighbor was very upset about the placement of a construction dumpster in the Comerchero's driveway. Ms. Brill went on to say, even though the Comerchero's were

allowed to have the dumpster in the driveway, Mrs. Comerchero asked the contractor to move it so as not to upset the neighbor.

Chairman Geller asked the Building Department what was the intent of the narrow description on the original permit application, which stated "Repave existing tennis court same dimensions". Mike Yanovitch, Chief Building Inspector, said the description is a snapshot of what a project includes. He said an application for a driveway may say repave existing driveway, but in actuality the project may include removing the substrate, excavation of soil, placement of drainage, placement of a binder coat and placement of a top coat. Chairman Geller asked if an amendment would be required if the work exceeded repaving. Mr. Yanovitch said no because the additional work could be inferred. Member Zuroff asked if there was any additional work that exceeded the original permit. Mr. Yanovitch said yes. Retaining walls and fences were constructed that were not permitted. Chairman Geller asked if the tennis court is a structure. Mr. Yanovitch responded that the tennis court is a use specified by our By-Law and is not specified as a structure; therefore we treat it as a use subject to the specified setbacks and screening in the use table.

Chairman Geller asked John Buchheit, Associate Town Counsel, about the adequacy of notice. What constitutes adequacy? The Chairman's second question was what constitutes abandonment and whether there must be intent to abandon? Mr. Buchheit responded that the case law suggests there are many ways an abutter can obtain notice, and that evidence of actual notice, such as receipt by certified letter, is not required. He further stated that the deciding body needs to consider all of the facts when determining whether an abutter had notice. With

regard to abandonment, Mr. Buchheit explained that evidence of intent to abandon does not have to be shown. This had been the law but more recent cases have changed this. A lack of use of a long enough period of time is now enough to demonstrate abandonment.

Member Zuroff asked if a homeowner came in to replace a shed that had not been used in years, would that be considered abandoned. Mr. Yanovitch said the Building Department would not consider it abandoned and further noted the similarity in a residential garage that has not been used to park vehicles for many years. Member Zuroff asked if any permits have been denied for renovation or alteration of accessory uses or structures based on abandonment. Commissioner Bennett said in his time in Brookline, he cannot remember any permits being denied based on abandonment.

The Board deliberated. Member Zuroff said he feels the neighbors had constructive notice. Member Schneider said even if the petitioner did not act within the thirty day appeal period, it was a year before an appeal was filed and she does not feel the Board has jurisdiction. Chairman Geller asked if any portion exceeded the permit that would be subject to appeal. Member Zuroff said the testimony he heard stated the fence returns that were added would require enforcement. Member Schneider said those are small non-conformities that can be handled as separate issues. Chairman Geller said it seems the neighbors had some form of notice, there was work going on and the permit was issued. He said the onus was on the abutters to inquire. He said the argument could be made that the returns on the fences and the retaining walls would need to be permitted. Member Zuroff said the degree of non-conformity is not significant. Chairman Geller said he is

in agreement with the Board Members that the petitioner had sufficient notice and are barred from appealing. The decision was unanimous.

Unanimous Decision of
The Board of Appeals



Jesse Geller, Chairman

Filing Date: May 23, 2013

A True Copy
ATTEST:



Patrick J. Ward
Clerk, Board of Appeals

RECEIVED
TOWN OF BROOKLINE
TOWN CLERK
2013 MAY 23 P 7:07