



# *Town of Brookline*

## *Massachusetts*

**BOARD OF APPEALS**  
Enid Starr, Co-Chair  
Jesse Geller, Co-Chair  
Robert De Vries

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Patrick J. Ward, Clerk

**TOWN OF BROOKLINE**  
**BOARD OF APPEALS**  
**CASE NO. 2010-0074**

Petitioners, Lynda Chin and Ronald Depinho, applied to the Building Commissioner for permission to erect a fence atop an existing retaining wall on their property at 89 Hyslop Road. The application was denied and an appeal was taken to this Board.

On 16, December 2010, 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 20, January 2011, at 7:15p.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 his 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 30, December 2010, and 6, January 2011, 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: **Lynda Chin and Ronald Depinho**  
Owner: **Lynda Chin and Ronald Depinho**  
Location of Premises: **89 Hyslop Road**  
Date of Hearing: **January 20, 2011**  
Time of Hearing: **7:15 PM**  
Place of Hearing: **Selectmen's Hearing Room, 6th. floor**

A public hearing will be held for a variance and/or special permit from:

1. **5.43; Exceptions to Yard and Setback regulations, special permit required.**
2. **5.62; Fences and Terraces in Side Yards, variance required.**
3. **5.63; Accessory Buildings or Structures in Side Yards, variance required.  
(existing garage)**
4. **8.02.2; Alteration or Extension, special permit required.**

**Of the Zoning By-Law to erect a 6'0" fence atop a concrete retaining wall thereby exceeding the height limitation for fences in the side yard.**

Said premise located in an **S-25 (single-family)** residence 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, Stephen Bressler, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone: (617) 730-2330; TDD (617) 730-2327.*

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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, Jonathan Book and Mark Zuroff. The petitioners, were represented by their contractor, Andrew Marvel of Marvel Construction, 97 Rumford Ave., Newton, MA.

Mr. Marvel stated that the petitioners, Lynda Chin and Ronald Depinho, were unable to attend the hearing but that they submitted a letter in support of their application, which the Chairman admitted as Exhibit #1.

Mr. Marvel described the 89 Hyslop Road property as a two-story stucco single family home that was designed by Chapman and Frazer and built in 1907. The home has a hip roof, wooden beltcourse and a bracketed entrance. It is situated on a corner lot at the intersection of Hyslop Road and Fisher Avenue. The property is served by a driveway (off Fisher Avenue) and has a motor court and garage in the rear yard (which is considered the side yard for zoning purposes). As the yard slopes steeply down-gradient to the northwest, the motor court is supported by an existing concrete retaining wall. He said the existing garage is only 4' from the property line and is therefore pre-existing, non-conforming.

Mr. Marvel said that his clients are proposing to construct a 5' tubular steel fence atop an existing concrete retaining wall to screen the motor court from neighboring properties. As the retaining wall ranges from 3'4" to 6' in height, the fence will exceed height regulations for fences within the side yard setback.

Mr. Marvel said that the only relief available in this case is in the form of a variance. He said that he understood the requirements for a variance under Section 10 of M.G.L. Ch. 40A. He said that a literal enforcement of the Town of Brookline Zoning By-Law would in this case impose a substantial hardship to his clients. Mr. Marvel explained that the topography of the land slopes significantly to the northeast. At some point, a retaining wall was constructed to provide a level area for the driveway and garage. He said that over-time the retaining wall deteriorated and a new wall of similar size was constructed in its place. Mr. Marvel said that the petitioner's

children play on this level surface and there is a basketball hoop mounted on the garage that is often used. He said that the parents are concerned for the safety of the children because without a substantial guard they could fall off the retaining wall and become hurt. He also said that errant balls that might not be contained by a fence of more modest proportions, might encourage the children to chase them, possibly exposing them to injury. Mr. Marvel explained that this substantial hardship is caused by the unusual topography and the fact that the retaining wall exists and it does not provide any other option to assure the safety of the children playing in the area. Mr. Marvel explained that this special condition is specific to this lot and does not generally affect other lots within the zoning district. He said the topography, steep slope, existing retaining wall and proximity of the garage to the lot line, are specific to his client's lot and atypical of other lots in the district. Mr. Marvel explained that for a variance to be granted there must be no substantial detriment to the public good. He said that Clara Batchelor of CBA Landscape Architects prepared elevations depicting the retaining wall from the immediate abutter's perspective as well as the view from the street. He said that this plan dated 3, January 2011, depicts a high quality, powder coated black metal fence with substantial plantings from Fisher Avenue. He said that the immediate abutter at 195 Fisher Avenue has seen the plan and is happy with the landscape treatment. Mr. Marvel said that this proposal does not nullify or substantially derogate from the intent or purpose of the Town of Brookline Zoning By-Laws because the topographic issues are specific to this site.

Board Member Book asked for clarification about the age of the retaining wall and garage. Mr. Marvel explained that the garage and a retaining wall were built before the existence of the zoning by-laws. The old wall fell into disrepair and was recently replaced in the same location,

by his clients. Chairman Geller stated that a letter had been received from the abutter at 195 Fisher Avenue expressing approval of the proposal provided landscaping was provided.

