



# *Town of Brookline*

## *Massachusetts*

### **PLANNING BOARD**

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To: Brookline Board of Appeals

From: Brookline Planning Board

Date: February 8, 2018

Subject: Legalize fence within the side yard setback exceeding allowed height maximum

Location: **292 Warren Street/246 Dudley Street**

Atlas Sheet: 91

Block: 350

Lot: 05

Case #: 2017-0052

Zoning: S-40

Lot Area (s.f.): 104,914

Board of Appeals Hearing: **February 22, 2018 at 7:15 pm**

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### **BACKGROUND**

**2014:** After a complaint by the side abutter at 274 Dudley Street, the Building Department found that the fence in question was ten feet high as measured from the abutter's side, the lower grade of the two properties. The fence owner then applied to the ZBA to legalize the fence; however, the ZBA denied the relief.

**2015:** Mystic River Contracting was thereafter hired by the property owner to modify the fence to comply with the height restriction. After completion, the Building Commissioner made a site visit to the abutting property to view the fence and determined that although the fence height had been modified, portions of it were 8 feet to 8½ foot high (when measured from a swale on the abutter's side) and therefore still non-compliant. He ordered the fence to be removed or brought into compliance. The applicant appealed the ZBA decision to Norfolk Superior Court, particularly in relation to the definition of natural grade. The case is still pending. The fence owner has now applied to the ZBA to legalize the modified fence rather than continue to pursue litigation.

### **SITE AND NEIGHBORHOOD**

246 Dudley Street is a large 2-story stucco house situated on a 2 acre rear lot half way between Warren and Sears Road and connected by a long right-of-way to Dudley Street. The property is just south of Reservoir Park and near the Transfiguration Monastery, off of Warren Street.

## **APPLICANT'S PROPOSAL**

The applicant hired a contractor to alter the fence and bring it into compliance following the 2015 denial of a special permit to legalize the 10 foot high fence. The fence was originally constructed, according to the applicant, in response to removal of vegetative screening by the abutter, which resulted in loss of privacy, increased noise, and detrimental visual impacts, especially from the abutter's outdoor patio. The Building Commissioner determined that from the abutter's property sections of the fence still exceeded the 7 foot height limit in relation to the "natural grade". Therefore, the applicant is seeking to legalize the modified fence.

## **FINDINGS**

**Section 5.43 – Exceptions to Yard and Setback Regulations**

**Section 5.60 – Side Yard Requirements**

**Section 5.62 – Fences and Terraces in the Side Yard**

<b>Dimensional Requirements</b>	<b>Allowed</b>	<b>Proposed</b>	<b>Relief</b>
<b>Fences in Side Yards</b>	7 feet	8 to 8.5 feet	Special Permit*

\* Under **Section 5.62**, the Board of Appeals may allow a special permit to allow fences over 7' high where it is determined that it is warranted to mitigate noise or other detrimental impact or provide greater safety, such as when a property is bounded by active train tracks.

## **Section 9.04 – Procedures for Application and Review of Special Permits**

The Building Commissioner shall determine whether the applicant's plans are in compliance with any applicable decision and corresponding conditions previously issued by the Board of Appeals.

## **PLANNING BOARD COMMENTS**

The Planning Board does not oppose legalization of the side yard fence by special permit. The applicant hired a contractor to modify the fence in response to the ZBA's denial of their earlier special permit application and was under the impression that the fence was now in compliance based on their contractor's grade measurements. The fence height does not appear to be overly imposing and was installed to provide privacy after the abutter removed vegetation that had provided screening from any noisy activities in his yard. However, the Planning Board strongly urges the applicant to provide the Board of Appeals with a site plan that shows the location of the fence and estimates what percentage of the fence is over seven feet. Since the Building Department's policy is that fence height should be measured from whichever property has the lowest grade, and since in this case the abutter's property has the lower grade, the applicant cannot take a precise measurement without going on the abutting property.

**Therefore, the Planning Board recommends legalization of the fence, as currently constructed, per the site plans by Reed Hilderbrand Associates Inc., dated 1/12/05.**

*kmm*

