



Board of Appeals
Jesse Geller, Chair

Town of Brookline

Massachusetts

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Board of Appeals Virtual Public Hearing Minutes

Thursday, June 3, 2021

7:00 p.m.

Via ZOOM

ZBA DECISIONS can be found at: <https://www.brooklinema.gov/Archive.aspx?AMID=76>

Board Members Present: Chair Jesse Geller, Mark Zuroff, Johanna Schneider, and Paul Bell

Staff Present: Polly Selkoe (*Assistant Director for Regulatory Planning*), John Buchheit (*Associate Town Counsel*), Karen Chavez (*Zoning Coordinator/Planner - Regulatory Planning*) and Paul R. Campbell (*Deputy Building Commissioner*)

Chair Jesse Geller opened the meeting.

292 Warren Street – Remand of 292 Warren Street ZBA Case Number 2017-0029 regarding fence height within side yard setback to Board of Appeals by Norfolk Superior Court in Edward J. Bartlett, as Trustees for the Kargman Family Brookline Residence Trust, v. The Town of Brookline Board of Appeals

Attorney Wayne Dennison, on behalf of the applicant, waived the reading of the public hearing notice and provided an overview of the project.

Mr. Dennison opined that the uniqueness of the property was shown to the Board during the site visit including the matter that the structure starts approximately 5 feet from the lot line, and that the property is removed from the streets upon which it is accessible, and where privacy is a principle and important component.

Mr. Dennison opined that if the fence is moved any lower it will go down from about five feet in most places, to about four feet or less. He opined that the highest portion of the fence serves a purpose to the abutting property.

Mr. Dennison stated that the main question is whether there is a detriment to the neighborhood, and not just to a single neighbor. He noted that this is a neighborhood that is concerned about privacy.

Chair Geller asked Mr. Dennison if there was evidence of noise.

Mr. Dennison noted that there has been modest evidence of noise when the abutter uses their patio. He further stated that with regards to noise that amounts to the nuisance level, there is no nuisance.

Chair Geller asked if the argument is that the detrimental impact is the privacy expectation.

Mr. Dennison stated that it is a principal privacy interest, and opined that it is a privacy interest that makes sense in the context of the location.

Paul Campbell, Deputy Building Commissioner, noted that the Building Department identifies issues and that the Building Department holds its position, and will work with the applicant if the Board of Appeals grants the relief. Mr. Campbell further added that the Building Department agreed with the Board of Appeals' suggestion in 2018 that the fence should be moved back, and still feels that it should happen.

Mr. Dennison stated that the Building Department's position when public hearings began, was that they had no objection. He further stated that to the extent that they had an objection to the fence in previous public hearings was relative to the manner in which they chose to measure the fence, since the applicant measured it differently. Mr. Dennison noted that since the structure is 5 feet away from the lot line, moving the fence back is untenable and unworkable. He added that the suggestion would require the removal of maturing plant material, which ought not to be moved.

Mr. Campbell stated that the Building Department has no opinion on what the Board of Appeals chooses to do, and will work with the Petitioner if the relief is granted.

Polly Selkoe, Assistant Director for Regulatory Planning, stated that the Building Department has been steadfast on the interpretation of the height of fences, which is measured from the lowest side. This measurement is taken even if that means that it is measured from the abutters side, the reason being that the height affects both the property owner and abutter.

Ms. Selkoe also noted that there are many properties in Brookline, that are not as large as the subject property, where structures are 7 feet from the property line or less resulting in a 14 foot separation between two structures, and yet the Zoning By-Law maintains that the fence should not be over 7 feet tall. She further added that in this case, the two structures have a separation of over 150 feet, and there would be no reason why the fence could not meet the standards of the Zoning By-Law.

Mr. Dennison noted that fences that exceed 7 feet need a Special Permit, and that is why he is here.

