



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

Town of Brookline

Massachusetts

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Patrick J. Ward, Clerk

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 080042

Petitioner, David Pui Yee, applied to the Zoning Board of Appeals for relief from the Building Commissioner's issuance of a building permit for the erection of bollards along the driveway of 148 Fuller Street.

On 11 September 2008, 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 16 October 2008, at 7:30 p.m. on the 2nd floor of the Main Library 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 9 September and 2 October 2008 in the Brookline Tab, a newspaper published in Brookline. 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: **DAVID PUI YEE**
Location of Premises: **148 FULLER STREET**
Date of Hearing: **10/16/2008**

Time of Hearing: 7:30 p.m.
Place of Hearing: **Main Library, 2nd. floor**

A public hearing will be held to Appeal the decision of the Building Commissioner to issue a permit to Jacque Friedman and Evelyn Murphy to construct bollards in their driveway at 148 FULLER ST BRKL

Said Premise located in a **M-2.0** (Multi-Family) 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, Kathryn Ham and Jonathan Book. The petitioner was represented by Attorney Neal B. Glick of Donovan/Hatem LLP, World Trade Center East, Two Seaport Lane, Boston, MA 02210.

Attorney Glick described the property at 142 Fuller Street as a four unit apartment building built in 1945. He said that there is and has always been a large paved open space between 142 Fuller and another multi-family structure, 148 Fuller, which is immediately to the north. Originally, the northern property line for 142 Fuller (the bound facing 148 Fuller) extended three-feet from the building. In 1970, the then owners of 148 Fuller transferred to the owners of 142 Fuller an additional ten-foot strip of land contiguous to the northern bound of 142 Fuller (claiming title by adverse possession). Thus, he said, title to 142 Fuller Street includes ownership in fee simple absolute for a 13 foot strip of paved land

to the north. Attorney Glick represented that there has been parking on this strip of land since 1946. Attorney Glick said that the paved, open area between 142 Fuller and 148 Fuller has openly, continuously, adversely, and for a period of more than twenty years been used for vehicular access and egress via a shared curb cut. Attorney Glick stated that his client, David Pui Yee requests that the Board of Appeals revoke the building permit issued to Ms. Friedman and Ms. Murphy because the construction of the bollards took place on property which Mr. Yee claims prescriptive rights to pass on foot or by motor vehicle. Therefore, he said, issuance of the permit by the Building Department and construction of the bollards thereunder is unlawful insofar as the bollards are to be situated on property subject to Mr. Yee's claimed prescriptive rights and will interfere with, and effectively eliminate Mr. Yee's use of those rights. Attorney Glick said that Mr. Shepard, the Building Commissioner, should not have issued the permit in question, knowing that Mr Yee asserted rights over the affected property. Mr. Glick disclosed that a claim had been filed in the Land Court seeking to establish Mr. Yee's claimed prescriptive rights.

Chairman Geller stated that claims of prescriptive rights are not properly before the Board of Appeals since the Zoning Board of Appeals' jurisdiction is limited by Massachusetts General Laws Chapter 40A and the Town Zoning By-Law to zoning matters. The Chairman added that the asserted claims of prescriptive rights are appropriately before the Land Court. Attorney Glick respectfully disagreed saying that there was a legitimate property dispute between the neighbors and, until it is resolved, a permit should not have issued. He said that, in his opinion, it was appropriately within the jurisdiction of the Board to examine the property rights in question in the context of issuance of the permit , thus preserving the parties' rights pending final determination by the Land Court.

Jonathan Book reviewed the definition of the term "lot" as used in the Zoning By-Law. He said that the petitioner may have a claim of title but that a claim of title is not the same as an actual interest in title itself, as intended by the Zoning By-law. He said that a claim of adverse possession or of a prescriptive

right is simply a claim until a final decision is rendered by the court. Attorney Glick responded that his client had property rights to the land as anticipated by the Zoning By-Law notwithstanding that those rights may not have been recorded at the Registry of Deeds. He said that the erection of the bollards impinges on his client's rights and he asked the Zoning Board of Appeals not to permit such impingement until the asserted claims have been determined by the court.

Attorney Duggan, representing the owners of 148 Fuller Street, said that his clients agreed with the Building Commissioner's determination relative to the issuance of the building permit. He said that after a meeting in August with Town Counsel, the Building Commissioner and Attorney Glick, he tried to contact Attorney Glick to resolve the parking issues but received no response. He said the issue of property rights should be resolved in the Land Court.

The Chairman called upon Mr. Shepard for comment. Mr. Shepard stated that had Mr. Yee's claim been filed in the Land Court two years ago and the court made a determination in Mr. Yee's favor, the situation would have been much clearer. Mr. Shepard said that at the time of issuance of the permit no credible evidence was presented of Mr. Yee's claimed rights; Mr. Yee asserting only claims. He said that during the August meeting and in the presence of Town Counsel, he informed Attorney Glick that Mr. Yee's assertions concerning claimed prescriptive rights in and to portions of 148 Fuller Street could only be resolved by a court of appropriate jurisdiction. Mr. Shepard observed that the filing of the action with Land Court was not made until the date of the within Zoning Board of Appeals Hearing, 16 October 2008. Mr. Shepard stated that prior to issuance of a permit, the Building Department as a matter of practice requires assurance from the applicant that the applicant has rights in and to and will be working on their own property. Typically, the Building Department requires an applicant to submit certified site plans in support of the applicant's assurance. He said that inasmuch as the owners' of 148 Fuller Street presented a plan prepared by a registered engineer provided evidence of ownership of the

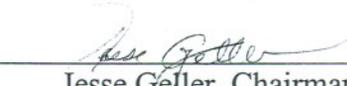
property, he had no basis upon which to deny the permit. He said that in the immediate case, the application for the permit met all the requirements of the Building Code and the Zoning By-Law. Mr. Shepard said, as a courtesy, he notified Mr. Yee upon the issuance of the permit because the owners of 148 Fuller Street could have maintained the permit for thirty days without commencement of work, in which event, Mr. Yee would have had no opportunity for appeal.

John Buchheit, Associate Town Counsel said that to his knowledge Town Counsel's office has never interpreted the definition of the term "lot" as used in the Zoning By-Law in the manner suggested by Attorney Glick and in his opinion the Building Commissioner's interpretation is correct. He added that there may be instances in which claims of adverse possession or prescriptive rights are very clear such that one could consider a lot bigger or smaller based on those claims, but given the letter submitted by the owner of 148 Fuller giving Mrs. Yee, as Mr. Yee's predecessor in title to 142 Fuller Street, permission to use her land, it obscures the clarity of the case. Mr. Buchheit said he agreed with the action of the Building Commissioner, respecting the property rights as known to exist.

During deliberation, Jonathan Book stated that he was in support of issuance of the permit by the Building Commissioner and that the Board of Appeals was not the proper forum for resolution of the property claim dispute. Kathryn Ham agreed with Mr. Book stating that the Land Court is the proper forum for resolving the property right claims. Chairman Geller stated that the prescriptive easement claim was appropriately within the purview of the Land Court rather than the Zoning Board of Appeals and that the Building Commissioner acted correctly given all the information available at the time the permit was issued.

Having considered all the testimony, by a vote of 3-0 the Zoning Board of Appeals voted to sustain the decision of the Building Commissioner in issuing building permit #BL0801208 and denied the appeal by Mr. Yee.

Unanimous Decision of
The Board of Appeals



Jesse Geller, Chairman

Filing Date: December 15, 2008

A True Copy
ATTEST:



Patrick J. Ward
Clerk, Board of Appeals

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REGISTRARS OF VOTERS

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