The Chairman asked whether anyone in attendance wished to speak in favor or opposed to the proposal. Pamela Lodish of 195 Fisher Avenue rose in support of the proposal before the Board. Ms. Lodish said that long before cars were as large as they are today and zoning would have precluded building a garage so close to the property line, their three-car garage was built.

Her home was built in 1885 and the home at 89 Hyslop was built in 1910. She said that she had been told that the Hyslop home was built by one of the children of the owners of 195 Fisher Avenue. The garage for 89 Hyslop Road also housed cars from 195 Fisher Avenue, she said.

Ms. Lodish said that it makes sense that the Depinhos be allowed to install an attractive fence on top of the wall in order to give them more clearance to maneuver a car out of that garage bay. In addition, they want to be sure their children can safely play out of doors. There is a significant drop off next to the retaining wall. This fence will help with that requirement as well. Ms.

Lodish, referring to a landscape plan prepared by Clara Batchelor dated 29, December, 2011, said that the plantings will help to camouflage the retaining wall that extends beyond her fence.

The plantings from the edge of the retaining wall to Fisher Avenue will replace the landscaping that was damaged during the construction of their new driveway.

Lara Curtis Hayes, Senior Planner, presented the findings of the Planning Board.

**Section 5.62 – Fences and Terraces in Side Yards**

**Section 5.63 – Accessory Buildings in Side Yards**

Dimensional Requirements	Allowed/Required	Existing	Proposed	Finding
Fence (height includes retaining wall)	7'	3'4"-5'	8'4"-11'	Variance
Garage Setback	5'	2.3'	2.3'	Pre-Existing Nonconforming

**Section 8.02.2 – Alteration or Extension**

A special permit is required to alter a pre-existing nonconforming use or structure.

Ms. Hayes said that the Planning Board was supportive of the proposal to install a fence atop the existing retaining wall. The applicant is proposing to install the fence for safety purposes (the motor court is also used for basketball) as well as to provide some screening for neighboring properties. As the yard slopes thus necessitating a retaining wall, it would be difficult to install a fence that adequately screens vehicles, provides the level of security the applicant is looking for and also keeps basketballs on the property. Finally, the Planning Board noted, that while not a zoning issue, the applicant is required per the Building Code to install a guardrail or fence on top of the retaining wall at least 36” in height for safety. Therefore, should the Board of Appeals find the proposal meets the requirements for a variance, the Planning Board recommended approval of the plans by CBA Landscape Architects dated 11/19/10, subject to the following condition:

**Prior to issuance of a building permit, the applicant shall submit to the Building Commissioner for review and approval for conformance to the Board of Appeals decision: 1) a final site plan stamped and signed by a registered engineer or land surveyor; 2) final elevations of the fences stamped and signed by a registered engineer or architect; and 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.**

The Chairman then called upon Michael Shepard, Building Commissioner, to deliver the comments of the Building Department. Mr. Shepard stated that the home and the neighborhood in general were very well kept. He said that the contractor for the project is well respected and does quality work. He said that the petitioners have worked cooperatively with their neighbor to achieve a result that works for both parties. He said that the Building Department believes that the petitioner has met the burden of proof required for the grant of a variance and is supportive of the conditions recommended by the Planning Board. Mr. Shepard said that the Board may want

to consider the inclusion of a landscape plan, subject to the approval of the Assistant Director for Regulatory Planning, as an additional condition of the relief, if granted.

During deliberations, Board Member Book said that in his opinion the petitioner had met all the conditions required for the grant of a variance and would support such relief. He said that he supports the inclusion of the condition recommended by the Building Commissioner. Board Member Zuroff agreed with Mr. Book's comments. Chairman Geller stated that he did not believe that any special permit relief was required in this case since the fence height issue could only be approved by the grant of a variance and all other cited non-conformities were pre-existing. Mr. Geller said that he agreed that the petitioner had met the burden of proof required for the grant of a variance. The Board, having deliberated on this matter and having considered the foregoing testimony is satisfied that the petitioner has established the existence of an unusual topography to the petitioner's land, which condition does not affect generally the zoning district, that a literal enforcement of the requirements of the Zoning By-Law would involve a substantial hardship to the petitioner and that relief by variance may be granted without a substantial detriment to the public good and without nullifying or substantially derogating from the intent of the Zoning By-Law.

Accordingly, the Board voted unanimously to grant a variance from the provisions of **Section 5.62** of the Zoning By-Law subject to the following conditions:

- 1. Prior to the issuance of a building permit, the petitioner shall submit a landscape plan subject to the review and approval of the Assistant Director of Regulatory Planning.**
- 2. Prior to issuance of a building permit, the petitioner shall submit to the Building Commissioner for review and approval for conformance to the Board of Appeals decision: 1) a final site plan stamped and signed by a registered engineer or land surveyor; 2) final elevations of the fences stamped and signed by a registered**

engineer or architect; and 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Unanimous Decision of

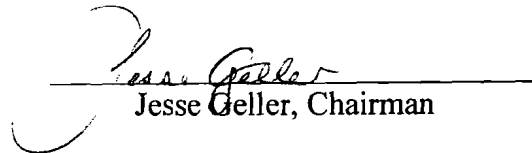
The Board of Appeals

Filing Date: January 28, 2011

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Patrick J. Ward  
Clerk, Board of Appeals



Jesse Geller, Chairman