John Buchheit, Associate Town Counsel, stated that he wanted to make the Zoning Board of Appeals aware of the deadline for getting this to the court, on June 19.

Board Member Mark Zuroff stated that the site visit was enlightening and having reviewed the Board's prior decision, and seeing the property up close, it is his opinion that the privacy issue is not compelling. He further added that the houses are so far apart, and that there is a vegetative screening that exists between the properties. Board Member Zuroff noted that there is no compelling reason why they

should grant a Special Permit for an extra foot of height on a fence that does indeed provide privacy, and does not see an issue with one house intruding on the other's privacy.

Board Member Johanna Schneider agreed with Board Member Zuroff, and noted how tall the fence would be even if a foot was removed, and would still perform a solid buffering task. She further added that there is a tremendous amount of vegetation that has been planted that further shores up that buffering, and there is not a compelling privacy reason. Board Member Schneider added that there is no prohibition on fences over 7 feet but the Board, in its discretion, has to find that the standard of Section 5.62 of the Zoning By-Law is met, and does not believe that it is met in this case. Board Member Schneider noted Brookline is a town of houses built in close proximity to one another, and in most cases closer than these two houses. Board Member Schneider expressed concern about parsing out neighborhoods where exceeding the fence height is or is not allowed, and what that would mean for the Board's obligation to rigorously apply the standards.

Chair Jesse Geller agreed with Board Members Zuroff and Schneider, and noted that if the standard is that the Board is supposed to find that the fence is warranted to mitigate noise or other detrimental impacts, by the petitioner's attorney's own admission, noise is clearly not an issue. Chair Geller further added that he does not find other detrimental impacts, as the argument has been made that privacy is the other detrimental impact. Chair Geller stated that after all the hearings that have taken place, the site visit was the most illuminating.

Accordingly, the Board voted unanimously not to grant the Special Permit.

2021-0016 18 Thorndike Street – Construct rear addition

Attorney Robert Allen, on behalf of the applicant, waived the reading of the public hearing notice and provided an overview of the project. Also in attendance was Anne Snelling, the project architect.

Mr. Allen described the proposal to add a rear addition consisting of 220 square feet. Mr. Allen stated that the overall FAR is decreased by about 40 square feet, due to the demolition of an enclosed porch at the front of the home. He noted the front porch would return to a farmer's porch.

Mr. Allen noted that with the removal of the rear deck, and with the addition occupying less of the side yard setback, the impact on the side yard is reduced. Mr. Allen stated that the only increase to a preexisting nonconformity is a 1% reduction of the useable open space. Mr. Allen explained that while these changes are small, they will have a significant impact on the amount of natural light that can get into the home, particularly the kitchen.

Mr. Allen stated that a letter of support was submitted to the Board from the abutter at 22 Thorndike Street.

Mr. Allen explained no opposition has been communicated during the public hearing process.

Mr. Allen opined that the case law precedent under Deadrick (Deadrick v. Board of Appeals of Chatham, 85 Mass. Appt Ct 539) the ZBA may allow for the extension of a preexisting nonconformity as long as no new nonconformities are created, and that there is no substantial detriment to the neighborhood.

Mr. Allen explained that in this case a finding of no substantial detriment is requested, pursuant to M.G.L. c. 40A Section 6, for the proposed addition that would extend a nonconforming side yard setback, and for preexisting nonconforming usable open space. He stated that the existing side yard setback is 5.8 feet and will not encroach any further, and noted that there is an overall reduction in massing in the side as the existing porch will be demolished. He stated that the usable open space is at 26.5%, where 30% is required, and will be reduced by less than 1% to 25.6%.

Mr. Allen opined that a finding to allow this proposal can be granted as it will not create any substantial detriment to the neighborhood, the most impacted abutter is in support, the Planning Board was fully supportive of the design and improvements to the house, and the Board has used Section 9.05 to assess detrimental impact.

Mr. Allen opined that pursuant to Section 9.05 of the Zoning By-Law, the Petitioners met the standards of a special permit.

Mr. Allen requested that condition #2 of the Planning Board report be removed as Section 5.43 of the Zoning By-Law is not applicable to this case.

Chair Geller then called for public comments in support of the application. No comments were submitted.

Chair Geller then called for public comment in opposition to the application. No comments were submitted.

Karen Chavez, Planner & Zoning Coordinator, provided the Planning Board Report. The Planning Board is supportive of the proposal.

Paul Campbell, Deputy Building Commissioner, stated that the Building Department had no objections to the proposal, and would work with the Petitioner to ensure compliance with the Board's decision and all state building codes.

Board Member Paul Bell agreed with the Planning Board, and stated that a M.G.L. c. 40A Section 6 finding would suffice for this addition.

Board Member Johanna Schneider concurred and noted that counterbalancing amenities are not required. She further explained that she would like to see condition #2 modified to remove the obligation of providing a counterbalancing amenity.

Chair Geller agreed with Board Member Schneider and Board Member Bell.

The Board unanimously granted the request for special permit.

2021-0025 136 Woodland Road – Construct new house

Attorney Donald Gentile, on behalf of the applicant, waived the reading of the public hearing notice and provided an overview of the project.

Mr. Gentile explained that the proposed project is to build a new single-family home on the vacant lot, and that the proposed project complies with the dimensional and other requirements of the Zoning By-Law.

Mr. Gentile explained that the Petitioner was before the Board seeking design review pursuant to Zoning By-Law Section 5.09.2.n because the proposed home includes space which if finished, built out, converted to habitable space, would result in the gross floor area of the structure being greater than the permitted gross floor area in Table 5.01.

Mr. Gentile introduced the project architect, Michael McCray, and indicated that he was present to answer any questions that the Board may have.

Mr. Gentile indicated that the Planning Board is in support of the project.

Chair Geller asked the Board Members if they needed to hear a presentation from the architect, and they indicated that they did not.

Chair Geller then called for public comments in favor of or in opposition to the proposal. No comments were submitted.

Karen Chavez, Planner & Zoning Coordinator, provided the Planning Board Report. The Planning Board is supportive of the proposal.

Paul Campbell, Deputy Building Commissioner, stated that the Building Department had no objections to the proposal, and would work with the Petitioner to ensure compliance with the Board's decision and all state building codes.

Board Member Paul Bell stated that he thought the only issue was the basement under By-Law Section 5.09 and, subject to the conditions recommended by the Planning Board, particularly condition number two regarding conversion to habitable space, he had no objections to the proposal.

Board Member Johanna Schneider agreed with Board Member Bell.

Chair Geller recommended that the Board find that the massing, scale, footprint, and height of the building are not substantially greater than, and that the setbacks of the building are not substantially less than, those of abutting structures in the neighborhood.

Chair Geller indicated that, subject to the condition regarding the conversion of habitable space and the other conditions recommended by the Planning Board, he would be in favor of granting the requested relief.

The Board unanimously granted the request for special permit.

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Paul Campbell, Deputy Building Commissioner, stated that the Building Department had no objections to the proposal, and would work with the Petitioner to ensure compliance with the Board's decision and all state building codes.

Board Member Paul Bell stated that he supported the project, subject to the conditions recommended by the Planning Board, particularly condition number two regarding conversion to habitable space, and making the required findings under the Zoning By-Law.

Board Member Johanna Schneider agreed with Board Member Bell, and stated that the basement issue was adequately addressed with condition number two. Board Member Schneider added that she defers issues of design review to the Planning Board, and finds that the standards under the Zoning By-Law are met.

Chair Geller indicated that he agreed with Board Member Bell and Board Member Schneider's comments.

The Board unanimously granted the request for special permit.

Minutes

The Board unanimously approved the Minutes for 02/25/21, 03/04/21 and 03/11/21.

The meeting was adjourned.